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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Certiorari to the Court of Appeals

Opinion No. 5295 (Ct. App. filed Feb. 11, 2015)
Appellate Case No. 2010-177147

EDWARD FREIBURGER

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

AMENDED APPENDIX
VOLUME IV of V

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C E P H O S
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Appendix 3 – Massachusetts License

Cephos is licensed to perform fMRI lie detection services under Massachusetts Private Investigator License P-1584.



Dr. Laken's C.V.

Curriculum Vitae

Name: Steven John Laken, Ph.D.

Current Position: President and CEO

Work Address: Cephos Corp.
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(f) 978 703.4726

Education: The Johns Hopkins School of Medicine
Ph. D , Cellular and Molecular Medicine
Advisor: Bert Vogelstein, M D
August 1994 – June 1999

University of Minnesota
BS in Genetics and Cell Biology
August 1991 - June 1993

Colorado State University
August 1989 - June 1991

Awards: Johns Hopkins University
David Isreal Macht Award
Young Investigators Day May 1999

Technology Review 100 Finalist
100 Young Innovators Under 35
Massachusetts Institute of Technology
2002

Experience: Cephos Corp.
Founder, President and CEO
38 Lawrence St
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June 2003 - Present

Exact Sciences, Inc.
100 Campus Drive
Marlborough, MA 01752
April 1999 – June 2003

C E P H O S

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The Johns Hopkins School of Medicine
Ph D , Cellular and Molecular Medicine
Advisor Bert Vogelstein, M D
August 1994 – June 1999

Publications.

Kruesi, Markus J P , **Laken, Steven J.**, Johnson, Kevin A Herbsman, Tal, Morgan, Paul S , Christie, Douglas, Kozel, Frank Andrew. Structure and functional neuroanatomy of lying differs in conduct disorder youth. Submitted

F Andrew Kozel, M D , M S C.R , Kevin A Johnson, B E , Emily L. Grenesko, B A , **Steven J. Laken, Ph.D.**, Samet Kose, M.D , Xinghua Lu, Ph D , Dean Pollina, Ph.D , Andrew Ryan, Ph D ⁶ , & Mark S. George, M D Functional MRI Detection of Deception Testing After Committing a Mock Sabotage Crime (Accepted J Forensic Sciences, publication date 2009)

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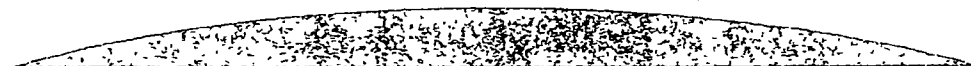
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Oetting, WS., Wiesner, G, **Laken, S.**, Lee, H., Sellers, TS., King, RA. Analysis of Short Tandem Repeat Polymorphisms Using Infrared Fluorescence with M13 Tailed Primers. October 1994, American Society of Human Genetics

Invited Presentations

Laken, S.J. Neuroethics Society First Annual Meeting, November 12-14, 2008. Washington, D C

Laken, S.J. Neuroscience, Law and Government, September 25-26, 2008. Akron Ohio Law School, Akron, OH

Laken, S.J. Siemens Customer Education Symposium, July 28 - 31, 2008. LasVegas, NV

Laken, S.J. Association of American Law Schools, June 3-6, 2008 fMRI Lie Detection Cleveland, OH

Laken, S.J. The National Judicial College Neuroscience Symposium. November 14 - 15, 2007 Reno, NV

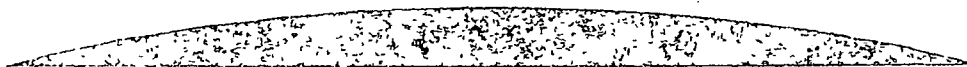
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Laken, S.J. The National Academies Committee on Science, Technology, and Law March 22-23, 2007 Washington, D.C

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
EDWARD FREIBURGER # 286115,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent)

IN THE COURT OF COMMON PLEAS
CA No. CA No. 06-CP-40-3866

FOURTH AMENDED
APPLICATION FOR
POST-CONVICTION RELIEF

JEANETTE W. McBRIDE
Clerk of Court
C.C.P. & G.S.

2009 AUG 17 PM 12:35

RICHLAND COUNTY
FILED

1. Place of Detention: Kirkland Correctional Institution, 4344 Broad River Road Columbia, S.C. 29210
2. Name and location of Court which imposed sentence: Court of General Sessions, Richland County
3. Name(s) of co-defendant(s) (if any): Not applicable
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 01-GS-40-2955.
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on August 2, 2002; Life
6. A jury returned a verdict of guilty after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. (a) The Courts to which the applicant appealed:
 - (i) South Carolina Court of Appeals, which certified the appeal to the South Carolina Supreme Court pursuant to SCACR 402
- (b) The result in each Court to which applicant appealed:

(1) Conviction and sentence were affirmed

(c) The date of each result

(1) September 26, 2005

(d) Citations of written opinions or orders entered pursuant to such results:

(1) The decision of the South Carolina Supreme Court is published at *State v. Freiburger*, 366 S.C. 125, 620 S.E.2d 737 (2005)

9. If you answered "no" to (7), state your reasons for not so appealing: Not applicable.

10 & 11

GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a) *Applicant was deprived of his right of confrontation guaranteed by the Sixth Amendment and Fourteenth Amendments, as well as the corresponding provisions of the South Carolina Constitution, when he was not permitted to cross-examine and confront the witnesses against him when the trial court permitted the prosecution to introduce testimonial hearsay contained in police reports, witness statements prepared by law enforcement, and other documents*

11(a) At trial, the prosecution was permitted to introduce testimonial hearsay contained in police reports, witness statements and other documents. Applicant's trial counsel objected to the admission of the evidence but the trial court determined that the evidence was admissible under state exceptions to the hearsay rule. Because the hearsay was testimonial, and because Applicant was thus deprived of the right to cross-examine the witnesses, the admission of the evidence violated the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the South Carolina Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004)

10(b) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of trial counsel's failure to adequately preserve the Confrontation Clause and Due Process Clause violations for appellate review*

11(b) The allegation states the relevant facts *Strickland v. Washington*, 466 U.S. 668 (1984).

10(c) *Applicant was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sec. 14 of the South Carolina Constitution, as a result of appellate counsel's failure to raise the Confrontation Clause and Due Process Clause violations on direct appeal to the South Carolina Supreme Court.*

- 11(c) The allegation states the relevant facts *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(d) *Applicant was denied a) the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution and b) his right to Due Process of Law as a result both of counsel's failure to present evidence that another individual committed the crime and the prosecution's failure to disclose to counsel additional evidence implicating known third parties*
- 11(d) Evidence existed that another soldier stationed at Fort Jackson, John Morgan, was observed by witnesses covered in blood the evening of the murder. Furthermore, evidence existed indicating that this individual disappeared shortly thereafter and went AWOL. Applicant's trial counsel did not present this evidence at trial. Also, Morgan was interviewed by law enforcement in South Carolina after he was found and admitted that he had called a cab to pick him up at Fort Jackson the evening of the murder. The contents of this interview were not disclosed to applicant's trial counsel. Evidence also existed indicating that a gun seized from another location inhabited and frequented by known criminals, not applicant's gun, was in fact the murder weapon. This evidence, if presented, would have created a reasonable doubt as to Applicant's guilt. *Holmes v. South Carolina*, 547 U.S. ___ (2006)
- 10(e) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South Carolina Constitution as a result of counsel's failure to adequately challenge the state's ballistic evidence and to present expert testimony regarding Applicant's cognitive and mental deficits and ballistics evidence during Applicant's case-in-chief*
- 11(e) Trial counsel failed to adequately challenge the state's ballistics evidence and to garner and present critical expert testimony regarding Applicant's mental and physical condition and ballistics evidence. At trial, the state relied heavily upon applicant's mental and physical condition when questioned by the investigators. Expert testimony rebutting such testimony would have undercut the state's evidence and theory of the case. In addition, the state's only evidence linking applicant to the crime was expert ballistics testimony. Trial counsel failed to challenge the unscientific evidence presented by state's witness Cayton, and failed to present expert testimony rebutting the state's evidence that the bullet, which killed the victim, was discharged from the gun allegedly in applicant's possession. Attacking and rebutting this evidence was critical to mounting a defense to the state's allegations and evidence. Furthermore, additional evidence of Cayton's incompetence was available and could have been used to impeach his conclusions. Counsel's failure to present expert testimony was deficient performance prejudicing applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10(f) *Applicant was denied the effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the South*

Carolina Constitution as a result of counsel's failure to present character evidence during Applicant's case-in-chief

- 11(f) Applicant had lived a law abiding and productive life as a business man, member of his community and as a husband, father and grandfather. Numerous witnesses were able, willing and ready to provide character evidence on Applicant's behalf. Counsel's failure to call these witnesses was unreasonable and prejudicial. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(g) *Applicant's right to a fair trial as guaranteed by the United States Constitution and South Carolina law was violated as a result of the prosecutor's improper argument during closing argument*
- 11(g) The prosecutor violated applicant's right to a fair trial by asserting improper argument during his closing argument. Specifically, the prosecutor flagrantly disobeyed the trial court's order that informing the jury that allegedly applicant was absent without leave (AWOL) after the time of the alleged murder was inadmissible evidence because it was more prejudicial than probative, when the prosecutor made multiple references and implications that applicant was AWOL. In addition, the prosecutor told the jury that the blood found in the front seat of the cab was the victim's blood; however, the state presented no evidence that the blood belonged to the victim. Furthermore, the prosecutor improperly compared the alleged murder of the victim to the treatment of a dog. Specifically, the prosecutor stated that the victim's body was "thrown on the side of the road with less dignity than most people would show to the burial of their dog." Finally, the prosecutor made other arguments which were not supported by any record evidence including that applicant's friend, Abersold and Tilbury, did not know where applicant was the night of the murder despite the fact they were in the same barracks. Prosecutors have a duty to do justice at all times. Every action taken by a prosecutor is to further their duty of doing justice. When a prosecutor engages in improper argument during closing, the prosecutor violates his duty to do justice. *Darden v Wainwright*, 477 U.S. 168 (1985). Further, the prosecutor violates a defendant's right to a fair trial by presenting improper argument to a jury. *Payne v Tennessee*, 501 U.S. 808 (1991); *Hall v Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004); *State v Huggins*, 325 S.C. 103, 481 S.E.2d 114 (1997); *State v Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).
- 10(h) *Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as result of trial counsel's failure to object to the prosecutor's improper closing argument*
- 11(h) Applicant's trial counsel failed to object to the prosecution's improper closing argument. This failure constituted deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984)
- 10(i) *Applicant's right to the effective assistance of appellate counsel as guaranteed by the Sixth*

and Fourteenth Amendments to the United States Constitution and South Carolina law was violated as a result of appellate counsel's failure to assert on appeal that the prosecutor violated applicant's fair trial rights during closing argument

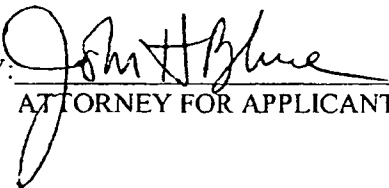
- 11(i) Appellate counsel failed to raise on appeal the prosecutor's repeated and gross violations of applicant's right to a fair trial due to the prosecutor's improper closing argument. Appellate counsel's failure was deficient performance that prejudiced applicant. *Strickland v Washington*, 466 U.S. 668 (1984).
- 10(j) *Applicant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated, and continues to be violated, because newly discovered and obtained evidence reveals that he is actually innocent of the charges*
- 11(j) Substantial evidence exists establishing applicant's innocence of the offense for which he was convicted and sentenced. Evidence of applicant's innocence has been revealed through post-trial investigations and other newly discovered evidence. Applicant's continued incarceration for a crime he did not commit is a miscarriage of justice and should be remedied immediately.
- 10(k) *Applicant right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law was violated as a result of the prosecution's failure to disclose exculpatory material information*
- 11 (k) John Cayton was called as a ballistics examiner by the prosecution at applicant's trial in 2002. In 1999, Cayton was terminated by the Kansas Bureau of Investigation for failure to follow policies, protocols and procedures. This information was not disclosed to applicant's trial counsel despite the fact that it was material impeachment information. In addition, as noted previously, John Morgan was also a soldier at Fort Jackson at the time of the homicide in question. He went AWOL the evening of Omer's murder, after having been seen by another soldier with blood on his person. Morgan was subsequently interviewed by law enforcement regarding the incident and admitted that he took a cab from the Fort to downtown Columbia the night of the murder. This was not disclosed to applicant's trial counsel even though it was exculpatory given the prosecution's theory that the perpetrator was a soldier at Fort Jackson.
- 12 Applicant has not filed any petitions or applications in the state or federal courts seeking post-conviction or habeas corpus relief, nor has he sought a writ of certiorari from the United States Supreme Court
- 13(a) through (e): Not applicable.

14. No ground set forth in (10) has been previously presented to this or any other court, state or federal
15. Not Applicable.
16. If any ground for relief set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) The grounds for relief in this application have not previously been presented to any court, state or federal, because the allegations contained therein rely upon facts which are not contained within the trial record, and must therefore be developed in post-conviction relief proceedings
- 17 & 18 Applicant was represented before the Circuit Court John D Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202.
- Applicant was represented on direct appeal by John S. Nichols, Esquire, Bluestein & Nichols, LLC, 1634 Taylor Street, Post Office Box 7965, Columbia, South Carolina 29202, and John D. Delgado, Esquire and Katherine Hudgins, Esquire, Office of John Delgado, Post Office Box 1359, Columbia, South Carolina 29202
- 19 Applicant seeks relief from his conviction and sentence
20. Applicant is not under sentence from any other court.

Respectfully submitted,

JOHN H. BLUME

Cornell Law School
110 Myron Taylor Hall
Ithaca, NY, 14853
(607 255-1030)

BY: 
ATTORNEY FOR APPLICANT

August 12, 2009

Edward Freiburger,)
)
 Applicant)
 vs.) TRANSCRIPT OF RECORD
) (PCR Hearing)
)
 State of South Carolina,)
)
 Respondent.)

BEFORE:

APPEARANCES:

JENNY H. WILLIAMS
Official Circuit Court Reporter
(803) 576-1743

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1	APPLICANT'S EXHIBITS			
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1 Thursday, August 13, 2009

2 THE COURT: All right. Attorney General.

3 MR. PETRANO: Thank you, Your Honor. May it
4 please the Court. This is 2006-CP-40-3866, Mr.
5 Edward Freiburger. This was a PCR application filed
6 with our office on July 5th, 2006. The Applicant was
7 originally indicted by the June 2001 term of the
8 Richland County Grand Jury for murder. That's
9 2001-GS-40-2955.

10 He was represented at the Circuit level by
11 Mr. John Delgado and Ms. Katherine Hudgins. On
12 July 25th, 2002 there was a jury trial with Judge
13 Floyd. He was convicted and sentenced under the 1961
14 version of the murder statute and received a life
15 sentence.

16 There was an appeal. Ultimately that was with
17 the Court of Appeals. However, pursuant to their
18 internal rules, the Supreme Court took that from the
19 Court of Appeals. And so the South Carolina Supreme
20 Court, opinion number 26042, affirmed the conviction
21 and the sentences

22 Unrelated to the PCR there was also a petition
23 for Writ of Cert to the United States Supreme Court.
24 That was denied Monday May 22nd, 2006. The
25 remittitur date from the State Supreme Court was

1 September 26th, 2005, making this application timely.

2 And on that I will turn it over to -- oh. I
3 didn't mention it. On appeal he was represented by
4 Mr. John Nichols. On that I will turn it over to
5 Mr. John Blume, the Applicant's current counsel of
6 record. Thank you, Your Honor.

7 THE COURT: Mr. Blume.

8 MR. BLUME: Thank you, Your Honor. I would just
9 ask for the record, we filed a pre-trial brief last
10 week. Did the Court receive that?

11 THE COURT: Yes.

12 MR. BLUME: So then I guess my next question
13 would be, would it help the Court if we had some
14 preliminary discussion of what the issues are going
15 to be and what the evidence is, or do you want us to
16 go straight into the evidence? It's really --

17 THE COURT: Well, I think as a preliminary
18 matter, you filed a motion to be allowed to, quote,
19 direct a notice of intent to rely on depositions,
20 affidavits and other documentary evidence. The State
21 opposes that motion. So I think first before we even
22 get to the issues we ought to discuss the procedure.
23 Do you disagree with that?

24 MR. BLUME: We could do it that way. It might
25 make -- it might streamline it a little bit and make

1 it easier to see the affidavits in context if you saw
2 them in relation to the particular witnesses we want
3 to admit them with or through. I'm happy to argue
4 about it in the abstract. But we don't intend to
5 just sort of put them into the record. They have
6 some contextural basis for people who are going to be
7 here and testify in court. But I'm happy to argue
8 it.

9 THE COURT: Well, let's take it from that
10 standpoint. Witnesses being --

11 MR. BLUME: Well, --

12 THE COURT: Have you supplied counsel, the
13 Attorney General, with a list of witnesses that you
14 plan --

15 MR. BLUME: I supplied him with -- excuse me.

16 THE COURT: -- live?

17 MR. BLUME: The two witnesses who are going to
18 testify live are -- well, there are going to be five
19 witnesses who will testify in total, as I understand
20 it, unless there is some witness I don't know about.

21 The first witness will be Dr. Steve Laken who is
22 here. And so his affidavit was provided to the
23 Attorney General's Office. It's really just his
24 report, and he is going to be here to sort of
25 authenticate that. And so, I mean, we will take his

1 up with him.

2 THE COURT: How do you spell his last name?

3 MR. BLUME: L-A-K-E-N.

4 THE COURT: I've read it

5 MR. BLUME: It was Steve Laken. So really his
6 affidavit is just -- it's not as if we're trying to
7 put his affidavit in without him being here. He will
8 be here.

9 Then the next witness will be Adina Schwartz who
10 is going to testify primarily about the lack of a
11 scientific basis for ballistics evidence. And three
12 of the affidavits, that of Bill Thompson, William
13 Thompson, William Tobin and Alicia Carriquiry were
14 affidavits which Professor Schwartz relied upon as
15 part of the materials which she reviewed in
16 conjunction with her preparation for her testimony in
17 this proceeding. So we will intend to mark those
18 during her testimony as information she relied upon
19 in coming to her conclusions.

20 THE COURT: They would also be live witnesses?

21 MR. BLUME: No. Just Professor Schwartz.

22 THE COURT: Oh. So she is relying on
23 affidavits?

24 MR. BLUME. Of Thompson, Tobin and Carriquiry.

25 THE COURT: And she would qualify as an expert?

1 MR. BLUME: Yes. She has testified as an expert
2 witness in a number of ballistics trials around the
3 country.

4 Then the other affidavits I believe primarily
5 are the character witnesses' affidavits. And with
6 those, these are individuals essentially who could
7 have testified as character witnesses at Mr.
8 Freiburger's trial, and they will not be present.

9 But with those, what I intended to do is to
10 offer, to present those to trial counsel when they're
11 here and ask them if this is consistent with
12 information they developed and received but yet chose
13 not to present during Mr. Freiburger's trial and then
14 question them about, you know, why they did or did
15 not choose to present them. I think that is
16 basically it.

17 THE COURT: Were those witnesses -- or those
18 affidavits --

19 MR. BLUME: Those affidavits.

20 THE COURT: -- were available at --

21 MR. BLUME: Not the affidavits. The witness
22 testimony itself. And so in that regard -- but --
23 so, I mean, that's it. I think that's basically the
24 categories in which they fall. So I intend to do Dr.
25 Laken, do him, Tubin, Thompson and Carriquiry with

1 Professor Schwartz, and then the character affidavits
2 in the context of the examination of trial counsel.

3 I mean, that's the issue of admissibility. I
4 mean, the statute itself, I don't intend to offer
5 depositions. I mean, that was just sort of a mistake
6 on our part. There are no depositions in this case.
7 Therefore, there aren't any depositions at all that
8 are relevant or not relevant to anything. The only
9 thing we have is the affidavits.

10 But the Post Conviction Relief statute
11 specifically allows for the admission of affidavits.
12 These have been provided to the Attorney General's
13 Office. And in Simpson vs. State, the South Carolina
14 Supreme Court upheld the admission of affidavits even
15 in a capital case. But I think really the only ones
16 that are being offered as substantive evidence
17 without the witnesses being here or being present are
18 the character evidence.

19 THE COURT: All right. What's the State's
20 position? I was somewhat quizzical about the memo
21 because I was not aware of any deposition. Of course
22 I wasn't aware of a lot of things in this case. But
23 depositions were a problem.

24 And the Applicant says, Mr. Petrano, that -- you
25 heard him -- that he plans to offer two experts. One

1 expert's opinion would be supplemented by affidavits
2 upon which she relied in developing her theory of
3 this case. And the only other affidavits that would
4 be offered without witnesses would be the character
5 witnesses. I mean, I understand your memo in this
6 case and you were objecting to it, but I wonder now,
7 since you have more clarity as to what the Applicant
8 plans to offer, if you have any objection.

9 MR. PETRANO: Just one or two, a couple of
10 points I'd like to make, Your Honor, directly in
11 reply to your question. One, now we know that
12 "depositions" was mistaken language. First of all,
13 the State doesn't appreciate that. I was off on a
14 rabbit hunt for a week researching those issues.

15 THE COURT: I was up pretty late last night
16 looking for a record myself.

17 MR. PETRANO: So I feel rather insulted on that
18 aspect. But now depositions is not an issue. Okay.
19 I'll shove that part aside. But first I want to
20 distinguish Simpson. The Applicant referenced
21 Simpson. Simpson was a California case. The rules
22 are completely different. It's 17-27-150, part (b).
23 Discovery is automatic there. And I would like to
24 distinguish that. I am not trying to suggest
25 affidavits are discovery. I'm just trying to

1 distinguish any applicability of affidavits being
2 allowed in Simpson if that's going to have it apply
3 here.

4 THE COURT: You're correct. That's a capital
5 case.

6 MR. PETRANO: Second, regarding the character
7 affidavits, I guess I understand the argument that he
8 wants to bring those up with trial counsel regarding
9 the allegations of ineffective assistance of counsel.
10 But once again, it would be nice to have those
11 witnesses live, the point being the South Carolina
12 Supreme Court, I think the case Patrick Devon Harris
13 vs. State, any time you're going to suggest
14 ineffective assistance of counsel for failure to
15 present witnesses, which in this case would be the
16 character witnesses, those witnesses actually have to
17 be present. It's mere speculation as to what their
18 testimony would be. And I mean full testimony.
19 Sure, we've got the affidavits, some nice, pretty
20 predicate questions, but they're not subject to cross
21 examination.

22 I could go on and on about where the questions
23 do leave off. I'll save that for if those come in.
24 I'm not going to go through them one-by-one and bring
25 up questions that weren't asked in these affidavits.

1 Then regarding what the affidavits that are
2 going to be relied upon by the expert, I think that
3 the case law and the statute does certainly suggest,
4 the statute under the rules does suggest that an
5 expert can rely on studies and that type of thing.
6 But then why have those introduced via affidavit? I
7 think that the suggestion is that there is some sort
8 of aura of credibility because those are sworn. I
9 think that's inappropriate.

10 If those people want to testify via an
11 affidavit, they should be here present and subject to
12 cross examination regarding their purported claim
13 that they attest to these other studies which is
14 hearsay within hearsay, almost within hearsay again,
15 without being subject to cross examination. And we
16 stand by our memo. And thank you, Judge.

17 THE COURT All right. With that I guess we'll
18 deal with each of them as they arise through the
19 course of the proceedings. All right. How do you
20 wish to proceed, Mr. Blume?

21 MR. BLUME Your Honor, we can -- if the Court
22 would like, I can give you an overview of what the
23 claims are and what the arguments we're going to be
24 making are. We can go directly into testimony,
25 whatever would be helpful to the Court.

1 THE COURT: Well, I've read your memorandum, I
2 mean, your pre-trial brief, and I think I understand
3 what the issues raised in there are. And I've read
4 the Supreme Court opinion. I've read the closing
5 arguments of Solicitor McMahon. I take it there was
6 no direct objection to Solicitor Campbell's argument
7 since it was basically a recitation of the law.

8 MR. BLUME: That's correct. The issue that's --
9 the failure to object to the argument that's in the
10 application is in Mr. McMahon's argument.

11 THE COURT: All right. Well, in the interest of
12 time, let's proceed.

13 MR. BLUME: The Applicant would call Steve
14 Laken.

15 DR. STEVEN J. LAKEN, after being duly sworn,
16 testifies as follows:

17 THE COURT: Have a seat in the witness box.
18 State your full name for the record.

19 (WHEREUPON, Applicant's Exhibit No. 1 is marked
20 for identification.)

21 THE COURT: Let me inquire at this point; where
22 is trial counsel?

23 MR. PETRANO: That is a good question, Your
24 Honor. I've got co-counsel, Ms. Hudgins. I got an
25 email last night.

1 THE COURT: She changed her hairstyle.

2 MS. HUDGINS: I tend to do that, Judge.

3 MR. PETRANO: I got an email last night from my
4 counterpart here indicating that Trial Counsel
5 Delgado -- which I guess I think it's correct to say
6 was primary counsel?

7 MS. HUDGINS: That would be correct.

8 MR. PETRANO: -- is not -- would not be present.
9 I have had no contact with Mr. Delgado whatsoever.
10 I've tried to mail him and telephone him. I did get
11 him served with a subpoena.

12 THE COURT: For today?

13 MR. PETRANO: Yes, sir; for today. It's my
14 understanding that there's some type of scheduling
15 issue. And I would concede that PCR is at the very
16 bottom of the priority list as far as conflicts when
17 it comes to appearances in other courts and other
18 matters. So if he does have something, I concede
19 that it probably has priority over this, although I'm
20 not --

21 THE COURT: Ms. Hudgins, have you talked to him?

22 MS. HUDGINS: No, sir, Your Honor.

23 THE COURT: Do you know anything about his
24 whereabouts?

25 MS. HUDGINS: No, sir. We don't practice

1 together any more.

2 THE COURT: Well, I know that. But you've had
3 no communication?

4 MS. HUDGINS: No, sir, Your Honor.

5 THE BAILIFF: State your full name.

6 THE COURT: All right.

7 MR. BLUME: Your Honor, it's my understanding
8 that he is in federal court this morning and has
9 another -- has something else. And so, you know, I
10 would just suggest at the break we try and call him
11 and see what we can, you know, work out here.

12 THE COURT: That's fine.

13 MR. BLUME: And if we need to go forward and if
14 we have to do something to get his testimony, we'll
15 get it done.

16 THE COURT: All right.

17 MR. PETRANO: And, Your Honor, if I may. I
18 don't want to interrupt. I know the rules are a
19 little relaxed. I do have a general relevancy
20 objection to the FMRI. I just didn't know whether or
21 not that was appropriate. And I'll stand down now.
22 I just wanted to bring that up if you wanted to hear
23 that now. Thank you, sir.

24 THE BAILIFF: State your name.

25 THE WITNESS: Steven John Laken.

1 DIRECT EXAMINATION

2 BY MR. BLUME

3 Q And is it Dr. Laken?

4 A It is Dr. Laken.

5 Q Dr. Laken, where are you currently employed?

6 A At Cephos Corp in Massachusetts.

7 Q And what is the Cephos Group?

8 A Cephos is a company that provides forensic services
9 to the legal community. We perform DNA evidence
10 work, FMRI work, as well as private investigation
11 work.

12 Q And what is your position there?

13 A I am President and CEO.

14 Q And what is your educational background?

15 A I have achieved -- I received my bachelor's of
16 science from the University of Minnesota and a Ph.D
17 from Johns Hopkins.

18 Q And prior to going to the Cephos Group, what did you
19 do?

20 A Prior to doing that I was in graduate school
21 developing diagnostic tests. After that I joined a
22 company called Exact Sciences that developed tests
23 for colon cancer screening.

24 Q And in conjunction with that work, did you win any
25 awards?

1 A Yes, I did. I won an award at Johns Hopkins, the
2 Israel Macht Award for my work in my graduate work,
3 as well as the TR-35 2001 Award which is an MIT Award
4 for Young Innovators Under the Age of 35.

5 Q And you said that one of the types of forensic
6 analysis the Cephos Group does is FMRI. Can you
7 explain to the Court what an FMRI is?

8 A FMRI is a way to look at what the brain -- the
9 responses the brain has to certain stimuli. The way
10 that it works is a person is put into an MRI scanner.
11 There is a number of things that are presented. They
12 could be questions; they could be feelings; they
13 could be pin pricks. While that's going on, the
14 scanner is taking snapshots. It's recorded what
15 stimuli is presented to that person at that time.
16 And then after the time they arrive, the analysis
17 takes place basically using computers. And what the
18 analysis looks for are points of the brain that are
19 activated in relationship to a specific stimuli.

20 Q And is this a well accepted medical technology?

21 A It is a well accepted medical technology.

22 Q And it's used in a variety of different applications?

23 A It is used in a variety of different applications.
24 Medicare, Medicaid have a CPT code which is a current
25 code for use as a medical test.

1 Q And are researchers in addition to the medical
2 community currently using FMRI?

3 A Yes. There is thousands and thousands of research
4 publications of researchers who have used FMRI.

5 Q And are researchers currently using the FMRI in the
6 context of lie detection?

7 A There are currently 28 peer reviewed and published
8 results in PubMed of researchers that have used FMRI
9 in lie detection.

10 Q And does the Cephos Group use FMRI in lie detection?

11 A We do.

12 Q Has the technique that you use at the Cephos Group
13 with the FMRI for lie detection, has that been
14 subject to peer review?

15 A Yes, it has.

16 Q And what is peer review basically?

17 A Peer review is the way that you generate a
18 hypothesis. You perform a research study. You write
19 up your research results and you submit those to
20 blind review to the scientific community. With those
21 results, when you submit those to a paper or a
22 journal for publication, it can get sent out to a
23 random number of scientists for review.

24 It's one-way blinded. That is, that you don't
25 know who the reviewers are so they can make any

1 comments that they want and they can criticize or
2 critique the paper in any way that they feel is
3 important. And this way it allows for only
4 scientific papers that meet high quality standards to
5 be published.

6 Q And have you had the opportunity to address judges
7 and other professional organizations about the use of
8 FMRI and lie detection?

9 A Yes. I've been asked to present at a number of
10 conferences.

11 Q And can you talk about some of these?

12 A Yes. I've been asked to present at the Sandra Day
13 O'Connor federal courthouse to federal judges on the
14 use of FMRI detection, the National Judicial College
15 at a two-day seminar on four state judges on FMRI for
16 lie detection. The National Academy of Sciences had
17 a meeting. The American Association for the
18 Advancement of Science also had a meeting. And at
19 all those meetings I was asked to present.

20 Q And back to the question of peer review. What has
21 the peer review methodology that you use established
22 as far as the accuracy rates go?

23 A The peer review and methods that we use are
24 98 percent.

25 Q 98 percent accuracy?

1 A That's correct.

2 Q And can you explain to the Court the difference
3 between a false positive and a false negative?

4 A Yes. In the context of lie detection, what we
5 consider a false positive is it would be a person who
6 is telling the truth that we say, incorrectly that we
7 would say is lying and we incorrectly say that that
8 person is lying. A false negative would be a person
9 who is telling the truth and we would say is -- a
10 false positive is a person who is telling the truth
11 who we say is lying. A false negative is a person
12 who is lying who we say is telling the truth.

13 Q And you said you have a 98 percent accuracy rate
14 based on the methodology. The two percent of
15 inaccuracy, are those false positives or false
16 negatives?

17 A We have a publication in the Journal of Forensic
18 Sciences in 2009, and in that publication all of the
19 misclassifications or inaccurate calls that we made
20 were all false positive results. So those were
21 people who were telling the truth who we said were
22 lying.

23 Q But based on the studies that you've done, the
24 methodology you use, you have not had a situation in
25 which someone was lying and it indicated they were

1 telling the truth?

2 A That is correct.

3 Q And as far as quality control of the methodology that
4 you use, do you have a quality control procedure?

5 A Yes, we do. There is three steps for quality
6 control. The first is the person themselves, making
7 sure the person is qualified to go into the scanner,
8 to make sure they're medically safe to go in there.
9 We do perform a drug screen on everybody to make sure
10 that they're not taking illicit drugs that may impair
11 or affect their brains. We also perform a structured
12 clinical interview and diagnostic test, and that's to
13 make sure that when we perform that that they don't
14 have any psychiatric conditions, overt psychiatric
15 conditions that we're reviewing for.

16 In the MRI itself, the way that the MRI works is
17 when the person is put into the scanner, the
18 questions are randomly displayed to the person and
19 they read the questions so we're not asking the
20 questions. When that happens you have to make sure
21 that the scanner starts and the questions start at
22 the same time. Think about this as when the movie
23 starts and the sound track starts, if they were off,
24 it wouldn't make sense. The way the scanner and the
25 sound track or the questions start in this case are

1 timed so that they start and they're succinctly
2 timed.

3 And then after the scan itself, we look at the
4 images. We make sure that the images are of high
5 quality. We go through and make sure that the person
6 didn't move too much. We can actually visually look
7 at whether they moved and we can track their
8 movements.

9 We also make sure when the person presses when
10 they see a question and then they respond to the
11 question we know what their response is. It's
12 recorded on a computer. We know what the reaction
13 time to that question is. And we make sure that they
14 respond correctly to those questions. And we would
15 also look at the response times.

16 Q So we've talked about peer review. We've talked
17 about the method that you use. We've talked about
18 quality control. And we've talked about the accuracy
19 rates of the procedure that you used in general
20 terms. But let me ask you this. Did you have the
21 opportunity to administer an FMRI to Mr. Freiburger?

22 A Yes, I did.

23 Q And where did you do that?

24 A I did that in Charleston at the Medical University of
25 South Carolina.

- 1 Q And did anyone assist you at that time?
- 2 A Yes. There were two researchers assisting me, Dr.
- 3 Kevin Johnson and Dr. Paul Morgan.
- 4 Q And what was the purpose of the FMRI study you
- 5 conducted?
- 6 A The purpose of the FMRI study was to collect the data
- 7 while Mr. Freiburger was being presented questions
- 8 regarding whether or not he shot a taxi cab driver.
- 9 Q And did you follow a standardized procedure in
- 10 administering the FMRI?
- 11 A Yes. We have a standardized procedure that we
- 12 perform, a knee scanner. We have validated that
- 13 procedure for different purposes around the country.
- 14 Q And can you briefly describe the procedure that you
- 15 used?
- 16 A Yes. The procedure, of course we meet with the
- 17 person ahead of time, about an hour before they're
- 18 scanned. We review the questions with them. We make
- 19 sure the questions are clear. The questions are
- 20 displayed to the person. They are given a laptop to
- 21 practice the questions. We make sure that they
- 22 practice and we make sure that they can basically
- 23 press the yes and no key when the questions are
- 24 presented.
- 25 In this case, when the questions are presented,

1 we asked the person to basically say that they did do
2 whatever it is that we're asking them, in this case
3 say that you did murder a taxi cab driver and then
4 also say that you didn't murder a taxi cab driver.

5 When I say we instruct, there is a command that
6 says lie. And on the lie, that's when Mr. Freiburger
7 would say that he had murdered the taxi cab driver.
8 And on the true, that would be his version of the
9 truth, that he did not murder the taxi cab driver.

10 These types of questions are randomly presented
11 in the scanner. They're presented on a video screen.
12 The questions are randomized so the order changes
13 every single time and I don't know what the questions
14 are that are presented.

15 Once he's in the scanner, when the scanner
16 starts, there is about 60 or so questions. Those
17 questions then are randomly presented to the person.
18 The computer documents which question was presented.
19 He is given about three seconds to respond in a yes
20 or no fashion. After he responds yes or no, then the
21 scan takes place for about 16 minutes while these
22 questions are presented. After 16 minutes he is
23 basically given a break, and then the scan is
24 repeated two more times.

25 Q And the standard of procedure that you used, is this

- 1 the procedure that you discussed producing that is
2 subject to peer review?
- 3 A Yes.
- 4 Q And this is the procedure which has demonstrated the
5 98 percent accuracy rate?
- 6 A Yes. That's correct.
- 7 Q With no false negatives?
- 8 A That is correct.
- 9 Q Now, and the procedure used, is this capable of being
10 replicated by other researchers?
- 11 A Yes.
- 12 Q And the data that you gathered in reaching your
13 conclusions, I assume that's available for anyone
14 that wants to inspect it?
- 15 A Yes.
- 16 Q And analyze it?
- 17 A That's correct.
- 18 Q And so based upon the FMRI that you conducted, did
19 you reach any conclusions in Mr. Freiburger's case?
- 20 A My conclusion was that Mr. Freiburger was lying when
21 he was saying that he committed the murder.
- 22 Q So, can you say that in reverse?
- 23 A My conclusion was that he is telling the truth about
24 not committing the murder.
- 25 Q And did you produce a report documenting your

1 conclusion?

2 A Yes, I did

3 Q And let me show you what's been marked as Applicant's
4 Exhibit 1. Is that the report that you produced?

5 A Yes, that is.

6 MR. BLUME: Your Honor, at this point we would
7 move to admit this as Applicant's 1.

8 MR. PETRANO: I object to the relevancy. And
9 I'm not sure if this is supposed to be a polygraph or
10 some type of expert, but he's not been qualified as
11 such. More importantly, I object to relevancy. I
12 don't understand what the relevancy is of whether the
13 Applicant thinks he did or did not commit the crime.
14 That is absolutely irrelevant. He has informed the
15 State of that when he pled not guilty.

16 THE COURT: (A), he's not been qualified.

17 MR. BLUME: I mean, I don't think he has to be
18 qualified. He's really -- he is testifying as to the
19 results of a procedure that he used. I can move to
20 qualify him as an expert in FMRI. I think he
21 certainly meets the criteria for this.

22 THE COURT: Well, let's do that to begin with.

23 Q Dr. Laken, you have -- how long have you been working
24 with FMRI?

25 A Since 2004.

1 Q And you have received I assume special training in
2 how to administer the FMRI?

3 A I have been working with the Medical University of
4 South Carolina for the last four years or five years.
5 They developed the technology. We transferred the
6 technology. We developed the technology from them.
7 I have taken classes specifically on how to use FMRI.
8 I have subjected my work to peer review and published
9 results and have been asked to present the FMRI work
10 at a number of conferences.

11 MR. BLUME: Your Honor, at this point I would
12 move to admit Dr. Laken as an expert in FMRI.

13 THE COURT: Any objection or voir dire?

14 MR. PETRANO: I have my own voir dire. Yes,
15 Your Honor.

16 THE COURT: Go ahead.

17 VOIR DIRE EXAMINATION

18 BY MR. PETRANO

19 Q Doctor, is it a medical doctor or a Ph.D?

20 A Ph.D.

21 Q In what?

22 A Cellular molecular medicine.

23 Q You talked about some awards you got from MIT and
24 someplace else. Those weren't for MRI, were they?

25 A They were not.

- 1 Q What are you measuring here? You said brain
2 activity. But that's not true. You're actually
3 measuring oxygen flow, right?
- 4 A That's not correct.
- 5 Q Tell me about it.
- 6 A What we're actually looking at is when the brain,
7 when the neurons in the brain start to work. That
8 requires energy. Just like in the same way that if
9 you were using a muscle, that requires energy; as
10 specific neurons in the brain start to work, they
11 require energy. And the way the body compensates for
12 that is blood flow goes into those areas.
- 13 Q So you're measuring blood flow?
- 14 A No.
- 15 Q Well, what form of energy then? Electrochemical?
16 Mechanical? Energy has to have a form, right?
- 17 A Can I restate? Can I finish?
- 18 Q Please.
- 19 A Thank you. So as blood flows into that region, there
20 is more oxygenated and deoxygenated hemoglobin.
21 Energy comes in the form of oxygenated glucose.
- 22 Q So you're measuring the difference between the
23 hydrogens and the oxygen and the glucose?
- 24 A Again, I would say no. You're not asking the right
25 question.

1 Q How are you measuring energy?

2 A So when blood flows into the region, there is more
3 oxygenated hemoglobin that comes into the region,
4 into that part of the brain. And there are small
5 areas of the brain. That small amount of oxygenated
6 hemoglobin results in a slight increase in the MRI
7 signal.

8 Q What signal?

9 A The magnetic resonancy imaging, basically the protons
10 that are there.

11 Q So what's magnetic?

12 A The protons that are -- the water molecules that are
13 there are the ones that are magnetized.

14 Q And how are those manipulated by thought process?

15 A The water molecules aren't manipulated by thought
16 processes.

17 Q So what are you measuring?

18 A So what happens is that when those oxygen -- when
19 those hemoglobin molecules come into that part of the
20 brain, there is -- those hemoglobin molecules have
21 iron on them. Deoxygenated hemoglobin has a -- does
22 not have an oxygenated molecule on it; and,
23 therefore, it's like having a big magnet right there.
24 So that absorbs the signals from the deoxygenated
25 hemoglobin.

1 When there is more oxygenated hemoglobin that
2 exists there, that results in a net decrease of the
3 amount of deoxygenated hemoglobin. Therefore, you're
4 not absorbing all that signal that exists there from
5 those basically protonated water molecules.

6 Q And so it's the difference of the water molecule
7 being attached or near the iron molecule in the
8 hemoglobin itself?

9 A It has nothing to do with oxygen molecules.

10 Q You're measuring iron. And the magnetic difference
11 of the iron is affected by the oxygen. Correct or
12 not correct?

13 A No. We're measuring -- basically the way that it
14 works is you're measuring the -- you are measuring
15 the hydrogen, the differences in the hydrogen spins
16 as it relates to the local magnetic differences of
17 what exists that are there.

18 Q And the hydrogen in the blood?

19 A Yes.

20 Q So you're measuring blood flow then?

21 A It's not hydrogen in the blood. It's the whole
22 entire area. Blood flow in a single voxel -- and a
23 voxel is any 3D element, like a pixel -- in that
24 region there are lots of things. There are neurons.
25 There is water. There is blood. Blood consists of

1 water, glucose, deoxygenated hemoglobin, proteins, et
2 cetera; lots of things.

3 What you're looking at is the net of what's
4 going on in that specific voxel as it relates to
5 basically the hydrogen molecules that exist there,
6 what's going on. When things like deoxygenated
7 hemoglobin come into there, oxygenated hemoglobin,
8 those things make a difference on what happens to
9 those local water molecules.

10 Q So you're not measuring the water molecules. You're
11 not measuring the neurons. You're measuring the
12 oxygenated hemoglobin?

13 A You're indirectly measuring the oxygenated
14 hemoglobin. That's correct.

15 Q So you're measuring blood flow, the difference in
16 blood flow over a period of time?

17 A I don't think it's -- it's not fair to say blood
18 flow, because there's a lot of things in blood flow.
19 Blood flow to me means it's a velocity number. It
20 means that you're -- it's like measuring the speed of
21 a car. You're not measuring the amount of speed of
22 the car. You're measuring the net of what's there at
23 a specific time.

24 THE COURT: I didn't hear what you just said.

25 You're measuring what?

1 A Flow, flow to me means it's like measuring the speed
2 of a car.

3 THE COURT: I heard that part.

4 A When I hear counsel say it's measuring blood flow, I
5 don't understand that. It's just not what we're
6 measuring. It would be incorrect to say that we're
7 measuring flow. At a specific period of time when
8 there is a snapshot taken, what we're looking at is
9 what is going on to those individual hydrogen
10 molecules, and blood flow certainly has an influence
11 on that. The amount of blood that's there and what's
12 in that blood will make a difference on the signal
13 that's generated at a specific time.

14 Q So both the speed and the volume of blood?

15 A The volume of blood, certainly. The speed, no.
16 Because it's a snapshot. It's a single point in
17 time.

18 Q And so how would volume change?

19 A So the body has this great mechanism that when you
20 start thinking of moving or of doing anything and
21 blood needs to go to a region, those capillaries
22 dilate. Capillaries dilate. And so there is a net
23 amount of more blood in a specific area.

24 Q And so that would be flow. It moved?

25 A It certainly has to get there. So it would move.

1 Q How fast is a thought?

2 A How fast are thoughts?

3 Q You're the one measuring them.

4 A So what we have is a -- when the -- when a stimuli is
5 presented to a person and they start thinking about
6 it and they start using the specific part of the
7 brain, it's very well documented that blood starts to
8 flow into that region after about two seconds. And
9 that occurs, the blood flows from two seconds and it
10 maximizes at about six seconds. Then it decreases
11 over the course of ten seconds.

12 And the point of that is that your body
13 overcompensates for any thoughts that you have. So,
14 though the neurons are virtually instantaneous, the
15 body's physiological response to that is very slow.
16 We have looked at what happens when people are lying.
17 And the question is: When does the lie start?
18 Does it start when the question is first presented or
19 when the person starts to press a button that says
20 that this is when they're lying?

21 And what we see is that it's a relatively slow
22 process. And even if we're off by two or three
23 seconds on either direction that the parts of the
24 brain that react are reacting are still staying the
25 same.

1 Q And what is a lie?

2 A A lie, the way that we define a lie is the
3 intentional act to counter deceive.

4 Q And I'm not trying to be difficult, and I'm not real
5 smart here; but basically you're measuring belief
6 then?

7 A That is correct.

8 Q These pictures in the exhibit, they look real nice
9 and clear. Were there any deleted, or were they all
10 that good?

11 A So in the affidavit we make a point of saying that
12 the images are only meant to be pictorial, basically
13 pictorial representations. They're actually not the
14 things that we look at. And we make a very -- it's
15 very important that what we have done is we've
16 developed the software programs to go through and
17 look at specific parts of the brain, specific voxels
18 or specific regions in the brain that are more active
19 when a person is lying than when they're telling the
20 truth. And so we don't use those images to basically
21 make a determination of deceit or truthfulness.

22 Q You don't; but the machine does, right? Your black
23 box, the software?

24 A They do use images, yes.

25 Q Now, is it true that in an MRI sharper images are

- 1 purposely avoided because they could take longer to
2 develop?
- 3 A I don't understand your question.
- 4 Q And how does he -- how does an individual undergoing
5 this test -- is this a medical procedure?
- 6 A The FMRI is an FDA approved procedure. The FDA has
7 looked at it and they've said that it's fine, it's
8 acceptable.
- 9 Q And you were saying -- and I think I was reading in
10 the report, or you said it here -- the person
11 undergoing the procedure has to be very still?
- 12 A That is correct.
- 13 Q And so would this procedure be feasible to the
14 uncooperative?
- 15 A So it requires a person to read the questions and
16 respond to the questions using a mouse pad. If that
17 person closes their eyes, if they fall asleep, if
18 they don't respond using the mouse pad, and that's
19 how you define uncooperative, then it wouldn't be --
20 it couldn't be performed on a person like that. If
21 the person was thrashing around in the scanner or
22 didn't go into the scanner and that's what you
23 consider to be uncooperative, then this test wouldn't
24 be appropriate for that type of person.
- 25 Q All right. And you had said, I think the question

1 was regarding the peer reviewed studies, and I think
2 the question was specifically asked regarding the
3 error rate. And your response I thought was rather
4 interesting. You said the error rate for the methods
5 you use is 98 percent. Was that the error rate in
6 the overall studies?

7 A The studies that we published that are in the
8 affidavit range from 78 percent to 93 percent. The
9 methods that we used in those studies, the way we
10 presented those questions in those studies range from
11 a low of 78 to a high of 93. The analysis that was
12 taking place in those studies didn't change at all in
13 those studies.

14 And what we've done is we basically have taken
15 the -- when we went from -- we started off with
16 90 percent and our first studies were at 90 percent.
17 We eliminated a few questions from the scan. We
18 changed the scan from 16 minutes to 12 minutes, and
19 that resulted in a 78 percent accuracy rate.

20 We said if we could get worse, maybe we can get
21 better. We added some things in. We changed a
22 couple of questions around, and then from that we
23 went back to 98 percent. And that's the way I prefer
24 using it.

25 Q And what kind of timeframe are we talking to go from

1 such a difference?

2 A Essentially those studies were about a year apart.

3 Q And how long ago was that year period?

4 A So we validated that technology in the year 2007,
5 2008.

6 Q What is the error rate for polygraphy?

7 A I don't know

8 Q And how is it that you determine what is an error for
9 the purposes of your calculations?

10 A Right. So errors are, you have two types of errors.
11 You have errors where you have a truthful person who
12 you determine is a liar. And that's what we would
13 consider to be a false positive. And you have an
14 error where there's a liar who you consider a
15 truthful person. And that's a false negative. You
16 also have true positives. True positives are when
17 you call a person that is a liar a liar and true
18 negatives as a truthful person as a truthful person.
19 So those are the four buckets that you can put a
20 person into.

21 Q And so how do you figure -- how do you determine what
22 really was the truth? Do you show them a bunch of
23 cards, tell them to pick one, and then you show them
24 the cards again in the machine and when the one they
25 pick pops up and they say, yeah, you know, that's

- 1 true? Tell me about it.
- 2 A That's not the way that we have done our studies.
- 3 Q So how do you do yours?
- 4 A So the way that we do our studies is that people are
- 5 asked to come in. They are given -- they are told
- 6 they're going to a room where there's a ring or a
- 7 watch. They open up that drawer. They're allowed to
- 8 take one of the two objects. They're told to hide
- 9 that object and not to tell anybody what object it is
- 10 that they took. From that they are given an
- 11 incentive to beat the test. So they're given
- 12 monetary incentive if they can convince us they
- 13 didn't do anything. They are then told to go into
- 14 the scanner and say that they didn't take either of
- 15 the two objects.
- 16 Q And that's a lot like the Myth Busters episode that
- 17 you participated in?
- 18 A That is correct.
- 19 Q And was that done through marketing of -- how do you
- 20 pronounce the company name again?
- 21 A Cephos.
- 22 Q Cephos. Was that a marketing aspect of Cephos?
- 23 A We didn't market it to Myth Busters.
- 24 Q They came to you?
- 25 A That's correct.

1 Q What was the error rate on that?

2 A There were three people that were scanned, and two of
3 the three people were called correct.

4 Q So that would be 66 percent?

5 A That would be 66 percent.

6 Q How do you differentiate between lies as you define
7 them and strong emotions of any type?

8 A One could have emotions without having lies. And
9 that's the nature of the polygraph, is the idea that
10 a polygraph works, because when a person lies they
11 have to have strong emotions. We have a study that
12 shows that when people are lying, it's peer reviewed,
13 and we look at their sweating or their skin
14 conductance response, that that is in a different
15 part of the brain than where the lies are occurring.
16 So what we can say is that the lies are in a
17 different part of the brain than the emotional
18 responses.

19 Q Now you're making some comparisons to polygraphy
20 here. You indicated that you didn't know what the
21 error rate for polygraphy was. Do you know if your
22 error rate is higher or lower?

23 A I do not know.

24 Q And you had indicated just a few minutes ago that you
25 had testified before judges at conferences. Have you

1 ever been in court?

2 A If I said testify, I have been asked to present. I
3 have not testified.

4 Q My mistake. Sorry. Thank you. Is there a lot of
5 random noise in the human brain?

6 A I don't think there's any noise at all in the human
7 brain.

8 Q So you don't have any studies to see if your
9 technique differentiates between what could or could
10 not be random noise versus what you're looking for?

11 A Can you define random noise for me? When you say
12 random noise --

13 Q Signal degradation.

14 A -- I was thinking of sound.

15 Q Signal degradation?

16 A Signal ...?

17 Q Degradation.

18 A So there are other places at parts of the brain, the
19 frontal cortex, around the orbits, this part of the
20 brain here, where there can be signal degradation.
21 The images that we look at, the images that we take,
22 the way that we set up the scanner really reduces
23 those types of signal noises, as you define those,
24 being reductions of the signal.

25 Q Now, you referred to the software. The software

1 really does all the work here, correct?

2 A Yes.

3 Q Are you a programmer?

4 A I program, yes.

5 Q In what language?

6 A I use Matlab, a program called Matlab.

7 Q Maplab (phonetic)?

8 A Yes.

9 Q Okay. And is your software for this machine, is that
10 written in Maplab (phonetic)?

11 A That is correct.

12 Q It's a Maplab (phonetic) based software?

13 A M-A-T lab.

14 Q Matlab. And that's Paschal based?

15 A No. It's a company called MathWorks that produces a
16 program called Matlab. Matlab is their own
17 programming language. It's much like C or Python.
18 And you program in that language itself.

19 Q And who did the programming?

20 A So the program, the basis for the program comes from
21 something called statistical parametric mapping or
22 SPM. It comes out of the university, the College of
23 London. Eighty percent of the people that use fMRI
24 use this program package. It's basically a free
25 programming package.

1 The program itself that people use is written in
2 Matlab. So one has to have Matlab in order to run
3 their free, their shareware program. Because the
4 program is shareware, everybody can take a look at it
5 and evaluate it and make corrections and improvements
6 to it. What we have done is we've taken it and made
7 the hooks into that program so that we don't have to
8 manually run an analysis or perform the analysis
9 manually each time.

10 Q Now, all that does, the London program, that just is
11 a base model that processes the MRI data. That
12 doesn't actually tell -- nothing in that program says
13 something is a lie or not. Is that correct?

14 A That is correct.

15 Q Now, you take that a step further with your own
16 internal programming, what you've licensed and
17 patented, correct?

18 A That is correct.

19 Q Tell us about that part.

20 A So that part is, in the 2004 study that was published
21 in 2005, Internal Biological Psychiatry, what we
22 developed is a model of the brain when it's lying.
23 And that was based on 30 subjects. Based on those 30
24 subjects, we can look at specific portions of the
25 brain or specific parts of the brain; and if those

1 parts of the brain are more active on a person on the
2 two types of questions that I said before, or if
3 they're more active on one type of question than the
4 other type of question, then we determine that that
5 person was being deceptive.

6 Q How did you determine -- what was the composition of
7 the 30 people?

8 A The composition of the 30 people were people
9 generally between the ages of 18 to 50. They were
10 non-medicated, healthy adults.

11 Q Any psychopaths?

12 A No.

13 Q Did you screen out psychopaths?

14 A We did not include psychopaths. Yes.

15 Q Anybody on drugs?

16 A No.

17 Q And you screened all of them for drugs?

18 A I didn't screen them personally for drugs. Andy
19 Kozel, Dr. Andy Kozel, screened them for drugs.

20 Q Thank you for clarifying that. The software that you
21 developed based on the 30 subjects, how often does
22 that get changed? Is it a fuzzy program?

23 A It's been changed. There was one change that
24 occurred after the 2005 program. And that one change
25 added two pieces that we did. We implemented two

1 changes after the Biological Psychiatry paper. We
2 went back and validated that those changes didn't
3 affect the results that we obtained, and then we've
4 used those results for -- we've used that program
5 since then.

6 COURT REPORTER: I'm sorry. I didn't hear you.

7 A We've used that program since then.

8 COURT REPORTER: Thank you.

9 Q Who validated those changes? Who approved them?

10 A Those changes were performed. We work with the
11 medical -- we work with Andy Kozel and Mark George
12 and Kevin Johnson. Andy Kozel is now at the
13 University of Texas. Mark George and Kevin Johnson,
14 Mark George is an MD at the Medical University of
15 South Carolina. And Kevin Johnson was a graduate
16 student at the time. He's now a Ph.D. And those
17 changes were basically submitted to that group. That
18 group saw the changes, and that's the group that
19 approved the changes.

20 Q And that group is your board?

21 A They're on the side. Andy and Mark, Dr. Kozel and
22 Dr. George are on the scientific advisory board,
23 though there is no contracts at all with those
24 individuals.

25 Q And do you have the final say as the CEO and

1 President as to what changes are made to the
2 software?

3 A I do.

4 Q Are there any other changes that you have on the
5 horizon that you're looking at?

6 A No.

7 Q Where -- and I think I've got my final subject here,
8 Judge. I appreciate your patience. How do we know
9 what part of the brain -- and I'm going to use the
10 phrase, layman jargon -- lights up when someone is
11 lying?

12 A So in the case of any fMRI study, you take people,
13 you always have to do two states. It's called an A
14 state and a B state. And then you look at the maps
15 of the brains from those people when they're
16 performing the A task and maps of the brain when
17 they're performing the B task and you statistically
18 subtract the A task from the B task, that tells you
19 what parts of the brain are active when they're
20 performing the A task. You can do the B task by
21 using the A task and see what parts of the brain are
22 active then they're performing the B task.

23 Q And those are just based from your 30?

24 A So that general description that I described is the
25 way that all the fMRI community does it. In the case

1 of the way that we do it, we look at -- base it on
2 the people when they were lying minus neutral
3 questions and truth telling minus neutral questions.
4 We use those two types of the maps, again the A and B
5 map. We look at what parts of the brain were active
6 when the person was lying and what particular parts
7 of the brain were active when the person was telling
8 the truth.

9 Q And what part is that? What's the name?

10 A There's a number of regions of the brain that are
11 activated: The frontal cortex, the dorsa lateral
12 prefrontal cortex. We see mostly right-sided parts
13 of the brain. The right anterior singlet, the right
14 precuneus are the regions that we see consistently
15 activating when a person is telling a lie.

16 Q And those areas, all of those, particularly the
17 frontal -- what was the first one you named?

18 A Dorsa lateral prefrontal cortex.

19 Q Is that a component of the brain that is used for
20 other purposes besides lying?

21 A Yes.

22 Q Such as breathing?

23 A Breathing would not be one of those purposes.

24 Q Really? Holding your breath wouldn't come through
25 the frontal?

1 A So what you asked, the way I -- I'm sorry. The way
2 that I interpreted your question is, is breathing,
3 the act of the body, moving the lungs, is that part
4 of that part of the brain? No. When you start
5 controlling different parts of your body, those parts
6 of the body that are controlled would come from
7 different parts of the brain. I don't know
8 specifically about breathing.

9 Q So you don't know if someone was holding their breath
10 how this would affect your readings? Have you done
11 any studies of that?

12 A We have not done any studies of that.

13 Q And, Your Honor, I have one more if I can have just a
14 second. Oh. Your 30 subjects, how many were
15 professional actors? Any of them?

16 A In that study we had no professional actors. We have
17 done a professional actor.

18 Q And how did that go?

19 A And the Myth Busters guys I guess would be
20 professional actors.

21 THE COURT: Sir.

22 THE WITNESS: I'm sorry.

23 THE COURT: You sort of swallowed your words
24 there. I didn't hear you.

25 A We have scanned around 350 people. One of those

1 people was a professional actor. The Myth Busters
2 people that weren't subject to peer review and
3 weren't part of a research study would be the other
4 people we said were actors, professional actors.

5 MR. PETRANO. Thanks.

6 THE COURT: Any --

7 MR. BLUME: Well, I think that actually went
8 sort of beyond his qualifications. I think where we
9 were is cross. But I have just one question. Then
10 I'll come back to the initial.

11 DIRECT EXAMINATION

12 BY MR. BLUME

13 Q It was asked, part of your protocol, you were asked
14 the question about screening for drugs. Part of your
15 protocol is screening for drugs. Is that correct?

16 A That is correct.

17 Q And that was done in Mr. Freiburger's case?

18 A That is correct.

19 Q You took a urine sample from him and determined there
20 weren't any drugs in his system which would affect
21 the reliability of the test?

22 A That is correct.

23 Q And what did that indicate?

24 A It was negative for drugs.

25 MR. BLUME: So I think where we were, Your

1 Honor, is I had -- Dr. Laken had testified as to the
2 results of his FMRI study, that based upon his FMRI
3 of Mr. Freiburger and the computer analysis of that,
4 based on his peer reviewed and patented process that
5 he determined that Mr. Freiburger was telling the
6 truth when he denied being the perpetrator of the
7 offense for which he was convicted and sentenced to
8 life imprisonment.

9 And so I believe clearly we've demonstrated he
10 has the qualifications to be an expert in FMRI, that
11 he is one of the leading researchers in the country,
12 if not the world, in this technique. He's
13 administered numerous FMRI's and he has training. So
14 we would formally move to admit him, to qualify him
15 at this time as an expert in the FMRI.

16 THE COURT: The State's position.

17 MR. PETRANO: Certainly, Your Honor, I'd like to
18 differentiate between FMRI which is just a diagnostic
19 tool of medicine versus what's being taken here,
20 which is about three levels beyond that, as to a lie
21 detector.

22 The State submits that under the Jones factors,
23 or whatever standards, he's never testified in
24 another court, been qualified as an expert
25 regarding -- well, I'm sorry. What are the purposes

1 of the witness? I'm not trying to cross examine
2 opposing counsel, but --

3 THE COURT: Well, I assume the purpose is to
4 question the admissibility of the report.

5 MR. BLUME: The admissibility of his testimony.
6 I mean, I don't think --

7 THE COURT: And his testimony.

8 MR. BLUME: His testimony. His testimony is
9 just basically what is in his report.

10 MR. PETRANO: Which ultimately is a lie detector
11 test which the State submits is beyond his scope of
12 expertise, if any. I'm not even going to get into
13 whether he's qualified to talk about an FMRI in
14 general. That seems to be a different subject matter
15 than the ultimate conclusions as to take that FMRI
16 data, use that and put it in a magical software box
17 and get a lie detector test. That's the difference.
18 That's the State's objection.

19 And once again, we renew our objection to
20 relevancy, as it doesn't matter whether Mr.
21 Freiburger remembers that he killed someone or thinks
22 he didn't.

23 MR. BLUME: Well, Your Honor, this is being
24 offered -- I think it's clear from the brief in the
25 application. But this is being offered as newly

1 discovered evidence of events. This technology was
2 not available at the time of trial. Also this is not
3 an ineffective assistance of counsel claim. We're
4 not saying that trial counsel should have
5 administered an FMRI to Mr. Freiburger.

6 On the other hand, this is a new, highly
7 reliable technique used in a variety of applications
8 to determine lie detection. It's currently being
9 used by the Department of Defense, the CIA, the
10 Department of Justice in interrogating --

11 MR. PETRANO: Your Honor, I object to that.
12 That's not in evidence at all.

13 THE COURT: You're testifying now.

14 MR. BLUME: Well, you can take judicial notice.
15 Go Google FMRI and lie detection. It's --

16 THE COURT: I have not Googled it.

17 MR. BLUME: But back to the Jones factors, I
18 mean, we have gone through publication and peer
19 review.

20 THE COURT: Yes. I understand that. I think
21 you've probably met the Jones factors.

22 MR. BLUME: Okay. And we talked about quality
23 control and consistency. So, I mean, that is the
24 purpose of it. It's being offered on that basis.
25 This is -- now, I understand this is an unusual type

1 of evidence to present, but this is a highly unusual
2 case. Mr. Freiburger was convicted in 2002 of a 1961
3 murder on very circumstantial evidence. He asked and
4 wanted to be subjected to this because he knew this
5 was a new technique which might present evidence
6 relevant to his consistent assertion that he is not
7 the perpetrator. We had it done and that's what it's
8 being offered for through Dr. Laken.

9 THE COURT: This technology has been available
10 for -- what you did say -- four years? Is that --

11 THE WITNESS: The commercial applicability, our
12 company started offering it at the end of 2008.
13 There is a second company --

14 THE COURT: 2008?

15 THE WITNESS: 2008. Yes. I'm sorry. The
16 beginning of 2008.

17 THE COURT: Well, the question I still have is
18 He's offering it as new evidence, after-discovered
19 evidence, evidence which if this Court rules that it
20 is indeed after-discovered evidence, of course that's
21 subject to appellate review. But if that were to
22 stand, it would be available for use at trial if the
23 petition is granted, the application is granted. Is
24 that where we are?

25 MR. PETRANO: Your Honor, isn't that convenient?

1 A test that would not be available to the
2 uncooperative. So if the State wanted to do the test
3 and ask him some different questions, an
4 uncooperative person would not be able to undergo
5 this procedure. So we get to cherry pick the
6 questions, which we get into as far as weight when we
7 get to that, as far as who picked the questions and
8 what questions were taken out.

9 But let's get into -- if I could, just go back
10 to Jones. We've got a serious reliability issue
11 here. It was down to 66 percent, floating somewhere
12 around 98. I hardly think that meets the definition,
13 considering the fact that polygraphy is not approved,
14 is not permissible, and we don't even know what the
15 comparison is to that error rate.

16 With that being said, let's assume for a moment
17 that Your Honor allows this in. Again, what does it
18 do? We have lie detectors in this courtroom. They
19 sit right over there. The idea of this is to
20 preclude him from having to testify and be subject to
21 cross examination and usurp the role of the jury who
22 is the lie detector Thank you.

23 THE COURT: Well, I guess that was my point,
24 although not stated as articulately as you have
25 stated it. Once it becomes evidence, it becomes --

1 it takes the role away from the jury in a sense.
2 Because I will tell you, I mean, this is the first
3 time I've heard this testimony, but it's not likely
4 that a jury is going to be able to filter through it
5 any easier than I am trying to filter it through.

6 MR. BLUME: Of course you could say the same
7 thing about many types of forensic evidence which are
8 always -- and the jury really filters their way
9 through.

10 THE COURT: You can say the same about shoe
11 prints and fingerprints and everything else. I
12 understand that. I would like to -- is the report --
13 would that conclude his direct examination?

14 MR. BLUME: Yes, Your Honor. If you'd like
15 additional briefing on it, we could do that.

16 THE COURT: Yeah. I do. I mean, I just think
17 it's such a significant issue in this case that --
18 I've heard this for the first time. And, you know,
19 --

20 MR. PETRANO: Your Honor, if I may. The
21 suggestion of additional briefing, this case has been
22 pending for I think a little over two years. I don't
23 know. Beyond that, we've gotten 200 pages in the
24 last couple of weeks. Time for additional briefing
25 is over, Your Honor, with all due respect. This

1 could have been presented before. We knew this was
2 going to be a hotly contested issue. If there was
3 anything additional that needed to be offered, it
4 should have been offered. Via witnesses, not briefs.

5 MR. BLUME: I mean, I have briefed the issue in
6 the pretrial memo. I did submit the affidavit ahead
7 of time. I just thought it would be helpful to the
8 Court. I'm not trying to be obstructious (sic). I'm
9 trying to be a help.

10 THE COURT: You briefed it in two pages, two and
11 a half pages. Well, I'm going to take this issue
12 under advisement.

13 MR. BLUME: The report has been marked. It has
14 been identified by Dr. Laken as his report. And I
15 have moved its admission and counsel has objected.
16 So as I understand the procedural posture, you are
17 deferring ruling on that. You're going to take that
18 under advisement.

19 THE COURT: That is correct.

20 MR. BLUME: So at this point I have no further
21 questions of Dr. Laken.

22 THE COURT: All right. Anything from the State?

23 MR. PETRANO: I just have a general cross
24 examination as far as the weight once it's admitted.
25 So I'm not sure how to proceed. I'm not trying to be

1 difficult, Your Honor.

2 THE COURT: Well, let's just assume that it may
3 be admitted.

4 MR. PETRANO: Then, yes, I have some follow-up
5 questions.

6 THE COURT: All right. Let's proceed.

7 CROSS EXAMINATION

8 BY MR. PETRANO

9 Q Who created the questions?

10 A I created the questions.

11 Q How?

12 A I read the trial testimony and then I developed a set
13 of questions that I thought were yes or no and
14 unambiguous questions.

15 Q You read the trial transcript or just testimony?

16 A The trial transcript, sir.

17 Q How many pages was that?

18 A It was quite large. I don't remember.

19 Q Were there any questions that you had -- oops.

20 Excuse me. Did you submit those questions to
21 opposing counsel before you gave them to Mr.
22 Freiburger?

23 A I did.

24 Q And were those edited at all?

25 A I don't recall.

- 1 Q Do you have that original list that you sent?
- 2 A I am sure I do.
- 3 Q Now, you read the trial transcript. So you're aware
- 4 that there were some issues regarding the Applicant's
- 5 memory, I believe some type of arsenic poisoning.
- 6 You're familiar with that subject?
- 7 A Yes.
- 8 Q So how come there's no questions in your report
- 9 regarding what he remembers or may not have
- 10 remembered during that time period?
- 11 A Because I think that memory is somewhat subjective.
- 12 Q Is deception subjective?
- 13 A The way that we define it, the intentional act to
- 14 counter deceive is not subjective.
- 15 Q So if someone has blocked something out, whether they
- 16 forgot it via malfunctions of the brain, physical
- 17 deformations, or just conscious block it out, would
- 18 that be detected by your machine?
- 19 A Assuming that that person is not intentionally -- is
- 20 trying not to lie, that they are not intentionally
- 21 trying to counter deceive, then that would come up as
- 22 either a truthful or a deceptive statement, depending
- 23 on what it is they are being asked.
- 24 Q But you just said memory is subjective. So is memory
- 25 deception?

1 A No. They're different.

2 Q How?

3 A Deception is the intentional act to counter deceive.
4 It's an active process. Memory is things that occur
5 in the brain. But just because people remember
6 something, it could be wrong.

7 Q And you're quoted in I think The Washington Post as
8 saying: If we could get this -- and I'm
9 paraphrasing. Correct me if I'm wrong. If we could
10 get this admitted, that would be the Holy Grail?

11 A Sure. Yes.

12 Q And you also told The National Academy of Sciences
13 that we are not at 90 percent. And I have said if
14 we're not going to get to 90 percent, we're not going
15 to sell this product.

16 Now, I recognize that throughout your testimony
17 you've indicated that the accuracy rate has
18 fluctuated. So (A), did you make the statement?
19 (B), how long ago was that?

20 A So in the course of development it's very important
21 that we get the science right. And we've always been
22 consistent that we have to have the science right
23 before we launch the product commercially. If we
24 don't get the science right, we're not going to
25 launch the product commercially. We have set a bar

1 at 98 percent. When we didn't achieve 98 percent
2 accuracy, we obviously wouldn't launch -- we wouldn't
3 launch or offer the test commercially.

4 Q And how again do you change the error rate?

5 A In the way that we -- so we did a study. The one
6 that was published in Biological Psychiatry showing
7 93 percent accuracy, that was based on about 16
8 minutes of scanning. We reduced the scanning time
9 down by four minutes or 25 percent. When we did
10 that, because we weren't seeing everything that was
11 going on in the brain, those accuracy rates changed.

12 The same type of analysis, what we decided, what
13 we said is we can change the accuracy rates. That
14 is, if they can get worse, and then you can model
15 that. Statistically you can go through and model and
16 say, oh, actually if we would have done the modeling
17 beforehand we could have seen that the accuracy rates
18 would have gotten worse. Then maybe there's ways
19 that we can improve our accuracy rate.

20 And that's what I did, is I went through and
21 figured out a way to basically make the scans better,
22 present the questions and optimize the way that we do
23 that.

24 Q And you're quoted in The New Yorker -- and correct me
25 if I'm wrong -- as saying We have not worked out

- 1 the kinks -- and I'm paraphrasing. We have not
2 worked out the kinks in FMRI lie detection. We make
3 mistakes. We don't know why we make mistakes. We
4 may never know why. We hope we can get better. Is
5 that accurate?
- 6 A That is accurate.
- 7 Q And how long ago was that?
- 8 A You have the publication when The New Yorker was.
9 Q It's dated July 2007.
- 10 A That would seem correct.
- 11 Q And that's the publication. When did you make the
12 statement to the author?
- 13 A I don't know the specific date, but it was probably
14 at least six months or a year before that.
- 15 Q Okay. And so you're still working out those kinks?
- 16 A No. As I said, in 2007, 2008 we modified our
17 programs. Not our programs. We modified our
18 procedure. We added in this way. We got it better.
19 We showed 98 percent.
- 20 Q Okay. So you've disbanded the board then because
21 there's not going to be any need to adjust the
22 software or edit it any further?
- 23 A No.
- 24 Q I'm sorry. What was that?
- 25 A No.

1 Q No, you have not disbanded the board?

2 A That's correct.

3 Q So you still have everyone present and able to edit
4 the software and further develop it?

5 A So the software that exists basically everybody can
6 use. Andy Kozel has access to the software. Kevin
7 Johnson has access to the software. Mark George has
8 access to all the software. The software resides on
9 the South Carolina research authority's computer, and
10 everybody has access to that.

11 Q Everybody. Everybody in your board or the public?
12 Can I go look at it?

13 A Everybody that has a log in and password that can get
14 to that.

15 Q So it is proprietary software that this black box --
16 what color is the computer?

17 A I don't know. Well, the color of the computer, you
18 can run the software on any computer. You can run it
19 on a laptop computer. And the laptop, if I were to
20 run it on my laptop, that color would be black.

21 Q And that software is proprietary to you and not
22 available to the public?

23 A That software, the software is not available to the
24 public. No. We have said it all along at all these
25 talks, that we're happy to work with any of the

- 1 groups and the software would be available to the
2 public. That's correct.
- 3 Q To this day, has that been done?
- 4 A Nobody has ever asked for it.
- 5 Q So all the peer review studies that you're referring
6 to, none of them resolve your software and the code?
- 7 A They all resolve the software and the code.
- 8 Q No one has critiqued or peer reviewed the actual
9 lines of code, have they?
- 10 A Not the actual lines of code. But the protocols and
11 procedures that are in there can be replicated
12 precisely without having necessarily the hooks into
13 those lines of code.
- 14 Q And the way your machine interprets it, the way you
15 interpret what your machine produces, if the
16 Applicant simply did not remember killing the cab
17 driver, how would that be any different in his
18 response as to what we see in the report? And I
19 apologize for my compound question, but that's
20 enough.
- 21 A Please repeat the question because I --
- 22 Q If he had no memory of killing the cab driver, how
23 would your report differ, considering the questions
24 you asked?
- 25 A If a person is telling the truth; that is, that they

1 do not remember something that happened and they're
2 saying truthfully they do not remember that this
3 thing happened, then they are not lying.

4 MR. PETRANO: Nothing further. Thank you, Your
5 Honor.

6 THE COURT: Anything?

7 MR. BLUME: I have nothing further, Your Honor.
8 If you have questions, I'm sure Dr. Laken would be
9 happy to any answer any questions you might have as
10 well.

11 THE COURT: All right. You can come down, sir.
12 Thank you very much. Do you want this witness to be
13 excused?

14 MR. BLUME: Pardon me? Oh, yes. Your Honor,
15 may the witness be excused?

16 THE COURT: Any objection?

17 MR. PETRANO: None.

18 THE COURT: All right. You're free to go.
19 Thank you very much.

20 THE WITNESS: Thank you.

21 THE COURT: Next witness.

22 MR. BLUME: We call Adina Schwartz.

23 ADINA SCHWARTZ, after being duly sworn,
24 testifies as follows.

25 THE COURT: Thank you very much.

1 THE BAILIFF: State your name.

2 THE WITNESS: Adina Schwartz.

3 (WHEREUPON, Applicant's Exhibit No. 2 is marked
4 for identification.)

5 DIRECT EXAMINATION

6 BY MR. BLUME

7 Q Ms. Schwartz, where do you currently reside?

8 A New York City.

9 Q And what do you do in New York City?

10 A I'm a professor at John Jay College of Criminal
11 Justice of the City University of New York.

12 Q And what is the John Jay College of Criminal Justice?

13 A Well, the City of University of New York is divided
14 into various colleges. John Jay has a distinctive
15 mission. It's the only liberal arts college in the
16 country devoted to criminal justice.

17 Q And do you have -- what's your educational
18 background?

19 A I have a Ph.D in philosophy and I have a JD.

20 Q And where is your Ph.D from?

21 A My Ph.D is from the Rockefeller University in New
22 York City.

23 Q And where is your law degree from?

24 A Yale Law School.

25 Q And you said you teach at John Jay. Are you a

1 tenured member of the faculty there?

2 A Yes, I am.

3 Q And what is your area of expertise, and what do you
4 teach?

5 A My area of expertise is primarily evidence law with a
6 concentration in expert testimony, scientific
7 evidence, primarily forensic information evidence.
8 John Jay goes all the way from, we still have a few
9 associates degree students, and we have had actually
10 officially the graduate center of the City of
11 University of New York has a Ph.D program in criminal
12 justice. Actually that program is housed at John Jay
13 College. Most of the faculty, the doctoral faculty
14 in that program are at John Jay College. So I teach
15 in the doctoral faculty in criminal justice.

16 Our criminal justice program is unique in the
17 country, our criminal justice Ph.D program, in that
18 it has a forensic science track. And I teach a
19 course on expert testimony which is either -- it
20 keeps on sort of fluctuating. It's either required
21 or highly recommended for students in the forensic
22 science track.

23 I also teach undergraduates. I primarily teach
24 them evidence law. Sometimes I've taught
25 jurisprudence and Constitutional law. We also have a

1 master's program in forensic computing, and I teach
2 the master's students in that program a required
3 course which goes all the way from sort of forensic
4 baby evidence law focusing on forensic computing to
5 cyber surveillance issues. That course is also open
6 and is taken by students in our master's program in
7 criminal justice. And in the master's program in
8 criminal justice I also teach Constitutional law and
9 evidence law.

10 Q Okay. Well, now, so, Dr. Schwartz, let's sort of
11 move to the field in which you are particularly
12 conversant, I guess maybe even extremely conversant.
13 And that is in the area of toolmark and firearms
14 identification. Can you provide the Court with your
15 writings and research in the area of toolmark and
16 firearms identification?

17 A Okay. Well, the primary piece I have published was
18 in 2005 in Columbia Science and Technology. I think
19 that's Science and Technology Law Review. That piece
20 has been cited, and there have been two National
21 Academy reports recently bearing on firearms and
22 toolmark identification. There was a National
23 Academy report on ballistics imaging in 2008, and my
24 Columbia STLR piece is cited there. There was a
25 National Academy report just this past February on

1 forensic science, and again my piece is cited there.
2 The piece has also been cited in a number of judicial
3 opinions.

4 I also authored a piece on -- I guess the
5 Columbia STLR piece is called "The Systemic Challenge
6 to Firearms and Toolmark Identification". I have
7 another piece in Journal of Philosophy, Science and
8 Law, 2004, similar title: "A Challenge to the
9 Admissibility of Firearms and Toolmark
10 Identification".

11 Both "A Challenge" and "A Systemic Challenge"
12 are posted with I believe links to them on the
13 website of SWGGUN which is the FBI's Scientific
14 Working Group on Firearms Identification. There have
15 been -- there's been a lot of teaching of both
16 pieces.

17 Bruce Moran who is a very prominent firearms and
18 toolmark examiner and John Murdock who is probably
19 the most prominent living American firearms and
20 toolmark examiner have been teaching I think both
21 pieces throughout the country and workshops on
22 criteria for identification.

23 A firearms examiner named Ronald Nichols has
24 written two replies to me. One of them is in the --
25 appeared in The Journal of Forensic Sciences in 2007.

1 I wrote a reply to him. Journal of Forensic Sciences
2 policy is that replies are published solely at the
3 discretion of the editor. And that reply was
4 published.

5 And their chapter in -- there is a very standard
6 treatise people in the field use. It's by David
7 Faigman, et al., and Biasotti, Murdock and Moran who
8 are three very prominent firearms and toolmark
9 examiners. Biasotti is actually deceased. Anyway,
10 the chapter concludes by referring people to a
11 chapter I authored and a treatise by Jay Moriarty on
12 scientific evidence. And they basically said: For
13 an alternative view, read this. Those are the main
14 pieces I've published.

15 I guess I've published a two-part article in The
16 Champion Magazine which is a magazine for National
17 Association of Criminal Defense Lawyers rather
18 recently. And that article is actually also cited on
19 the SWGGUN website, specifically in the -- I'm sorry,
20 yeah -- in the SWGGUN response to the National
21 Academy of Sciences, 2009, a report called "For the
22 Formulation of Specific Standards by Various Forensic
23 Disciplines".

24 Q And we'll come back to those reports in a minute.
25 And then can you also briefly tell the Court about

1 your involvement with the Northeastern Forensic
2 Science Society?

3 A Okay. The Northeastern Forensic Science Association
4 is a rather large academic, fairly academically
5 oriented group of forensic sciences. They publish a
6 newsletter. They have a very well attended meeting
7 once a year. And I was invited this past fall, I
8 believe in October, to participate. They had a
9 cleverly invited session, four-hour session. They
10 had about five of us invited. And the issue was the
11 science in forensic science. And I was invited to
12 participate on the basis of my work on firearms and
13 toolmark identification.

14 Q Dr. Schwartz, let me show you what's been marked as
15 Applicant's Exhibit 2. Is that a current copy of
16 your curriculum vitae?

17 A Yes, it is.

18 MR. BLUME: Your Honor, we would move to admit
19 this as Applicant's 2.

20 MR. PETRANO: Without objection.

21 (WHEREUPON, Applicant's Exhibit No. 2 is
22 admitted into evidence.)

23 Q Dr. Schwartz, how did you initially become intimately
24 familiar with the subject area of firearms and
25 toolmark identification?

1 A Well, I had published the piece in Harvard Journal,
2 Journal of Law and Technology. It was actually a
3 piece that basically argued that the Delwood standard
4 for the admission of scientific evidence was based on
5 outmoded and wrongheaded philosophy of science and
6 that in fact if you took the Frye standard and what I
7 called philosophically revamped it, you got a very
8 viable, philosophically well grounded standard.

9 And what happened was Susan Hack who is
10 distinguished both as a philosophy professor and a
11 law professor at University of Miami knew about my
12 work, and she also knew about a case pending before
13 the Florida Supreme Court, Ramirez Three. Ramirez
14 Three was a toolmark identification case.

15 I should say why we say firearms and toolmarks,
16 it's one field that's based on the premise that each
17 tool; take a knife, take a bolt cutter, take a gun
18 which is considered a composite of tools with a
19 bullet, the barrel of the gun, with the cartridge
20 case, a lot of different tools, ejector, extractor
21 and a semi-automatic breach face, firing pin,
22 scepter, that each tool leaves unique marks on the
23 objects with which it comes in contact.

24 Now, in Ramirez the tool in question was a steak
25 knife and the issue was whether the defendant's steak

1 knife was the one and only one knife in the world
2 that could have stabbed the decedent. And Dr. Hack
3 knew of my work. And the reason she contacted me is
4 the case had been sitting before the Florida Supreme
5 Court. The attorney had basically briefed it as
6 Daubert which seemed to be a problem because Florida
7 is a Frye state.

8 So Susan said, well, what happens with your spin
9 on Frye? What would it do with this evidence? And I
10 was curious. And what happened was I went -- this
11 was fall 2001, and I went to one of the standard
12 treatises. I went to Gianelli and Enrique Reed. And
13 I said, my, God, this is good old, old-fashioned
14 Frye. Because what they referred to was a divide
15 within the literature between people who thought the
16 real issue is criterion for identification.

17 How do you know that the similarities between
18 toolmarks are great enough so that they must have
19 been fired from the same gun; or in the case of the
20 state thing, the test, how do you know that the test
21 toolmarks that they made with the steak knife and
22 some sort of plastic were similar enough in a plastic
23 cast of the victim's chest to the actual marks in the
24 victim's chest so that they must have been made by
25 the same knife?

1 And there had been a debate in the literature
2 actually starting in 1959 with the work of Alfred A.
3 Biasotti where Biasotti argued no, no, no; you can't
4 just say people, say the examiners in this case, none
5 of them have an articulated criterion. None of the
6 SLED examiners had it. Cayton didn't have one.

7 Q Before we get to that --

8 A Yeah. But that's how I got involved. I'm sorry.

9 Q Okay. Well, so -- and in the course of your work in
10 this area, have you been called as an expert witness?

11 A Yes, I have.

12 Q And have you testified as an expert witness in
13 challenges to ballistics evidence?

14 A Yes, I have.

15 Q And in the course of those proceedings, have you been
16 qualified as an academic expert in firearms and
17 toolmark identification?

18 A Well, let's see. I was qualified in Federal District
19 Court for the Northern District of California in fall
20 2006 as a literature expert. I was qualified just as
21 an expert on firearms and toolmark identification in
22 Massachusetts state court in Boston in spring 2006.
23 I was qualified in or allowed to testify -- there
24 wasn't really a formal qualification issue -- in
25 United States District Court for the Southern

1 District of New York in summer 2008.

2 I testified at an admissibility hearing in state
3 court in Pennsylvania in January 2009. And I
4 testified at an admissibility hearing in Cleveland in
5 Ohio state court. Actually this was by
6 teleconference. So I wasn't in Cleveland, but it was
7 in Ohio state court, in, I believe it was March 2009.

8 Q Okay. But let's -- just to be clear, you are not a
9 firearms and toolmark examiner?

10 A That's correct.

11 Q So you don't actually get the bullets out and you
12 don't like put them under a microscope and look at
13 them?

14 A No.

15 Q Your area of expertise is in the science and
16 literature involving the reliability of toolmark
17 examination?

18 A That's correct. I'm an academic expert.

19 Q And in this particular case, what materials have you
20 reviewed that are relevant to Mr. Freiburger's case?

21 A Well, I reviewed the parts of the trial transcript
22 that bore on the firearms identification issue. I
23 reviewed Mr. Cayton's report as well as his
24 testimony. I reviewed the SLED reports. I reviewed
25 the SLED letter which I guess was discovered

1 subsequent to trial, the SLED letter to J. Edgar
2 Hoover in 1961 I believe. And I reviewed the
3 affidavits of Mr. William Tobin, Professor William
4 Thompson and Professor Alicia Carrigury.

5 (WHEREUPON, Applicant's Exhibit No. 3 is marked
6 for identification.)

7 (WHEREUPON, Applicant's Exhibit No. 4 is marked
8 for identification.)

9 (WHEREUPON, Applicant's Exhibit No. 5 is marked
10 for identification.)

11 Q Now, you mentioned the affidavits of William
12 Thompson, William Tobin and Alicia Carrigury. So is
13 this the affidavit -- I show you what's been marked
14 as Applicant's Exhibit 3. Is that the affidavit of
15 William Thompson that you're referring to?

16 A I know it from the others because it's much shorter.
17 Yes, it is.

18 Q And I'm going to show you what's been marked as
19 Applicant's Exhibit 5. Is that the affidavit of
20 William Tobin --

21 A Yes, it is.

22 Q -- that we've been referring to?

23 (WHEREUPON, Applicant's Exhibit No. 6 is marked
24 for identification.)

25 Q And Applicant's Exhibit 6, is that the affidavit of

1 Alicia Carriquiry --

2 A Yes, it is.

3 Q -- that you're referring to? And do you know
4 Thompson, Tobin and Carriquiry?

5 A I know Alicia Carriquiry only through email
6 correspondence. We've never met. We've never talked
7 on the telephone. I know Bill Thompson and Bill
8 Tobin. You know, I've met them in person at
9 conferences. I have talked to them, both of them
10 extensively on the phone, and I have extensive email
11 correspondence with both of them.

12 Q But they are also scientists who are working in the
13 area, in this general area?

14 A That's correct.

15 MR. BLUME. Now, Your Honor, at this point I
16 would move to admit Dr. Schwartz as an academic
17 expert in the field of firearms and toolmark
18 identification which is I think the best
19 qualification for her.

20 THE COURT: Any objection or voir dire?

21 MR. PETRANO: No voir dire, but I do have a
22 relevance objection. And I don't want to interrupt.
23 Later I do have an objection to the affidavits, but I
24 know they haven't been introduced yet. I just want
25 to reserve that.

1 THE COURT: All right. I'll admit her as an
2 academic expert --

3 MR. PETRANO: Thank you.

4 THE COURT: -- and overrule your objection as to
5 relevance.

6 MR. PETRANO: Thank you.

7 Q Now, Dr. Schwartz, I am going to -- in your testimony
8 I want to cover three basic areas with you. And the
9 first is probably the broadest and one that you
10 referred to previously. And I'm not nearly as
11 knowledgeable in this field as you are. So if I
12 misstate the question or it shows a fundamental
13 ignorance, please correct the question for me. But
14 as I understand it, the fundamental premise of
15 firearms identification is that every gun produces a
16 unique mark when a projectile or bullet is fired from
17 that gun?

18 A That is -- that's one of two fundamental premises.

19 Q And the other one is it's reproducible?

20 A Right. It's reproducible. And this becomes a
21 problem because unlike in, say, fingerprint
22 identification or nuclear DNA identification,
23 somebody's DNA, fingerprints except in rare accidents
24 or disease remain the same over time. But it's not
25 in fact a mantra among firearms and toolmark

1 examiners, is no two bullets fired from the same gun
2 ever have exactly the same toolmarks.

3 So the question becomes: How much variation do
4 you get? Is there so much variation that you can
5 possibly after a period of time identify a bullet
6 back to the gun that fired it? Because by the time
7 you get the gun, say, four years later or forty years
8 later, it will have changed so much that the test
9 fire, the fire that you make with the gun for the
10 purpose of comparing and saying, okay, this is going
11 to produce the same signature on the test fired
12 bullet as the bullet recovered from the crime scene,
13 if the gun has radically changed, you may not be able
14 to trace back.

15 So the reproducibility isn't that every gun has
16 the same signature. We know that guns don't. But is
17 the instability not so great as to prevent
18 identification? So the two premises are unique mark
19 and a unique mark that doesn't change so much over
20 time that it can't be traced back to the same gun.

21 Q Okay. And so based upon your research and writing
22 and your knowledge of the science, the broader
23 scientific literature in this area, have these
24 fundamental premises been scientifically proven?

25 A No.

1 Q And why not?

2 A Well, the best source for this, and let me explain
3 what the National Academy of Sciences is briefly and
4 what the National Research Council is. The National
5 Academy of Sciences is this country's premiere body
6 of scientists established since the 1860's. It's a
7 voluntary body to advise federal agencies on
8 scientific issues that have important policy
9 concerns.

10 And the National Academy really operates its set
11 of -- the arm that does the work is called the
12 National Research Council. Now, the National
13 Research Council operates by forming committees. And
14 the principle is when a question arises you get a
15 committee. They are committed to getting a committee
16 of people who represent all relevant areas of
17 expertise and all relevant viewpoints

18 Now, in 2008 there was a committee on ballistics
19 imaging, and one of the findings of the committee was
20 that the premises of the reproducibility and
21 uniqueness of gun toolmarks had not been
22 scientifically validated. The committee specifically
23 said that in order for them to be validated you would
24 need extensive work, and they thought the people who
25 could do the work were not firearms and toolmark

1 examiners but experts in experimental design,
2 physicists, statisticians and metallurgists. So
3 that's --

4 Q Well, let me show you first --

5 (WHEREUPON, Applicant's Exhibit No. 7 is marked
6 for identification.)

7 Q You're now talking about the ballistics imaging
8 report?

9 A That's correct.

10 Q And so I'm going to show you what's been marked as
11 Applicant's Exhibit No. 7. Is this the ballistics
12 imaging report you are speaking of?

13 A Yes, it is.

14 Q And who prepared this report again?

15 A Excuse me?

16 Q Who prepared this report?

17 A Well, I should -- in explaining the composition of
18 the committee, I should say what the purpose of the
19 report was. And the purpose of the report since the
20 mid -- since 1997, the FBI and the ATF have had a
21 joint system called NIBIN which a computerized bullet
22 and cartridge case identification system. NIBIN uses
23 what's called the Ibis software.

24 Under federal regulation, for federal
25 investigations, the only bullets or cartridge cases

1 that can be inputted into NIBIN are bullets and
2 cartridge cases that are either recovered from a
3 crime scene or from a suspect. Which now I should
4 say what Ibis does, it's not a complete computerized
5 system. What it does is when a bullet or cartridge
6 case -- the question is, is this a bullet and
7 cartridge case with the same signature as a bullet or
8 cartridge case which you've identified in a previous
9 crime or recovered from a suspect?

10 And Ibis is a computerized again proprietary
11 software. We heard about that with the previous
12 witness. It's proprietary software. It's a company
13 in Montreal, Canada that produces the software. And
14 Ibis spits out a list of candidate matches. And
15 usually ten, but the examiner can specify: I want to
16 go down to 50, I want to go down to 100. I just want
17 five.

18 But the issue was, could you create, would it be
19 scientifically feasible to create what's called an
20 RBID, a reference ballistics imaging database, where
21 you have every gun that came into the country; if you
22 could do it, every newly manufactured gun. Where
23 we've manufactured, you'd have the test firing of
24 cartridge cases or bullets and you'd then have
25 everything in the system. So if a perp had been

1 committing crimes but had escaped, right, never been
2 convicted, never been sought, you'd still have that
3 gun in the system.

4 Now, the reason there was investigation about
5 this was that in 19 -- in 2000 a firearms examiner
6 named Frederick Tulleners published what's called the
7 AB1717 study. And the reason it's called that is
8 there was a bill in California state court, states
9 are free to have reference ballistics imaging
10 databases asking would it be feasible.

11 And Tulleners's result was no. Because his
12 result was that as you expanded your database so that
13 you inputted more and more cartridge cases from a
14 given class of gun, a gun with a certain caliber,
15 certain other characteristics, you'd -- it became
16 less and less likely that the correct gun, if you did
17 a test; right, you input sequentially, you fire two
18 cartridge cases from a gun, you put one in as a
19 question cartridge case, you put another in in your
20 database of cartridge cases; right, and it became
21 less and less likely that your cartridge case would
22 be in the top ten candidates.

23 And he said, oh, my God, this isn't feasible if
24 we expanded Especially because in California
25 something like I think a figure in this case,

1 something like 45 percent of handguns are
2 9-millimeter Luger. So you get a lot of guns of the
3 same class. He said, it's not going to do the trick.

4 There was serious objection to that, and the ATF
5 sought to suppress the study. And an external
6 reviewer, a very distinguished firearms examiner, Yon
7 de Kinder of Belgium, was called in. And de Kinder
8 said the ATF objections were solely political, no
9 scientific basis. And then de Kinder did an expanded
10 study with more types of guns about the feasibility
11 of reference ballistics database and got the same
12 result.

13 So with this background, and I should say that
14 they were both dealing with cartridge cases, there
15 had been doubts about bullets in 1997, a
16 distinguished member of the AFTE, Association of
17 Firearms and Toolmark Examiner, Joseph Masone,
18 published a rather small note where he said, you
19 know, it's sort of amazing. Now that we have Ibis,
20 we look under the microscope, and as we expand the
21 number of bullets in the database that are from the
22 same class of gun, we find more and more similarities
23 between bullets that we know were fired from
24 different guns.

25 And when we take them out and we put them under

1 a comparison microscope -- and a comparison
2 microscope is basically the tool firearms and
3 toolmark examiners use; it's just two microscopes put
4 together with a bridge so that at the same time they
5 can be comparing two cartridge cases or two bullets,
6 and the object of the comparison is to see if they
7 were fired from the same gun. And Masone said, my
8 God, we take them out and we put them under a
9 comparison microscope, and bullets we know were fired
10 from a different gun are very, very difficult to tell
11 apart.

12 Now, the mission of the ballistics imaging
13 committee was simply to determine was it
14 scientifically feasible to develop Ibis, to use the
15 Ibis software to create a national reference
16 ballistics imaging database. And they said it wasn't
17 scientifically feasible because based on, they
18 reviewed the de Kinder papers, et cetera, they said
19 the methodology is, you know, crackerjack. And they
20 said -- and they reviewed all the relevant
21 literature. And these were people, actually since it
22 was a database, they had people in there from Google.
23 They had a lot of computer types. They had
24 engineers. They had -- basically they had engineers,
25 they had statisticians and they had computer experts.

1 And those are the people. And they had one firearms
2 and toolmark examiner.

3 There was a political issue. The AFTE got
4 incensed that there weren't firearms and toolmarks
5 examiners appointed. The National Academy had not
6 thought they had the relevant intellectual expertise
7 for judging this. There was one on the committee
8 Anyway, they just --

9 Q And this was done by the National Academy of Science?

10 A Right. This was done by the National Academy of
11 Science. And they keep getting confused. I mean,
12 the National Academy of Science is the parent body,
13 and then it operates, the studies come out by
14 committees, National Research Council committees.
15 This is the National Academy of Science.

16 And they concluded the national reference
17 ballistics imaging database was just, throw out the
18 idea because if you've got all the guns in the
19 nation, the signatures, firearms and toolmark
20 examiners would have to search down through hundreds
21 of candidates in Ibis to be sure that they'd get the
22 correct match, and this just wouldn't work.

23 Now, their mission was not to evaluate
24 traditional firearms and toolmark identification.
25 And by traditional, I mean what we have in this case.

1 An examiner is presented usually with one candidate
2 gun, sometimes the gun isn't recovered, presented
3 with a number of bullets recovered from a crime
4 scene. And the question is, is this the gun that
5 fired the bullet? Or are these two bullets, must
6 they have been fired from the same gun? And
7 traditionally, it's done by hand, by eyeball through
8 a comparison microscope.

9 Their mission, the mission of the ballistics
10 imaging committee was not to evaluate traditional
11 firearms and toolmark analysis, but they said, look,
12 obviously the whole idea of a reference ballistics
13 imaging database makes no sense. It has no
14 scientific foundation really unless we know that
15 there is something to firearms and toolmark
16 identification; especially because, remember the way
17 Ibis works. At the end of the day the computer does
18 not spit out the determination of a match; the
19 computer spits out candidates. And it's up to the
20 individual examiner to say, yes, that's a match or,
21 no, Ibis ranked that high but it's not a match.

22 And so the primary finding of the committee
23 again was that the fundamental assumptions of
24 uniqueness and reproducibility of firearms' toolmarks
25 had not been scientifically validated and that

1 basically there had really been no start on it, that
2 the studies that purported to show this by firearms
3 and toolmark examiners had all sorts of
4 methodological flaws and that you really needed the
5 expertise of experts and experimental design,
6 statisticians, physicists, metallurgists, some of the
7 expertise of people like Alicia Carriquiry, Bill
8 Tobin, Bill Thompson.

9 (WHEREUPON, Applicant's Exhibit No. 8 is marked
10 for identification.)

11 Q And was there another report of the National Academy
12 in this realm?

13 A Yes, there was. There was a National Academy report
14 on "The Future of Forensic Science" in the United
15 States. And that report was motivated, was ordered
16 by Congress, and Congress motivated the report
17 because they were very concerned with the findings of
18 The Innocence Project, that people had been convicted
19 and sometimes put on death row for crimes that they
20 did not commit and that at times, a significant
21 amount of the time, the statistics, one of the
22 problems that had led to an erroneous conviction, a
23 conviction for something someone had not done was
24 forensic science that was really junk science, that
25 was pseudo science; it wasn't really science.

1 So this was a two-year investigation. The
2 committee heard lots of testimony. Principal
3 testimony actually was by forensic scientists. And
4 the committee issued a report that claimed that none
5 of the forensic identification sciences except
6 nuclear DNA was on adequate scientific foundations.

7 The committee specifically discussed firearms
8 and tool mark identifications and specifically agreed
9 with the finding of the ballistics imaging committee
10 that the fundamental premises of uniqueness and
11 reproducibility had not been scientifically valid.

12 The committee was presented with a sort of
13 summary of studies that firearms and toolmark
14 examiners claimed validate these premises and
15 specifically said that the methodology of the studies
16 was highly flawed.

17 Q Let me show you what's been marked as Applicant's
18 Exhibit 8 and ask if this is the report of the
19 National Academy of Science of which you're speaking?

20 A Yes.

21 Q So it doesn't fall on somebody and kill them. Now,
22 you've been talking about the fundamental premise.
23 And you mentioned the 2008 ballistics imaging report
24 and the 2009 reports of the National Academy of
25 Sciences. But the trial in Mr. Freiburger's case

1 took place in 2002. And so what I want to ask you
2 is, were the reports and studies which led to the
3 2007 report, do they predate -- did many of these
4 studies predate 2002?

5 A Yes, they did. The Masone study I referred to was in
6 1997. Tulleners' AB1717 study as well as de Kinder's
7 report validating -- I know Tulleners' 1717 was in
8 2001, and I believe -- no. 2000. And I believe, I'm
9 reasonably confident that de Kinder's evaluation
10 report was in either 2000 or 2001.

11 Now, I should mention that there is a lot of
12 other work also that casts doubt on the premises of
13 uniqueness and reproducibility. And to do that, I
14 want to make a distinction that firearms and toolmark
15 identification rests on distinguishing three types of
16 characteristics of toolmarks: Class
17 characteristics, subclass characteristics and
18 individual characteristics.

19 And class characteristics are intentionally
20 designed features of a tool that are reflected in a
21 toolmark. So, say, a gun is manufactured, the barrel
22 of the gun, a rifled barrel; we're not talking
23 shotgun here, is manufactured with six lands and
24 grooves with a twist to the right, or I guess a twist
25 to the left with my hand, but a twist to the right,

1 and with lands and grooves of a certain width within
2 a certain tolerance. That's an intentionally
3 designed characteristic and you will have a
4 reflection of that on the bullet.

5 Now, the theory about uniqueness is that each
6 gun, also toolmarks have individual characteristics.
7 They're not visible. They're microscopic. They're
8 supposed to be unique to each tool.

9 Now, starting in the 70's and actually the first
10 really classic work on it was by John Murdock, a
11 study of desk staplers. It was found that some of
12 these microscopic characteristics that looked the
13 same as individual characteristics were what were
14 called subclass characteristics, that although
15 firearms and toolmark experts say all the time that
16 each gun or each tool comes off the assembly line
17 capable of producing unique marks, that's in fact not
18 true.

19 Some batches will produce a microscopic mark,
20 and every tool in that mark in that batch will just
21 be producing subclass characteristics. And firearms
22 and toolmarks examiners knew this, knew this in '76.

23 And, in fact, in the late 80's, in response to
24 discovered misidentification, discovered bullet
25 misidentifications, the AFTE, the Association of

1 Firearms and Toolmark Examiners, came out with a
2 theory of identification. And one of the main things
3 in that theory in bold type, it says, Caution:
4 Should be exercised in distinguishing between
5 subclass and individual characteristics. And that
6 was -- the theory of ID had come out in 1992. And
7 the classic work on subclass characteristics, the
8 classic thing that people still say is by Bonfonte
9 and de Kinder, 1999.

10 Now, the other thing, and this is going back to
11 Al Biasotti's work, and I'll be mentioning him a lot
12 because he's kind of --

13 Q Well, who is he?

14 A Biasotti was a firearms and toolmark examiner. And
15 he did a study as part of -- Berkeley used to have a
16 criminalistics master's and Ph.D program. It
17 certainly no longer has the Ph.D program, hasn't for
18 years. I don't even know if it has the master's
19 program. But Biasotti did a master's thesis in 1955
20 that was later published in 1959, and it was sort of
21 the spearhead of a huge debate in the field about
22 whether an objective, statistically-based criterion
23 of identification was needed; in other words, a
24 criterion where people could say, look, we require a
25 match on such-and-such aspects before we'll say

1 individual characteristics are the same. Now, --

2 Q And what did he find?

3 A He found -- okay. He did a study -- I should
4 backtrack. An individual characteristic is a
5 misleading term, because individual characteristics
6 are patterns. Firearms and toolmark examiners tend
7 to say they do pattern matching. And on bullets, the
8 parts of the pattern, they call them striae.

9 MR. PETRANO: Your Honor, I do apologize for
10 interrupting sincerely. I am going to object as to
11 hearsay here. I know that experts are allowed to
12 rely on studies and whatnot to form their opinions,
13 but this witness is simply testifying for other
14 people who have done those other studies, going
15 beyond that allowability. Thank you.

16 THE COURT: Well, I think it's a valid
17 objection. I do think that if she is using this as a
18 basis for her testimony, I'll overrule it.

19 MR. BLUME: I think she is using it as the basis
20 for her testimony. Her --

21 THE COURT: I think that you need to focus the
22 questions that way --

23 MR. BLUME: Okay.

24 THE COURT: -- as opposed to an elucidation of
25 what the studies are and who the authors are. She

1 can identify them.

2 (WHEREUPON, Applicant's Exhibit No. 9 is marked
3 for identification.)

4 Q Let me show you what's been marked as Applicant's
5 No. 9. Is this the Biasotti or Biasotti study that
6 you're referring to?

7 A Yes, it is.

8 Q So, I mean, really the point of this is that in 2002,
9 at the time of Mr. Freiburger's trial, the larger
10 scientific community had identified that the
11 fundamental premise of fire and toolmarks
12 identification had not been scientifically
13 established. Is that correct?

14 A Certainly had identified that there were reasons for
15 doubting it. Yes.

16 Q Okay. And so that's the first fundamental premise.
17 Let's move on to the second area which I was going to
18 ask you about today which I talked about at the
19 beginning. And that is, let's assume for the
20 purposes of your testimony that the fundamental
21 premise has been proven or just set it to the side.

22 A Okay.

23 Q And let's move to the methodology which is used by
24 firearms and toolmark examiners in making an
25 identification in a particular case, which rests upon

1 obviously the first premise. But even beyond that,
2 has the scientific community, including the National
3 Academy of Sciences, and other studies identified
4 problems with the techniques currently used by
5 firearms and toolmarks examiners?

6 A Yes. This was the primary focus of the National
7 Academy report on forensic science. Their criticism
8 was that there was no strict protocol that examiners
9 used for reaching identification decisions. In other
10 words, what happens is an examiner eyeballs, compares
11 two bullets, say, under a comparison microscope.

12 The issue becomes individual characteristics of
13 a bullet since bullets change over time. Even two
14 bullets fired from the same gun won't have exactly
15 the same signature. And the signature is a pattern
16 comprised of what are called striae, S-T-R-I-A-E, or
17 striations.

18 And parts of the pattern of striations, well,
19 first of all, will vary from bullet to bullet fired
20 from the same gun, and then parts of the pattern of
21 the striations will be the same between bullets of
22 the same class, between all 9-millimeter Luger
23 bullets, say. And so -- and there is an overlap.

24 Biasotti, we were talking earlier about that
25 paper, found that on average 15 to 20 percent of the

1 striae matched on bullets known to be fired from
2 different guns; and 21 to 38 percent, only 21 to
3 38 percent of the striae matched on bullets known to
4 be fired from the same gun.

5 So since you can have substantial resemblances
6 between bullets fired from the same gun and the
7 microscopic signature and substantial differences
8 between the microscopic signature of bullets fired
9 from different guns, how do you know that you've
10 observed enough similarity to declare an
11 identification?

12 And what bothered both the National Academy
13 reports, the ballistics imaging and more thoroughly
14 and more in depth forensic science report is the
15 answer that firearms and toolmark examiners give is
16 essentially, I know it when I see it. It's based on
17 my experience and training. They don't identify --
18 and you can see it in this case -- just which striae
19 they relied on for an identification. They don't say
20 why that's sufficient. They say, I have my mind's
21 eye criteria of identification.

22 And the National Academy, the forensic science
23 people looked at this and said, wait a second. Look
24 at that. It doesn't work, that you have to have a
25 protocol that gives people guidance that is based on

1 constructing databases so that you know the range of
2 variation among bullets fired from different guns.

3 The --

4 Q Well, would it be fair then to crystallize the
5 problem that's been raised in the broader scientific
6 community with this as one of subjectivity?

7 A Yes.

8 Q And the subjectivity problem arises from the fact
9 that there is not a commonly agreed upon, accepted
10 criteria for determining whether any particular
11 bullet is a match?

12 A That's right. There is also not an agreed upon
13 criterion for when there is an exclusion, for when
14 there isn't a match, for when two bullets couldn't
15 have come from the same gun.

16 Q And in this case there was testimony; and we'll come
17 back a little bit to this, but I want to use it to
18 talk about the broader problem identified, that the
19 testimony of the one examiner in this case, the other
20 examiner said it was inconclusive; but the one
21 examiner who testified for the prosecution said that
22 the weapon taken from Mr. Freiburger fired the bullet
23 to the exclusion of every other weapon ever made in
24 the world.

25 And is that type of assertion which has been

1 made, not that this person is the only firearm
2 examiner who has ever said that, has that type of
3 testimony particularly been subject to very grave
4 concerns and scrutiny by the scientific community?

5 A Yes. Well, actually starting in 1935 at least,
6 Gunter & Gunther in a classic textbook said, look,
7 an identification statement is probabilistic. You
8 haven't -- you can't look at all guns in the world.
9 You know there can be great, substantial similarity
10 between the signature on a bullet fired by different
11 guns.

12 So really all you can be doing is assessing what
13 people in DNA call a random match probability. It's
14 really -- you have to be answering the question:
15 What is the likelihood that a bullet fired from
16 another gun could have been as good a match as a
17 bullet fired from your suspect gun?

18 And in DNA, as you know, you actually get a
19 statistic. You get a specification of the parts of
20 the genome on which people match and then you get a
21 specification of the likelihood, the random match
22 probability that somebody other than the suspect's
23 DNA could have done as good a job.

24 None of that is done with -- when you say "to
25 the exclusion of all others in the world", it's a

1 logical mistake. It's a fundamental misunderstanding
2 of the probabilistic nature of identification claims.

3 The AFT theory of identification in 1992
4 specifically said that an identification is a claim,
5 is at best a claim, that it's extremely unlikely that
6 any other bullet could have fired the gun.

7 Now, the ATF theory was itself criticized but
8 not for that in the ballistics imaging and in the
9 forensic science report. But the ballistics imaging
10 report specifically says that there is no basis for
11 such absolute identification claims. They rest on a
12 fundamental misunderstanding of the nature of
13 forensic identification.

14 And you get the same criticism in the National
15 Academy of Sciences report on forensic science, said
16 that no forensic identification science other than
17 nuclear DNA was on firm foundations. And one of
18 their reasons, and they specifically developed it in
19 their sections on firearms and toolmarks, was that
20 there was not even a basic attempt. They hadn't gone
21 to square one in attempting to figure out the random
22 match probability and that it was kind of, sort of
23 pulling the wool over people's eyes, saying, well, we
24 don't need to do statistics, we can make absolute
25 identifications, when that's just not logically

1 possible. It's not the nature of the beast.

2 Q And based on these studies and presentation, have
3 courts prevented firearms examiners from testifying
4 this weapon to the exclusion of all others?

5 A Yes. The first court -- well, Ramirez vs. State
6 which was another knife print identification case,
7 but the logic is basically the same, excluded the
8 testimony, period. And one of the major grounds was
9 because the criterion for identification was
10 subjective and there was no basis for an absolute
11 identification.

12 Q And when was that?

13 A That was 2001, December 2001. In December 2005, in
14 the United States vs. Green, Federal District Court
15 of Massachusetts, Judge Nancy Gertner said that there
16 was no basis for such a sort of absolute statement,
17 and she actually prevented the firearms and toolmark
18 examiner from reaching any identification conclusion
19 whatsoever. She said that all the firearms and
20 toolmark examiner could do was to testify as to
21 similarities he had observed between toolmarks.

22 In January 2006, again in the Federal District
23 Court for Massachusetts, Judge Pattie Saris said that
24 there was no basis for a claim to the exclusion of
25 all others in the world or for any estimate of the

1 statistical likelihood that two bullets had been
2 fired from the same gun. But she had claimed that in
3 general, firearms and toolmark examiners could
4 testify to identifications to a reasonable degree of
5 ballistic certainty. However, she totally excluded
6 the identification in that case on grounds of a lack
7 of documentation.

8 Last summer, in 2008, in an unrecorded decision
9 in United States vs. Brown, this is a case I
10 testified in, Judge Rakoff said that the firearms and
11 toolmark examiner, Judge Rakoff of the Southern
12 District of New York, Federal District Court, could
13 not testify to science --

14 MR. PETRANO: I'm going to have to object to
15 hearsay on that one, Judge.

16 THE COURT: Go ahead.

17 A The transcript is there available to be read. The
18 transcript says -- and I guess it could be checked --
19 they could not testify as a scientist and could only
20 testify that an identification was more likely than
21 not.

22 On the basis of the testimony in Brown, the
23 government in another case, Glenn, the government
24 sought to admit and did admit Ronald Nichols' reply
25 to my work in Journal of Forensic Scientists, and

1 then the defense sought to admit, and Judge Rakoff
2 allowed, my reply in Journal of Forensic Sciences in
3 United States vs. Glenn.

4 Judge Rakoff said Brown had been limited to the
5 facts of that case. Glenn said that in no firearms
6 identification case could an expert ever make an
7 absolute identification. There was no basis for
8 saying a reasonable degree of scientific certainty or
9 a reasonable degree of ballistic certainty because
10 there was no certainty to the field. All the expert
11 could testify was more likely than not.

12 And then again in a ruling from the bench that
13 was not recorded in State vs. Eashawn Anderson --
14 Eashawn is E-A-S-H-A-W-N -- in Cleveland, Ohio, in
15 March, the judge ruled similar to Judge Rakoff; that
16 the expert could not testify as a scientist and that
17 he would be limited to testifying that his
18 identifications were more likely than not.

19 Q So now, Dr. Schwartz, I'd like to turn to the final
20 theory that we identified at the beginning that we
21 were going to talk about with you this morning. So
22 we've had you testify about that fundamental premise
23 of ballistics evidence has not been scientifically
24 proven. That was area number one.

25 Area number two was, even if the fundamental

1 premise has been proven, are there problems
2 identified by the larger scientific community with
3 the methodologies currently used by toolmark and
4 firearms examiners. And you've talked about the
5 problem of subjectivity primarily in that area.

6 The final area, what I would like to turn to are
7 some aspects of the identification particularly that
8 was made in this case, in Mr. Freiburger's case.

9 Now, one of those you already spoken about, so
10 we won't go back over that. You were talking about
11 the idea that there is no -- in the scientific
12 community, no basis for this gun to the exclusion of
13 all others. And we know that Mr. Cayton testified to
14 that and you've told us about that.

15 But as I understand it, based on our
16 conversations, there are other aspects of the
17 identification in this case that based upon the state
18 of scientific knowledge both at the time of Mr.
19 Freiburger's trial and now can make an identification
20 particularly susceptible to misidentification. And
21 so I'd like to talk about those.

22 And now, to sort of keep us on track here, the
23 first one is that the identification here was not
24 made with an entire bullet; is that correct, based on
25 your review?

1 A Yeah.

2 Q It was based on several small fragments of a bullet?

3 A That's correct.

4 Q And so based upon the scientific literature and the
5 studies of this, does that create a heightened
6 possibility of misidentification?

7 A Yes, it does.

8 Q And why does it?

9 A Well, because the notion is, remember I talked about
10 there were overlapping patterns, that the so-called
11 individual characteristics of bullet toolmarks could
12 have similar areas between bullets fired from
13 different guns. And so standard treatise, Biasotti,
14 Morgan and Moran warned that in their experience what
15 happens a lot of times is people make
16 misidentifications because they see a small amount of
17 resemblance, a small amount of striae that resemble
18 each other between two bullets and they say, voila,
19 it must have come from the same gun; and they don't
20 realize you could get the same amount of resemblance
21 from bullets fired from different guns.

22 Well, as you restrict yourself, as you have a
23 smaller area, then it becomes by the nature of the
24 case more likely that the area you'll look at and see
25 as the same will be an area that's not unique, that a

1 lot of -- where a lot of bullets could resemble each
2 other.

3 Q And as I understand it, that is similar to but not
4 exactly like the problem with distortion?

5 A Yeah. It's similar to. It's not exactly. The
6 problem with distortion; and it's actually
7 highlighted, when you get a distorted bullet; and
8 here we have quite a distorted bullet, the claim is
9 that this comes from a gun where class
10 characteristics are six lands and six grooves.

11 If you trust Mr. Cayton, all that was present on
12 some of the -- there were three fragments of the
13 bullet. Some of them had -- one of them had three
14 grooves, no lands somehow. One of them had two
15 grooves. Another had two grooves. If you trust --
16 and this shows how many differences you get from
17 people. If you trust the latest SLED examiner,
18 Parnell, actually there were limited lands and
19 grooves but not the six lands and grooves.

20 So you're not looking at the bullet as it would
21 be if you had a fully formed bullet. And that
22 creates a problem. Because what you ideally do under
23 a comparison microscope, the theory is that each land
24 and groove is marked differently, has different
25 individual characteristics because it's come from a

1 specific part of the gun.

2 When you get things all mushed up and you don't
3 have all the lands and grooves of the gun, it becomes
4 difficult to say, okay, what are the relevant things
5 to look at to match? And so that creates a problem.

6 Another problem you can have is you can have so
7 much distortion that you can't even know the class
8 characteristics. Because remember, an important
9 thing about class characteristics, and one of the set
10 of really troubling things about this case is, in
11 determining whether a particular type of gun could
12 have fired a bullet, you have to look at the widths
13 of the lands and grooves. And I have never seen a
14 case before, I guess I've looked at 30 or 40 odd
15 bench notes, et cetera, where you didn't get a
16 measure of the width of the lands and grooves because
17 that's basic for seeing what sort of gun could have
18 fired it. Now, --

19 Q Let me stop you right there for a minute just so the
20 record is clear on this. And the Court may know but
21 I didn't really know until yesterday. What's a land
22 and what's a groove?

23 A Okay. A rifled barrel, and that's the barrel you get
24 in your pistols, in your revolvers, mostly almost
25 never in shotguns, but there a few kinds of shotguns,

1 has, into the barrel you cut grooves, a certain
2 number of them. You cut out portions of the barrel.
3 After it's manufactured you make valleys, so to
4 speak. And a valley is a groove. And then there are
5 portions you don't cut out, and those are the lands.
6 And the reason it's done is to give a bullet a spin
7 kind of like a football, so I'm told, so the
8 literature says.

9 Q To increase the velocity?

10 A What?

11 Q For velocity purposes?

12 A Well, I think --

13 Q And accuracy?

14 A I think it's for accuracy purposes more than velocity
15 actually.

16 Q Shows you how much I know.

17 A And what you have is a reflection. It's a mirror
18 reflection. So the groove is depressed in the barrel
19 of a gun. The groove will be raised on the bullet
20 similarly with the lands. And what you match when
21 you do an identification are lands and grooves in the
22 same position on a bullet. And, ideally, one of the
23 things you look at -- not ideally. One of the things
24 people do look at to determine whether a particular
25 type of gun could have fired a bullet is the width of

1 the lands and grooves. Now, if a bullet is really
2 distorted, the width can be distorted.

3 So you had a case, it's called the Nanon
4 Williams case, it's now the Fifth Circuit, said there
5 was an error. There was a report of an investigation
6 of the Houston Police Department labs in 2006. And
7 they found in Mr. Williams' case Mr. Williams had had
8 a .25 caliber gun. The co-defendant had had a .22
9 caliber gun.

10 The bullet that came from the deceased's head
11 was severely distorted. Three firearms examiners in
12 the Houston Police Department got the class
13 characteristics wrong. In other words, they said
14 Williams' gun fired the bullet when in fact on
15 re-examination it was the wrong type. It was a .22
16 caliber bullet.

17 And the investigation said, well, that was
18 understandable in a way. It didn't show that this
19 was a really bad department, because when you get
20 really deformed bullets like that, it can even be
21 difficult to determine the class characteristics.

22 Q Okay. So you've talked about the problem of
23 distortion and the problem of having less than the
24 entire bullet and that those have been recognized to
25 create a heightened risk for misidentification. And

1 we know we had multiple fragments of a bullet here.
2 Did the SLED file you viewed also indicate some
3 problems with distortion?

4 A Yes, it did. Especially Parnell's notes. Parnell
5 also indicated there's a problem -- again, this is
6 changes in guns over time. Well, at the time he made
7 his test fires, the guns had been around for 40
8 years. And he specifically notes in his notes that
9 the barrel of the gun was fouled. In other words,
10 there was build up of ash and rust and whatever.

11 And of course when that happens, if you think
12 about it; and we all think about it, you know, knife
13 sharpening, et cetera, et cetera, you have a
14 different mark. So he claimed, Parnell claimed that
15 he could only reach an inconclusive both because of
16 its distortion of the bullets and because of the
17 condition, the fouled condition of the barrels, the
18 fact that it had been 40 years since the guns had
19 been examined.

20 Q And, in fact, his conclusion in his report was that
21 it could have been either one of the two weapons that
22 he reviewed or any other similar type weapon?

23 A Yes. That's what an inconclusive means.

24 Q And he also backed up Mr. Cayton. And you hit on
25 this but I am not sure that we talked about this one

1 additional point. He made his identification that
2 this gun to the exclusion of all others based on a
3 groove comparison as opposed to a land?

4 A Right.

5 Q Or a land and groove?

6 MR. PETRANO: I'm going to have to object to
7 leading on that one.

8 THE COURT: Well, it's in the transcript. I'll
9 allow it. Go ahead.

10 A Yeah. He does say, well, he had to make it on the
11 basis of a groove comparison. Because if you look at
12 his notes, he says these are bullets with grooves and
13 he says no lands. What I have is a bullet with three
14 grooves, et cetera. So what could he compare it to?
15 Right? And --

16 Q Well, so the question then I guess is: Based on the
17 scientific literature and the studies, is there a
18 heightened risk of misidentification when the
19 identification is based on a groove as opposed to a
20 land or land and groove?

21 A Yes. That's when we get the problem of subclass
22 characteristics that I mentioned earlier. In other
23 words, there can be a problem that examiners reach
24 identifications. They say the microscopic
25 characteristics agree, but they're microscopic

1 characteristics and they don't look any different,
2 are not individual signatures of guns. They're
3 subclass signatures common to guns, all guns that
4 were manufactured in the same batch.

5 And it's well known, Bonfonte, de Kinder,
6 various papers by Miller, et cetera, it's common that
7 you don't want to rely on groove impressions because
8 groove impressions are very, very likely to have
9 subclass characteristics. In fact, Bonfonte and de
10 Kinder advise that -- and it's pretty common
11 actually; you want to base your identification on
12 land impressions.

13 Bonfonte and de Kinder say, look, and not even
14 the edge of the land. The edge of the land is too
15 close to the groove. You have to base your ID on the
16 center of the land. You start looking at the edge of
17 the land. You start looking at the groove
18 impressions. And it's so high a risk of mistaking
19 subclass for individual characteristics that you
20 shouldn't do it.

21 Q So now let me ask you about another area. And that
22 is documentation. Based upon your review of
23 Mr. Cayton's file and his testimony and your
24 knowledge of the scientific requirements, were there
25 significant problems with the documentation of his

1 identification in this case?

2 A Yes. Well, it's been common practice starting with
3 sort of the father of firearms identification, Major
4 Julian Hatcher, to say you should take photo
5 micrographs. In other words, you take your
6 photograph, what you saw under the comparison
7 microscope.

8 And you'll see that SLED, it's clear looking at
9 the file, SLED in 1961 did photo micrographs.
10 Parnell did photo micrographs. There are no --
11 Cayton did not take photo micrographs.

12 Now, there are a few sketches, but the sketches
13 so far as I can see -- and again, you're supposed to
14 do documentation so that somebody else looking at
15 your work can see the basis for an identification,
16 some other firearms and tool mark examiner, and can
17 say, yes, I agree; or, no, I don't agree. And a
18 photograph is the best thing. And you can see that
19 the AFTE came out with what it called its
20 "Standardization of Comparison Document" I think in
21 2005 where they say the photograph is the best thing.

22 And you can see it, as I say, going back to
23 Julian Hatcher. There's a detailed article on photo
24 documentation by Moran. It's commonplace. He
25 doesn't have it.

1 Now, as to his sketches, so far as I can see,
2 they're very hard to see. At first I didn't see them
3 in the folder. They're very, very small, little
4 sketches. And so far as can I see -- and I shouldn't
5 have to guess; you should know; it should be clearly
6 labeled -- they're just sketches of the bullet
7 fragments; in other words, the fragments recovered
8 from the decedent.

9 That's not good enough. Because to make an
10 identification, what he has to identify is the test
11 fire made from the suspect gun with the bullet
12 fragments. So if he is going to document, you've got
13 to see the test fire and you have to see it in detail
14 so you really have a sketch of what's there and see
15 the fragment.

16 The other thing he does is you're also supposed
17 to take detailed notes. You're not just supposed to
18 have the photographs. You're supposed to have the
19 photographs and explain what about the photographs
20 warrants an identification.

21 Nothing in that level, except he says that he
22 compared Freiburger's gun with the other suspect gun
23 and there was no subclass problem. And given the
24 high risk of subclass characteristics on grooves, you
25 know, this is -- well, this is just conclusory. You

1 want to know how, how does he know. I mean, you're
2 supposed to -- it's supposed to deal with -- your
3 explanation has to be with a method of manufacturer
4 of the gun, with the quality. And there is nothing
5 there.

6 Q Well, does the NAS reports and the other studies
7 indicate that the failure to adequately document work
8 creates a heightened problem, risk of
9 misidentification?

10 A Yes. The NAS forensic science report in Chapter 6
11 really sort of let into forensic scientists in
12 general for just issuing reports that were barely
13 conclusions and that didn't show clearly the
14 observations that supported the conclusions and
15 explain why those observations supported the
16 conclusions.

17 This fall, this past fall, 2008, the Detroit
18 police lab was shut down because there was a finding
19 of a ten percent rate of misidentifications in actual
20 cases. The Detroit Police Lab apparently issued
21 these conclusory reports. Basically we found an
22 identification, no photo micrographs, no explanation,
23 et cetera.

24 And the Michigan State Police who did this audit
25 of the Detroit Police Lab that led it to be shut down

1 said that one reason they attributed the high rate of
2 misidentifications in the Detroit lab is that there
3 was no record. There was nothing anyone could review
4 to be skeptical or to say, hey, why didn't you look
5 at this, why didn't you look at that?

6 And there were articles, Moran photo
7 documentation, an article by Drew, Zabowski, Murdock,
8 Moran, Nichols; you name it, that basically says the
9 standard of the field is documentation so that you
10 can tell what people observed and why that warranted
11 a conclusion.

12 Q And then I think finally, another -- did Mr. Cayton
13 have anyone review his work?

14 A No. He had no peer review. And he himself explained
15 that was one reason his lab was not accredited, and
16 it couldn't have been accredited by ASCLAD he said
17 because -- ASCLAD is American Society of Crime
18 Laboratory Directors, a primary accrediting
19 organization and in fact requires peer review by a
20 minimum of two people.

21 There is supposed to be a technical peer
22 reviewer who looks over the work ideally, does the
23 comparison microscope examination himself; that's
24 rare, but at least looks at the documentation, says:
25 Is an identification warranted?

1 And then there's supposed to be an
2 administrative peer reviewer, and the job of the
3 administrative peer reviewer is to look at the
4 documentation of the case and say things like: Hey,
5 why aren't there photo micrographs? Or, wait a
6 second. These two bullets are of different brands,
7 different degrees of hardness. How do you account
8 for that? And aren't you measuring, comparing apples
9 and oranges? How do you do that comparison? And
10 there wasn't administrative or technical review which
11 is required under ASCLAD standards.

12 Q And so the --

13 A And it's standard. It's so standard that in the
14 cases of review, your standard, you know, sheets that
15 people fill in, at the bottom of it there's a line
16 for technical reviewer to give a signature. There's
17 a line for administrative reviewer to give a
18 signature. This isn't something that a few folks do.
19 It's -- some people don't do it, but it's -- you
20 know, it's industry procedure.

21 Q So if you take all of these together, that you have
22 essentially no peer review, work done in an
23 undocumented lab without adequate documentation on
24 multiple fragments of a bullet based on distortion
25 and a groove analysis, based upon the scientific

1 literature and the concerns of the scientific
2 community, is there significant risk of a
3 misidentification in this case?

4 A Yes.

5 MR. BLUME: No further questions.

6 THE COURT: All right. Approach the bench,
7 please.

8 (Whereupon, a bench conference is had)

9 MR. BLUME: Are you okay to do cross now?

10 MR. PETRANO: Sure.

11 MR. BLUME: Do you need a break?

12 THE COURT: Let's proceed.

13 MR. PETRANO: Your Honor, I have an odd request.

14 If I may inquire, I don't know how to take my
15 examination. It depends on what capacity this
16 witness is being offered in the sense that, is this
17 ineffective assistance of counsel or newly discovered
18 evidence, or should I just do both?

19 THE COURT: Well, you probably ought to let Mr.
20 Blume answer that. It's my impression from the
21 pretrial brief that she's offered for the ineffective
22 assistance of counsel issue.

23 MR. BLUME: That's correct.

24 MR. PETRANO: Okay. So it's not newly
25 discovered?

1 MR. BLUME: That's correct.

2 MR. PETRANO: Okay.

3 THE COURT: Let's don't make it that.

4 MR. PETRANO: Excuse me?

5 THE COURT: Let's don't make it that.

6 MR. PETRANO: I can't make any promises, Judge.

7 CROSS EXAMINATION

8 BY MR. PETRANO

9 Q Ma'am, you referred to -- I'm going to go a little
10 out of order. So stop me if I do. And I have a
11 habit of talking real fast. And so I apologize ahead
12 of time. And please just stop me. You referred to
13 some court cases where the firearms expert had been
14 excluded. You mentioned an '05, an '08, a couple of
15 other recent cases. But the only one that I noted
16 that was before Mr. Freiburger's trial was Ramirez
17 One. And that was 2001. Am I getting that right?

18 A No. Well, actually, no. That was Ramirez Three.

19 Q That was?

20 A Ramirez One was in 19 -- I don't know -- 89. And
21 firearms and toolmark experts were admitted without a
22 Frye hearing. And the Florida Supreme Court said
23 that was error. Ramirez Two was in 1995 and there
24 was a Frye hearing. But after prosecution experts
25 testified, the defense experts weren't allowed to.

1 Error. Ramirez Three -- and there's a Ramirez Four
2 pending, by the way, but not about firearms and
3 toolmarks.

4 But Ramirez Three, there was a hearing. The
5 judge admitted the evidence, the trial judge, and the
6 Florida Supreme Court said it should be excluded. So
7 you're correct that the first case, aside from
8 actually -- and I'm lazy about this kind of thing.
9 If you're a historian type, back in the 1920's or so,
10 there were cases that excluded firearms and toolmark
11 identification.

12 Q And on that note, and to the opposite, are you aware
13 of cases where firearm and toolmark examiners are
14 allowed as experts?

15 A There's a great majority of cases. I should say
16 there was -- well, there was also a case in
17 California in 1995. It wasn't an admissibility
18 issue. It was an issue where the defense lawyer
19 actually brought in and questioned the expert about
20 Biasotti's work and its implications. That's People
21 vs. Hawkins in the Supreme Court of California, I
22 think 1995, but I wouldn't swear to it.

23 Q And the purported experts that were not allowed in
24 the cases that you mentioned, were they members of --
25 firearms and toolmark examiners?

- 1 A Oh, yes, they were. I believe every -- I know that
2 the experts in Ramirez were AFTE members.
- 3 Q But you were at the Massachusetts one. What about
4 that one?
- 5 A Well, there are three Massachusetts ones.
- 6 Q I'm talking about the one in '05.
- 7 A No. In Green, actually I was not there, but the
8 court cites my Columbia CLR article, but I was not
9 involved in Green. I was involved in Montero, the
10 '06 case, but simply submitting an affidavit which is
11 cited in the opinion. I did not testify. The only
12 Massachusetts case I have testified in was
13 Commonwealth vs. Meeks and Warner which was spring
14 '06.
- 15 Q And --
- 16 A I should say there was also a challenge. So again,
17 it's after Mr. Freiburger's case. In '04 I was
18 involved in a bolt cutter identification challenge in
19 the Eastern District of Pennsylvania.
- 20 Q And are you familiar with this report? And I think
21 it was more of a loose leaf version that you got.
- 22 A Yeah. Well, actually the two versions, courtesy of
23 the computer age, you can -- I mean, there aren't two
24 versions. You have a choice. You can download a pdf
25 or you can get the spiffy hard copy.

1 Q And my problem is I think that the difference between
2 the two, although they are identical, the pagination
3 is a little different.

4 A No. I believe what happened was, you see, before the
5 NAS always issues its report and reports in
6 prepublication form. And that's sold -- I think
7 it's -- it's not even sold as a pdf. You can buy
8 that. And then the only change they make, which is
9 very irritating for those of us writing legal
10 documents, is they correct some type but they change
11 all the pages. And that's the final form. But I'm
12 reasonably sure you could consult counsel, that the
13 pdf's they download, these days you cannot -- since
14 last summer, since, oh, June '08, the only pdf you
15 can download are the ballistics imaging, is the final
16 report.

17 Q Okay. And so you're aware in there -- and I'm going
18 to say page 18. My point is it might be wrong, and
19 you correct me if I'm wrong; or if you need a copy,
20 I'll bring it up to you -- that the study indicates
21 that this is not a verdict on the uniqueness of
22 firearm identification?

23 A They don't say it's not a verdict on the uniqueness.
24 Well, they say -- they do not say it has not been
25 scientifically established. They say -- rather, they

1 say it has not been scientifically established. They
2 don't say it's been scientifically proved. To the
3 contrary, they don't say this is not a verdict on the
4 uniqueness. They say their position, their
5 mission -- and I should explain. NAS policy is --
6 the NAS views itself as sort of a servant of the
7 federal government. And reports are issued on
8 specific questions defined by the government. So
9 unlike us lucky academics who can say, wow, you know,
10 this is turning out to be the interesting paper
11 issue, I'll write about this, the NRC committee has
12 to stick to its mandate.

13 And so what they are saying is that their
14 mandate was not to issue a verdict on the validity of
15 firearms and toolmark identification. At the same
16 time though in bold type they do say -- and they
17 never say we don't have enough of a foundation for
18 that -- that the fundamental assumptions have not
19 been proved.

20 Q So do you agree or disagree that on page 20 -- and it
21 may be a different page -- that they --

22 A Well, let me -- I have to see that because I don't
23 actually recall them saying exactly what you said.

24 Q I'm going to refer you -- and for the Court, may I
25 approach the witness? Sorry.

1 THE COURT: Yes.

2 Q Page 18. I'm looking at the italics portion in the
3 center of the page.

4 THE COURT: And what report are you referring
5 to?

6 Q That's the big one that was brought up by --

7 THE COURT: The big one? What is the big one?

8 MR. PETRANO: It's his item.

9 A Okay. They say this study is neither a verdict on
10 the uniqueness of firearms related toolmarks
11 generally, neither an assessment of the validity of
12 firearms identification as a discipline.

13 But you will see them say later on that page:
14 Although a definitive statement on firearms toolmark
15 uniqueness is not within our purview; in other words,
16 this isn't what we were ordered to do, some
17 discussion of issues related to uniqueness are
18 essential to our work.

19 And they do say they really are -- they are
20 saying: This is not our mission. At the same
21 time -- and it's sort of speaking out two sides of
22 their mouth -- what they claim about uniqueness, if
23 you look at the chapter, it's in bold face. It's
24 there and it's there in their summary.

25 Now, rather than argue sort of, you know, we can

1 go back and forth, I think the mission of the NAS
2 scientific report, right, was specifically to
3 evaluate the scientific validity.

4 Q And we'll get to that in one minute. But --

5 A But, I mean, where it's relevant is they do take this
6 claim about uniqueness to be a valid claim.

7 Q And so, agreeing with what you're saying, I just want
8 to make sure I've got it right, that it was beyond
9 their purview to examine the admissibility of
10 firearms?

11 A Well, they weren't asked. They couldn't do it. At
12 the same time, where they were going; and we've all
13 gone there logically, you weren't posed a specific
14 question; but if you'd have answered the posed
15 question, you have to answer another question
16 previously.

17 And what they said is we have to discuss
18 firearms and toolmark identification as traditionally
19 performed because it makes no sense to talk about a
20 ballistics imaging database unless we look at it. So
21 they did look at it. They looked at the relevant
22 literature. You know, they really -- I mean, if you
23 look at that chapter, they really did a quite
24 thorough job of looking at the literature by firearms
25 and toolmark examiners themselves.

1 Q Let me turn back to the beginning of your testimony
2 here today. You differentiated between DNA and
3 firearms and toolmarks examination. I believe you
4 said something about -- and correct me if I'm
5 wrong -- how DNA was static, how the genome was
6 either there or not there which differed from
7 firearms?

8 A Right. I mean, basically if you have an allele,
9 right, you have a genome.

10 Q Let me stop you right there. I want you to explain
11 to the Court and everyone what that is.

12 A You have your genetic composition, your DNA. And
13 your DNA as a whole is unique to you even though -- I
14 don't know -- we see like 98 percent with gorillas or
15 something like that. But basically DNA typing is
16 done on what are called hyper variable portions of
17 the genome, portions where people vary a lot among
18 themselves.

19 And the allele, the allele is the -- there are
20 various forms people can have. Basically what it
21 relies on, the hyper variable regions that are
22 studied now are ones where there are a lot of repeats
23 of DNA bases, and people vary on how many repeats
24 they have. And if you have 25 repeats today, say --
25 this is just thrown out of the air -- you will have

1 25 repeats tomorrow. And should you live 100 more
2 years, you will have 25 repeats on that site.

3 Now, the difference, and again the illustration
4 I usually use is, if this wasn't the case, we
5 wouldn't have knife grinders like in the old days or
6 you wouldn't by a knife sharpener. Tools change over
7 time.

8 And the thing about a gun and essentially with
9 bullets, the reason that the literature says that no
10 two bullets fired by the same gun are ever exactly
11 alike is there are so many variables. Basically the
12 speed and velocity of the firing of a gun differs
13 from time to time.

14 As a gun barrel gets fouled and worn out, the
15 marks it will leave differ. Different types of
16 ammunition are of different brands of hardness and,
17 again, you'll get different marks. And one of the
18 things that -- I don't know if it was either the
19 ballistics imaging report or the forensic science
20 report -- said this makes it a very, very tough
21 statistical problem basically.

22 Because with DNA or with fingerprints, you
23 know -- it makes a tough identification problem. You
24 know that if you type in DNA, right, on the hyper
25 variable regions and it's done correctly and the

1 suspect's DNA differs from the DNA recovered from a
2 crime scene, it's simple; it's the wrong suspect.
3 With firearms and toolmarks you don't know that.

4 THE COURT: Ms. Schwartz, I think I understand
5 that.

6 THE WITNESS: Yeah.

7 THE COURT: Okay.

8 A And so doing the statistics, if you're asking what is
9 the likelihood that a random gun could do as good a
10 job, you'd have to talk about both the likelihood of
11 changes in a gun over time and you have all these
12 different variables and the likelihood of
13 similarities between different guns. So it kind of
14 boggles the mind how it's -- it's very, very
15 difficult to see how you'd even construct a database
16 or how you could do that.

17 Q And, Doctor, you're walking into my exact next topic.
18 The basic criticism I think, at least I thought as
19 you put it and my notes reflect what you say, is that
20 there was no database?

21 A Right.

22 Q And yet you're saying now the nature of firearms,
23 being that they change over time, they are not
24 static, not binary, that it would be virtually
25 impossible to create such a database.

1 A Well, that's not --

2 Q So tell us.

3 A See, that's where you get into the premise of
4 reproducibility. One should be able to calculate how
5 much the change is over time. So let's distinguish.
6 My claim is it would be difficult to do. Just
7 because it would be difficult to do something, to put
8 something on scientific foundations, I can say, (A),
9 it would be difficult to do it; and I could say, (B),
10 it would be necessary to do it to put it on
11 scientific foundations. And that is precisely what
12 the NAS report on forensic science says.

13 And I've got to tell you, the people who wrote
14 that report have far greater intellectual
15 qualifications and know a heck of a lot more about
16 forensic science than I do. And the majority of
17 people they listen to with regard to firearms and
18 toolmark identification, they had a presentation from
19 Peterstry Uptatis who is an AFTE member who did not
20 get -- they read stuff by firearms and tool mark
21 examiners.

22 They also -- at least they cited it, but they
23 may have read it -- read my stuff. But basically
24 they had all the stuff that firearms and toolmark
25 examiners could present, including the argument that

1 you didn't need a database. And they said. Hokum.

2 Q Now, when you say scientific foundations just a
3 moment ago, what you really mean is lack of
4 statistics?

5 A No, I don't. Let me -- something that wasn't brought
6 out. Lack of statistics goes along with a lack of a
7 protocol. And one of the things that the NRC
8 committee in the forensic science report criticized
9 most severely was the AFTE theory of identification.
10 Why? Because the AFTE theory is the best guidance
11 the field gives for how you reach an identification.

12 And it says that basically if you see two
13 bullets, right, under a comparison microscope and the
14 agreement between the striae exceeds the best known
15 match, the best match you've seen between bullets,
16 you know, not to match and is consonant with the best
17 match, it's sufficient.

18 Well, what they said was, wait a second. That
19 gives you no protocol because there is nothing that
20 defines best known non-match. It's left to the
21 individual. And this case is an illustration. And
22 his reply to me in Journal of Forensic Sciences,
23 Ronald Nichols brings up the AFTE theory. And then
24 he says -- and this is the defense of the field -- of
25 course different examiners will differ, not all the

1 time, but it's not unexpected as to whether to reach
2 an inconclusive or an identification. Why? Because
3 they'll have different experience. So their
4 conception, their mind's eye conception of the best
5 known non-match will differ.

6 And in the same paragraph he says, by the way,
7 it's going to depend on whether you're on the east
8 coast or the west coast because west coast examiners
9 will have encountered different training materials
10 than east coast examiners; and, therefore, they'll
11 differ.

12 And he says in that article. And Gruzowski, et
13 al, say that Nichols has testified that because it's
14 not unexpected for examiners to disagree about
15 whether an inconclusive or an identification is
16 warranted, in other words, what we have in this case
17 isn't a weird situation.

18 And what's also not weird about this case is
19 because we don't have -- the profession has no
20 standard for telling who is right in these
21 situations; and, therefore, he says we can't
22 calculate, they say, an error rate for actual case
23 work because we don't know who's right and who's
24 wrong

25 And then Nichols says, he also wrote a reply to

1 me in California Association of Criminalistics
2 Newsletter, no problem; leave it up to the jury. We,
3 the NAS report, thinks it's a problem for an area to
4 say it's a science and then to say that we have no
5 standards for when people should declare
6 identifications. And it's not like chicken sex since
7 supposedly that's where people will agree. We think
8 disagreements will occur. And, hey, we don't know
9 who is right. We even don't know -- we know the east
10 coast and west coast people will disagree. We don't
11 know who's right.

12 I mean, it's basically like, okay, maybe you and
13 I have tasted different ice cream and we have
14 different standards as to what's a good vanilla. And
15 maybe that's okay, unless I claim to be a scientist
16 testing vanilla. But if you and I disagree about
17 whether somebody has committed a crime that could put
18 them away for a long time, one might like it to be
19 more than a matter of taste.

20 And that is related to the need for statistical
21 foundations. But the real thing -- they're related.
22 But the real thing the committee says is there is no
23 strict protocol. And as Biasotti noted in 1959, the
24 only way to get a strict protocol is through
25 statistical empirical studies. And the best -- and

1 you can read all sorts of people -- the best
2 statistical empirical study ever done in the field
3 was Biasotti's 1955 study which was restricted to .38
4 Smith and Wesson revolvers which were the most common
5 gun then. You'd probably have a hard time finding
6 one now; certainly not the most common gun.

7 MR. PETRANO: Nothing else, Your Honor.

8 MR. BLUME: No redirect. I did forget to move
9 in -- I marked several of these for identification.
10 I'd like to make those a part of the record. These
11 are treatises she relied upon.

12 THE COURT: Any objection?

13 MR. PETRANO: I renew the objections made at the
14 beginning, Your Honor. It goes beyond the scope of
15 an expert. You can't just introduce those under some
16 aura of reliability simply because they're
17 affidavits. Are we talking about studies or the
18 affidavits?

19 THE COURT: No. We're talking about the
20 studies.

21 MR. PETRANO: Oh. No. Your Honor, I have to
22 disagree with that. She can testify to that and form
23 her opinions, but we don't need the studies
24 themselves. If we did, we'd need the authors of
25 those studies, the case materials and the source

1 materials therein. I'm sure my counterpart is going
2 to differ with that.

3 MR. BLUME: They're self-authenticating. I
4 think they're clearly supporting treatises in her
5 field.

6 THE COURT: The studies are -- I'll admit them.

7 MR. BLUME: And so then now, as for the
8 affidavits, we had those marked. Really the purpose
9 of those, this is information which Dr. Schwartz
10 relied upon in rendering her opinion, and that's the
11 primary basis they'd be marked and made part of the
12 record.

13 THE COURT: That's the -- those are the
14 documents that the State objects to?

15 MR. BLUME: Yes.

16 MR. PETRANO: And, Your Honor.

17 THE COURT: Go ahead.

18 MR. PETRANO: I'm sorry. Of course he's saying
19 that these are treatises. I do differ with that
20 interpretation.

21 THE COURT: These?

22 MR. PETRANO: Yes. But I understand your
23 ruling. Thank you.

24 THE COURT: Yeah. I think they're admissible.
25

1 (WHEREUPON, Applicant's Exhibit No. 3 is
2 admitted into evidence.)

3 (WHEREUPON, Applicant's Exhibit No. 4 is
4 admitted into evidence.)

5 (WHEREUPON, Applicant's Exhibit No. 5 is
6 admitted into evidence.)

7 (WHEREUPON, Applicant's Exhibit No. 6 is
8 admitted into evidence.)

9 THE COURT: As to the affidavits.

10 MR. PETRANO: Once again, I don't want to repeat
11 myself over and over, but I'd just like to rely on --

12 THE COURT: She has relied on them. I don't
13 know why they need to be marked as evidentiary. They
14 don't even -- in a cursory review, they don't even
15 refer to this case.

16 MR. BLUME: They're basically more the general
17 science.

18 THE COURT: The general science.

19 MR. BLUME: They go to her point one.

20 THE COURT: She's adequately expressed her point
21 one and she's been cross examined on it.

22 - MR. BLUME: That's fine, Your Honor. I'd like
23 to make them part of the record.

24 THE COURT: For identification only. Thank you
25 very much, Ms. Schwartz. Dr. Schwartz. I'm sorry.

1 MR. BLUME: And I assume the witness is
2 released, is free to go.

3 THE COURT: Without objection?

4 MR. PETRANO: Without objection.

5 THE COURT: All right. I think let's take a
6 break for lunch. Now, what does the afternoon
7 consist of?

8 MR. BLUME: The afternoon consists of at least
9 one of the trial lawyers. We're going to check on
10 the second one. And appellate counsel. And we are
11 going to check on Mr. Delgado during the break. So
12 it will be Mr. Nichols and Ms. Hudgins. And then I
13 understand --

14 THE COURT: Did you tell Nichols?

15 MR. BLUME: Yes. I talked to Mr. Nichols. I
16 told him it would probably be this afternoon. Yes.

17 THE COURT: Let's reconvene, say, at -- we don't
18 need an hour, do we? In about 45 minutes. Would
19 that suit? I just want to make sure we get all this
20 in this afternoon.

21 MR. BLUME: So at 1:30 basically?

22 THE COURT: Thereabouts. If you're a few
23 minutes late, that's okay. All right. We'll stand
24 at ease until 1:30.

25 MR. PETRANO: Thank you, Judge.

1 (Whereupon, a lunch break is taken)

2 THE COURT: All right, Mr. Blume. You may
3 proceed.

4 MR. BLUME: Yes, Your Honor. The Applicant
5 would call John Nichols.

6 MR. PETRANO: If I may, Your Honor? We have a
7 rebuttal witness to the doctor who just testified.
8 Is that out of order?

9 THE COURT: Let's let them finish their case.

10 MR. PETRANO: And I wasn't trying to --

11 THE COURT: Let's do it that way.

12 MR. PETRANO: Thank you. That's all right.

13 THE COURT: No problem.

14 JOHN S. NICHOLS, after being duly sworn,
15 testifies as follows:

16 THE COURT: Have a seat. State your full name
17 for the record.

18 THE WITNESS: John Shannon Nichols,
19 N-I-C-H-O-L-S.

20 DIRECT EXAMINATION

21 BY MR. BLUME

22 Q Mr. Nichols, you're a lawyer in private practice?

23 A Yes, I am.

24 Q And where do you currently practice?

25 A I have a firm, Bluestein, Nichols, Johnson, Delgado,

1 here in Columbia.

2 Q And just to sort of cut to the chase here and try to
3 make this as brief as possible, were you involved in
4 the direct appeal of the case of The State vs. Edward
5 Freiburger?

6 A Yes, I was.

7 Q And what was your role?

8 A Mr. Delgado and I had known each other since I had
9 been in law school. I actually worked with him and
10 we had kept in touch. I worked for about ten years
11 at the Court of Appeals. So when I got out and
12 started my own firm, Mr. Delgado and Ms. Hudgins
13 asked me to assist them with the appeal. And I ended
14 up being the primary lawyer working on the appeal.

15 Q Now, really, based on my review of the application
16 which I think is correct, there's only one issue in
17 the case which arguably involves you.

18 A Right.

19 Q And that is, there is an allegation of ineffective
20 assistance of counsel for failing to raise a
21 confrontation clause issue on direct appeal. And
22 it's essentially pled in the alternative that if it
23 was preserved, it wasn't. So can you tell the Court
24 why you did or didn't raise this issue on direct
25 appeal?

1 A Well, and I looked back at the file prior to today.
2 I have actually looked back at my brief and tried to
3 look back at as much of the file after reading the
4 application. We filed the brief on April 1st, 2004
5 which I think was a few weeks after Crawford. And I
6 really don't remember. I'm pretty sure I did not
7 read Crawford. I'm certain I did not read Crawford
8 before we filed the brief. I am pretty sure -- I
9 don't even remember if I was aware of Crawford at the
10 time we filed the initial brief on April 1st, 2004.

11 Q So is it just fair to say that you did not have a
12 strategic reason for failing to raise this issue in
13 the direct appeal?

14 A I really didn't, because when we were doing that
15 brief and I raised a number of issues for Mr.
16 Freiburger in that brief, some of the issues I
17 thought were stronger than others. But I thought
18 with what was at stake, I would raise every issue I
19 could. And I don't -- I was aware of Ohio v. Roberts
20 and that whole line of cases and the cases that had
21 talked about the firmly rooted exceptions to the
22 hearsay rule and those kinds of things. And I am
23 certain that it was after I filed the brief and
24 raised whatever issues I thought I could raise that I
25 became aware of Crawford and what the U.S. Supreme

1 Court did in that case.

2 Q And that would have been after the briefs were filed
3 in this case?

4 A Yeah. It was after the briefs were filed in this
5 case. And then of course once I had filed the
6 briefs, I wasn't able to raise any other argument.

7 MR. BLUME: No further questions.

8 CROSS EXAMINATION

9 BY MR. PETRANO

10 Q Can you tell us a little bit about your previous
11 employment?

12 A Sure. Before law school or any of that?

13 Q After being admitted to the bar.

14 A Oh, okay. That's fine. Because I worked prior to
15 going to law school.

16 Q I'm sorry I wasn't clear.

17 A That's fine. After being admitted to the bar I
18 worked for about seven months for a firm called
19 Rogers & Koon which is now Rogers, Townsend & Thomas.
20 But in 1986, in the summer, I had the opportunity to
21 work at the Court of Appeals as a staff attorney. I
22 eventually became the chief staff attorney. I ended
23 up working there for ten years. During that time at
24 different times I clerked for Chief Judge Alec
25 Sanders. I clerked for Associate Judge Randall Bell

1 and for acting Associate Judge Bruce Littlejohn.

2 I left the court in 1996 to go to work at Suggs
3 & Kelly, primarily doing pharmaceutical products
4 liability cases all over the country. And in 2000,
5 Marty Bluestein who is another lawyer at Suggs &
6 Kelly, she and I left to form Bluestein & Nichols.
7 Since that time we've become Bluestein, Nichols,
8 Thompson, Delgado.

9 Q I just want to make sure I got it right. Ten years
10 as a staff attorney but in different capacities?

11 A In different capacities. I was initially hired as a
12 temporary staff attorney, a two-year staff attorney.
13 I then became deputy chief staff attorney which is a
14 permanent position with them. And in '93 when Ken
15 Richstad became the clerk I became the chief staff
16 attorney and stayed in that role for three years.

17 But also at times a judge might need a law
18 clerk. Judge Sanders' law clerk went out on
19 maternity leave I believe. So he came and asked me
20 to be his temporary clerk, and I did that for three
21 months. Judge Bell had a clerk leave early, so he
22 came and asked me to be his pinch law clerk, and I
23 did that for about five months.

24 Judge Littlejohn came and said the chief justice
25 appointed him to sit with our court, Justice

1 Littlejohn as an active judge. And he was with us
2 for eight months, and I was his law clerk for that
3 period of time.

4 Q So it's fair say you have a good deal of experience
5 with the appellate courts in South Carolina?

6 A I feel like I've got a pretty good bit of experience.
7 Also, since leaving the court, that's where I've
8 tried to at least concentrate half of my practice, in
9 the appellate practice.

10 Q How did you end up getting this case?

11 A I had known Mr. Delgado. I clerked for his firm
12 while I was in law school. After I left Suggs &
13 Kelly and was no longer doing the pharmaceutical
14 cases but was mostly -- I was trying to develop an
15 appellate practice, Mr. Delgado contacted me and Ms.
16 Hudgins contacted me to assist.

17 Q And you said that once you knew Crawford came out you
18 weren't going to raise it on argument because you had
19 not raised it in the original brief. Am I getting
20 that right?

21 A That, and I am not really sure that I thought about
22 raising Crawford at that point. I wasn't -- I'm as
23 certain as I can be five years down the road that I
24 was not aware of Crawford when we filed the initial
25 brief. I am certain of that. I know that I had not

1 read it.

2 Q Now, are there avenues for procedures within the
3 appellate court rules, or case law for that matter,
4 to supplement a brief that's already been filed if
5 there's been some type of watershed or new
6 fundamental case that's come down?

7 A There is. Under Rule 207(b) something, Rule 207,
8 appellate court rules, allows you to alert the court
9 of controlling authority that comes out after you
10 have filed the initial brief. You can't make
11 changes from the initial brief to the final brief,
12 except you can fix typographical errors. You can
13 change from a citation to a transcript to where it is
14 in the record of appeal. Those are the kind of
15 changes you can make. You can't make substantive
16 changes. But there is a rule that allows you to
17 alert the court as to subsequent authority if it has
18 varying arguments, but you've got to point to where
19 in the brief that you're referencing, either in your
20 brief or the appellant's brief.

21 Q And so if -- okay. Thanks. And then my question is,
22 would you have read Crawford before you filed the
23 brief to the United States Supreme Court?

24 A I think it's fair to say that I probably read
25 Crawford by that time because there was a buzz about

1 Crawford by the -- I would say at least by the fall
2 of 2004. And the other reason that I would have read
3 Crawford is that I helped Judge Sanders do the trial
4 handbook, and one of the chapters in that book is on
5 hearsay and hearsay exceptions and those kinds of
6 things. And I would have read that when we were
7 doing -- that's for West Group Publishing, and I
8 would have read that as part of the supplemental
9 material for the 2005. And in fact now we have a
10 subsection that's just Crawford vs. Washington in
11 that book.

12 Q What was the issue or issues as you saw them in this
13 direct appeal?

14 A In the direct appeal, my recollection was the primary
15 issue was the search and seizure. And not only the
16 Terry v. Ohio type issues. There was really no
17 question about retroactivity with regard to
18 Mapp/Ohio, Terry and some of the other cases. I
19 think Judge Floyd took the view that those were
20 fundamental rights and he applied them retroactively
21 even though this was a crime that occurred in 1961.

22 But I thought there was an interesting issue
23 about how Tennessee law, specifically Tennessee law,
24 controlled Officer Meredith's behavior that night.
25 And I felt like there was a violation of that

1 behavior and the exclusionary rule should have -- and
2 as I recall, that's how Mr. Delgado argued it at
3 trial.

4 There were other issues. There was an issue
5 regarding the chain of custody of the pistol because
6 the pistol that was presented at trial had been
7 stored at SLED for decades in a -- I think it was
8 described as a cigar type box with another identical
9 pistol. And so there was an argument regarding the
10 fungibility of the item and the chain of custody.

11 And, frankly, I'm having a block about some of
12 the other issues that we raised. But we did raise
13 several others issues, including failure to direct a
14 verdict of acquittal.

15 Q And in your experience as an appellate lawyer and
16 working for the court itself, is it your
17 understanding that it's best to leave out non issues
18 to not cloud the real ones?

19 A In most appeals, if I sense that an issue is not
20 going to be an effective issue and it's going to
21 pull, it's going to sort of detract from the specific
22 issues that I think would get the court's attention,
23 then I might not raise it. But I'm -- and I
24 specifically remember trying to raise everything I
25 could in Mr. Freiburger's appeal. I just remember

1 raising that. And I think in looking back at the
2 brief, I think I raised about five issues. And even
3 though I wasn't even clear whether the chain of
4 custody issue was properly preserved in the Supreme
5 Court, in fact the court held it was not. Well, I
6 raised it anyway trying to get it in the appeal.

7 Q Thanks. Nothing further.

8 THE COURT: Anything further?

9 MR. BLUME: Nothing further, Your Honor.

10 THE COURT: You may come down. May this witness
11 be excused?

12 MR. BLUME: Yes, Your Honor.

13 THE COURT: Without objection.

14 MR. BLUME: I call Katherine Hudgins.

15 THE COURT: Come around, Ms. Hudgins.

16 KATHERINE H. HUDGINS, after being duly sworn,
17 testifies as follows:

18 THE COURT: Have a seat in the witness stand.

19 State your full name for the record.

20 THE WITNESS: Katherine Haggard Hudgins,

21 H-U-D-G-I-N-S.

22 DIRECT EXAMINATION

23 BY MR. BLUME

24 Q Ms. Hudgins, where are you currently employed?

25 A I work at Appellate Defense as a --

- 1 Q And at the time of Mr. Freiburger's trial, where were
2 you employed?
- 3 A I was working with John Delgado. I was an associate
4 in his firm.
- 5 Q And what was your role in the defense of Mr.
6 Freiburger?
- 7 A I am hesitant to say I was even co-counsel. John was
8 certainly lead counsel. The way we divided our case
9 load, sometimes when John would be in trial,
10 sometimes he preferred to have somebody back at the
11 office dealing with things there. As time progressed
12 I became somewhat more involved. And as you can see
13 from the trial transcript, I did handle a few of the
14 witnesses, I think very few, probably two or three.
15 So I would say my role was minor compared to what
16 John's role was. John was certainly the chief
17 attorney.
- 18 Q Would it be fair to say that most of the significant
19 strategic decisions were made by Mr. Delgado?
- 20 A Absolutely.
- 21 Q Now I want to cover a couple of areas. And if the
22 answer is Mr. Delgado handled that, I didn't have
23 anything to do with that, then that's the answer.
24 But just to sort of be sure, I'm going to go over a
25 few different things. Do you recall that there was

1 information in the discovery which had been provided
2 to you that there was another soldier in Mr.
3 Freiburger's unit, an individual by the name of John
4 Morgan who was seen at or about the time of the
5 murder with blood on him?

6 A I do recall that.

7 Q And this soldier also went AWOL shortly around the
8 time right after the murder?

9 A I believe I recall that as well.

10 Q So if there were a decision to be made as to whether
11 to pursue that as a matter of third party guilt,
12 would that have been a decision you made or a
13 decision Mr. Delgado made?

14 A That would be a decision that Mr. Delgado would have
15 made.

16 Q And do you recall whether you discussed this with him
17 today?

18 A I do not recall discussing that in specific.

19 Q Now, let me ask you another question.

20 (WHEREUPON, Applicant's Exhibit No. 10 is marked
21 for identification.)

22 Q Do you recall -- and again, you may not remember. I
23 understand it's been a while. But did you review the
24 discovery in the case?

25 A I think I did. You know, discovery came in

1 piecemeal. I remember getting -- I remember there
2 being in the office a giant three-ring binder, and
3 every time more discovery would come in we would try
4 to put it in there. Whether I reviewed all of the
5 discovery or not I can't say.

6 Q Okay. And do you recall from reading the discovery
7 whether you ever saw an interview with Mr. Morgan
8 where he admitted leaving the fort the evening or at
9 or around the time of the murder by taxi cab?

10 A I don't recall.

11 Q And if there were such a police report -- I mean,
12 again, the answer may be take this up with Mr.
13 Delgado -- given the State's theory the person was
14 killed or might have been killed by a cab driver;
15 with this other information, would that have been
16 significant?

17 A I would say so, yes.

18 Q Now let me ask you about another item. And again, if
19 the answer is you don't recall, it is that you don't
20 recall.

21 (WHEREUPON, Applicant's Exhibit No. 11 is marked
22 for identification.)

23 Q Now, in the discovery which was provided to you by
24 the prosecution in this case was a letter written in
25 1961 by then deputy -- I guess the chief of the State

1 Law Enforcement Division, J. F. Strom. And in that
2 letter he writes that Lieutenant Kate -- do you
3 remember who Lieutenant Kate was from the trial?

4 A I do.

5 Q And he was a SLED employee in 1961 who did the
6 original examination. And this letter says -- and do
7 you also recall at trial that at the time around the
8 time of the murder there were two almost identical
9 guns found?

10 A I do remember that.

11 Q One of these guns was found on Mr. Freiburger and
12 another was taken from a local resident, a man by the
13 name of Mr. Dreher. And in this letter which is
14 contained as part of the record, but it's contained
15 in Applicant's Exhibit 11 -- and I've done it this
16 way, Your Honor, because it's a little hard to read.

17 But in this letter Mr. Strom writes: On
18 April 12th, 1961, an H&R revolver, serial number
19 9893, was recovered in a house where it is possible
20 that any number of persons could have carried it out.
21 However, the owner, Alonzo Dreher, who is an old man,
22 says that he does not believe that anyone had his
23 gun. A number of known thieves and robbers,
24 including members of his own family, have been in
25 this house from time to time. There was no physical

1 evidence other than the gun. Lieutenant Cate is of
2 the opinion that this weapon killed the taxi driver
3 based on bullet comparisons but has withheld a formal
4 report because of the condition of the bullet.

5 Do you know or do you have anything, decision
6 why this letter was not used at trial?

7 A I -- I don't know.

8 Q I mean, that wasn't a decision that you made?

9 A I -- I don't --

10 Q So this would be something essentially I would have
11 to pursue --

12 A That's right. I'm sorry. I just --

13 Q No, no. I'm just trying to make it clear. Okay.

14 Now, would you agree with me that at least from the
15 defense perspective, the ballistics testimony,
16 especially the testimony of Mr. Cayton, was the key
17 to the case?

18 A Yes. I would agree with you.

19 Q And that you -- and to the extent that as a defense
20 strategy you were involved in a primary component of
21 that was to try and discredit Mr. Cayton?

22 A That's correct.

23 Q And his conclusions and findings. And that's because
24 he was the only one who said that there was an
25 identification?

1 A Mm-hmm (affirmative). That's correct.

2 Q And all the other examiners had indicated it was
3 inconclusive?

4 A That is right.

5 MR. PETRANO: Your Honor, if I may.

6 THE COURT: Yes, sir.

7 MR. PETRANO: With all due respect, I know
8 scheduling is an issue, but I haven't heard one
9 direct question yet. I'm not sure who is testifying.
10 My objection is leading. Thank you.

11 THE COURT: Don't lead your witness.

12 Q Now, let me ask you this. Do you recall Mr. Cayton's
13 testimony from trial?

14 A Vaguely.

15 (WHEREUPON, Applicant's Exhibit No. 12 is marked
16 for identification.)

17 Q Mr. Cayton testified at trial. In recounting his
18 history he said that he had worked in Topeka for
19 several months and then retired. I don't know. Do
20 you recall that testimony? Do you remember?

21 A Not specifically.

22 Q And would it have been significant to you and the
23 defense to know that that testimony was demonstrably
24 false?

25 A Of course it would. Yes.

1 Q Would it have been beneficial for you to know at the
2 time of your cross examination of Mr. Cayton that in
3 fact he did not retire but that he was terminated
4 from the Kansas Bureau of Investigation, fired,
5 terminated for failure to follow policies, protocols
6 and procedures?

7 A I think that would have been a critical issue as to
8 his credibility. Yes.

9 Q And why would that have been important?

10 A Well, obviously we were challenging his findings.
11 And if his credibility would have been challenged and
12 if we were able to show that he had lied on the
13 stand, then that certainly would have directly gone
14 to his credibility and the jury might have given no
15 credit to his findings whatsoever. That would have
16 been very important information for cross
17 examination.

18 Q Okay. Well, Ms. Hudgins, I am going to show you what
19 has been marked as Applicant's Exhibit 12 and ask you
20 if you could begin reading on page 42 and read to
21 this part and over to page 44?

22 A Sure.

23 THE COURT: What are you referring to?

24 MR. BLUME: This is Applicant's Exhibit 12, Your
25 Honor. This --

1 THE COURT: I know. But what is it?

2 MR. BLUME: It is a transcript, a portion of a
3 transcript of the case of State of Kansas vs. Matthew
4 Denny. This was provided to me recently, yesterday
5 actually, by the United States attorney for the
6 District of Kansas who was involved in this case
7 involving Mr. Cayton where Mr. Cayton gave similar
8 misleading testimony, and he was impeached with the
9 letter of termination.

10 MR. PETRANO: Your Honor, has this been
11 introduced or --

12 THE COURT: I don't know. I don't have
13 anything.

14 MR. PETRANO. I recall it was Applicant's
15 No. 12.

16 MR. BLUME: I'm getting ready to move for its
17 introduction. I have not done so yet.

18 A May I read?

19 Q Yes.

20 A It says:

21 "Q Okay. You were actually fired from the KBI,
22 weren't you?

23 "A Well, we had a meeting and TL was there and
24 they talked about all the problems they was having
25 with my performance in work. And it was pretty clear

1 that I was not wanted there. And I was asked if I
2 would resign and I resigned.

3 "Q Actually you were fired for failing to follow
4 KBI protocols and policies and they actually handed
5 you a termination letter, didn't they?

6 "A I think that's obvious.

7 "Q So let me show you what's --

8 (Pause - the court reporter marked for
9 identification Exhibit No. 192 which was later
10 changed to State's Exhibit)

11 "Q Sir, I'm handing you what's been marked now for
12 identification as State's Exhibit 192. Do you
13 recognize that?

14 "A Well, I may have seen it. I don't recall
15 actually getting one, but I think they did show it to
16 me."

17 It says "there", and then:

18 "Q Okay. That letter is actually your termination
19 letter dated October 29th of 1999?

20 "A Yes. It says that on there.

21 "Q Read the first line."

22 And this in quotes is read.

23 "A This letter is to advise you of your
24 termination status from your probationary status as a
25 forensic scientist number three with the Kansas

1 Bureau of Investigation pursuant to KSA 75-2946 and
2 KAR 1-10-6(c). This termination is based on the
3 following facts.

4 "Q And it doesn't say anything about you
5 resigning, does it?

6 "A I'm talking about a conversation we had.

7 "Q Well, sir, my question is, does the letter say
8 anything about you resigning?

9 "A No.

10 "Q The letter is signed by who? Go to the last
11 page.

12 "A Larry Welch.

13 "Q And who is Larry Welch? The director of the
14 KBI?

15 "A Yes.

16 "Q And it says in one of the very first
17 paragraphs, citing the reasons, it was that you
18 failed to follow policies, procedures and protocols
19 of the KBI laboratory section. Is that fair?"

20 Q That's good. So you were not aware of this
21 information. This was in 1999 according to that
22 transcript, correct?

23 A That's what the transcript says, yes.

24 Q And to the best of your knowledge, you were not aware
25 of that in 2002, that termination?

1 A We were not aware of that.

2 Q And if you had been aware of it, do you feel like you
3 would have used it in Mr. Freiburger's defense?

4 A Yes.

5 Q For the reasons that we've talked about previously?

6 A Obviously.

7 MR. BLUME: Your Honor, we would move to admit
8 this as an exhibit.

9 MR. PETRANO: Your Honor, it's hearsay within
10 hearsay. It's not a transcript. The transcript has
11 to have a certification by the court reporter. This
12 is just a copy and paste job. The pagination isn't
13 even correct.

14 THE COURT: I can't hear you.

15 MR. PETRANO: I'm sorry.

16 THE COURT: I don't have it either. So I can't
17 even look at what you're talking about.

18 (Transcript handed to the Court)

19 THE COURT: So authentication is your objection?

20 MR. PETRANO: That's correct, Your Honor. There
21 is no certification by the court reporter at all.
22 And it's hearsay within hearsay.

23 MR. BLUME: I just -- well, just to -- I
24 actually only received this transcript yesterday.
25 No. The day before yesterday. We had learned of

1 this when a private investigator hired by Mr.
2 Freiburger's family, Mike Budenz, went to Missouri in
3 Kansas to do investigation on Mr. Cayton's
4 background. While there he talked to several
5 prosecutors who indicated that Mr. Cayton had
6 multiple problems with his veracity and with the
7 quality of his work and told them about this
8 termination.

9 And this is provided by, and then I ultimately
10 received this transcript from, a prosecutor who is
11 now in the U.S. Attorney's Office in the District of
12 Kansas. We were not able to get it any other way.
13 He provided a copy and gave this to us, which I think
14 unquestionably clearly demonstrates without question
15 that Mr. Cayton testified falsely at this trial but
16 also that there was Brady material which should have
17 been disclosed. I don't know. Obviously I have no
18 idea if Mr. McMahon or Ms. Campbell knew about this.

19 But he was a state agent and certainly he was
20 required to disclose any information which was
21 material to his credibility. I think the fact that
22 you were fired from essentially the State equivalent
23 of SLED for failure to follow policies, protocols and
24 procedures is a significant indication of the lack of
25 quality and reliability of this individual's work.

1 And given that he was for all practical purposes the
2 prosecution's case here, I mean, there's no question
3 of relevance.

4 MR. PETRANO. Your Honor, what we just heard was
5 basically testimony by --

6 THE COURT: I understand.

7 MR. PETRANO: Thank you, Judge.

8 THE COURT: It's in the record now.

9 MR. PETRANO: The State requests that it be
10 stricken.

11 MR. BLUME: Given the --

12 THE COURT: Can you authenticate this?

13 MR. BLUME: I cannot authenticate it.

14 THE COURT: Can you supplement the record?

15 MR. BLUME: But I would ask -- yes. That was
16 going to be my request -- that we be given the
17 opportunity to supplement the record. There's no
18 question this is the actual record.

19 MR. PETRANO: May I just inquire as to what form
20 the authentication is going to come in so I'm not
21 surprised when it comes from another third party?
22 How are you going to authenticate it?

23 MR. BLUME: Well, I will do -- obviously at this
24 point the transcript obviously exists. So we'll go
25 and find who the court reporter is and get a

1 certified copy of that transcript from the court
2 reporter.

3 THE COURT: Do that. That will satisfy the
4 Court.

5 Q Now, just a few more things, Ms. Hudgins. As far as
6 the actual decisions about what to present on the
7 ballistics evidence, as I understand it, what you're
8 saying is that would have been Mr. Delgado's
9 decision?

10 A That's correct.

11 Q So it's pointless for me to ask you questions about
12 why something wasn't done in that regard. As to the
13 closing arguments, whose responsibility would it have
14 been to object to anything perceived to be
15 impermissible if there was anything during the
16 closing?

17 A That would have been Mr. Delgado's call.

18 Q That would have been Mr. Delgado's call?

19 A Yes.

20 Q So that would not have been something that you would
21 have done either?

22 A That's correct.

23 Q Now, finally let me ask you; during the course of the
24 representation, did you get to know Mr. Freiburger?

25 A Yes. I did.

- 1 Q And did you get to know members of his family?
- 2 A Yes, I did.
- 3 Q And did you do any investigation or find out anything
- 4 about his character? Character I guess.
- 5 A Yes. We had lots of information about Ed's
- 6 character, his background, his family's background.
- 7 I feel like that part of the case I was probably more
- 8 involved with than the actual going through the
- 9 documents. So, yes. We had a lot of information
- 10 about Ed and his family and his good character.
- 11 Q And is it fair to say that had you chosen to do so
- 12 you could have presented numerous character witnesses
- 13 on Mr. Freiburger's behalf?
- 14 A I'm not sure I've ever had a client that had more
- 15 positive character witnesses than Mr. Ed Freiburger.
- 16 Q And what would have been the general gist of the
- 17 testimony that these witnesses could have provided
- 18 had they been called?
- 19 A That Ed is a great guy, that he's an active member of
- 20 his community, that he has always been a law-abiding
- 21 citizen, that he was just a good guy and that he
- 22 raised three wonderful children. He had
- 23 grandchildren. He was an active member of his
- 24 church. I could go on. I mean, the general text of
- 25 it was he was just a good guy. Two of his children I

1 believe were in law enforcement. He volunteered with
2 youth groups.

3 (WHEREUPON, Applicant's Exhibit No. 13 is marked
4 for identification.)

5 Q For purposes of simplicity of the record, Ms.
6 Hudgins, I want to show you what has been marked as
7 Applicant's Exhibit 13 which is actually a
8 combination of documents. It includes an affidavit
9 of Russell York, an affidavit of Connie Hosier, an
10 affidavit of Carole Tinbarger, an affidavit of Pamela
11 Jordan, and finally an affidavit of Ed Habrowski.

12 And all I would just ask you, if you could just
13 briefly take a look at those and just tell me if
14 that's the type of -- generally the type of
15 information that would have been available at trial
16 as character evidence had you put that on?

17 A If I may just briefly review these?

18 Q Yeah.

19 A Right now I'm reviewing the affidavit of Russell York
20 who is the chief of police for the Fort Wayne Police
21 Department where Ed and his family lived. He just
22 talks about --

23 MR. PETRANO: Your Honor, I'm going to object to
24 publishing these.

25 THE COURT: Yes. He asked you just to read

- 1 them, not to the court, just to yourself and see if
2 they coincide with your evaluation of Mr. Freiburger.
- 3 A I have quickly glanced over all three of these, or
4 the three affidavits that you provided to me, and
5 they are completely consistent with my impressions of
6 Ed's character.
- 7 Q Okay. There's actually another one. They got away
8 from me.
- 9 A Oh-oh.
- 10 Q And then I just want to ask you; there's two other,
11 Carole Tinbarga and Connie Hosler. And see again if
12 this is ...
- 13 A Yeah. They are consistent with, you know, reputation
14 for peacefulness. As I testified to earlier I think
15 on this other, this fifth one; yeah, they're all
16 consistent with him being a law-abiding, active
17 member of his community. Again, like I say, I don't
18 think I've ever had a client that had as many good
19 character references or witnesses.
- 20 Q And do you recall that this evidence was not
21 presented at trial?
- 22 A Yes.
- 23 Q And do you recall, do you know why it wasn't
24 presented at trial?
- 25 A I am not certain why it was not presented.

1 MR. BLUME: Your Honor, we would move that these
2 affidavits be admitted. There has been testimony
3 essentially from Ms. Hudgins that there were numerous
4 witnesses, even more than these people, who could
5 have testified as to Mr. Freiburger's long-standing
6 history of peacefulness, his law-abiding behavior,
7 the fact that he worked in the community, was active
8 in his church, a good father, a good parent. All of
9 this was potentially relevant character evidence.
10 She's testified to that. These affidavits are a
11 demonstration of that, people who could have
12 testified --

13 THE COURT: Her testimony is what her testimony
14 is.

15 MR. BLUME: Pardon me?

16 THE COURT: Her testimony is what it is. So I
17 don't see -- what's the State's position?

18 MR. PETRANO: Your Honor, we object to
19 relevance. I think we've heard the relevant part of
20 this. But, second, that these --

21 THE COURT: I think her testimony is relevant.

22 MR. PETRANO: Well, what is the relevance of the
23 character affidavits really isn't clear in the brief.
24 But, nonetheless, I apologize if I'm jumping the gun
25 there. To answer your question more specifically,

1 these affidavits should not be allowed in. One, she
2 doesn't have any personal knowledge of any of it.
3 She's testified to what she does have personal
4 knowledge to, is that other people thought he had
5 good character.

6 There's nothing in here with these affidavits
7 that he's a murderer, he spent time at Leavenworth,
8 he's got obstruction of justice. This is a backhand
9 way to get clouded, one-sided testimony in regarding
10 his character without being able to cross examine
11 them, and the State objects to that on just
12 fundamental fairness grounds.

13 THE COURT: I sustain the objection. Her
14 testimony is what it is. And I don't know the source
15 of these affidavits or how they were prepared. The
16 State doesn't have the opportunity to cross examine
17 them. I sustain the State's objection.

18 MR. BLUME: Okay. I just would like to say then
19 for the record so our position is complete, the Post
20 Conviction Relief statute clearly allows for the
21 admission of affidavits.

22 THE COURT: I understand that.

23 MR. BLUME: And the affidavits were provided to
24 counsel some time ago with respect to the hearing if
25 they wanted to challenge the substance of it. But

1 the relevance of these, just so the record is clear,
2 I don't want the record to be unclear as to
3 relevance, is that these affidavits represent
4 testimony which could have been presented at Mr.
5 Freiburger's trial on --

6 THE COURT: She's testified to that. I think
7 she has testified to that and made that abundantly
8 clear.

9 MR. BLUME: And with that, I have no more
10 questions of Ms. Hudgins.

11 THE COURT: Cross examination.

12 CROSS EXAMINATION

13 BY MR. PETRANO

14 Q Ms. Hudgins, you explained how Mr. Delgado was the
15 primary attorney and you had more of a secondary
16 role. Did I hear that correctly?

17 A Correct.

18 Q Now, were you involved? While you may not have made
19 the big decisions, were you involved in them?

20 A I was involved on some of them. I can't tell you I
21 was involved with all of them.

22 Q- What about the ballistics? Were you involved? I
23 mean, are you aware of that topic?

24 A Generally, I'm --

25 Q I didn't mean that --

- 1 A No. I know. Generally, I think I can recall Mr.
2 Delgado and I having some conversations about whether
3 there was a need to hire our own private ballistic
4 expert. You will have to ask him why that was not
5 done.
- 6 Q Wait. So you weren't there or you were? You said
7 you had conversations?
- 8 A We had a conversation about it, and I think Mr.
9 Delgado made the decision not to hire one.
- 10 Q But as part of the team, why was that?
- 11 A We were just discussing whether or not that was going
12 to be done. I didn't question him as to why it
13 wasn't done.
- 14 Q So he just told you he wasn't going to get one and
15 you don't know anything more?
- 16 A I think he was going to rely on the SLED analysis
17 that came back inconclusive rather than as a way to
18 attack the State's expert. As it turned out, in my
19 opinion, we should have hired our own independent
20 expert in ballistics.
- 21 Q Why do you say that?
- 22 A I don't think the testimony from the SLED agents was
23 as strong as we hoped it would be in contradicting
24 the other expert that was retained by the State.
- 25 Q But you say that in hindsight just because everything

1 went poorly?

2 A Well, no. I mean, I think as a defense attorney,
3 when you're looking at using SLED as your own expert,
4 you need to be careful because SLED is not typically
5 on the defense side. SLED is typically on the side
6 of the prosecutor.

7 Q Did you voice that concern to Mr. Delgado?

8 A You know, Brian, Mr. Petrano, I'm not sure whether I
9 did or not.

10 Q Was it a concern that if you did get an independent
11 expert that that could be a match?

12 A No.

13 Q But you have no way of knowing because you never got
14 one?

15 A Correct.

16 Q All right. Were you involved in any discussions as
17 to whether the Applicant should testify at the trial?

18 A I do not remember being involved in those
19 discussions.

20 MR. PETRANO: Okay. Nothing further. Thank
21 you, Judge.

22 MR. BLUME: No redirect.

23 THE COURT: All right, ma'am. You may come
24 down. May this witness be excused?

25 MR. BLUME: Yes, sir.

1 THE COURT: Without objection. Next witness.

2 MR. BLUME: It's my understanding that Mr.
3 Delgado is at the doctor's office with his wife, and
4 he would have been the final witness we would have
5 called if he were here.

6 THE COURT: All right. It appears then that
7 we'll have to do him either by deposition or at some
8 time when he's available and obviously you're
9 available.

10 MR. BLUME. That's fine, Your Honor.

11 THE COURT: We'll have to -- he has communicated
12 to the Court as well that he has a medical emergency.

13 MR. PETRANO: Yeah. I didn't want to put the
14 details on the record. But medical is medical,
15 Judge. No objections here.

16 THE COURT: We'll just have to take his -- we'll
17 work it out so that you'll have his testimony and the
18 State will be able to cross examine him.

19 MR. BLUME: So then what I would suggest is that
20 I talk with Mr. Delgado about some potential times
21 and Mr. Petrano and I can discuss times and possibly
22 at a deposition versus reconvening, and then we'll
23 provide the Court with maybe certain alternatives to
24 choose from.

25 THE COURT: That will be fine.

1 MR. BLUME: And so the Applicant doesn't rest
2 but he rests for now until Mr. Delgado's testimony is
3 taken.

4 THE COURT: All right. State's witness.

5 MR. PETRANO: Yes, Your Honor. Just a couple of
6 brief arguments here. I think that regarding the
7 ballistics issue, the State is a little confused as
8 to whether it's ineffective assistance of counsel or
9 newly discovered evidence. If you want, I can save
10 this for the end, but my point being --

11 THE COURT: Are you talking about the --

12 MR. PETRANO: The criticism of ballistics.

13 THE COURT: -- witness or --

14 MR. PETRANO: Yes. My --

15 THE COURT: The witness?

16 MR. PETRANO: Yes.

17 THE COURT: Go ahead.

18 MR. PETRANO: My point is, all of her testimony
19 regarded --

20 THE COURT: Of the expert.

21 MR. PETRANO: The expert -- new developments in
22 criticism of firearm and tool identification. There
23 was really nothing beyond a couple of little critical
24 studies that were before the actual trial. So as far
25 as the Strickland analysis and ineffective assistance

1 of counsel, I don't think that there has been any
2 demonstration that trial counsel was ineffective for
3 failing to make an argument that basically wasn't
4 being made at that time, the standard being whether
5 counsel was deficient under the reasonable norms of
6 the profession here in South Carolina. I think that
7 even by the Applicant's own expert, that simply was
8 not an issue that was being raised at that time here
9 in South Carolina. So I think that that issue fails
10 as a matter of law.

11 That being said, Your Honor, we do have a
12 rebuttal witness to that expert, Mr. Parnell, who did
13 testify at the trial.

14 THE COURT: Come around, Mr. Parnell.

15 IRA B. PARNELL, JR., after being duly sworn,
16 testifies as follows:

17 THE COURT: Be seated in the witness box. State
18 your full name for the record.

19 THE WITNESS: My name is Ira Byrd Parnell, Jr.,
20 P-A-R-N-E-L-L.

21 DIRECT EXAMINATION

22 BY MR. PETRANO

23 Q Sir, what is your current occupation?

24 A I am a firearms examiner assigned to the firearms lab
25 at SLED headquarters here in Columbia.

1 Q How long have you been employed by SLED?

2 A Thirty-seven years.

3 Q What are your duties there?

4 A What are my duties currently, or what have they been?

5 Q Both.

6 A Well, I began my career while I was going to college
7 here at USC and then continued my employment there as
8 I was assigned to the firearms laboratory in 1973.
9 Since that time I have worked my way up through the
10 ranks in the firearms department, have been
11 supervisor and have retired and come back and am
12 assisting part time now doing essentially the same
13 things I've done for the last 36 years, which is
14 examine firearms and firearms related evidence.

15 Q And what is firearms identification?

16 A Essentially firearms identification is the
17 microscopic examination of fired components, whether
18 they are fired bullets or fired cartridge cases, and
19 known test fired bullets and cartridge cases which
20 are fired from various kinds of firearms, the
21 microscopic comparison of the test versus the
22 unknown, or evidence, to try and make a determination
23 if there is a relationship between the unknown
24 evidence fired components and the known components
25 fired by the known firearm.

1 Q And what makes that actual identification possible?
2 A The fundamental assumption of uniqueness within fired
3 components that come out of various firearms. It's
4 been shown by many studies over the years, for
5 approximately the last 90 years, that based on
6 probably millions of comparisons I would guess by
7 now, individual microscopic comparisons, that there
8 have been no two fired bullets that have been
9 identical to each other such that a trained firearms
10 examiner could not determine whether or not a bullet
11 was fired at a particular barrel unless that
12 particular gun had been left to rust or degrade or
13 the evidence was in such condition that it could not
14 be examined.

15 There are certain firearms that mark bullets in
16 such a light manner or they don't put much marks on
17 there that sometimes you cannot make a conclusive
18 determination whether these components were or were
19 not fired in the gun submitted.

20 Q And you talked about your degree from USC. Have you
21 had any specialized training in firearms
22 identification?

23 A Yes, sir. I went through the specialized techniques
24 school at the FBI Academy in Quantico. I've been to
25 numerous AFTE or AF-TEE (phonetic) as we call it

1 conferences where the basic techniques of firearms
2 and toolmarks examination are discussed, papers are
3 presented, articles are presented by different
4 examiners which point out different and new
5 techniques that may be coming around or different
6 firearms manufacturing or toolmark manufacturing
7 techniques that make us aware of these things and to
8 be cognizant of these changes.

9 Q And are you a member of any professional associations
10 regarding firearm and tool examination?

11 A I'm a member of AFTE or the Association of Firearm
12 and Toolmark Examiners.

13 Q Have you testified before as an expert in courts in
14 South Carolina?

15 A Yes, sir, I have.

16 Q About how many times?

17 A Approximately 580.

18 Q And in other states?

19 A I've testified in North Carolina and Virginia.

20 Q Have you ever not been qualified as an expert?

21 A No, sir.

22 MR. PETRANO: Your Honor, the State moves to
23 recognize this witness as an expert in firearms and
24 toolmark examinations.

25 THE COURT: Any voir dire or objection?

1 MR. BLUME: No, I don't have any objection.

2 THE COURT: All right.

3 Q Sir, do you have any personal knowledge of this
4 particular case?

5 A Yes, sir, I do.

6 Q Now, this being a PCR, it's a little different than a
7 normal trial. But can you tell us how that is? Did
8 you testify at the other trial?

9 A I did.

10 Q And do you recall your testimony?

11 A Pretty well. Yes, sir.

12 Q Did you review a firearm or firearms regarding the
13 Applicant's case?

14 A I did.

15 Q Tell us about that. ,

16 A This case was very unusual from the beginning in that
17 based on its age, the fact that the evidence was
18 still at SLED and as it happened in my custody at the
19 time that the request for the reopening was made. It
20 had been at SLED and under climate controlled
21 conditions for 10 these many years. And at the time
22 the request for the reopening of the case was made,
23 it was in my custody, in my evidence room sealed in a
24 large cardboard box.

25 And when the request was made by the Richland

1 County Cold Case Group, I told them that I had the
2 evidence. And it was very surprising to them. And
3 so, anyway, the evidence as I looked -- when I opened
4 it up and looked at it, it was in pristine condition
5 from 41 years ago; no rust, not any problems with it.
6 I mean, they were just like I guess they were in
7 1961.

8 Q Did you examine them?

9 A I did.

10 Q And what were the results of that?

11 A I test fired both firearms and examined -- well, I
12 examined -- first I examined the tests that were
13 fired in 1961 from both firearms and got a feeling of
14 how each gun was behaving and how it was marking the
15 bullets that were fired through it. I then test
16 fired my own tests using both firearms and similar
17 ammunition, because we keep on hand some old
18 ammunition for this purpose. I don't know they were
19 exactly the same age but they were quite old. I test
20 fired those and compared those with the tests from
21 1961. And I determined that they were marked in
22 substantially the same manner. I could easily
23 distinguish between the tests fired from each
24 firearm.--

25 I then compared the three fired bullet fragments

1 from Mr. Orner. I found numerous similarities. By
2 similarities I mean common marks that were present on
3 the tests from 1961, the tests that I fired and the
4 tests that -- or excuse me -- the marks that were on
5 the evidence bullets from Mr. Orner's head from the
6 what we called item number 2 firearm I believe it
7 was.

8 The other firearm, I didn't see any agreement
9 past class characteristic agreement, which simply
10 says that it was potentially fired out of an H&R
11 firearm.

12 The condition of the evidence bullet was such
13 that the body fluids that were present in 1961 had
14 degraded the surface of the bullet to a certain
15 degree and there were certain residues that were
16 still on the bullet that I couldn't get off.

17 So, consequently, based on the limited amount of
18 agreement that we had to the gun that was reported to
19 us as being Mr. Freiburger's gun, our results on that
20 was inconclusive. And in an inconclusive result,
21 when we have two guns that are just alike and a
22 degraded evidence bullet that's in three pieces, the
23 conclusion would have stated, as it did in my report,
24 that although I found no individual characteristic
25 agreement between the gun that was not Mr.

1 Freiburger's and I did find some that was from the
2 gun Mr. Freiburger had, then the results were
3 inconclusive and it could have been fired in either
4 one of the guns or another similarly rifled firearm
5 which indicates another H&R firearm with like class
6 characteristics.

7 Q And you testified to that at the trial?

8 A I did.

9 Q And what did you do or -- yeah. What did you do with
10 the evidence after you were done with it?

11 A At the request of the Richland County Sheriff's
12 Department, it was turned over to them. And as I
13 understand it, they sent it out to Mr. Cayton.

14 Q And you were there at the trial and saw Mr. Cayton's
15 testimony?

16 A I was at the trial in and out, but I'm not sure that
17 I heard John testify.

18 Q Are you familiar with what he did and that he matched
19 it or did not match it?

20 A Yes, sir.

21 Q Can you tell us about that?

22 A I mean, it --

23 MR. BLUME: Judge, I think if he doesn't know,
24 he was present, I think Mr. Cayton's testimony speaks
25 for itself as to what it was.

1 THE COURT: All right.

2 Q Are you familiar with the results of Mr. Cayton's --

3 A I am.

4 Q -- examination? And do you know if he did a -- was
5 he -- never mind. Sorry about that. Are there any
6 protocols that you follow in your discipline?

7 A Yes, sir. We have procedures and protocols that we
8 follow during each and every examination.

9 Q Are you aware of or have you participated in any
10 statistical studies, particularly in consecutively
11 rifled or manufactured firearms?

12 A I have.

13 Q And how were you involved in those?

14 A As an examiner doing what we call the ten-barrel
15 test. It's a test that was set up to determine
16 whether or not ten consecutively rifled barrels off
17 of an assembly line could be distinguished, or marks
18 rather from the inside of the unfired pulls can be
19 distinguished one from the other.

20 Q Now, you said you testified in other cases. Have you
21 ever testified that a firearm and a projectile was a
22 match? And I apologize if I'm getting the jargon
23 wrong.

24 A Yeah. A negative or an exclusion.

25 Q A positive match?

1 A Oh, positive. Yes. I've testified many times.

2 Q And then do you ever follow that up with an
3 exclusionary comment as to that would be excluded to
4 all other firearms? Is that common within the
5 discipline?

6 A That language prior to probably the last four or five
7 years was real common. Yes. I have testified to the
8 exclusion of any other firearm many times before.

9 Q And can you tell us how you reach that conclusion?

10 A By the uniqueness and the individuality of the
11 firearm and the marks that it leaves. When we test
12 fire a firearm using similar ammunition to the
13 evidence that's submitted, whether it's this case or
14 any other case, the first thing we do is determine if
15 the gun is operable. The second thing we do is
16 determine its condition. You know, is it cocked or
17 is it open or what is the condition of the gun.

18 And then once we get to the point of test
19 firing, we determine by microscopic comparison if the
20 test bullets are marked substantially the same; in
21 other words, do they look like each other.

22 And if they do, then we can conclude that this
23 firearm, this marking each bullet that's fired out of
24 its barrel in substantially the same fashion; not
25 identically, but substantially the same fashion, such

1 that a trained firearms examiner could tell that they
2 were fired out of this gun barrel.

3 Then and only then do we microscopically compare
4 any evidence that is submitted to the tests that we
5 fire. And if we find agreement such that we feel an
6 identification is warranted, then we so report and
7 put that in our notes.

8 Q Now, were you here earlier today to hear the
9 testimony of Dr. Schwartz?

10 A Yes, sir, I was.

11 Q Now, while she's not a firearms tool examiner, did
12 you have any comment to what she was testifying to?

13 A Quite a few.

14 Q Go ahead and tell us.

15 A But I still would say that, you know, with all
16 respect to Dr. Schwartz, she is not a firearms
17 examiner. And someone who has read and is as
18 conversant as she is on all the various rulings and
19 all the various studies and all the various things
20 that are currently going on in the field of firearm
21 and toolmark identification, I still submit that she
22 is not a trained firearm and toolmark examiner and
23 does not understand the concept of microscopic
24 comparison of individual markings as we see it
25 day-to-day.

1 Q Now, she had mentioned -- she had criticized the
2 examination in this case regarding that there was
3 only grooves. Or I may have missed it. Did you
4 agree with that portion of her testimony?

5 A Well, here again with all due respect to Dr. Schwartz
6 in her capacity as a non-firearms examiner, the
7 technical jargon of a firearms examiner is a little
8 different than what you might read into it if you're
9 not familiar with it; I went back and reviewed my
10 notes, and my notes indicate that there were three
11 grooves present. We do not rely on land markings on
12 the bullet.

13 Now, when I say land on the bullet, that's a
14 raised place. Okay. And when I call it a groove on
15 the bullet, that's a land impression. Land is what
16 puts the most reliable marks on a fired bullet
17 because it is the part that is left basically
18 unfinished after the drilling and reaming is done.

19 Anything that's on a groove, as Dr. Schwartz
20 stated quite correctly, is not reliable because
21 subclass characteristics may enter in on a land on
22 the bullet or groove impression. So land impressions
23 is what we examine. And there were three partial
24 land impressions; very little, if anything, on the
25 other two fragments.

1 Q Now, do you know -- you had mentioned that there was
2 some tissue or bone fragment -- and I apologize if
3 I'm getting that wrong -- on the fragments that you
4 saw and you did not want to remove those. Do you
5 know if those were removed ever?

6 A Well, I soaked the bullets in a very non-invasive
7 manner. It's been my experience that any heavy-duty
8 cleaning on a copper-plated or a Lubroid-plated lead
9 bullet, it could be very detrimental. So I didn't do
10 anything past soaking.

11 As I understand it, Mr. Cayton used a sonic
12 cleaner method to possibly remove some more of this
13 body tissue residue. In talking with him, I didn't
14 get into very great detail, but I did understand that
15 he was able to clean the bullets up some, or the
16 fragments up some.

17 Now, having said that, if I could have seen more
18 on the two fragments that were obscured during our
19 examination, then, you know, our results could have
20 possibly been different than what they were.

21 Q And are there always photographs taken?

22 A In our laboratory there are.

23 Q And when -- there was some suggestion -- and I think
24 you were even cross examined about it at the trial,
25 and I may be mistaken. But there was suggestion by

1 Dr. Schwartz, if you recall her testimony, regarding
2 the inadequacy of the science because no one followed
3 up. Were you here for that part?

4 A For her testimony today?

5 Q Yes.

6 A Yes, sir. I heard all her testimony today.

7 Q And do you ever follow up on other examiners?

8 A Yes. We have 100 percent micro verification at our
9 laboratory and have had for quite a few years. We
10 are accredited by the Association of Crime Laboratory
11 Directors or ASCLAD and have been since 1992. And as
12 a part of our accreditation process we have 100
13 percent micro verification so that at least two
14 examiners look at any conclusion that goes out of the
15 door.

16 Q And when another examiner looks at another examiner's
17 work, do they look at just the notes, or do they
18 actually look at the actual evidence itself?

19 A No. It's an actual re-examination of the evidence
20 itself. The notes themselves in the photographs,
21 they're documentation but they're not an examination.
22 We actually re-magnify, I mean, re-microscopically
23 examine each specimen.

24 Q So anyone could come and follow up on anything. They
25 just look at the evidence again. It's nothing to do

1 with photographs, correct?

2 A That's correct. I mean, photographs are
3 documentation and part of our note taking process but
4 do not enter into the conclusion whatsoever.

5 Q Thank you. I've got nothing further on direct.

6 CROSS EXAMINATION

7 BY MR. BLUME

8 Q Mr. Parnell, I think this will be mercifully short.

9 (WHEREUPON, Applicant's Exhibit No. 14 is marked
10 for identification.)

11 Q Mr. Parnell, at SLED, normally when you do an
12 evaluation you produce a report. Is that correct?

13 A Yes, sir.

14 Q And I'm going to show you what's marked as
15 Applicant's Exhibit 14. And can you tell me, is that
16 the report you issued in this case?

17 A It is, sir. It has my signature and markings on it.

18 Q And your ultimate findings in this case; I believe
19 you testified to it on direct, but just to make it
20 clear, is that from your examination of the bullet
21 fragment in this case, it could have been fired by
22 item 1 which was a Harrington & Richardson model 732,
23 serial number W-9893, correct? It could have been
24 fired by that?

25 A (Nods head affirmatively).

- 1 Q It could also have been fired by item number 2 which
2 is a Harrington & Richardson model 732, serial number
3 W-9948, correct?
- 4 A That is correct.
- 5 Q Or any other similarly rifled firearm of the same
6 caliber?
- 7 A Any other six-landed groove right twist .32 with
8 dimensionally consistent land and groove impressions
9 with a .32 H&R.
- 10 Q So it could have been essentially either one of those
11 two guns or any other sort of similar weapon?
- 12 A Well, the longer explanation of that result is that I
13 found no individual agreement with item 1. That
14 would be the Harrington & Richardson, I believe the
15 W-9893. And I think I stated that in the report.
- 16 Q But you could not exclude it?
- 17 A Exactly. And by the same token, I found some
18 individual agreement with item 2. But I couldn't
19 identify it.
- 20 Q But you could not identify it?
- 21 A Exactly. So, therefore, the very basis of an
22 inconclusive says that although I found none here,
23 some there, I still couldn't identify either one of
24 them or exclude either one of them. So the results
25 are inconclusive.

- 1 Q Right. Or exclude any other sort of similar
2 projectile that might have been fired by another gun
3 of that caliber and type is what your report says?
4 A With similar standards. Yes, sir.
5 Q Right. Were you -- now I can't find the exhibit.
6 THE COURT: Here it is.
7 MR. BLUME: I'm sorry, Your Honor.
8 Q And do you remember -- do you know who Lieutenant
9 Cate is?
10 A I certainly do. He was one of my training officers
11 and he hired me. Yes, sir.
12 Q And are you familiar with the letter that he wrote in
13 1961 to J. Edgar Hoover?
14 A Well, Mr. Cate didn't write it, did he?
15 Q I'm sorry. Mr. Strom wrote that.
16 A Mr. Strom wrote that. The answer here is I have a
17 bad copy of it. Yes, sir.
18 Q And you were aware I guess that that letter indicates
19 that Lieutenant Cate -- it says that Lieutenant Kate
20 is of the opinion that this weapon, that would be the
21 weapon taken from Mr. Dreher, killed the taxi driver
22 based on bullet comparisons, but withheld a formal
23 report because of the condition of the bullet?
24 A I see that in the letter. But I also know that
25 Mr. Kate didn't write a formal report indicating one

1 way or the other. But I am familiar with the letter
2 and I do see what's written here, and that is what it
3 says.

4 Q That is what it says, correct?

5 A Mm-hmm (affirmative).

6 Q So at least in the correspondence between Mr. Strom
7 and Mr. Hoover, again, he'd indicated he did not do a
8 formal report but that Lieutenant Cate thought in
9 fact that the other weapon was in fact the weapon in
10 the letter?

11 A That's what the report or the letter says that
12 Mr. Strom wrote. Yes, sir. You are correct.

13 Q And that letter was written for the purpose of
14 obtaining, attempting to obtain assistance from the
15 FBI in doing an additional examination of the bullet?

16 A Correct. Yes, sir.

17 Q But which I understand they didn't do according to
18 their policy at the time?

19 A That is correct. And still is. Yes, sir.

20 Q If somebody else has evaluated it, the FBI won't do
21 it?

22 A We won't either. That's correct.

23 Q Now, there has been -- now, you also in your notes,
24 in looking at your report, you noted that there was
25 distortion present in the bullet. Is that correct?

- 1 A Yes, sir. It was in three fragments, three pieces;
2 and there was some twisting and distortion present.
3 Yes.
- 4 Q And that in itself, that complicates the
5 identification procedure?
- 6 A It can. Yes, sir.
- 7 Q And now, were you -- are you familiar with -- there
8 were the reports -- Dr. Schwartz talked about the
9 reports of the NRC and the ballistics imaging report.
10 Are you familiar with those reports?
- 11 A Yes, sir.
- 12 Q And I understand that, you know, obviously there's a
13 difference of opinion about that between you and Dr.
14 Schwartz. But you are familiar with the fact that
15 those reports at least challenge, say the fundamental
16 premise of uniqueness has not been scientifically
17 proven?
- 18 A According to them.
- 19 Q According to them. And in response to that, have you
20 read the AFTE response to that?
- 21 A I have.
- 22 Q And are you familiar with the fact that in the AFTE
23 response that they admit in the response that
24 firearms examiners should not testify that this gun
25 to the exclusion of all other guns in the world fired

1 the projectile?

2 A I understand that the acceptance of various
3 association or identification language has modified
4 over my career certainly and over the last few years.
5 And I think in fact the last few times that I have
6 testified as an expert in firearms identification
7 that the language was to a reasonable scientific
8 degree of certainty or words to that effect. Yes,
9 sir.

10 THE COURT: And just let me interrupt you for a
11 minute. Both in your brief and during your colloquy
12 with the witnesses, you keep referring to "any other
13 gun in the world". Unless I am reading the
14 transcript in error, the question was: Is that to
15 the exclusion of any other and every other .32
16 Harrington & Richardson? And the answer was: Yes.
17 I don't find that to the exclusion of all other guns
18 in the world. It may be insignificant.

19 MR. BLUME: Yes. I think he says it a little
20 different somewhere else. But I agree. I don't mean
21 to over -- the testimony obviously is what the
22 testimony is, what he said.

23 THE COURT: It's a more limited field if it's
24 just every other .32 Harrington & Richardson as
25 opposed to every gun in the world.

1 MR. BLUME: Your Honor, I'm sorry.

2 THE COURT: Go ahead.

3 Q Now, are you familiar with Biasotti? Do you know who
4 he is?

5 A I do.

6 Q And are you familiar with his work in modern
7 scientific evidence on discussion of firearms?

8 A I've read it at some time in the past. Yes, sir.

9 Q And Biasotti, is he sort of thought of as one of the
10 fathers of this field?

11 A He's an old-time examiner. I think he's passed away,
12 has he not?

13 Q Recently, yes.

14 A Yes. But, yes. He was a long-time examiner and a
15 long-time experimenter in testing theories, you know,
16 throughout his career.

17 Q And are you aware of the fact that in his studies
18 that they found that bullets fired from different
19 barrels or no non-matches, range -- they had 15 to
20 20 percent sort of non-matching striae?

21 A Define striae.

22 Q Pardon me?

23 A Define striae.

24 Q Well, you tell me what it is.

25 A See, therein lies the rub. And we've done tests

1 where 100 of us are in a room like this. They give
2 us all the same photograph, the same limited number
3 of striations or striae. Some people see 12. Some
4 people see 120. The majority of the examiners noted
5 60, about.

6 So with all due respect to Al and his research,
7 the definition of a striation, you know, sometimes
8 cannot be really pinned down. That does not mean
9 that the same 120 examiners couldn't take five fired
10 bullets and determine whether or not they were fired
11 in the same gun or not. It's just a perception issue
12 as to the striations. Yes, I'm familiar with what
13 you're talking about.

14 Q Okay. And, you know, you would agree with me that
15 mistakes are sometimes made?

16 A There have been documented cases where
17 misidentifications have been done, although few. If
18 you are defining a mistake as saying, yes, this gun
19 fired this bullet when it actually didn't, that's
20 definitely a mistake. If you are saying that if I
21 say a bullet or a test is inconclusive and it
22 actually was positive, then I don't consider that a
23 mistake. I consider that being conservative. So
24 that's just to have that clear. But, yes, there are
25 mistakes made occasionally.

1 Q And in fact the record in this case revealed that Mr.
2 Cayton had previously made a mistake in another case.
3 Were you familiar with that?

4 A I wasn't until you brought it out.

5 Q And at the time of the trial were you aware of the
6 fact that Mr. Cayton had been terminated from the
7 Kansas Bureau of Investigation?

8 A No, sir. I was not.

9 Q And did you know what the Kansas Bureau of
10 Investigation is?

11 A I do.

12 Q Is it --

13 A It's the Kansas equivalent of SLED.

14 Q SLED. So you were not aware that he had been
15 terminated from there as an examiner for his failure
16 to follow policies, protocols and procedures?

17 A I was not aware of that. No, sir.

18 Q Nothing further.

19 THE COURT: Any redirect?

20 MR. PETRANO: Nothing, Your Honor. Thank you.

21 THE COURT: You may come down, sir.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: May this witness be excused?

24 MR. BLUME: Yes, Your Honor.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Without objection. Mr. Petrano.

2 MR. PETRANO: Your Honor, just very briefly, I
3 have just some summation of cases that firearms and
4 expert firearm testimony was admissible. I think
5 there was some criticism that there had been some
6 cases that it was not. I have a non-exhaustive list
7 of probably a couple, three or four dozen. If Your
8 Honor is interested in those, I can provide those to
9 the Court. It's a simple matter of Westlaw. I
10 wasn't trying to ...

11 THE COURT: Is there -- you say there's an issue
12 as to whether or not the firearms testimony was
13 admissible at all?

14 MR. PETRANO: Well, we've had a hearing today --

15 THE COURT: In the original trial?

16 MR. PETRANO: No, Your Honor. I'm talking about
17 here today.

18 THE COURT: Oh. You're talking about here
19 today. Okay.

20 MR. PETRANO: There has been a criticism of
21 basically the entire discipline as far as firearms.

22 THE COURT: I understand.

23 MR. PETRANO: And I just wanted to provide it to
24 Your Honor if you want.

25 THE COURT: Absolutely.

1 (Documents handed to the Court)

2 MR. PETRANO: I'll just mark this list as
3 State's 1?

4 COURT REPORTER: Respondent's 1.

5 (WHEREUPON, Respondent's Exhibit No. 1 is marked
6 for identification.)

7 MR. PETRANO: Your Honor, that's the State's
8 case except for arguments. But I don't know if you
9 would rather have my argument after the Applicant's
10 as far as a closing type argument.

11 THE COURT: Well, do you want to do that? I
12 guess it would be most the expeditious use of our
13 time to go ahead and do that now. I was wondering if
14 you wanted to do it after Mr. Delgado's testimony.
15 But that could be a supplemental matter at that time.
16 Let's hear from the Applicant at this time. Now, --

17 MR. BLUME: Yes, Your Honor.

18 THE COURT: -- if you go in any order, I have
19 your Fourth Amendment application for Post Conviction
20 Relief. If you care to go in that order, I can
21 follow you, or suit yourself.

22 MR. BLUME: Yes. And of course we're at a
23 little bit of a handicap since the main actor or main
24 player I guess, one of the main players, Your Honor,
25 hasn't yet testified.

1 But if you want me to go in that order, ground
2 10(A) has to do with the admission of evidence, of
3 hearsay evidence at Mr. Freiburger's trial. As you
4 know, Your Honor, this crime occurred in 1961 and Mr.
5 Freiburger was not charged with this until 2001 and
6 the trial was in 2002.

7 At his trial a police officer, a City of
8 Columbia police officer, Mr. Clark, was called to
9 testify. During the course of his testimony he was
10 allowed to publish verbatim extensive passages from a
11 police report which was prepared at the time of
12 trial; I mean, at the time of the offense, the time
13 of the investigation.

14 And the parts of the report he published
15 essentially contained multiple hearsay. The police
16 went here. They talked to this person. This is what
17 they said. They were able to sort of talk to people
18 to document and indicate that the victim went and got
19 a call, went to the fort or most likely got a call
20 and went to the fort. And they were able to use this
21 report essentially to fill in numerous holes in their
22 case.

23 In addition to that, when Mr. Ebersold
24 testified -- Ebersold had previously been in Mr.
25 Freiburger's unit -- and at the time he testified, he

1 did testify at trial, but his trial testimony
2 indicates he had no recollection then of most of the
3 statements which were contained in essentially an
4 investigative report.

5 I believe it was prepared by the military
6 authorities, but it may have been by the City of
7 Columbia Police. I don't remember truthfully at the
8 time. And he couldn't remember. He was not shown
9 the document, essentially allowed to refresh his
10 recollection. He was allowed to publish essentially
11 his statement verbatim. And both of these items of
12 evidence are in our view clearly testimonial hearsay.

13 THE COURT: All right. Let me stop you there.
14 Are you familiar with the case of the Supreme Court,
15 United States Supreme Court case of Whorton vs.
16 Bockting?

17 MR. BLUME: Yes, Your Honor.

18 THE COURT: How does what your argument on
19 Crawford apply in a collateral proceeding such as
20 this when the Supreme Court says because Crawford
21 announced the new rule and because it is clear and
22 undisputed that the rule is procedural and not
23 substantive that rule cannot be applied in this
24 collateral attack on Respondent's conviction unless
25 it is a watershed rule of criminal procedure?

1 And they find that it was not a watershed rule
2 of criminal procedure and it was not to be allowed in
3 collateral review. So I am -- I mean, I think that's
4 a fundamental question going to your whole Crawford
5 argument in this collateral review.

6 MR. BLUME: Well, Your Honor, fortunately, there
7 is an easy answer to this. And it's an easy answer
8 which is favorable to Mr. Freiburger. What Whorton
9 vs. Bockting says is that Crawford is not applicable
10 to cases which were final on direct appeal --

11 THE COURT: Well, that's the next question.

12 MR. BLUME: -- at the time it was decided.

13 THE COURT: And the direct appeal was in 2005.
14 I mean, the finality of the direct appeal was
15 September 26th, 2005.

16 MR. BLUME: That's correct. And Crawford was
17 decided prior to that. And thus, according to
18 Whorton vs. Bockting, and any essentially
19 retroactivity decisions decided by the Supreme Court
20 of the United States, Crawford clearly applies to his
21 case. There is no issue of retroactivity in here.

22 Bockting was a situation in which the direct
23 appeal of the case was final before Crawford came
24 out. Here the direct appeal had not been decided.
25 In fact, the briefs were not even yet filed at the

1 time Crawford came down.

2 THE COURT: Go ahead. No. I mean, I wanted
3 that on the record if that's your appeal.

4 MR. BLUME: So it is clearly retroactive. And
5 so, I mean, to me there's no question this is
6 testimonial hearsay. It was taken by law enforcement
7 in the furtherance of the investigation. That's
8 testimonial hearsay under all the Supreme Court's
9 testimony of hearsay decisions.

10 He was not -- Mr. Freiburger did not have the
11 opportunity to confront these witnesses against him.
12 And this was important, an important component of the
13 prosecution's case. And we have heard appellate
14 counsel say that he did not have a strategic reason
15 for not raising this on appeal. And yet, so the
16 question is, I think clearly there is a meritorious
17 Crawford claim. The only issue is the ineffective
18 assistance of counsel component of it.

19 It was objected to at trial under the State
20 hearsay rules. They're essentially put differently.
21 The prosecution moved to get this in as both an
22 ancient document and as a business record. And
23 counsel opposed that and argued against it saying
24 that it did not meet any of the criteria, didn't meet
25 those criteria, and the judge allowed it in over his

1 objection.

2 He did not make, at least based on our review of
3 this, a confrontation clause objection to it. I
4 mean, the testimony is a little sort of squishy on
5 the record. He does say I think at one point in
6 relation to Ebersold, well, I can't cross examine
7 him. And at one point the judge does seem to say,
8 well, there's always some tension between the
9 confrontation clause and the hearsay rules.

10 But I think under the fairly strict preservation
11 requirements which are currently applied by the South
12 Carolina Supreme Court, the objections there would
13 not constitute a confrontation clause objection to
14 it.

15 The reason we raised it as both ineffectiveness
16 of trial counsel and appellate counsel is in the
17 event the Court were to disagree with us and find
18 that counsel had preserved the issue at trial on the
19 confrontation clause grounds, then it raises
20 appellate ineffectiveness on the basis, well, if that
21 was true, then it should have been raised on direct
22 appeal and it wasn't. And you've heard the testimony
23 there wasn't a strategic reason for failing to do
24 that. So that really is sort of just the nub of the
25 first three claims.

1 Now, that brings us to 10(D). And this has to
2 do with the issue of third party, whether there were
3 other potential third party people that could have
4 been -- that the defense could have presented as
5 evidence that someone else committed the crime which
6 was not done at trial.

7 And this claim actually has two components. It
8 has a component based on simply an ineffective
9 assistance of counsel component and a Brady component
10 to it. The ineffective assistance component is that
11 at the time of trial counsel were in possession of
12 information that another soldier, a man by the name
13 of John Morgan -- the victim in this case was John
14 Orner, so it gets kind of confusing -- but that
15 another soldier was in Mr. Freiburger's unit, and
16 Mr. John Morgan was seen at or around the time of the
17 murder and that he was observed by another soldier, a
18 Mr. K. Beaver, that he came back to the barracks and
19 he had blood on him and shortly after this he
20 disappeared and went AWOL.

21 So, it is, you know, our contention that this is
22 information which could have been presented under the
23 third party guilt rules to indicate that there was a
24 viable other suspect. This particular individual
25 would also sort of fit in with the modus operandi

1 theory offered by the prosecution. There are some
2 problems with it. But essentially, their theory was
3 that the perpetrator most likely was a soldier at the
4 fort, and that was because of some evidence contained
5 in Clark's testimony as to sort of pattern and
6 practices of Mr. Orner, the cab driver.

7 THE COURT: You're alleging some Brady
8 violation?

9 MR. BLUME: Pardon me?

10 THE COURT: You're alleging some sort of Brady
11 violation?

12 MR. BLUME Well, yeah. The first part, they
13 had this information that I've talked about so far,
14 the part they didn't have which is the part --

15 THE COURT: Not disclosed?

16 MR. BLUME: Pardon me?

17 THE COURT: And it was not disclosed?

18 MR. BLUME: No. This was disclosed. I'm sorry.
19 No. This is the ineffective assistance argument.

20 THE COURT. All right.

21 MR. BLUME: That was disclosed and trial counsel
22 had that.

23 THE COURT: Okay.

24 MR. BLUME: And they didn't use that. And I
25 believe I asked Ms. Hudgins about why it wasn't used,

1 and she said she didn't know. And so we haven't yet
2 heard from Mr. Delgado on that.

3 Now, there is a part to this which we submit was
4 not disclosed. This was contained in the affidavit
5 of Mike Budenz which was marked earlier. And he
6 interviewed Mr. Morgan, and Mr. Morgan informed him
7 that he was in fact -- he was brought back. He was
8 arrested. He was brought back to Columbia. He was
9 at Ft. Jackson. He was put in the brig here and that
10 he was interviewed at the time.

11 MR. PETRANO: I'm going to have to object to
12 that. There is absolutely nothing regarding that in
13 evidence whatsoever.

14 THE COURT: There's nothing. I don't believe
15 you did.

16 MR. BLUME: I believe Mr. Budenz's affidavit is
17 in. But, I mean, part of it again, the problem here
18 is this is something we were going to take up with
19 Mr. Delgado. So I can wait and do it later.

20 MR. PETRANO: Your Honor, Mr. Delgado cannot
21 authenticate whatever this investigator may have
22 said. So if that's going to try to be introduced, it
23 can't be done via Delgado. We can try to do that
24 now, but I object. And I didn't mean to interrupt
25 his closing argument and I do sincerely apologize.

1 THE COURT: Budenz? Is that the pronunciation?

2 MR. BLUME: Yes, sir.

3 THE COURT: It was not offered.

4 MR. BLUME: Well, then that was an oversight on
5 my part.

6 THE COURT: I understand.

7 MR. BLUME: And so that's the -- well, then the
8 other component to this, the third party guilt issue,
9 has to do with there was the letter which we've
10 talked about which was written by Mr. Strom to J.
11 Edgar Hoover. And that letter which we've talked
12 about with Mr. Parnell was not used at trial during
13 the cross examination of Mr. Cayton, Mr. Parnell or
14 any of the other SLED examiners.

15 The significance of that letter -- and I do
16 believe that it highly significant -- is that it
17 indicates two things; number one, that they found the
18 other similar weapon in a home in Columbia which was
19 in Chief Strom's words, you know, a home known to be
20 frequented by thieves. I think it's thieves and
21 robbers. Or thieves. So this other gun which they
22 believe is the type of gun used in the crime is taken
23 from a home where people with a known criminal
24 history live. So that's the important piece of
25 information, number one.

1 Important piece of information number two is
2 that Lieutenant Kate who was essentially what most
3 people referred to at trial as the dean of firearms
4 identification in the state of South Carolina, that
5 his initial conclusions were that it was that weapon,
6 not the weapon taken from Mr. Freiburger that fired
7 the bullet that killed the taxi cab driver.

8 So it is our position that that is strong
9 evidence of third party guilt which could have been
10 used and presented at trial and which was not and
11 that it was unreasonable and prejudicial not to do
12 so.

13 So then moving on to the next claim, this was
14 really the one that Dr. Schwartz testified about
15 primarily today. And this claim is one of
16 ineffective assistance of counsel. It moves in two
17 parts.

18 The first part is that at the time of the trial
19 there was sufficient information available on which a
20 more general challenge to firearms and toolmarks
21 identification could have been made.

22 While Dr. Schwartz's testimony did focus
23 primarily upon the 2008 ballistics imaging report and
24 the 2009 report of the National Academy of Sciences,
25 she also -- at least I thought she did and we talked

1 about it -- made clear that there was nothing magical
2 about the 2008 ballistics imaging report. It
3 essentially synthesized years of studies going back
4 to Biasotti who was a firearm and toolmarks examiner
5 from 1959 and his work.

6 She also testified to previous cases which were
7 where the issue of the admissibility of ballistics
8 evidence was litigated prior to the time of Mr.
9 Freiburger's trial.

10 So, I mean, but there are, as you saw, three
11 different components. Number one, is that you could
12 have made a general challenge to firearms testimony
13 at the time. Number two, that even if you couldn't
14 do that, that you could have made -- there was
15 essentially information available at the time which
16 would have sustained a more specific challenge, not
17 that the fundamental assumption hadn't been proven
18 but that examiners should not be allowed to testify
19 that this gun to the exclusion of other guns, you
20 know, fired the projectile.

21 In this case you asked about that. But when he
22 says that this gun to the exclusion of every other
23 sort of .32 caliber weapon, I mean, that is de facto
24 an exclusion of every other weapon in the world.
25 Because, at least as I understand it, if it were a

1 .22, obviously they knew it was a .32 caliber that
2 fired this. So they knew it wasn't a .22 and they
3 knew it wasn't a .45.

4 So to say that this gun to the exclusion of
5 every sort of similar caliber of gun is de facto an
6 exclusion of all other guns that were made, because
7 they had already determined that that's the type of
8 gun that had fired the projectile that killed the
9 victim.

10 But essentially I think there's no mystery in
11 this. The claim was that there was information
12 available that you could have either made a general
13 challenge, a more specific challenge to this gun and
14 no other gun, to the problem of subjectivity which
15 has been essentially described by Dr. Schwartz and
16 even in fact admitted to by Mr. Parnell as he said,
17 well, describe striae. Well, you know, you can get
18 different ballistics examiners to look at them and
19 they are going to come up with sort of three
20 different, you know, ideas. And I think that
21 illustrates the problem of subjectivity in this.

22 But the third component of it was that had the
23 defense obtained their own ballistics examiner, they
24 could not only have made these general attacks and
25 tried to limit the testimony of Mr. Cayton, exclude

1 it or limit it, but they also could have more
2 effectively cross examined him by pointing out the
3 type of identification he made in this case.

4 And I think Your Honor is familiar with the fact
5 that he was the last in a long line of people who had
6 looked at this. You know, it wasn't just Mr.
7 Parnell. All the other SLED examiners at the time
8 looked at it. They all concluded that this was
9 inconclusive. It was only Mr. Cayton who made the
10 identification.

11 But as the testimony here revealed, the
12 scientific literature, including much of the
13 literature used and relied upon by firearm and
14 toolmark examiners, indicates that when you do an
15 identification based on small bullet fragments where
16 distortion has been noted, based on a groove only
17 analysis, which is what Mr. Cayton did, not what Mr.
18 Parnell did, in an unaccredited lab without any peer
19 review, there is a very heightened risk of
20 misidentification.

21 And then the second component of this has to do
22 with the failure, even if counsel shouldn't have done
23 that. And of course we submit they should have.
24 They could have used both the Hoover report, I mean,
25 the letter from Strom to Hoover to show that there

1 had been a previous identification of the other
2 weapon, and also that they could have cross examined
3 both Cayton and Parnell on the fact that Mr.
4 Parnell's report indicated that it could have been
5 Mr. Freiburger, the gun taken from Mr. Freiburger, it
6 could have been the gun taken from Mr. Dreher, or it
7 could have been any other similar weapon. And that
8 report was not used at trial to cross examine Mr.
9 Parnell.

10 Then I think the character evidence claim is
11 self-sufficient. It basically speaks for itself.
12 You heard Ms. Hudgins. And I think Mr. Delgado's
13 testimony at least on the availability of the
14 character evidence would be the same. We've
15 established part of the basis for this. The rest of
16 it will have to come later.

17 But I think what has been established is that
18 there were numerous character witnesses who would
19 have come to testify in court who would have
20 testified as to Mr. Freiburger's good character, to
21 his long-standing service to his community, that he
22 was a good father, a good worker, a Sears manager,
23 had no run-in's with the law over an extensive
24 period, it was 40 years, that he'd lived in Fort
25 Wayne, Indiana.

1 And what we don't know yet and we have to figure
2 is, well, you know, why wasn't that done? So, I
3 mean, I don't think I can say much more about it.
4 The component we have established is the evidence was
5 available. What hasn't been established, what I
6 can't say more about is, did counsel have a
7 reasonable strategic decision, because I don't know
8 what it was.

9 Then 10(H), this has to do with improper closing
10 argument. And we briefed this extensively in the
11 brief. At trial in his summation then Assistant -- I
12 guess he was assistant solicitor -- McMahon made in
13 closing argument an issue for the prosecution. And
14 he made an argument that Mr. Freiburger's bunkmate,
15 Mr. Ebersold, didn't know -- he said, you know, his
16 bunkmate, Mr. Ebersold, didn't know where he was on
17 the night of February 28th, 1961, which is the date
18 of the murder.

19 He said and his friend Mr. Tillsbury who Mr.
20 Freiburger had joined the Army with who is someone he
21 knew from Indiana, and Mr. Tillsbury, his long-time
22 companion that he joined the Army with, he didn't
23 know where he was in 1961, on February 28th, 1961.

24 The clear implication, the obvious implication
25 of this, or not even implication, the thrust of this

1 is that Mr. Freiburger was missing, was not at the
2 fort on February 28th, 1961. Those people who knew
3 him best and should have known where he was did not
4 know where he was. Therefore, there's a really good
5 chance he committed the murder.

6 The problem with that is that's not what the
7 evidence was. The evidence for Mr. Ebersold was he
8 couldn't remember the night of February 28th, 1961.
9 He had no idea. You know, he couldn't differentiate
10 that from any other night.

11 And the testimony of Mr. Tillsbury was, no, I
12 don't know where he was, but I wasn't in that dorm.
13 I didn't live near there. That wasn't where I was.
14 I had no way to know where he or anybody else in his
15 unit was.

16 So it is, you know, our position that this
17 argument clearly was -- it's our position this
18 argument was a misstatement of the record, it was a
19 misstatement of the record evidence, and it created a
20 fundamental misimpression of the evidence. And so
21 that's the substantive claim.

22 The next claim in the application is the
23 ineffective assistance of counsel claim. And I
24 raised that because counsel did not object to it.
25 And since it wasn't objected to, it couldn't be

1 raised on direct appeal by Mr. Nichols. And so those
2 two sort of worked together. There's a substantive
3 claim. This was an improper closing argument. And
4 then there's the procedural claim that it was
5 unreasonable for trial counsel not to object to it.

6 Then that I think brings us -- well, 10(K) is --
7 and then I'll go back to J's. But 10(K) is the claim
8 which we have some more work to do. We have to
9 essentially authenticate the transcript of the record
10 which indicates that Mr. Cayton was terminated from
11 the KBI for failing to follow policies and
12 procedures.

13 This is I think significant for two reasons.
14 Number one, although people may take a different
15 view; to my mind, he clearly testified falsely about
16 this at Mr. Freiburger's trial. He said he worked in
17 Topeka and then he retired and then he went back to
18 work later. That's his trial testimony.

19 If we are able to authenticate this
20 transcript -- and I have no doubt that we will be
21 able to do so -- then we will know that the facts
22 actually are he went to work for the Kansas Bureau of
23 Investigation and he was terminated. He didn't
24 retire. He was terminated, fired, not for any reason
25 but for the reason that he failed to follow the

1 policies, protocols and procedures.

2 I think that is significant, number one, because
3 he didn't tell the truth about it at trial. But
4 since he was the only person apparently who the
5 prosecution could find who would say that the weapon,
6 that the projectile taken from the victim's head in
7 this case was shot from Mr. Freiburger's gun, the
8 fact that he was terminated by the Kansas equivalent
9 of SLED for the failure to follow policies, protocols
10 and procedures would have been very powerful
11 impeachment information that counsel didn't have and
12 could have used. And this happened two years prior
13 to his trial.

14 And at least -- we haven't heard from Mr.
15 Delgado on this, but Ms. Hudgins I thought was clear
16 that they did not have any knowledge of this at the
17 time of the trial and had they had knowledge of it,
18 they clearly would have used it in their effort to
19 impeach, further impeach Mr. Cayton.

20 And then the final claim in the application has
21 to do with the FMRI evidence which was presented this
22 morning through Dr. Laken. And this is being offered
23 as newly discovered evidence. I mean, you heard the
24 testimony of Dr. Laken. You've seen the affidavit
25 where he discussed the FMRI technology which his

1 Cephos Group uses for lie detection purposes.

2 Mr. Freiburger asked for -- I mean, he asked us
3 if we had heard about this technology, and he asked
4 us if we would arrange for him to undergo this. We
5 did. And the results, you have seen at least Dr.
6 Laken testify the results are that Mr. Freiburger is
7 being truthful when he says that he did not kill
8 Mr. Orner.

9 Again, this is not ineffective assistance of
10 counsel. That isn't what it is. We agree that the
11 technology did not exist to do this at the time of
12 Mr. Freiburger's trial. But this is, you know, a new
13 technology. It is a more reliable way of determining
14 essentially truth or veracity against the old
15 polygraph method.

16 And, you know, I agree it's an unusual
17 technology to try and utilize in a case, but this is
18 a highly unusual case. I mean, it was an old case.
19 Mr. Freiburger was tried 40 years after the fact
20 after living in the community. And this technology
21 was available. We took advantage of it. And you've
22 heard Dr. Laken's testimony presented, and it
23 indicates that Mr. Freiburger was being truthful.

24 And I believe we satisfied the Jones factors. I
25 understand the Court has taken the issue under

1 advisement, but I think our position on this is
2 relatively clear.

3 THE COURT: All right. Thank you. Mr. Petrano,
4 do you have the Fourth Amendment?

5 MR. PETRANO: I do, Your Honor.

6 THE COURT: Take them in the same order.

7 MR. PETRANO: I think first we started with the
8 Crawford issue?

9 THE COURT: Yes, sir.

10 MR. PETRANO: One, the allegation was that Clark
11 was allowed to publish almost verbatim police reports
12 from the incident. The State submits, let's look at
13 what that incident was. Was that testimonial
14 evidence? Absolutely not. That was a missing
15 person's report.

16 If you look at Crawford and what's come after
17 Crawford, and even Melendez up until very recently,
18 the issue in Crawford is what is testimonial, meaning
19 basically something that's intended to be used at
20 trial.

21 Now, that doesn't exclude every single thing
22 that the police do. 911 records are allowed in.
23 There is other business records that are allowed in.
24 The personnel records from the police. I mean, you
25 can't say that everything law enforcement does was

1 meant for trial. Particularly, they do do public
2 service activities that are not related to law
3 enforcement per se as far as to seek a criminal
4 conviction, such as missing persons.

5 They're allowed to follow up on a missing
6 person's report, take statements and follow up on
7 that without the intent to use any of that at trial,
8 in which case that would be non-testimonial.
9 Crawford doesn't even apply, even if Crawford does
10 apply retroactivity within Workmen (phonetic). Or
11 Workman. I'm not sure how you pronounce it.

12 Regarding Ebersold, the second portion of the
13 Crawford criticism here in this case, Ebersold was
14 there. Ebersold was subject to cross examination.
15 Ebersold testified at trial. So Crawford doesn't
16 apply at all. He was subject to cross examination.
17 He was sitting right there. So there is no Crawford
18 violation there.

19 I think next we go to the third party guilt.
20 That was in three sections. You had ineffective
21 assistance of counsel. Your Honor, I don't think
22 there was anything to suggest that the third party
23 guilt allegations were complete in the sense that
24 whatever Morgan being covered in blood or whatever
25 that's trying to allude to actually excludes the

1 guilt of the Applicant. They could have been
2 co-defendants for all we know. So you can't --

3 THE COURT: That's the Godfrey standard.

4 MR. PETRANO: Thank you, Your Honor. Second,
5 the Brady allegation, that simply has not been
6 demonstrated at all.

7 And then the Hoover letter, I think that the
8 allegation was that trial counsel was ineffective for
9 not cross examining Parnell with the Hoover letter.
10 Well, that happened here today; and the State submits
11 that, if anything, there wasn't any prejudice
12 whatsoever. I think Investigator or SLED Agent
13 Parnell -- I'm not sure how you refer to him --
14 handled that very well and criticized the letter. I
15 also have another topic on that letter. But
16 addressing the letter, it says that there was no
17 formal report. That's really the essence of the
18 letter.

19 But if we look at the letter itself, I have no
20 disrespect to my counterpart's paralegal or whoever
21 she is who translated the letter; but the copy I've
22 seen is absolutely illegible. Maybe I can make out
23 every two or three out of ten words. But I do object
24 to the introduction of the translation as a verbatim
25 translation because I simply cannot verify what that

1 letter says. But that's up to Your Honor as the
2 finder of fact.

3 Next we go to the ballistics. Once again, it's
4 the State's position that there is nothing
5 ineffective regarding what happened. All of the
6 ballistics criticism -- and I've made this before,
7 and I apologize for repeating it -- all of ballistics
8 criticism that occurred via Dr. Schwartz and within
9 the briefs is really a latest criticism of ballistics
10 in general.

11 There was nothing being made at the time of this
12 trial, and the Strickler standard is quite clear that
13 counsel had to have been deficient at that time under
14 reasonable professional norms. The State submits
15 that he did nothing unreasonable. That simply was
16 not an argument that was being made.

17 Whether it be a criticism of the firearms
18 matching at all, meaning basically the entire
19 discipline, or the opposing part which was the
20 exclusion of all other firearms in the world, which I
21 think Your Honor accurately detailed is not exactly
22 what was in the transcript, but more or less that's
23 the topic; those issues were not being made, were not
24 being made at the Circuit level at that time.

25 There was only a couple of cases mentioned at

1 all, and those were all post this trial. But I think
2 Ramirez was '01. But Ramirez is still under
3 advisement. It's still not even final now. We could
4 differ as to what the issues are still being
5 finalized in Ramirez. But it certainly wasn't an
6 issue that was being put forth all the time, every
7 day here in South Carolina. And that's the standard
8 for Strickland.

9 Oh. And a lot of the criticism regarding the
10 ballistics that PCR counsel alleges trial counsel
11 should have gotten out of Mr. Cayton, not being able
12 to peer review, his lab was unaccredited -- I think
13 I'm missing a couple of other things -- the
14 transcript is quite clear: Mr. Delgado did get all
15 of these things out of Mr. Cayton and quite
16 effectively. He also was able to use SLED agents to
17 criticize Mr. Cayton's techniques themselves.

18 Next was the character evidence. Your Honor, I
19 still don't understand the relevance. And you have
20 to pardon my ignorance on that one. And also that
21 under the Patrick Devon Harris; and I think there's a
22 few other cases in PCR, if we're going to claim that
23 trial counsel was ineffective for failing to put up
24 witnesses, those witnesses need to come here and
25 testify at the PCR hearing. Otherwise, it's pure

1 speculation, particularly concerning the affidavits
2 are very one-sided and not subject to cross
3 examination like they would be --

4 THE COURT: They're not in evidence.

5 MR. PETRANO: -- if they had been at trial.

6 THE COURT: They're not in evidence.

7 MR. PETRANO: Thank you, Judge.

8 And then the closing argument. There was
9 actually nothing technically inaccurate about the
10 closing arguments comment. I understand we differed
11 in that. But the State or either side in closing is
12 allowed to comment on the evidence and draw
13 reasonable inferences. The State submits that there
14 was nothing unreasonable about the inferences drawn.

15 Whether someone remembers being there or whether
16 someone remembers seeing someone, those are different
17 interpretations, and that's certainly a reasonable
18 inference from the testimony that did occur.

19 Regarding the transcript, I'm using the air
20 quotes for the record here, the transcript that we
21 got to be critical of Mr. Cayton's previous
22 employment and how he left that job, even if that is
23 the right Mr. Cayton and that is a transcript, the
24 Applicant has presented no witness whatsoever with
25 any personal knowledge of that, and that's simply not

1 in evidence at all at this time.

2 And then the FMRI, Your Honor, I'm not going to
3 repeat my objections to that. I think I have made
4 those very clear on the record. If you want me to, I
5 will. But also there has been no evidence put forth
6 at all today or in the report -- and if I missed
7 something, then I do apologize -- that that was in
8 compliance with 44-53-40 which is the State's lie
9 detection statute. It includes several things that
10 have to be -- I'll let that speak for itself. I'm
11 not going to try and paraphrase it. But that's
12 44-53-40.

13 Once again, or in conclusion, the State submits
14 that the Applicant failed to demonstrate and satisfy
15 their burden of proof, and we stand by our return.
16 Thank you, Judge. Oh. And obviously we still have
17 to get Mr. Delgado.

18 THE COURT: Any reply?

19 MR. BLUME: Not unless the Court has specific
20 questions about specific issues.

21 THE COURT: No. All right. I'll leave it to
22 counsel to contact Mr. Delgado. And somebody just
23 opened the door. I just thought it --

24 MR. BLUME: I thought it might have been him, he
25 might have appeared.

1 THE COURT: And we'll keep the record open until
2 such time as he is available for cross examination.

3 MR. PETRANO: Your Honor, I've got one further
4 thing.

5 THE COURT: Yes, sir.

6 MR. PETRANO: I don't know if this is just a
7 request or a question. Are we going to be getting
8 any more briefs or amendments, or is the Applicant's
9 case in itself closed?

10 THE COURT: It's my understanding the
11 Applicant's case is closed. However, I'm going to
12 ask for proposed orders which will I assume detail a
13 lot of the underpinnings of both of your cases.

14 MR. PETRANO: Certainly. I just wasn't prepared
15 to go into any other arguments that haven't been made
16 yet. And that was all. Besides Mr. Delgado.

17 MR. BLUME: The certification of the transcript
18 and Mr. Delgado are the only outstanding things.

19 THE COURT: Right. That's good. All right.
20 Now, I would like to let's make sure that the -- how
21 many exhibits did you offer that were actually
22 admitted?

23 COURT REPORTER: I have 14 in total, but I still
24 need to have the ones for ID go into the file.

25 THE COURT: Then you don't have those?

1 COURT REPORTER: I have -- they're spread
2 everywhere. I don't know where they are.

3 THE COURT: All right. Let's try just to
4 accumulate them.

5 MR. PETRANO: And I'm sorry. Did the court
6 reporter say 14 were actually admitted?

7 THE COURT: No. She said they were offered.

8 MR. PETRANO: Okay. Thank you. And, Your
9 Honor, are we recessed until tomorrow morning?

10 THE COURT: We'll be back at it again tomorrow
11 morning.

12 (Whereupon, the proceedings are concluded)

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1 CERTIFICATE OF REPORTER:
2
3

4 STATE OF SOUTH CAROLINA)
5 COUNTY OF RICHLAND)
6
7

8 I, Jenny H. Williams, Official Court Reporter for the
9 Fifth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the Court of Common Pleas for
14 Richland County, South Carolina, on the 13th day of
15 August, 2009.

16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18

19
20 November 10, 2009

21 _____
22 Jenny H. Williams, Court Reporter
23
24
25

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POSITIONS HELD

Professor, Department of Law, Police Science and Criminal Justice Administration, John Jay College of Criminal Justice, City University of New York 2006-
Associate Professor, Department of Law, Police Science and Criminal Justice Administration, John Jay College of Criminal Justice, City University of New York 1993-2005
Professor, The Graduate Center, City University of New York, Ph.D. Faculty in Criminal Justice, 2006-
Associate Professor, The Graduate Center, City University of New York, Ph.D. Faculty in Criminal Justice 1997-2005
Associate Appellate Counsel, The Legal Aid Society, Federal Defender Services Unit Appeals Bureau, New York City 1988-1991
Litigation Associate, Reinhardt & Schachter, P.C., Newark, N.J. 1988
Litigation Associate, Paul, Weiss, Rifkind, Wharton & Garrison, New York City 1985-1988
Assistant Professor, Department of Philosophy, Yale University 1975-1982

EDUCATION

J.D., Yale Law School 1985
Ph.D., The Rockefeller University 1976
B.A., Oberlin College (Phi Beta Kappa, Fall 1970; Highest Honors in Philosophy) 1971

PUBLICATIONS

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GRANTS

Co- Principal Investigator on "Security and Privacy: Global Standards for Ethical Identity Management in Contemporary Liberal Democratic States," Science and Society Program, NSF 0619226 2006-2008

Co- Principal Investigator on Cyber Trust Proposal NSF 043044 2004-2007

PRESENTATION OF PAPERS AND PARTICIPATION IN CONFERENCES

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"Biting the Bullet: Challenging Firearms Evidence," presented at the Fifth Annual Indigent Criminal Defense Seminar: Advanced Skills for the Experienced Practitioner, sponsored by the Supreme Court of Virginia and the Virginia State Bar, Richmond, VA, April 3, 2009

Panelist on "The Future of Forensics," 4th Annual Harry F. Guggenheim Symposium on Crime in America: "A New Beginning? Exploring the Criminal Justice Challenges over the Next Four Years," John Jay College of Criminal Justice, New York, NY, February 3, 2009

"*Daubert* Challenges to Firearms Identification," presented at the 5th National Seminar on Forensic Science and the Law, sponsored by the Administrative Office of the U.S. Courts, Philadelphia, PA, January 10, 2009

"Firearms & Tool Marks," presented at the Texas Criminal Defense Lawyers Association 6th Annual Forensics Seminar, Dallas, Tx, October 23, 2008

Guest Speaker, "'I Know It When I See It' and Criminalistics," presented at the 34th Annual Northeastern Association of Forensic Scientists (NEAFS) Meeting General Session on "Debating the Forensic Science in Forensic Science," October 3, 2008

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"Firearms and Toolmarks," presented at the Pennsylvania Juvenile Defender Statewide Training, April 18, 2008

"Overview of *Terry v. Ohio*," presented at the Second James Fyfe Police Accountability Conference, "Stop and Frisk: Policy, Practice and Research," John Jay College of Criminal Justice, February 28, 2008

"The Science/Junk Science of Firearms and Toolmark Identification," presented at the Criminal Justice Section Annual Meeting and CLE, North Carolina Bar Association, November 16, 2007

Panel Member, Plenary on "CSI Portland: Using Forensic Science in Juvenile Defense," and presenter of session on "Challenging Firearms & Toolmark Identification," 11th Annual Juvenile Defender Leadership Summit, Portland, Oregon, October 20, 2007

"A Case Study in Science and the Law: Firearms and Toolmark Identification," presented at the Legal Studies Workshop, John Jay College, October 9, 2007

"Firearms and Toolmarks," presented at the Texas Criminal Defense Lawyers Association 5th Annual Forensics Seminar, Dallas, Tx, October 5, 2007

"Firearms," presented at the Los Angeles Public Defender Forensic Science Conference, September 14, 2007

"Challenging Firearms and Toolmark Identification," presented at the National Seminar for Federal Defenders, Miami, FL, May 31, 2007

"Gunshot Cases," presented at the 2007 Capital Case Defense Seminar in Monterey, California, sponsored by the California Attorneys for Criminal Justice and California Public Defenders Association, February 18, 2007

"Firearms and Toolmark Identification: Legal and Scientific Issues," presented at the New York University Law School Criminal Law Luncheon, October 10, 2006

"Challenging Firearms and Toolmark Evidence" and "Firearms and Toolmark Evidence: Advanced Issues and Bring Your Own Case," presented at a conference on Death Penalty Defense and Forensic Science in Indiana, sponsored by the Indiana Public Defender Council, Sept. 15, 2006

"Firearms and Toolmark Identification: Legal Steps Forward, Scientific Steps Back," Science Department Lecture Series, John Jay College, April 2006

Guest Speaker on Daubert/Frye Issues and Firearms and Toolmark Identification at the Forensic Science Ph.D. Student Colloquium, John Jay College, April 21, 2005

"Forensic DNA Analysis and The Admissibility of DNA and Other Scientific Evidence," presentation (with co-presenters Henrietta Nunno and Lawrence Kobilinsky) to Spanish prosecutors (arranged by the U.S. Department of State, Office of International Visitors), John Jay College, March 2005

"The *Daubert* Revolution: Why Judges Get Decisions about the Admission of Scientific Evidence Right for the Wrong Reasons (and Then They Get Them Wrong)," presented at the Forensic Psychology Research Forum, John Jay College of Criminal Justice, November 2002

"A Market in Liberty?: Corruption, Cooperation, and the Federal Criminal Justice System," presented at a conference on Corruption—Public & Private, Institute of Criminal Justice Ethics, John Jay College of Criminal Justice, September 2002

"The *Daubert* Myth of the Super-Expert Judge," presented at the Annual Meeting of the Law and Society Association, May 2000

"Judges, Juries and Experts," presented to the New York Group of the Society for Philosophy and Public Affairs, March 2000

External evaluator for a conference on Matters of Life and Death, hosted by the Department of Philosophy, Rutgers University-Newark, and the New Jersey Medical School-UMDNJ, March 2000

"Daubert and Falsifiability," presented at the Annual Meeting of the Law and Society Association, June 1999

Roundtable moderator and commentator at a conference on Crime, Neo-Liberalism and the Risk Society, John Jay College of Criminal Justice, April 1999

"Judges as Super Scientists," presented to the Princeton University Psychology Department, December 1998, and at annual meetings of the American Society of Criminology (November 1998) and the Law and Society Association (June 1998)

"Homes as Folding Umbrellas: The Supreme Court's Recent Cases on 'Knock and Announce'," presented at the Annual Meeting of the Law and Society Association, May 1997

"*Daubert v. Merrell Dow Pharmaceuticals*: The Supreme Court Versus Science," presented to the Philosophy Department, the School of Criminal Justice and the College Honors Program at Rutgers University-Newark, April 1997; and in the Provost's Lecture Series on Philosophy and Criminal Justice, John Jay College of Criminal Justice, December 1995

"A Man's House Is His Castle': The Supreme Court's New Decision on the 'Knock and Announce' Rule," presented at the Annual Meeting of the American Society of Criminology, November 1995

"Just Take Away Their Guns': The Hidden Racism of *Terry v. Ohio*," presented to the CUNY Law and Society Study Group, March 1995; to the New York Group of the Society for Philosophy and Public Affairs, February 1995; at the Annual Meeting of the American Society of Criminology, November 1994; and at a conference on International Perspectives on Crime, Drugs and Public Order, John Jay College of Criminal Justice, June 1994

Chaired panel on "Legal and Extra-Legal Issues in Law Enforcement" and delivered "Who's the We: Relations among the Citizenry, Criminal Defendants and the Police" at the Annual Meeting of the American Society of Criminology, November 1994

Delivered papers at conferences at the Westminster Institute for Ethics and Human Values (1982 and 1983) and Montclair State College (1979); at meetings of the American Philosophical Association (1983), the New York Group of the Society for Philosophy and Public Affairs (1978 and 1981), and the Public Choice Society (1981); and to the Philosophy Departments at The University of Wisconsin at Milwaukee (1981), Vassar College (1980), Oberlin College (1979), The Catholic University of America (1978), and The University of Maryland at Baltimore (1978)

Commented on papers at meetings of The American Political Science Association and the Public Choice Society (1980) and at a conference sponsored by the Rutgers University Philosophy Department (1978).

PROFESSIONAL ACTIVITIES

Board of Directors, Ohio Innocence Project	July 2009-
Co-Chair, National Association of Criminal Defense Lawyers (NACDL) Task Force on the Future of Forensic Science	July 2009-
Defense Expert on Firearms and Toolmark Identification, <i>People of New York v. Giovanni Eligio</i> , Indictment No. 4097-08 (Supreme Court of the State of New York Bronx County, Criminal Division)	July 2009-
Defense Consultant on Firearms and Toolmark Identification, <i>Commonwealth of Virginia v. Chappell</i> , Case Number CF 000157 (Circuit Ct. for the City of Alexandria)	June 2009-
Defense Expert on Firearms and Toolmark Identification, <i>Commonwealth v. Kieson Cuffee</i> , Indictment No. 08-0665 (Superior Ct. Dept. of the Trial Court Hampden Co. Mass.)	May -Aug. 2009
Defense Expert on Firearms and Toolmark Identification, <i>State of Wisconsin v. Christopher Jones</i> , Milwaukee County Case No. 2006CF4929 (Circuit Ct. Milwaukee County) (submitted affidavit)	May 2009-
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Donald Scott Taylor</i> , No. CR 07-1244 WJ (D.N.M.) (submitted affidavits)	May 2009-
Defense Expert on Firearms and Toolmark Identification, <i>Cannon v. Belleque</i> , Case No. 04C10127 (Cir.Ct. Marion Co. Oregon) (submitted affidavit)	March 2008-
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Damion Jones</i> , 2008 CF2 23353 (D.C. Super. Ct.) (submitted affidavit)	April 2009
Defense Consultant on Firearms and Toolmark Identification, <i>Commonwealth of Pennsylvania v. Steven Carl Colegrove</i> , No. CP-08-CR000785-2007 (Court of Common Pleas Bradford County) (submitted affidavits and testified at admissibility hearing)	Dec. 2008 - Mar.2009
Defense Consultant on Firearms and Toolmark Identification, <i>People v. Joseph Melcher</i> , Ct.Nos. 2288575 & 2292777 (San Francisco Superior Ct.) (submitted affidavit)	Dec. 2008-Mar. 2009

Defense Expert on Firearms and Toolmark Identification, <i>State of Ohio v. Eashawn Anderson</i> , Case No. 50953 (Court of Common Pleas Cuyahoga Co.) (submitted affidavit; testified at admissibility hearing)	Dec. 2008 –Mar. 2009
Defense Expert on Firearms and Toolmark Identification, <i>Joshua Cain v. Belleque</i> (D.Or.) (submitted affidavit)	Oct. 2008- Jan. 2009
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Willie Gayden</i> , 2006 CFI 27899 (D.C. Super Ct.)	Oct. 2008
Affidavit and Testimony from <i>United States v. Damian Brown et al.</i> , 05 Cr. 538 (SDNY) and "Commentary on Nichols R.G., Defending the Scientific Foundations of the Firearms and Tool Mark Identification Discipline: Responding to Recent Challenges, J. Forens. Sci. 2007 May; 52(3): 586-94," <i>Journal of Forensic Sciences</i> 52(6): 1414-15 (November 2007) considered as evidence at <i>Daubert</i> hearing in <i>United States v. Glynn</i> , 578 F.Supp.2d 567 (S.D.N.Y. 2008)	June 2008
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Damian Brown et al.</i> , 05 Cr. 538 (S.D.N.Y.) (submitted affidavit, testified at <i>Daubert</i> hearing and advised attorney on cross-examination of prosecution witnesses)	June 2008
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Worsley</i> , Criminal No.2003 FEL 6856 (Superior Ct. of the Dist. of Columbia Criminal Division- Felony Branch) (submitted affidavit, advised attorneys on scientific issues)	Mar.-Sept. 2008
Defense Expert on Firearms and Toolmark Identification, <i>United States v. English</i> , Criminal N. 2007 CFI 16618 (Superior Ct. District of Columbia Criminal Division-Felony Branch)	Feb.- Mar. 2008
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Khalid Barnes</i> , et al., S9 04 Cr.186 (SCR) (SDNY) (submitted affidavit)	February 2008
Assistant Director, Cybercrime Studies Center, John Jay College of Criminal Justice	February 2008-
Defense Consultant on Firearms and Toolmark Identification, <i>Maryland v. Fleming</i> , Criminal Case No. 06-46624 (Circuit Ct. Howard Co.) (advised defense counsel on scientific issues, submitted affidavits)	Jan.-Feb. 2008

Participant, Fordham Law School Information Law and Policy Roundtable	Spring 2007-
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Natson No.: 4:05-CR-21</i> (M.D. Ga. Columbus Div.) (submitted F.R.Cr.P. 16 Statement)	February 2007
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Diaz</i> , Slip Copy, NO. CR 05-00167 WHA. 2007 WL 485967 (N.D.Cal. Feb 12, 2007) (testified at <i>Daubert</i> hearing)	November 2006
Steering Committee, Cybercrime Studies Center, John Jay College	Fall 2006-
Defense Expert on Firearms and Toolmark Identification, <i>Commonwealth of Massachusetts v. Meeks and Warner</i> , NO. CRIM.A. 2002-10961, CRIM.A. 2003-10575, 2006 WL 2819423 (Mass.Super. Sep 28, 2006) (testified in admissibility hearing and submitted affidavit)	April- May 2006
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Saldana</i> , CR 04-415 (A)-PA (C.D. Cal.) (submitted affidavit)	April 2006
Defense Expert on Firearms and Toolmark Identification, <i>United States v. Monteiro</i> , 407 F. Supp. 2d 351 (D.Mass. 2006) (submitted affidavit)	October 2005
Defense Expert on Firearms and Toolmark Identification, Post-Conviction Proceedings in <i>North Carolina v. White</i> (N.C. General Court Of Justice, Superior Ct. Div., Craven County, 99 CRS 10229-30) (submitted affidavit)	May 2005
Defense Expert on Toolmark Identification, <i>United States v. Kain</i> , Crim. No. 03-573-1 (E.D.Pa. 2004) (advised defense counsel on scientific issues and cross examination of prosecution expert)	Feb.- Mar. 2004
Ph.D. Examiner, Philosophy Department, University of New England, Armidale, Australia	Dec. 2003 – March 2004
Appellant's Brief, on Behalf of Adina Schwartz as Amicus Curiae, in <i>Ramirez v. State</i> , 810 So.2d 836 (Fla. 2001) (distributed and discussed by Bruce Moran, Criminalist IV, Sacramento County District Attorney's Office, at a meeting of the California Association of Criminalists (CAC), March 2002)	December 2001

Comments to Senator Hillary Clinton on a Draft of
a Bill to Prohibit Racial Profiling

June 2001

Reviewer of test materials for ETS

1999-2001

Comments on Proposed Rule 702 of the
of Practice and Procedure of the Administrative Office of
United States Courts, summarized at
<http://www.uscourts.gov/rules/archive/1999/propevid.pdf>

January 1999

Associate Editor, *Criminal Justice Ethics*

1997-present

Participant, Hoffinger (formerly, Fortunoff) Colloquium on Criminal
Justice, New York University

1993-present

Editorial Review Board, *Human Rights Quarterly*

1981-1983

Editorial Board, *Ethics*

1980-1983

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CA No. CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
Applicant,	)	
v	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent	)	
	)	

AFFIDAVIT OF WILLIAM C. THOMPSON

- 1 I am professor and chair of the Department of Criminology, Law & Society at the University of California, Irvine (UCI). I received a Ph D. in psychology from Stanford University, where my studies focused on human judgment and particularly on how people evaluate scientific data. My dissertation concerned the way people assess forensic science. I also have a J D from UC Berkeley and have been a member of the California Bar since 1982.

2. For more than 20 years I have been studying and writing about what might be called the human element in forensic science. I have published a number of articles concerning the way experts interpret forensic science evidence, focusing particularly on the potential for error and bias when experts make subjective judgments. I have also studied and written about jurors' interpretations (and misinterpretations) of forensic science evidence. I have published several articles on the topic of *observer effects* in forensic science and I have been invited by the editors of the *International Encyclopedia of Forensic Science* to write the encyclopedia article on the topic of observer effects in forensic science.

3. *Observer effects* arise from the tendency of human observers to interpret data in a manner consistent with their expectations and desires. Psychologists have studied observer effects for nearly 100 years. It is widely recognized and accepted that observer effects can influence expert's interpretations of scientific data. The process of influence is typically unconscious and cannot be controlled or eliminated by act of will. Scientists in most fields routinely take careful steps to minimize observer effects when they must rely on subjective judgment to interpret the results of an experiment. Generally, this requires

that they mask or shield the person interpreting data from extraneous information that might improperly influence the interpretation. For example, scientists in most fields use "blind" or "double-blind" procedures when relying on subjective judgment to interpret data. Blind procedures are also widely used for peer-review of scientific articles, for grading of written examinations, and for other functions for which it is important to minimize observer effects.

4. Forensic scientists have generally been less careful about avoiding observer effects than scientists in other fields. I have published several articles criticizing the field of forensic science for failing to take adequate measures to minimize observer effects. There are signs that the field is beginning to take notice of the issue. Several high-profile errors in forensic science, including the FBI's erroneous fingerprint identification of lawyer Brandon Mayfield, have been attributed to observer effects. The importance of observer effects has also been demonstrated by a series of experimental studies that have shown that forensic experts can be induced to interpret the same data in different ways depending on what they expect the data to show. As a result, methods for minimizing observer effects have recently been under discussion at major forensic science meetings. Forensic science journals have recently begun to publish commentary on best practices for minimizing observer effects.
5. I have a general familiarity with the field of toolmark examination from having read the scientific literature. I have discussed and reviewed scientific literature on toolmark examination, and debates about the scientific foundations of toolmark examination, in some of my academic publications.
6. The judgments that toolmark examiners are routinely called upon to make in their professional practice, such as whether a particular mark was made by a specific tool, or whether the marks on a bullet were caused by its being fired by a specific gun, are precisely the type of judgments I would expect to be strongly influenced by observer effects. Observer effects tend to be most powerful when the data being interpreted are somewhat ambiguous and when there are no fixed standards for interpretation. Both conditions are typically present in toolmark examination. There are no published studies in the toolmark literature that show that toolmark experts can reliably distinguish individual and sub-class characteristics, nor do any established standards exist for distinguishing individual and sub-class characteristics.
7. Based on these considerations, I seriously doubt that toolmark experts can reliably determine whether a specific tool, rather than a similar tool, made a particular toolmark. Experts' judgments in such tasks are likely to be influenced by extraneous contextual information (unless careful steps are taken to shield the examiner from knowledge of the

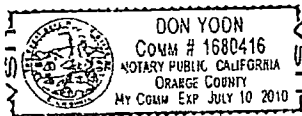
underlying facts of the case) and consequently their judgments will be slanted toward whatever result they expect or hope to find. In my opinion, such judgments are likely to be unreliable and should not be treated as trustworthy evidence.

Respectfully submitted,

William C Thompson
William C. Thompson
Irvine, California

* Please see the attached notary form.

DON YOON, Notary Public
03-27-2009



State of California)
County of Orange)

CALIFORNIA ALL-PURPOSE CERTIFICATE OF ACKNOWLEDGMENT

Don Yoon, Notary Public

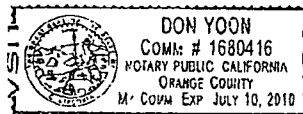
On March 27, 2009 before me,

(here insert name and title of the officer)

personally appeared WILLIAM CHARLES THOMPSON

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.



WITNESS my hand and official seal

Signature

DY

(Seal)

OPTIONAL INFORMATION

Although the information in this section is not required by law, it could prevent fraudulent removal and reattachment of this acknowledgment to an unauthorized document and may prove useful to persons relying on the attached document.

Description of Attached Document

The preceding Certificate of Acknowledgment is attached to a document titled/for the purpose of Affidavit of William C. Thompson containing 3 pages, and dated 03-27-2009.

The signer(s) capacity or authority is/are as:

- ☒ Individual(s)
☐ Attorney-in-Fact
☐ Corporate Officer(s)

Title(s)

- ☐ Guardian/Conservator
☐ Partner - Limited/General
☐ Trustee(s)
☐ Other

representing

Self

Name(s) of Person(s) or Entity(ies) Signer is Representing

Additional Information

Method of Signer Identification

Proved to me on the basis of satisfactory evidence

☒ Form(s) of Identification ☐ Credible witness(es)

Notarial event is detailed in notary journal on:

Page # 79 Entry # 7

Notary contact 949-854-8011

Other

☐ Additional Signer(s) ☐ Signer(s) Thumbprint(s)

☐

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	CA No CA No 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
<i>Applicant,</i>	)	
v	)	
	)	
STATE OF SOUTH CAROLINA,	)	
<i>Respondent</i>	)	

AFFIDAVIT OF WILLIAM C. THOMPSON

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be unreliable and should not be treated as trustworthy evidence.

Respectfully submitted,

William C. Thompson

William C. Thompson
Irvine, California
January 19, 2009

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	CA No. 06-CP-40-3866
	)	
EDWARD FREIBURGER # 286115,	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	
	)	

AFFIDAVIT OF WILLIAM A. TOBIN IN SUPPORT OF APPLICANT

I. I have a Bachelor of Science degree in Metallurgy from Case Institute of Technology in Cleveland, Ohio, and graduate studies in metallurgy and materials science at Ohio State University and the University of Virginia. While in graduate school, I accepted an offer of employment by the Federal Bureau of Investigation (FBI) as a Special Agent in 1971. After serving approximately 3 ½ years as a "street Agent", I was assigned to the FBI Laboratory in Washington, D.C., as a Forensic Metallurgist, where I remained until my retirement in 1998 as the *de facto* Chief Forensic Metallurgist. During my career at the FBI Laboratory, I undertook additional graduate studies in materials science (metallurgy) at the University of Virginia. In addition, I undertook studies for a Master of Arts in Special Studies at George Washington University (GWU), a program sponsored

and instructed by both the Forensic Science Department and Law School at GWU.

Between 1986 and 1995, per Congressional mandate, I was responsible for all requested forensic metallurgical examinations in the United States, for all local, state and federal law enforcement agencies, including determination of the causes of the TWA 800 midair explosion disaster, the nation's worst rail disaster ("Sunset Unlimited" in Mobile, AL), the nation's second worst environmental disaster (oil spill by the "Emily Berman"), and numerous other high profile incidents. I have testified before two U.S. Senate Subcommittees on the Judiciary and Court Oversight, appeared on CBS' "60 Minutes" (televised twice) in my capacity as Principal of *Forensic Engineering International*, and have authored numerous scientific and technical publications. I have been employed as a research metallurgist and also as a plant metallurgist involved with manufacturing, production and materials processing in both the aluminum and copper industries. During both my metallurgical studies and also in my position as an FBI forensic metallurgist, I visited numerous metal manufacturing and processing plants throughout the United States and Taiwan to observe industrial manufacturing operations and practices. Additionally, I am very familiar with the current practice and methodology of firearm and toolmark examinations, and used the same comparison microscopy (with even more advanced scientific modifications for interference microscopy) in many metallurgical examination matters. My

curriculum vitae is attached to this Affidavit as Exhibit A.

2. Firearms examiners rely on markings left on bullets and shell casings by firearm components such as the barrel or breech face of a gun in their evaluations of evidence. The probative significance of these markings depends on, among other factors, the particular alloys used, manufacturing processes involved, product distribution, and subsequent service.

3. Barrel manufacture can vary, but in one typical process barrels are fabricated by first drilling a blank of rod stock with a stationary drill and the workpiece (barrel stock) rotated at 4,000 – 4,100 rpm. Faster speeds increase tool & die (drill) wear and create an undersized bore; slower speeds increase manufacturing and cycle times. Accordingly, a balance is struck by plant metallurgists for the particular operation and materials involved. The workpiece is typically next reamed to remove slight tool (drill) marks and increase bore diameter to accommodate a bullet, and then is finally rifled.

4. Different fabrication techniques are available for rifling of gun barrels. Rifling techniques include, but are not limited to, swaging over a fluted mandrel, rotary hammer forging over fluted mandrel, broaching and carbide button rifling. Some processes effect rifling by metal removal (*e.g.*, broaching) and others by metal displacement (flow) (swaging, forging, carbide button).

5. Other metal forming, shaping, treating and finishing processes are used for other components in each firearm.

6. Alloys used can vary for each component in a firearm and among manufacturers, although it is not uncommon for the same alloy to be used for both the barrel and receiver. For example, one manufacturer generally uses a cold-rolled 4140 resulfurized steel or 414 free-machining stainless steel in barrel and receiver production; another uses 416 grade resulfurized stainless steel for both.

7. To a plant metallurgist, probably the most critical consideration for many manufacturing operations in full production is tool and die wear. Various techniques are used to eliminate or reduce production "down time" caused by die wear, malfunctions or failures (breakdown), a costly consideration in many production processes. Accordingly, efforts to maximize die life have been a dominant concern for plant metallurgists for many decades. It is so important that a very significant amount of scientific research has been, and is being, conducted in the field of tribology, the branch of engineering that deals in the study of friction, wear and lubrication of component surfaces in relative motion against each other, such as bearings and gears.

8. The primary metallurgical consideration for tool & die materials, such as the rifling tool surfaces, is that the materials selected remain chemically, thermally and mechanically stable under production operating conditions. Additionally, relative hardness of tool & die material is a significant consideration in die longevity, but material hardness alone is generally not a sufficient indicator

of wear resistance or wear performance in specific situations.

9. In general, the use of lubricants in production to effect boundary lubrication, or even fluid lubrication, tends to reduce tool & die wear by one to two orders of magnitude. However, there are some situations in which they can *increase* wear such as inhibiting formation of a beneficial tribofilm. They can also act as a carrier of indigenous abrasive chips and exogenous debris if not properly filtered or maintained. Further, lubricants tend to break down over various periods of time, in part depending on the nature of the production process.

10. In short, it is almost always economically beneficial for a manufacturer to obtain the longest die life possible, not only out of concerns for production continuity but also because of costs of various tool & die materials such as tungsten carbide. In addition, a strong trend has existed in almost all metalworking industries to reduce variability in manufacturing processes. The confluence of these concerns means that the characteristic striae imparted to a workpiece such as a barrel have likely tended to be persistent over larger production lots over time.

11. For some processes, a die can last from many hours to many months, particularly where primarily compressive stresses are involved, depending on production rates. The general metallurgical principles involved in how markings

are left on bullets and casings are no different in relevant aspects in the firearms

industry than they are for marks left on metals such as steels, copper, aluminum, *etc.* through other manufacturing processes such as drawing, extrusion and swaging.

12. Due to the manufacturing processes described above, a number of firearms can be expected to exhibit virtually identical characteristics. It is highly unlikely that plant metallurgists manufacturing gun barrels would accept such high rates of tool & die wear that the rifling broach, for example, is required to be changed or resurfaced by grinding or carbide inserts after only a few barrels are fabricated. Identical characteristics, in turn, will likely impart identical characteristics onto bullets and shell casings such that it is not possible to tell apart bullets or shell casings fired from different firearms. Due to the properties of both workpiece and die materials, and to the manufacturing process, a significant number of weapons may be indistinguishable in matchable characteristics, including any distinctions based on so-called individual characteristics.¹

13. Even when discernible extraneous characteristics are introduced in the fabrication process, it is difficult to understand how a forensic examiner far removed from the production process can assess the difference between individual characteristics and sub-class characteristics imparted by the die surface during the

¹ As an NRC Committee recently reported, two semiautomatic pistols purchased at the same time were found to produce sufficiently similar breech face markings that a match could be made to either weapon. See Report on Ballistics Imaging (2008), National Research Council (NRC) at 2-14.

production sequence. The difference between class, sub-class, and individual characteristics is extremely important. Class characteristics are common to every member of a particular production run, such as the number and direction of lands and grooves on a bullet. Sub-class characteristics are produced by the manufacturing process through a tool that leaves identical markings on a number of firearms. Individual characteristics are, by definition, unique to one firearm. Without personal knowledge of the individual and sub-class characteristics produced by a particular manufacturing run, an examiner cannot necessarily tell the two apart. Such knowledge must be specific to a particular production run and/or even to subsequent use in service; while some examiners have a general knowledge of how firearms are produced, such general knowledge does not provide any information about whether a particular mark on a bullet or casing is individual or sub-class in nature.²

Some of the characteristics imparted by a die can be intermittent over various runs, and even during a single workpiece run, during production, such that even if a firearm does not share a particular subclass characteristic with a consecutively manufactured firearm, it may share the characteristic with earlier or

² Some class characteristics are similarly difficult to distinguish from sub-class or individual characteristics. However, many class characteristics are reliably identifiable, such as the caliber of a bullet or the direction and number of lands and grooves. These are useful pieces of data and can dramatically narrow the range of possible firearms that could have been used to fire a particular bullet or casing. However, these characteristics cannot be used to support the absolute individualization identification claims made by firearm examiners

later produced firearms.

14. The focus of a firearms/toolmark examiner is generally on finding *similarities* and dismissing or rationalizing non-matching characteristics as irrelevant. The quality of both agreements and disagreements can be difficult to assess. Unlike some forensic disciplines, such as fingerprints and DNA, firearms examiners do not follow the single dissimilarity rule, whereby the examiner will declare an exclusion if there is a single difference between two samples. Instead, firearms examiners generally do not make exclusions on the basis of individual characteristics, under the theory that bullets or casings fired from the same gun may acquire a number of dissimilar individual characteristics. However, it should be noted that, for example, it has been reported that a toolmark examiner can encounter 15-20% matching striations between bullets fired from different firearms of same manufacturer and type, and 21-38% on bullets fired from the same firearm. Consider, also, that field of view in normal comparisons is limited because examinations are typically conducted at between 5X and 40X, making it possible that field of view is of a subset of the 15-20%. See Biasotti, *A Statistical Study of the Individual Characteristics of Fired Bullets*, 4:1 J.For.Sci. 34, 34-50 (1959). A more recent work indicates that "...up to 25% of the striae in a non-match and more than 75% of the striae in a match will show concordance." See

Heard, *Handbook of Firearms & Ballistics: Examining and Interpreting Forensic*

Evidence (1997). Thus, firearm examinations are largely subjective in nature, as each examiner must decide whether the non-matching characteristics being viewed should prevent declaration of a match. Even as a metallurgist / materials scientist and former plant metallurgist concerned with tool and die life, and knowledgeable about how manufacturing dies are produced, used and rehabilitated ("reworked" in the trade), it is doubtful that I could make such an assessment in most cases without control samples acquired contemporaneously to fabrication. Among materials scientists, it is not generally accepted that a person could make such an assessment without access to such control samples acquired contemporaneously to fabrication, or without at least a detailed personal knowledge of the individual and sub-class characteristics produced by a particular production run.

15. Though many firearm and toolmark examiners claim that individual differences on bullets and casings are reliably discernable under a microscope, the claim that examiners have a methodology that can reliably detect and characterize individual differences is scientifically unsubstantiated. I find no properly designed meaningful and comprehensive studies validating the assumptions of uniqueness and reproducibility relied upon by firearm examiners, in other words, that no two tools will leave the same markings on a bullet or casing.

16. Even in the few studies of "consecutively manufactured" guns, the small samples studied are meaningless without more thorough description of

sampling procedure and production methods. Neither "consecutively manufactured" nor consecutive serial numbers necessarily means "consecutively rifled", "consecutively machined" or any other relevant parameter because of mass production processes allowing for interchangeability. For example, two "consecutively manufactured" firearms may have non-consecutively rifled barrels or non-consecutively milled breech faces. In addition, the studies of which I am aware are neither double-blind nor blind and/or do not constitute a statistically significant sampling. Accordingly, any such opinions of exclusivity by firearm examiners are not based on scientifically accepted validation methodology.

17. It should be noted that there are two distinct primary issues to be resolved in assessing validity of toolmark source attributions: not only whether the premise of tool/firearm uniqueness is valid, but also, even assuming the premise of uniqueness is accepted, the accuracy of examiners' source attributions. It should be kept in mind that examiners are seeing only a relatively small portion of a bullet surface in the field of view of between 5X and 40X stereomicroscopy.

18. Recovered bullets present an additional problem because such bullets can be severely damaged and distorted, frequently limiting their utility as forensic evidence. Even simple methodological procedures used to capture bullets fired for control purposes can lead to misleading characteristics - striae not originating from sub-class characteristics of manufacture or as individual characteristics in service.

In order to stop a bullet in an extremely short distance, obviously a strong external force must be exerted opposing forward motion of the bullet. Hollow-point rounds fired into a water tank are frequently deformed; rounds fired into a cotton box can acquire striae from forced contact with the cotton fibers. See "Does the Recovery Method Affect the Quality of Test-Fired Bullets?", Ryan J. Postlethwait, Presentation B92, *Proceedings of AAFS* (Feb. 2007), Vol. XIII. Abstract at <http://www.aafs.org/pdf/07ProceedingsComplete.pdf>. If test-fired bullets in a controlled environment acquire extraneous striae from materials as ostensibly non-damaging (soft) as cotton, then real-world surfaces such as drywall, wood, metal, glass, human bone and other materials assuredly are more damaging. Although it can be speculated that striae introduced during test firing would likely result in non-matches, there are no studies or data indicative of how many times, if any, such extraneous characteristics can lead to false positives.

19. As the firearms examination community has started collecting and storing images of bullet and casing markings, there is evidence that the uniqueness claim made by firearm examiners is being undermined by the availability of more data. This is a phenomenon "...long observed by DNA analysts: as the size of the databases increases, the likelihood of an adventitious cold hit increases as well."

Cole, Simon A., "MORE THAN ZERO: ACCOUNTING FOR ERROR IN LATENT FINGERPRINT IDENTIFICATION", *J.Crim.Law & Criminology*, 95:3

(2005) at 1064, referencing David J. Balding, *Errors and Misunderstandings in the Second NRC Report*, 37 JURIMETRICS 469, 470-71 (1997). It has been demonstrated by study of the Integrated Ballistic Identification System (IBIS), which "...is used, successfully with numerous regional..."open case file" databases...[and] performs automated comparisons between bullets and cartridge cases from different crime scenes and is the cornerstone of the National Integrated Ballistics Information Network (NIBIN) deployed by BATF." See Review: AB1717 report, "Technical Evaluation: Feasibility of a Ballistics Imaging Database for All New Handgun Sales", Dr. Jan De Kinder, Ballistics Section Head, National Institute for Forensic Science, Department of Justice, Vilvoordsesteenweg 98-100, B-1120 Brussels, Belgium. De Kinder noted that "...the situation [correlation, or rankings of firearms considered likely candidates] worsens as the number of firearms in the database is increased" [De Kinder, *ibid* at 3] and "...increasing the database size, the ranking of a cartridge case decreases substantially" [De Kinder, *ibid* at 21]. Likewise, Joseph Masson, an ATF firearm examiner, noted that "[a]s the [computer] database grew within a particular caliber, 9mm for instance, there were a number of known non-matched testfires from different firearms that were coming up near the top of the candidate list. When retrieving these known nonmatches on the comparison screen, there were numerous two dimensional similarities." Joseph Masson, Confidence Level

Variations in Firearms, AFTE Journal 29(1) (Winter 1997). These striking similarities persisted even when the examiner looked at the bullets themselves. "When using a comparison microscope, these similarities are still present and it is difficult to eliminate comparisons even though we know they are from different firearms." *Id.*

20. Even assuming, *arguendo*, that firearms are capable of leaving toolmarks with unique individual characteristics on bullets and casings, the conclusion that a "match" between evidence toolmarks on a bullet or casing found at a crime scene and test toolmarks on bullets or casings that an examiner fired from a particular gun shows that the particular gun was the source of the ammunition components to the exclusion of all other firearms in the world is not supported by any scientifically meaningful body of research or empirical evidence. Moreover, examiners do not follow any objective, generally accepted scientific methodology to reach their identity conclusions. In particular, the claim that examiners can make reliable and statistically meaningful source attributions is undermined by several particular problems: the lack of research into firearm retail density and distribution patterns, the lack of an objective methodology for declaring a match, the lack of statistical research on the probability of finding coincidentally matching markings, the lack of independent peer review in the field, the demonstrated occurrence of observer bias among forensic examiners, and

the lack of any meaningful error rates for the field.

21. First, there exist no apparent studies or research into retail density and distribution patterns of firearms. This void makes it virtually impossible to determine or even assess the likelihood of other weapons exhibiting similar characteristics in a specific local area. Firearm products are likely not uniformly dispersed throughout the U.S. Instead, there may be a clustering effect, similar to that found by bullet lead researchers, where groups of firearms produced at the same time and in the same manufacturing process cluster in one particular area or region. See "A Retail Sampling Approach to Assess Impact of Geographic Concentrations on Probative Value of Comparative Bullet Lead Analysis", S.A. Cole, W.A. Tobin, L. Burgess, H. Stern, *Law, Probability & Risk*, Vol. 4, No. 4 (2005), Oxford University Press (probabilities of 1 were found in some geographic areas for some product lines, meaning that consumers had no choice but to purchase the same packing-coded (indicia of composition) bullets even if they wanted others). In assessing the statistical significance of "matching" characteristics on test and evidence bullets or casings, one must take into account the retail density and distribution demographics of the particular type of firearm and, indeed, even the prevalence of other similar caliber firearm types, in a particular region. Firearms and toolmark examiners do not currently use any data on the retail density and distribution patterns of firearms in assessing the probative

value of matching characteristics on test and evidence toolmarks due, in largest part, to the unvalidated premise upon which they rely - that no two firearms will produce toolmarks with the same "individual" characteristics. It should be noted that proponents of comparative bullet lead analysis (CBLA) maintained the same position for almost 40 years with regard to the similar underlying premise of uniqueness and also of probative value until relatively recent research proved CBLA invalid as practiced and without probative value. See "Comparative Bullet Lead Evidence (CBLA): Valid Evidence or *Ipse Dixit?*", E.J. Imwinkelried & W.A. Tobin, *Okla. City Univ LR*, Vol. 28 No. 1 (2003). See also FBI Press Release dated Sept. 1, 2005, available at http://www.fbi.gov/pressrel/pressrel05/bullet_lead_analysis.htm (where FBI concedes lack of probative value).

22. There is little consensus in either the scientific community or the forensic community of firearms/toolmarks examiners as to number, type or characteristics of toolmarks that must match before a bullet or casing found at a crime scene can be attributed to the gun that an examiner test fired. Within the firearms and toolmark examiner community, the "standard" that examiners are supposed to follow provides no practical guidance. Instead, it provides vague and subjective benchmarks of "sufficient agreement," "best agreement", and "practical impossibility." In full it states:

“[a]greement is significant when it exceeds the best agreement demonstrated between tool marks known to have been produced by different tools and is consistent with the agreement demonstrated by tool marks known to have been produced by the same tool. The statement that “sufficient agreement” exists between two tool marks means that the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so remote as to be considered a practical impossibility.”

(AFTE Theory of Identification). This is a subjective standard, a characterization that the AFTE concedes. See AFTE Criteria for Identification Committee, “Theory of Identification, Range of Striae Comparison Reports and Modified Glossary Definitions – an AFTE Criteria for Identification Committee Report.” AFTE Journal, Vol. 24, No. 2, April 1992, 336-340.

23. The first step for assessment of the probative significance of any source attribution is to estimate the statistical probabilities of a “match.” Two metrics are required: (1) the likelihood that the observed results could occur if the samples had a common source, and (2) the likelihood that the observed results could occur if the samples *did not* have a common source. Without valid answers to both questions, there is no way to assess probative value of the evidence for an unequivocal source attribution. However, the literature does not answer either of these questions, and accordingly firearm examiners continue to make absolute identification claims without any proof of the probative value of such exclusive source attributions (“match”).

24. The only generally accepted scientific method of making a conclusion that similar or matching markings on bullets or casings indicate that the bullets or casings came from a particular firearm would be to perform properly designed and statistically significant studies of both metrics. Such studies to assess both the premise of uniqueness and also the probative value of a source attribution would also necessarily require study of retail firearm distribution patterns as discussed above.

25. Since the study of metallurgy and materials science encompasses all manner of materials interactions, including solids, liquids and gases, materials scientists are easily capable of understanding and forming judgments about the forensic methodologies used by firearm examiners. Toolmark examinations, of which firearms (*aka*, "ballistics") examinations are a subset, is generally a study of metal interactions and, at times, of metal and environmental interactions (corrosion). There is no more appropriate scientific discipline to address such interactions than metallurgy or materials science.

26. Notwithstanding that the two most appropriate disciplines for assessing experimental methodology and conclusions of toolmarks examiners are metallurgy/materials science and statistics, to my knowledge, understanding and belief, there has been no demonstrable significant cross-discipline input from materials scientists or statisticians ever sought by the Association of Firearm and

Toolmark Examiners (AFTE) or SWGGUN for purposes of peer review or other scientific input into the development or testing of the methodology used by firearm examiners for exclusive source attributions.

27. Until only recently, there was little extrajudicial interest in toolmarks comparisons. The only "peer review" or testing of the methodology appears to be non-blind review of each other's work within the firearm examiner community. Within the materials science community this is not a generally accepted method of "peer review" of a methodology because each "reviewer" has an occupational or vested interest in the outcome of the "review", since the occupation, credibility, career and/or public standing of each reviewer is dependent on the outcome of the review, and the reviews were not undertaken in a blind fashion.

28. The AFTE community is a very closed one. Peer reviews in such a closed community are vulnerable to a phenomenon in social psychology and research methodology known as observer effects, of which 'expectation bias'/'confirmation bias' is an element(s), and which has been recognized by researchers at least as early as 1620 (*see* Francis Bacon, *Novum Organum*, Book I, 109, point 46 (1620), *reprinted in* 30 Great Books of the Western World 110 (Robert M. Hutchins ed., 1952)) and demonstrated by numerous researchers, "...especially in those forensic science practices utilizing subjective human judgment as their primary instrumentality and not based on techniques derived

from normal scientific methodology.” See Risinger, Saks, Thompson & Rosenthal, “The Daubert/Kumho Implications of Observer Effects In Forensic Science: Hidden Problems of Expectation and Suggestion”, *Cal.L.R.* 90:1 (2002) at 6. Confirmation bias, one of a number of biases revealed by researchers (see Paul Giannelli, “The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories”, 4 *VA. J. SOC. POL’Y & L.* 439 (1997) for discussion of “pro-prosecution bias”), is a cognitive bias of selective thinking whereby one tends to notice and look for information that confirms one’s existing beliefs, whilst ignoring anything that contradicts those beliefs. It is of most concern in practices involving subjective inference and was most recently implicated in the high profile and sensational misattribution matter of Brandon Mayfield, an American attorney accused of a terrorist bombing a train in Spain, where multiple fingerprint examiners (including one of the defense experts), quite experienced and held in high esteem within their community, peer reviewed the original fingerprint source attribution and confirmed it. As noted by Cole, “The fact that [even] defense examiners have corroborated disputed identifications indicates that expectation bias may be even more powerful than the expert’s bias toward the party retaining her.” See Simon A. Cole, “More Than Zero: Accounting for Error in Latent Fingerprint Identification”, *J.Crim.Law & Criminology*, 95:3 at

29. As observed in paragraph 23, *supra*, the practice of toolmark associations lacks objective standards for declaring matches between test and evidence toolmarks, let alone for concluding that a "match" proves that the marks were made by one and only one gun. According to Saks & Koehler, "The lack of objective standards [for pattern recognition practices] helps explain the disturbing findings [of risk of error and examiner disagreements] from the small body of research that has been conducted on pattern matching by forensic scientists." See "The Individualization Fallacy in Forensic Science Evidence", *VANDERBILT L Rev* 61:1:199.

30. The vulnerability of forensic examiners to *contextual* bias was vividly demonstrated in a study by Dror, Charlton & Peron. Experienced fingerprint examiners were presented fingerprint specimens in a blind re-test of fingerprints on which they had rendered previous identification decisions. However, the examiners were presented with contextually biasing information in the new exposure in an effort to contaminate their objectivity. Although the experts were instructed to ignore all the contextual information and to focus solely on the actual prints ... [80%] were affected by the context and made decisions

³ Both the practices of fingerprint comparisons and toolmarks comparisons are based on entirely subjective methodologies involving the opinion of the examiner that the markings could only have come from one source

inconsistent with their original decisions.⁴

31. In another aspect of the study, only one-third of the participants remained entirely consistent across the trials. From a pattern recognition standpoint, fingerprint ridge characteristics, of which there are only seven,⁵ are varied in geometry and should be easier to recall than the patterns in toolmarks. Researchers in the Dror study were most alarmed with the data points of inconsistent decisions made even in the *context-free* controls. They reasoned that the data suggest the possibility, at least for subjective evaluations such as those involved in toolmark and fingerprint comparisons, that expert decisions are inconsistent across time *regardless of contextual biasing contamination*. Dror, *ibid* at 613.⁶

32. It is my experience and opinion that current proficiency tests are virtually worthless in establishing rates of error for forensic practices. There are a

(person or firearm) in the world. Accordingly, the contextual, observer and confirmation biases and inconsistency issues of fingerprint examiners are relevant in reviewing the methodology of firearm and toolmark examiners.

⁴ "Contextual information renders experts vulnerable to making erroneous identifications" Dror, I., Charlton, D., & Peron, E., *J For Sci.*, 156 (2006) 74-78. Cf., "Why Experts Make Errors", Dror & Charlton, *J For Sci* 600 / 56 (4), 2006, at 605.

⁵ See "Psychological Aspects of Forensic Identification Evidence", William C. Thompson & Simon Cole, in *Expert Psychological Testimony for the Courts*, Lawrence Erlbaum Assoc. Publishers (2007), at 36.

⁶ In view of the obvious pattern recognition difficulties demonstrated by subjects in the Dror study, it is even more apparent that the AFTE Theory of Identification cannot be reliably applied in practice to establish the statistical certainty required of exclusive source attributions. As noted by Risinger, *et al.*, "...reliability cannot be judged 'as drafted,' but must be judged only specifically 'as applied' for the task at hand." Risinger, *et al. supra*, at 6. I have not found any database, statistics, data, research or studies that have scientifically established the boundary conditions of the AFTE Theory, or even any metric by which they could be assessed. Further, in my opinion, pattern recognition of toolmarks is a perishable skill with limited mental shelf life. I have found no research or studies confirming that pattern retention of the toolmarks made by particular tools solely by memory over spans of hours, days, months or years between observations is humanly possible. Unless such pattern retention is possible, examiners cannot rely on their experience to determine whether, as the AFTE Theory requires, a "match" between

number of problems with current proficiency testing, including that: the tests are generally not double-blind or even blind, samples are most frequently not "real-world", examiners are sometimes familiar with the control samples such that complete analyses are not even necessary (if in-house control samples are used), bureaucratic concerns over credibility (damaging test results in personnel files that may potentially destroy the career of an expert witness), concerns over agency image, camaraderie allowing respondents to repeat tests until they "get it right", and no retention of the incorrect result records. *See also* "The Individualization Fallacy in Forensic Science Evidence", Michael J. Saks & Jonathan J. Koehler, at 14, available at:

http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michael_saks

34. Decades of acceptance by a closed community of toolmarks examiners does not constitute a generally accepted scientific validation of a theory, premise, hypothesis or forensic practice based on such a foundation. One reason the "test of time", also known as "implicit testing", is not a valid measure of practice validity or rate of error is that there is no effective feedback loop for expert witnesses testifying to exclusive source attributions. In part because there is little extrajudicial professional interest in the field of firearms/toolmarks comparisons, there are few avenues available for expert witnesses to learn of

test and evidence toolmarks exceeds the best known non-match.

individualization testimony errors other than by pure accident. In the profession of toolmarks examinations, alternative reliable techniques for discovering misidentifications are rare. Because there is no scientifically reliable feedback loop for an examiner's individualization process, claims of low rates of error are without foundation. See "Simon A. Cole, "Implicit Testing": Can Casework Validate Forensic Techniques?, 46 *Jurimetrics J.* 117-128 (2006). See also Saks & Koehler, *supra*

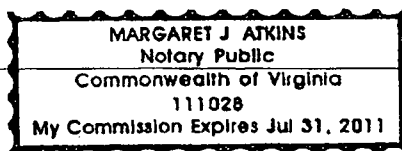
35. It is my opinion that the current state of scientific research in the field of toolmarks comparisons does not support any inference of exclusive source attribution. In addition, the methodology used by firearm examiners to reach conclusions of individualization in the current state of the art would not be generally accepted among the relevant scientific community, including materials scientists.

Signed under the penalties of perjury this 17th day of December, 2008.

William A. Tobin
William Tobin

Subscribed and sworn to before me this 17th day of December, 2008

Margaret J. Atkins
Notary Public



STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	CA No. CA No. 06-CP-40-3866
EDWARD FREIBURGER # 286115,	)	
Applicant,	)	
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	
	)	

AFFIDAVIT OF ALICIA L. CARRIQUIRY IN SUPPORT OF APPLICANT

I, Alicia Carriquiry, pursuant to 28 U.S.C. §1746, by my signature below, hereby declare under penalties of perjury that the following is true and correct:

1 I received an undergraduate degree in 1982 in Agricultural Engineering from the Universidad de la República Oriental del Uruguay, in Montevideo, Uruguay. In 1985 I received a Master of Science degree in Animal Breeding and Genetics from the University of Illinois at Champaign-Urbana. In 1986 I received a Master of Science degree in Statistics from Iowa State University and in 1989 I was awarded a PhD degree in Statistics/Animal Breeding and Genetics from Iowa State University. After obtaining my PhD, I joined the Department of Statistics at Iowa State University as a tenure-track Assistant Professor in 1990. I was promoted to Associate Professor with tenure in 1996 and to Full Professor in 2000. Between 2000 and 2004 I served as Associate Provost of Iowa State University. I have been a Visiting Professor at the Catholic University of Chile (in 1993, 1996 and 2007-2008) and at Duke University (1997).

2 I am an elected member of the International Statistical Institute (ISI) and a Fellow of the American Statistical Association (ASA) and of the Institute of Mathematical Statistics (IMS). I am currently Vice President of the ASA and a member of the ISI Council. I have been President of the International Society for Bayesian Analysis, a member of the Executive Committee of the IMS and a member of the Board of Trustees of the National Institute of Statistical Sciences. I serve on two standing committees of the National Academy of Sciences and have been a member of several ad-hoc committees of the National Research Council (NRC) and the Institute of Medicine (IOM). In particular, I was a member of the recent NRC Committee on assessing the technical feasibility of a national ballistics database. The report from the Committee, which was recently released,

concluded that at this time, a comprehensive database, to include images of bullets and casings fired by all guns manufactured or imported into the United States, is not technically feasible. While deciding on the admissibility of firearm markings in court was not within the charge of the Committee, the practice of firearm-related toolmark examinations was discussed by the Committee. The Committee concluded that the two fundamental assumptions on which firearm marks examinations rest, those of "uniqueness" and "reproducibility" of the marks, have not been fully demonstrated and that more research is needed before that can be accomplished.

3. I was also the Principal Investigator (PI) on a research project funded by the Federal Bureau of Investigations (FBI, through the Midwest Forensic Resource Center at Iowa State University) in 1998-2000. Co-Principal Investigators were Professors Hal Stern (now Chair of the Department of Statistics at the University of California at Irvine) and Prof. Michael Daniels (now Acting Chair of the Department of Statistics at the University of Florida). The main objective of that research project was to assess whether an error rate (or a probability of a coincidental match) could be attached to comparative bullet lead analysis results, so that it would then be possible to quantify the probative value of bullet lead matches. We found that the probability of a match between two samples with **different origin** was non-negligible and that extensive research would need to be carried out before the probative value of bullet lead matches could be established. Results were reported to the FBI in a report entitled *Statistical Treatment of Trace Evidence*, submitted to FBI on May 4 of 2000. Possibly as a consequence of the findings in the report, several challenges to expert testimony on bullet lead arose. This in turn motivated the creation of the NRC Committee which investigated issues around bullet lead evidence and the eventual cancellation of bullet lead analyses by the FBI. I was asked to make a presentation to that Committee as an expert on issues associated with the estimation of the probability of coincidental matches in trace evidence.

4. I have read the Motion to Exclude Firearms Identification Testimony submitted by Mr. Troy Worsley and the various responses and re-joiners that have followed. The Motion, filed on April 10, 2008, raised four objections to the testimony of firearms examiner Mr. Jonathan Pope. In this write-up, I refer to three of them: (1) The fundamental assumptions of "uniqueness" and "reproducibility" of tool marks on ballistic evidence are not generally accepted in the relevant scientific community, (2) The subjective methodology for identifying so-called "individual" characteristics is not generally accepted, and (3) Claims of identity should not be admitted because there is no generally accepted statistical expression for the probability of a coincidental match. Objections (1) and (3) are closely related; indeed, if (1) is true, then (3) must follow.

5. Whether firearms examiners can accurately establish a match between two or more samples by observing the samples under a comparison microscope and counting "matching" striations is a matter of debate, even in the community of

firearms examiners (See, for example, the work by Miller which appeared in the *AFTE Journal* in Spring 2000, Spring 2001 and Winter 2004) In his 2000 paper, Miller carried out thousands of land impression comparisons using bullets of different calibers that were known matches or known non-matches of specimens for which two and three dimensional images were available His main objective was to establish that the less subjective approach known as CMS (Consecutive Matching Striae) produces few false positive identifications and that its performance does not depend on caliber. In his research, Miller obtained the distribution of the percentages of land impression matches (minimum, average, maximum) over the thousands of comparisons for known matches (KM) and known non-matches (KNM) samples. His results are striking in that they put into question whether an examiner who is only counting matching land impressions can accurately declare that two samples match Miller's results suggest that there is a similar distribution of matching impressions among bullets that are known to be matches and among bullets that are known to be non-matches In particular, when the comparisons were carried out using 9mm bullets he found that on the average, 7% and 11% of impressions among KNM and among KM actually matched using two-dimensional images and that the corresponding average percent matches were 11% and 18% using three dimensional images. Given that in both cases, the ranges of matching landmarks overlap to a high degree, it is clear that simply by counting the number of matching markings between two samples it is not possible to accurately declare a match between the samples Consider, for example, the data obtained by Miller for 9 mm ammunition using two-dimensional images The range in the *number* of matching striae was 2 to 9 in KNM and was 1 to 27 in KM The corresponding average numbers were 5 and 7 Note that even though the maximum number of matching impressions appears to be much higher in KM (27 versus 9), the relatively low average of 7 indicates that much of the distribution of the number of matching impressions was actually concentrated around the lower values. Thus, given two samples with anywhere between 2 and 10 matching impressions it would be equally likely for them to be a "true" match or a "true" non-match.

6. Miller's results call into question the reliability of the method employed by firearms examiners This is because for most calibers and for both two- and three-dimensional images, experimental data suggest that the overlap between the distributions of numbers (and percentages) of matching impressions in KMs and KNMs is too high to permit "separating" a match from a non-match. The CMS method (which was not employed by Mr. Pope) at least provides clear criteria for calling a "match" and prevents reliance on the misleading percentage of matching striations

7 Even if we were to assume that a match can be accurately established using the traditional (i e , non-CMS) approach, the significance of the match in terms of probative value relies on the assumption that each gun leaves a "unique" impression on all bullets fired with it. This is an unverified and very critical assumption The assumption of "uniqueness" put in a different way says that if

two samples match (i.e., have indistinguishable markings) then they must have a common origin. In the case of markings on casings or bullets this says that the two samples must have been fired by the same gun. To my knowledge, this assumption has not been tested in a scientifically defensible way. With the information that is currently available, it is not possible to estimate the probability that two bullets or casings will match if they were fired by *different guns*. This probability is what we call the *coincidental match probability*. It is crucial to know whether this coincidental match probability is or is not negligible in order to appropriately evaluate the probative value of the match.

8 Consider evidence such as markings on a bullet or a casing that match the markings left on a different sample fired from a known gun. In order to determine its probative value, the evidence must be evaluated under two competing hypotheses: the "common origin" hypothesis and the "different origin" hypothesis. We can, in principle, compute the probabilities of observing the evidence under the two competing hypotheses, and the ratio of the two is called the *likelihood ratio* or the *odds against non guilt*. In the case of DNA evidence, for example, it is well known that

- The probability that two samples will match if they were deposited by the same person (the "common origin" hypothesis) is very large
- The probability that two samples will match if they were deposited by a different person (the "no common origin" hypothesis) is very low

The likelihood ratio for DNA evidence is very large and thus DNA evidence has high probative value. What can we say about the probative value of bullet or casing markings? Not much. That is due to the following: while we know that the numerator in the likelihood ratio (the probability of a match given the same gun) is high, the denominator (or the probability of a match of two samples fired by different guns) is unknown and will continue to be unknown unless extensive and as yet un-conducted studies are undertaken.

9 Estimating the probability of a match given the same gun is simple and is done routinely. In almost all investigations (including the one about which Mr. Pope testified in this case) examiners will test fire the gun in question repeatedly and will determine whether the markings on casings and bullets fired from the same test gun match. Typically a match will be established (again we do not address issues associated with the methods used to determine matches). We assume therefore that the numerator of the likelihood ratio mentioned in 7 above can be estimated and will typically be high for ballistic evidence.

10 The existing studies performed by firearms examiners are not adequate to establish the probability of a match given that different guns fired the samples, nor are they adequate to establish an error rate for firearms examiners. Estimating the probability of a match given that different guns fired the samples is very difficult and to my knowledge has not been done. The spotty, small scope studies that have been carried out in a disjointed manner by various firearms examiners in no way can be considered to provide the information that would be

needed to properly quantify the probative value of firearms markings. In order to reliably estimate the probability of a coincidental match (or the "uniqueness" of the markings left by a gun), it is necessary to conduct a population-wide study, where a representative (or at least very large) sample of guns is tested using a wide range of ammunition under both controlled and field conditions. Given that there are currently many millions of guns in use in the United States, such an experiment would need to include several thousand guns (although the exact number would need to be determined on the basis of experimental design principles and the margin of error that would be acceptable for the results). In essence, the study would result in a "reference database" similar to the database of DNA samples that has been used to successfully establish that the probability that two matches with different origin will match is essentially zero. In this light, Dr. Bieber correctly argues (Reply to Government's Opposition at 16) that currently, ballistics evidence is not easily amenable to the same type of quantitative treatment used in DNA evidence. But that was true also when DNA evidence was in its infancy, until a comprehensive reference database that permitted inferences at the population level became available, the probability of a coincidental match was not estimable either. Thus, we argue that the fact that at this time the information to make defensible statements about "uniqueness" is not available is no reason to unjustifiably assert that in the absence of evidence to the contrary the probability of a coincidental match will be assumed to be negligible.

11 In conclusion:

- Experimental results reported in the forensics literature cast doubts about the claim that by simply counting the number of matching striae or other impressions it is possible to determine whether two samples match. Miller's results, based on many thousand of comparisons of samples of different calibers and captured using two and three dimensional images clearly show that there is a significant overlap in the number of matching striae and other impressions in bullets known to be matches and bullets known to be non-matches. Thus, even among firearm examiners the practice of simply counting matching impressions appears to be questionable.
- Even if we were to assume (against the evidence) that matches can be accurately established by counting impressions, stating that markings from firearms are "unique" and thus, that a common origin conclusion can be drawn is potentially incorrect and definitely over-reaching given the current level of information that is available. It has not been shown that a gun will leave markings on the bullets it fires that are indistinguishable from the markings left by *all other* guns that are in use in the United States at this time.

It is generally accepted among statisticians that claims of identity (such as those made by firearms examiners when stating that two samples match) are inherently probabilistic. As such, these claims of identity must be supported by adequate data. In my opinion as a statistician with many years of experience, the studies that have been carried out and the (scant) data that have been collected in no

way support the methods or the conclusions that are routinely drawn by firearms examiners

Signed under the penalties of perjury this 23th day of April of 2009.

Alicia Carriquiry

Alicia Carriquiry

Sarah Erickson 4/23/09



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
) 2006-CP-40-3866

Edward Freiburger,)
)
 Applicant)
 vs.) TRANSCRIPT OF RECORD
) (PCR Hearing)
)
State of South Carolina,)
)
 Respondent.)

October 8, 2009
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE

APPEARANCES:

JOHN H. BLUME, ATTORNEY AT LAW
Attorney for the Applicant

BRIAN PETRANO, ASSISTANT ATTORNEY GENERAL
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	APPLICANT'S EXHIBITS			
	NO.	DESCRIPTION	ID	EV
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2	1	Affidavit	3	24
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4	2	Transcript	3	27
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1 Thursday, October 8, 2009

2 (WHEREUPON, Applicant's Exhibit No. 1 is marked
3 for identification.)

4 (WHEREUPON, Applicant's Exhibit No. 2 is marked
5 for identification.)

6 THE COURT: All right. Be seated. Thank you.
7 You know who everybody is?

8 COURT REPORTER: Yes, sir.

9 THE COURT: All right. This is a continuation
10 of the hearing, post conviction relief hearing which
11 commenced August 13th, 2009 in the case of Edward
12 Freiburger vs. The State of South Carolina. The
13 purpose of the recess at that time was due to Mr.
14 Delgado's unavailability for health reasons. And
15 we're now back on the record. And, Mr. Petrano, are
16 you calling Mr. Delgado --

17 MR. PETRANO: I'm not sure.

18 THE COURT: -- at this time?

19 MR. PETRANO: I believe that at the beginning of
20 the proceedings Applicant's counsel or my counterpart
21 indicated he had five witnesses. I think he only
22 called four. I assume the fifth would have been Mr.
23 Delgado, but I am just guessing on that.

24 THE COURT: Okay.

25 MR. PETRANO: But I can call him.

1 THE COURT: Well, I'm here. You are here. Mr.
2 Blume is here. Let's proceed somehow.

3 MR. BLUME: Your Honor, what I had intended to
4 do is to call Mr. Delgado. This has gone sort of
5 back and forth. But I can do it any way you want. I
6 could call Mr. Delgado, have him review the
7 affidavit, authenticate it, offer his direct
8 testimony and proffer cross examination. If the
9 Court wants to proceed some other way, I'll be happy
10 to. But, hopefully, that will expedite matters. Mr.
11 Petrano I think has been given notice about what Mr.
12 Delgado's position is on various issues.

13 THE COURT: All right. Mr. Petrano, call Mr.
14 Delgado on behalf of the State.

15 MR. PETRANO: Thank you, Your Honor. The State
16 would like to call Mr. John Delgado.

17 JOHN DELGADO, after being duly sworn, testifies
18 as follows:

19 THE CLERK: Please have a seat. State your full
20 name for the record.

21 THE COURT: And go ahead. State your name.

22 THE WITNESS: My name is John Delgado.

23 THE COURT: Just for the record, the Court has
24 been furnished a copy of an affidavit of John Delgado
25 dated September 16th, 2009. I did not spend much

1 time reviewing it in anticipation that we would have
2 this hearing and hear Mr. Delgado's testimony today.
3 You may proceed, Mr. Petrano.

4 MR. PETRANO: Your Honor, based on the nature of
5 the affidavit, I would like to respectfully request
6 to treat the witness as hostile.

7 THE WITNESS: Sure.

8 THE COURT: All right. Go ahead.

9 MR. PETRANO: Okay.

10 DIRECT EXAMINATION

11 BY MR. PETRANO

12 Q Mr. Delgado, do you recall your representation of the
13 Applicant?

14 A Yes, sir, I do.

15 Q And I'm sorry for the basic introductory questions.
16 Could you tell us how that came about? Were you
17 appointed or were you retained?

18 A No, sir. I was retained by Mr. Freiburger's family
19 on his behalf.

20 Q And how did that -- how was that arrangement -- how
21 did that begin? Did they call you? Or did he have
22 any other attorneys before you?

23 A Oh, no, sir. There may have been an attorney in
24 Indiana that referred the family to me. I think
25 that's the way it happened. But the best I recall,

1 there was some member of the family called me.

2 Q Did you meet with him? Was he incarcerated? Was he
3 on bond?

4 A No, sir. At that time in fact he had not even been
5 arrested. We arranged with the Solicitor's Office to
6 have Mr. Freiburger come down from Indiana to turn
7 himself in. We arranged a bond, and we had worked
8 out that Mr. Freiburger would be able to return to
9 his home in Columbia City, Indiana.

10 Q Did you meet with him and discuss the case and the
11 charges against him?

12 A Yes, sir, I did.

13 Q And the elements of that?

14 A Yes, sir, I did.

15 Q Did you all discuss how the length of time would
16 impact and which version of the law the statutes
17 would apply?

18 A Yes, sir. This was a very unique case because of the
19 length of time that had transpired between this
20 occurrence and Mr. Freiburger's arrest and trial.
21 But as best I could, I tried to place it in the
22 context of a post Mapp vs. Ohio, the rules of
23 evidence. And there were all sorts of things that
24 were conflict of laws problems. It was a law school
25 problem.

1 Q And let me take you back to Mapp. And I think you're
2 talking about the exclusionary rule and how that
3 would apply?

4 A Yes, sir.

5 Q And could you tell us about that? Just walk us
6 through the facts as you saw them and as you
7 explained them to Mr. Freiburger.

8 A Well, I can't exactly tell you how I explained them
9 to Mr. Freiburger. But as best I could, I'm certain
10 I went over with him the date of this occurrence in
11 1961 pre-dated the United States Supreme Court
12 decision in Mapp vs. Ohio relating to the
13 exclusionary rule. And we attempted to show how
14 Freiburger and his family were involved in every
15 aspect of this case, how that would play out now,
16 some 40 years later.

17 I think what you wish for me to address, Mr.
18 Petrano, is the business about whether or not I
19 conceived or thought of the confrontation clause that
20 has now been changed through the case of Crawford vs.
21 Washington and how that affects trial work.

22 Q I appreciate that.

23 A I'm sorry.

24 Q We're going to get to that.

25 A Oh, I'm sorry.

1 Q But actually I was focusing on the exclusionary rule
2 and how you focused on the Terry stop, the one that
3 occurred out of state and how the gun was retrieved.
4 I just wanted to know --

5 A I'm sorry. Yes. I apologize. As best I can recall,
6 we focused on the stop and attempted to show why that
7 stop was improper under the law of the state of
8 Tennessee, how -- and case law that was existent at
9 that time. It was my understanding -- again, sir,
10 this has been some eight years ago since the trial --
11 I can recall I believe at least researching Tennessee
12 law relating to searches of individuals.

13 I recall looking at some law relating to
14 hitchhikers in Tennessee, something along that line.
15 And I believe that we made the appropriate motion to
16 suppress the seizure of the gun as a result of Mr.
17 Freiburger's arrest in Tennessee for unlawful
18 possession of a weapon or whatever the Tennessee
19 counterpart of that is. If I am not mistaken, that
20 was ruled on by Judge Floyd.

21 Q Thank you. And then did you go over the discovery
22 with the Applicant?

23 A I did. Yes, sir.

24 Q And discovery was pretty -- was it typical in volume
25 for a murder case or atypical?

- 1 A It was more substantial than we usually get in a
2 murder case. And part of that had been simply
3 because of the length of time that had transpired.
4 There was a lot of stuff that was extremely, not
5 outdated, but you could just tell -- I've never seen
6 a letter to J. Edgar Hoover before. I mean, things
7 like that just didn't exist in the year 2000. So it
8 was a very unique case. But I went over everything
9 we had with Mr. Freiburger. Yes, sir.
- 10 Q And, for example, the letter to J. Edgar Hoover, that
11 has -- at least the copies I've seen; in fact, that
12 letter and all the discovery has a Bates number; I
13 believe that's the term, on the bottom in an attempt
14 to kind of keep everything organized?
- 15 A Yes, sir. I believe that was my -- I believe that I
16 Bates stamped it. I could be wrong about that. I
17 don't know if we received it from the solicitor Bates
18 stamped or not.
- 19 Q And that's what I read in the transcript I believe,
20 is that you had Bates stamped it. And my other
21 question was, there's also a table of contents, an
22 index, if you will, to the discovery. I just wanted
23 to know, was that prepared by you?
- 24 A Sir, if that was found in my trial box, then I'm
25 certain it was prepared by me.

- 1 Q I saw it in both places.
- 2 A Okay. I'm sorry. Well, I can't be sure. I'll be
- 3 honest with you; I cannot be sure.
- 4 Q Okay. And then let me jump right to the affidavit.
- 5 I'm going to go a little out of order here.
- 6 A All right.
- 7 Q Did you draft this?
- 8 A I re-drafted it with some edits as I recall and then
- 9 sent it back to Mr. Blume.
- 10 Q Okay. And where has your file been? Do you have a
- 11 storage facility? It's kind of large. I was just
- 12 wondering how you keep it.
- 13 A Yes, sir. It had been in my possession after the
- 14 trial. And then when I moved in with the firm that I
- 15 am presently working with, it was transported there
- 16 and it's been in our storage on site since that time.
- 17 Q Were there any plea offers in this case?
- 18 A Sir, there were. It is my recollection that the
- 19 morning that we started the trial in late July of
- 20 2001, I think the State said something along the
- 21 lines of fifteen years or possibly ten years. I
- 22 can't recall. But I do recall some sort of plea
- 23 offer. That was discussed with Ed and his family and
- 24 the decision was made to reject it.
- 25 Q Did the Applicant -- was that decision, if you

1 recall -- and I understand it's been a number of
2 years -- was that decision based on just a reluctance
3 to that amount of time? If I'm not being clear, I
4 apologize. But I'm trying to get at, did he want to
5 plead but just to a better deal?

6 A Oh, no, sir. No. He had always denied his guilt and
7 involvement in this. I just think the Solicitor's
8 Office knowing what an extended trial can produce or
9 would reveal decided that it might be in the interest
10 of justice to extend an offer. It was not done until
11 the Monday morning of the trial. That I am fairly
12 certain of.

13 THE COURT: Could I ask what it was a plea to?

14 THE WITNESS: I'm sorry?

15 THE COURT: A plea to what?

16 THE WITNESS: Your Honor, it would have had to
17 have been manslaughter of one sort or another. I
18 believe that is correct. It was a number of years.
19 Your Honor, here is what may have happened, because
20 as I understand the sentencing the sentencing had to
21 take place with the sentencing scheme that would have
22 been determined in 1961. So --

23 THE COURT: That's why I asked the question.

24 THE WITNESS: Yes, sir. Yes, sir.

25 THE COURT: So it wasn't a murder?

1 THE WITNESS: It was not the murder for
2 day-for-day 30 years to life that we have now. No.

3 THE COURT: Oh, I know that.

4 THE WITNESS: Yes, sir.

5 THE COURT: But it was a murder to the statute
6 at that time or --

7 THE WITNESS: Your Honor, I can't be sure. I'm
8 sorry.

9 THE COURT: I'm sorry for interrupting. Go
10 ahead.

11 Q I retrieved a number of pre-trial motions from the
12 clerk's office. Do you recall -- may I approach?

13 THE COURT: Yes, sir.

14 Q Do you recall making those? I've got one filed
15 July 25th I believe with your signature.

16 A Yes, sir. That is correct.

17 Q And I've got another one filed July 25th.

18 A Yes, sir. I believe these were noted in the heading
19 as number 1, or first set number 1, 2 and 3, if I'm
20 not mistaken.

21 Q And could you tell us, just read for the record the
22 title of this particular one I'm holding?

23 A Sure.

24 Q And I believe they're all stamped July 25th. I just
25 want to get the titles correct.

1 A Yes, sir. Defendant's Memorandum in Support of
2 Motion to Disallow Certain Writings Pursuant to
3 Denial of Confrontation Clause and Due Process
4 Clause.

5 Q And then the other set?

6 A Defendant's Memorandum in Support of Motion to
7 Disallow Certain Writings Pursuant to Inapplicability
8 of Rule 803(6) of the South Carolina Rules of
9 Evidence.

10 Q And the third?

11 A The third one, sir, is a Motion to Exclude Evidence
12 of Prior Bad Acts.

13 MR. PETRANO: And, Your Honor, I would like to
14 introduce these as one set if that's okay. I have
15 provided a copy to --

16 MR. BLUME: No objection.

17 THE COURT: Without objection.

18 MR. PETRANO: And I think this would be State's
19 3?

20 COURT REPORTER: I have no idea what was marked,
21 Brian, in the prior hearing.

22 MR. PETRANO: Shall we just call it 10?

23 COURT REPORTER: I guess we could just skip.

24 (WHEREUPON, State's Exhibit No. 10 is marked for
25 identification and received in evidence.)

- 1 Q And, sir, I also have a transcript from a pre-trial
2 hearing. Now, I -- well, is that your office's stamp
3 there at the bottom?
- 4 A Yes, sir, it is.
- 5 Q And the date of that stamp is July 27th, 2003,
6 correct?
- 7 A I believe it's January 27th, 2003.
- 8 Q Thank you. My mistake. My point was that this was
9 after the trial?
- 10 A Oh, yes, sir. Yes, sir.
- 11 Q Okay. And so I'm just guessing here. But this was
12 probably procured by your office in pursuit of the
13 appeal?
- 14 A That is correct, sir.
- 15 Q Okay. And do you recall this particular pre-trial
16 hearing?
- 17 A Sir, looking at the date, I see we had some sort of
18 pre-trial hearing on either the Thursday or the
19 Friday before the trial was to start, if I'm not
20 mistaken.
- 21 MR. PETRANO: And, Your Honor, I'd like to move
22 this in as State's Exhibit 11.
- 23 (WHEREUPON, State's Exhibit No. 11 is marked for
24 identification and received in evidence.)
- 25 Q Now, jumping back to when I asked you about Mapp and

1 the exclusionary rule, you went off and tried to talk
2 about the confrontation clause. And I apologize for
3 interrupting you and going backwards, but let's talk
4 about that now. What is it you were trying to get
5 out when you were saying that?

6 A The aspect of certain information that was introduced
7 or that we attempted to object to that was introduced
8 by the solicitor, we simply focused on what we
9 thought was the only objection, which were exceptions
10 to the hearsay rule, and were asking the Court to
11 disallow them as hearsay exceptions. It never
12 crossed my mind, notwithstanding Mapp, that
13 confrontation was an issue. I never saw that. And
14 now as a result of Crawford and Davis, that is now
15 the law. And I wish I'd have preserved that. I did
16 not see it.

17 Q Well, tell me about it. What would you have
18 preserved? What was actually introduced that was in
19 violation in Crawford that existed at the time?

20 A Sir, I'm sorry. It's been eight years. I cannot
21 tell you. But I do recall whatever we objected to on
22 hearsay grounds, I should have and could have
23 objected to on the grounds of confrontation as well.

24 Q And pardon my ignorance here, but the confrontation
25 clause, that's the Sixth Amendment, right?

1 A That is correct, sir.

2 Q And would you be surprised if you mentioned the Sixth
3 Amendment and the confrontation clause throughout
4 your motions throughout the pre-trial hearing and
5 throughout the trial?

6 A I may have. But if I did, what I was simply saying
7 was that I was preserving them for Sixth Amendment
8 purposes. But I was not focusing on them in my
9 argument. All my argument related to whether or not
10 these matters ought to be suppressed as a result of
11 being hearsay. Or that's the way I recall that.

12 Q Now, Crawford, and I'm not trying to make this a law
13 school test. And, sir, --

14 A I know that. I understand.

15 Q -- I'm going to sound like an idiot asking you these
16 questions, sir.

17 A No, sir. No, sir, you won't.

18 Q Crawford didn't destroy hearsay, right?

19 A That is correct. True.

20 Q So Ohio/Roberts basically is still correct for
21 non-testimonial?

22 A Sir, I believe that is correct. But what Justice
23 Scalia simply what I think was attempting to say in
24 the Crawford case was that confrontation has never
25 really been given the strength and the power that

1 it's due.

2 I think after Crawford we all now are
3 instructed -- not just Crawford and Davis; but,
4 listen, Melendez vs. Massachusetts is a case that
5 continues the line of cases that Scalia -- excuse me
6 -- Justice Scalia started with Crawford. So I think
7 we are all as a profession being educated as to not
8 just the nuances but the viability of the
9 confrontation clause. I did not use that. If I did
10 use it, I was not giving it any significance because
11 I really thought that these were hearsay exceptions
12 that I was arguing.

13 Q And so that being said, what was testimonial that was
14 offered in violation of Crawford? I think I've asked
15 you this, and I apologize if I'm repeating the
16 question. But this is kind of the heart of your
17 affidavit, particularly number 3.

18 A Sir, there were things, as I recall, if we're talking
19 about paragraph 3, I remember Mr. Clark testifying.
20 He was a former Columbia Police Department officer --
21 he may have been retired from the Department -- and
22 was relying on things that I considered to be
23 hearsay. And I am certain I objected or tried to.
24 Mr. Abersold, Gary Abersold -- A-B-E-R-S-O-L-D, Ms.
25 Court Reporter -- was a military inductee with Mr.

1 Freiburger.

2 And I believe Mr. Abersold when he testified,
3 talked about some other matters that other folks had
4 said to him or had told him about some sort of a -- I
5 can't recall -- something that was hearsay, and I
6 objected on those grounds. At least that's what I
7 can recall from eight years ago.

8 Q Did you review the file before you authored this or
9 edited the affidavit that was provided to you?

10 A I'm certain I looked at it and read certain portions
11 of it. I think I reviewed the transcript or tried to
12 review the transcript, which was an extensive
13 transcript, a five-day trial. I read some things.
14 Yes, sir. I can't be certain or recall exactly what
15 I read.

16 Q Now, number 4 on this affidavit indicates that you
17 made a strategic decision to not retain an
18 independent examiner?

19 A Yes, sir.

20 Q And stop me if I'm wrong here. The way I'm reading
21 this is that's because you were simply going to
22 challenge the State's expert, the out-of-house expert
23 with SLED?

24 A Yes, sir. What the case broke down to, sir, was that
25 there had been innumerable SLED experts that had

1 testified that it was -- that the gun and the bullet
2 fragment found in the victim was not a match. I
3 thought that that testimony from South Carolina
4 ballistics experts employed by the State Law
5 Enforcement Division could and, hopefully would
6 overcome the testimony of this hired gun from
7 Missouri, Mr. Cayton.

8 And I tried to play -- I had pictures taken of
9 Mr. Cayton's supposed laboratory which was a
10 single-wide trailer out in the woods by his house. I
11 hired an investigator to go out there, and I
12 juxtaposed that against the picture I took from Broad
13 River Road with the big SLED laboratory and tried to
14 show who is the most professional, who is the most
15 thorough, who is saying things that had the most
16 scientific viability. So that's what I tried to do
17 rather than hire an independent expert.

18 Q And you had indicated just a moment ago -- and
19 perhaps I heard you incorrectly; stop me if I'm
20 wrong -- that SLED's position was that this was not a
21 match?

22 A That is correct.

23 Q And the way the State spun it around was that it was
24 simply inconclusive and inconsistent. So it's not as
25 though SLED and Cayton disagreed. You tell me, sir.

1 A That may be specifically right. But they had never
2 also concluded that the gun that was supposedly
3 taken, that was taken off Mr. Freiburger was the
4 murder weapon. So as long as they couldn't say that,
5 I believed that the case had a reasonable doubt
6 component to it, and that's what I argued to the
7 jury.

8 Q And there's about 30 pages of that in your
9 examination of the SLED agents, correct?

10 A May very well be.

11 Q Tell us how you prepared for this case. I saw it
12 mentioned somewhere along the way -- and correct me
13 if I'm wrong.-- but did you have a mock jury?

14 A Mr. Petrano, I've done that in major cases. I'll be
15 honest with you, sir. If I didn't, I may I have
16 considered it. But I can't recall doing it. But I
17 try to do that in major cases. I don't recall
18 specifically doing it in this case.

19 Q And just what would that entail if you had done it
20 for this case?

21 A Sure. We attempted and have attempted in the times
22 I've done that to get six or eight, possibly ten
23 individuals to come to the office on an evening, get
24 them pizza and some Coke and have a dry run from both
25 the prosecution side and the defense side as to the

1 strengths and weaknesses of the case.

2 Sometimes I think lawyers don't see forest for
3 trees and sometimes lay witnesses -- excuse me -- lay
4 jurors can give us a better understanding of the
5 strengths and the weakness of our case. I've always
6 learned from mock juries important things that I
7 needed to either avoid or I needed to emphasize. But
8 that's a couple of hours. And I would videotape it
9 or tape it audibly so that I could review it in
10 preparation for the trial.

11 Q And it's basically just to work out the kinks and
12 fine tune and hone your arguments?

13 A Or discover new things that I never new existed.
14 It's never ceased to amaze me what jurors come up
15 with that I, or at least this lawyer, have never
16 considered.

17 MR. PETRANO: Your Honor, could I just have one
18 moment?

19 THE COURT: Excuse me?

20 MR. PETRANO: Could I just have one moment?

21 THE COURT: Yes.

22 Q Would you tell us about item number 5 in your
23 affidavit, sir?

24 A Mr. Petrano, when I reviewed the brief by Mr. Blume,
25 my instinctive reaction was: What are we talking

1 about? Because I do not to this day recall a letter
2 from Mr. Kate indicating that this weapon was the
3 murder weapon to the exclusion of all other weapons.
4 I just don't have any recollection of that. If it's
5 in the file and if I saw it, sir, when I read Mr.
6 Blume's pretrial brief and the application and when I
7 went over the filing of this affidavit, I simply did
8 not recall that. And to this day I'd take a
9 polygraph test on the fact that I just don't recall
10 this. No, sir.

11 Q And would you be surprised if that document is
12 stamped with your office's Bates stamp?

13 A No, sir. I figured that's where you were going with
14 the Bates stamp. If that's the case, I stand
15 corrected. I just did not see it. Oh. Well, it may
16 have been: How was I going to get that into
17 evidence. Because Mr. Kate had passed away many
18 years before. I can't recall. But my understanding,
19 my recollection, sir, is at this moment if it was in
20 the file, I do not recall seeing it.

21 Q And I apologize for harping on this, but just one
22 further question on that.

23 A Not at all.

24 Q Back to the index, would you be surprised if there's
25 actually a line item reference to page 301 and page

1 300 and it says letter from J. P. Strom to J. Edgar
2 Hoover that you produced?

3 A Oh. I recall --

4 Q I can show you.

5 A No. I see what you're saying. In other words, the
6 letter was from Mr. Strom to J. Edgar Hoover and it
7 references Mr. Kate's conclusion. I don't recall
8 that that was part of it. If it was, I stand
9 corrected.

10 Q Would you like me to bring you your box, or is that
11 not necessary?

12 A Oh, no, sir. No, sir.

13 Q Okay. I've got nothing further on -- I'm not sure
14 what this is -- direct in relation to the affidavit.
15 Thank you, Judge.

16 THE COURT: Do you have any other questions
17 outside the affidavit?

18 MR. PETRANO: I think we're good, Judge. Thank
19 you.

20 THE COURT: Okay. Mr. Blume.

21 MR. BLUME: Yes. I have just a very few
22 matters.

23 CROSS EXAMINATION

24 BY MR. BLUME

25 Q Mr. Delgado, there's been a lot of discussion about

1 this, but this has been marked as Applicant's Exhibit
2 1, 10-8, with today's date. I guess that's to keep
3 separate the ones from before. Is this the affidavit
4 that we've been speaking of --

5 A Yes, sir.

6 Q -- in your case? And you reviewed this. And to the
7 best of your recollection, everything in this is true
8 and correct?

9 A Yes, sir.

10 Q So I just have a couple of other things I wanted to
11 follow up on with you. Well, Your Honor, we would
12 move to admit the affidavit he's been questioned
13 about. I think it should be part of the record in
14 this case.

15 THE COURT: Any objection?

16 MR. PETRANO: I do object. I think that his
17 live testimony is the best evidence. That's all I've
18 got, Judge. Thank you.

19 THE COURT: All right. Well, I've already
20 looked it over. I'll admit it. Go ahead.

21 (WHEREUPON, Applicant's Exhibit No. 1 is
22 admitted into evidence.)

23 Q I just have just a few things for you, Mr. Delgado.
24 You would agree with me -- would you agree that
25 Mr. Cayton's testimony was in many respects the key

1 in this case?

2 A No question about that. Absolutely. Absolutely the
3 turning point in the case. Absolutely.

4 Q And that without him there really was no case, as
5 evidenced by the fact that he went 40 years without
6 being charged?

7 A Exactly.

8 Q And at the time of the trial, were you aware of the
9 fact that Mr. Cayton had been terminated by the
10 Kansas Bureau of Investigation for failure to follow
11 policies, protocols and procedures?

12 A Absolutely --

13 MR. PETRANO: I'm going to object to that
14 question, Your Honor. It's a fact not in evidence,
15 Your Honor.

16 THE COURT: Well, --

17 MR. BLUME: Well, it will be in evidence, Your
18 Honor. I have a certified copy of the transcript
19 that you asked me to get last time. It's already
20 been marked. It will be admitted.

21 MR. PETRANO: And if I could reply to that?

22 THE COURT: Sure.

23 MR. PETRANO: Even with the transcript, it's
24 still not a fact in evidence. There's no personal
25 knowledge of the contents of the transcript and the

1 exhibits that were referenced in the transcript. And
2 the transcript, they actually had the live people
3 there, and we've got none of that here today.

4 THE COURT: That's a transcript of what? Just
5 remind me.

6 MR. BLUME: Okay. Well, Your Honor, at the
7 previous hearing -- I mean, I feel a little bit
8 sandbagged on this. But at the previous hearing I
9 was cross examining Agent Parnell and I also asked
10 Ms. Hudgins about the transcript which indicated that
11 Mr. Cayton testified in a trial and on cross
12 examination he was asked about and admitted that he
13 had been terminated from the Kansas Bureau of
14 Investigation for failing to follow policy, protocol
15 and procedures.

16 THE COURT: It is a transcript of what?

17 MR. BLUME: It is a transcript of a trial that
18 took place in the state of Kansas where he was called
19 as a witness. And he was asked about this and
20 impeached with this. And I brought that up at the
21 last hearing. We went through it. And then the only
22 objection made at that time was that the transcript
23 was not essentially a certified, you know, copy; and,
24 thus, the Court instructed me to obtain a copy, a
25 certified copy of the transcript, which I have done

1 and brought to the hearing today. And I think that
2 conclusively establishes through Mr. Cayton's own
3 admissions that he was terminated from the Kansas
4 Bureau of Investigation for failure to follow --

5 THE COURT: All right. I'll admit it.

6 (WHEREUPON, Applicant's Exhibit No. 2 is
7 admitted into evidence.)

8 Q But, Mr. Delgado, were you aware of that at the --

9 THE COURT: Just put that in chronological
10 context, if you will, Mr. Blume.

11 MR. BLUME: Well, the termination --

12 THE COURT: When was the termination? When was
13 the transcript, and when was -- how did that relate
14 to Mr. Delgado's representation of him?

15 MR. BLUME: Okay. Well, the termination was
16 prior to his testimony in this case. So he was
17 terminated. At Mr. Freiburger's trial Mr. Cayton
18 testified that he had retired from the Kansas Bureau
19 of Investigation, which is demonstratively not true.

20 So this is raised, Your Honor, not as I think an
21 ineffective assistance of counsel issue, but it's in
22 the application as a Brady, that they were under an
23 obligation to disclose it, but also as a state agent.
24 Cayton was in fact a state agent, that he testified
25 falsely under Napugh (phonetic) vs. Illinois.

1 So what I am attempting to establish here is not
2 that Mr. Delgado was somehow remiss in failing to
3 discover this but that the prosecution had an
4 obligation I guess to disclose it. And certainly
5 Mr. Cayton as a State's witness had an obligation not
6 to affirmatively lie about it during his testimony.
7 What I was attempting to establish with Mr. Delgado
8 is that he was not aware of this.

9 THE COURT: Go ahead.

10 Q And so, Mr. Delgado, you were not aware of this?

11 A I was absolutely not aware of that.

12 Q If you had been aware of it, would you have cross
13 examined Mr. Cayton about it?

14 A I'd still be cross examining Mr. Cayton about that.

15 Q And in your opinion, was that a significant piece of
16 information?

17 A Absolutely. Mr. Blume, the whole case revolved
18 around the credibility of John Cayton. Without John
19 Cayton, the solicitor did not have a case. The
20 whole -- not the whole -- a good portion of my trial
21 preparation and my cross examination strategy
22 involved John Cayton. I recalled in opening
23 statements pointing out Mr. Cayton to the jury
24 because he was sitting in the first row.

25 And I had Googled him. I had done research on

1 him. I knew what he looked like, never met him. I
2 pointed him out to the jury and said to them, this
3 case involves this man's testimony. That's all this
4 case is about. And I tried to make him the break
5 point of the case. If I had known that he had been
6 terminated; first of all, I would have made the
7 motion to disallow his testimony and then would have
8 continued to cross examine him until I felt I'd worn
9 the subject out. But I did not know that and I'm
10 sorry I did not know that.

11 Q Now, Mr. Delgado, just a couple of other matters.
12 You were asked about a letter from Mr. Strom to
13 Mr. Hoover from 1961. And in that letter it
14 indicates that -- you remember Lieutenant Cate was
15 supposedly the dean of firearms identification in
16 South Carolina?

17 A Yes, sir. Yes, sir.

18 Q And there was a great deal of reference to him during
19 Mr. Freiburger's trial?

20 A Yes, sir.

21 Q And as I understand it, I mean, the affidavit, as I
22 understand what you have told me and what you have
23 testified to here today, is that today you do not
24 have a recollection of the contents of this letter
25 which indicate that Mr. Kate indicated that the other

1 gun which was obtained from the Dreher household in
2 South Carolina, Cate identified that as the murder
3 weapon?

4 A No, sir, I do not.

5 Q And so you don't really -- you're not saying you
6 don't have a memory. You did not have a strategic
7 reason not to use this letter --

8 A No, sir.

9 Q -- during your cross examination of Mr. Parnell or
10 someone else?

11 A That is correct, sir.

12 Q On the confrontation clause matters you were asked
13 about, it's in the affidavit, but I just wanted to
14 make sure I understand it. What you're saying is is
15 that, yes, the confrontation clause may or may not --
16 was mentioned at some points in your motions, but at
17 trial you did not have a strategic reason not to
18 object on confrontation clause. Correct?

19 A That is correct.

20 Q And then again, the only final thing again is your
21 affidavit. There was something in the argument that
22 you thought was objectionable. You might have raised
23 it. But if something was objectionable and you
24 didn't, you didn't have a strategic reason not to
25 object to it?

1 A That's correct, sir.

2 MR. BLUME: Nothing further, Your Honor.

3 THE COURT: Mr. Petrano.

4 MR. PETRANO: Briefly, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. PETRANO

7 Q What was the last question about, Mr. Delgado?

8 A About some sort of argument made by the solicitor in
9 closing.

10 Q Some sort. You said you wouldn't have objected to
11 it. Do you know what it was?

12 A Sir, I remember sitting and watching the solicitor do
13 it. I can't recall exactly what the argument was.
14 No, sir. I'm sorry.

15 Q So you just testified that you would have objected.
16 To what?

17 MR. BLUME: No. That wasn't -- I think that is
18 a mischaracterization.

19 THE COURT: Mr. Blume, I'm going to allow it.
20 It's cross examination. I don't know whether it's
21 cross. He's a hostile witness. I'm going to allow
22 the question. Go ahead.

23 A Yeah. What I recall was that I heard your friend,
24 the solicitor, was parading back and forth some sort
25 of military document that had not been admitted. And

1 I remember Katherine and I talking about it later.

2 And I said to her I should have objected to that. I

3 didn't.

4 Q What record? Tell us about it.

5 A Well, that was it. Just a record that was not in

6 evidence, sir.

7 Q What was he doing with it? Waving it around? I

8 don't understand.

9 A Yes, sir. He transported it from the prosecution

10 table in closing argument and held it under his arm

11 in such a fashion as to give it credence that had not

12 been established. It had some sort of big military

13 ribbon or bow or something around it, some sort of

14 stamp on the outside that indicated that it was an

15 official record.

16 There were either three or four former members

17 of the military on the jury. It was my recollection

18 that they knew or they believed that this was some

19 sort of military record of Mr. Freiburger's that was

20 not helpful to the defense. I just remember thinking

21 I should have objected to that and I didn't.

22 Q So you never opened it. You never talked about it.

23 And it was a binder of some stuff with some gold

24 ribbons on it?

25 A Like I said, sir, I recall seeing it. I can

1 visualize it at this moment. It was in the courtroom
2 across from us, in 3-A. I remember seeing the
3 prosecutor parade that back and forth in an attempt
4 to influence the jury, but I didn't object to it.

5 Q Did you know what it was, what was in it?

6 A Yes, sir. I believe that we had -- I believe that we
7 had reviewed that with the solicitor's concurrence.
8 It was something he had subpoenaed from the military
9 records file somewhere in the Midwest and received
10 it. And he told us that he wasn't going to put it
11 into evidence, and so we didn't object to it
12 formally. But there it was in closing argument.

13 Q And I'm a little confused, sir. Please walk me
14 through it. When you wrote this down in your
15 affidavit, you don't explain any of that. You talk
16 about an argument. Where would we have got that
17 little scenario that just happened from your
18 affidavit?

19 A I don't know if you would. I mean, I know what I
20 meant by it when I authorized this in the affidavit.

21 Q And you wrote this part?

22 A Sir, refresh my memory as to which paragraph that is,
23 sir, and I'll --

24 THE COURT: 8.

25 A Oh, yes, sir. Sir, I know exactly what I meant. I

1 mean, I don't think I objected to anything in the
2 closing. I may have. I can't recall that. But I
3 know exactly what I was thinking of. It was improper
4 argument. Yeah. The argument wasn't verbal, sir.
5 The argument was visual. And because it played to
6 several members of the jury, and I realized that
7 after the fact, I should have objected to it.

8 Q And what would the objection have been?

9 A First of all, relying on evidence that was not
10 introduced. He was parading things in front of the
11 jury that had not been introduced into evidence that
12 the jury would not have. It was not entered as a
13 visual aid or as a testimonial aid. But he knew,
14 exactly what it was. I can assure you the solicitor
15 knew exactly what he was doing with that. The
16 solicitor himself talked about his military record.
17 And I recall thinking that some members of the jury
18 knew exactly from a fellow military enrollee what he
19 was referring to.

20 Q And you yourself referred to members of your family
21 that were in the military, and specifically at Ft.
22 Jackson, correct?

23 A Yes, sir. As a matter of fact, my nephew. Yes.

24 Q And I think that you indicated that you had gone
25 there for some type of award ceremony --

- 1 A Yes, sir.
- 2 Q -- to visit him? You took some pictures. And you
- 3 used those to demonstrate how barracks look and how
- 4 they differed from --
- 5 A The barracks in 1961, if I recall it. Yes, sir.
- 6 Q And did you find some more pictures while you were?
- 7 A Yes, sir. I sure did. Yes, sir. I recall that now.
- 8 Yes.
- 9 Q Nothing further. Thank you.

10 MR. BLUME: I just want to clarify one thing.

11 RE CROSS EXAMINATION

12 BY MR. BLUME

- 13 Q Mr. Delgado, I think I might have inadvertently sort
- 14 of caused this. But really my only question was: If
- 15 Mr. McMahon made either legally -- or Ms. Campbell --
- 16 made improper arguments, either based on facts not in
- 17 evidence or misrepresentations of facts not in
- 18 evidence, you did not have any strategic reason not
- 19 to object to improper argument in general?

20 A That is correct, sir. I did not.

21 Q Thank you.

22 THE COURT: Anything further?

23 MR. PETRANO: Nothing from the State, Judge.

24 THE COURT: Thank you, Mr. Delgado.

25 THE WITNESS: Thank you, Your Honor.

1 MR. BLUME: He can be released I assume?

2 THE COURT: I assume he wants to be.

3 THE WITNESS: Your Honor, may I be released?

4 Thank you.

5 THE COURT: Yes, sir.

6 MR. PETRANO: Everybody has got everything?

7 THE COURT: Yes. We have all the evidence.

8 MR. PETRANO: Oh, okay. I just wanted to --
9 while we're doing a little housekeeping, I still
10 don't have a copy of the certified transcript.

11 (Transcript handed to Mr. Petrano)

12 MR. PETRANO: Thanks.

13 MR. BLUME: The certification is the back page.

14 And just formally, Your Honor, I think this has been
15 marked as Applicant's 2 as of October 8th, 1989.

16 This is the certified copy of the transcript. We
17 would move its admission at this time.

18 THE COURT: Over the State's objection I'll
19 admit it.

20 (WHEREUPON, Applicant's Exhibit No. 2 is
21 admitted into evidence.)

22 THE COURT: Is there anything of an evidentiary
23 nature or testimonial, anything else to be presented
24 in this matter?

25 MR. BLUME: No, Your Honor.

1 MR. PETRANO: Nothing but argument.

2 THE COURT: All right. Do you wish to argue?

3 MR. PETRANO: Yes, sir.

4 THE COURT: Okay. That's fine.

5 MR. PETRANO: Briefly, at whatever opportunity
6 you want.

7 THE COURT: I would assume -- you're standing.
8 Although I would think it would be Mr. Blume's
9 argument on behalf of his client and the State would
10 reply. Am I --

11 MR. PETRANO: Yeah. We're kind of in an awkward
12 situation, Judge. I think we closed everything else.
13 So I guess we're kind of just arguing to what we
14 heard today.

15 THE COURT: All right.

16 MR. PETRANO: Is that correct?

17 THE COURT: We'll do that. That's fine.
18 Because I'm just going to ask you for proposed orders
19 once this is --

20 MR. PETRANO: All I wanted to do, Judge, is just
21 hone in on this transcript real fast.

22 THE COURT: Sure.

23 MR. PETRANO: And just to make a couple of
24 comments beyond --

25 THE COURT: You're on the record. You're on the

1 record.

2 MR. PETRANO: Thank you. Judge, I just wanted
3 to add that there is absolutely nothing in here, I
4 think the word was demonstratively not true, the
5 phrase. Mr. Cayton never testifies that he was
6 terminated. He says he resigned.

7 I think if you read the record as a whole, there
8 really is no "got ya" in here. Mr. Cayton holds up
9 quite well in this transcript. And I think that it
10 really isn't the end of his testimony as it was
11 described here. I'm not sure. I don't think Mr.
12 Delgado would testify that he read it, and I think
13 that it's in his affidavit that it was provided to
14 him. But simply saying that he testified falsely is
15 absolutely incorrect and is an improper
16 interpretation of what actually occurred in here.

17 Second, I just want to add that the items that
18 were used to impeach him was in the transcript. So
19 let's say the idea was that Mr. Delgado was supposed
20 to impeach Mr. Cayton with this evidence that he was
21 supposedly, however you want to phrase it, terminated
22 or he quit, however it exactly happened, they had
23 personnel records. They had the personnel director.
24 It's all indicated and referenced in this transcript.

25 THE COURT: Who is "they"?

1 MR. PETRANO: Excuse me?

2 THE COURT: Who is "they"?

3 MR. PETRANO: It was the State I think
4 impeaching Mr. Cayton. Is that correct? It was the
5 State of Kansas.

6 THE COURT: Okay.

7 MR. PETRANO: It might be common law, not the
8 state. Anyway, none of that was here today. So you
9 can't hold counsel ineffective, you can't testify to
10 burden of proof in a PCR by saying counsel should
11 have used some evidence when you don't bring that
12 evidence here today for Your Honor to look at. All
13 there is is just blank reference, Judge.

14 The State submits that the Applicant has not
15 satisfied his burden of proof. It's the
16 preponderance of the evidence rule. That's Rule
17 71.1, I think (d). All we have here is just a
18 transcript with some testimony which no one has any
19 firsthand knowledge of. And the items that are used
20 in the transcript to develop what I think is the goal
21 of bringing the transcript in are not here. Thank
22 you, Judge. --

23 THE COURT: I think Mr. Blume at least -- and
24 let me hear you on this -- Mr. Blume takes the
25 position that this is not primarily an ineffective

1 issue but is a prosecutorial misconduct issue as
2 opposed to any delict on Mr. Delgado's part. And for
3 what it's worth, Mr. Delgado did go to the trouble he
4 said of Googling this witness. For what results that
5 may have turned up in 1991, I have no idea. At least
6 he made some effort to find out something about this
7 witness.

8 MR. PETRANO: And, Your Honor, I apologize if I
9 was not articulating that clearly. My argument is
10 the same for whatever the allegation is regarding the
11 contents of what this transcript may be. The burden
12 of proof has not been satisfied that he testified
13 falsely. There is nothing in here. There is nothing
14 been submitted except a transcript that no one has
15 any personal knowledge of and none of the items in
16 the transcript were brought here today. They could
17 have called John Cayton. They've got subpoena power.
18 Thank you, Judge.

19 THE COURT: Mr. Blume.

20 MR. BLUME: Just very briefly. That's correct.
21 This is not an ineffective assistance of counsel
22 claim. But I think there is -- I would -- any
23 objective observer can take Mr. Cayton's testimony in
24 Mr. Freiburger's trial where he says he resigned from
25 the KBI and compare it to his testimony under oath in

1 the certified copy of the record which is admissible
2 where he is forced to admit under cross examination
3 that in fact he did not resign, he did not retire; he
4 was terminated, and he was terminated because of his
5 failure to follow policies, protocols and procedures.

6 There is no way to put those two side-by-side
7 and say they are not fundamentally inconsistent. And
8 that is all contained again in the record under oath
9 with a certified copy which is admissible. And I
10 think that's the essence of the claim.

11 THE COURT: Okay. Anything further?

12 MR. BLUME: Nothing further.

13 THE COURT: All right. How much time do you
14 need to produce a proposed order?

15 MR. PETRANO: I have a term of court coming up.

16 THE COURT: You do?

17 MR. PETRANO. I have a term of court coming up.
18 I also have several appeals. We also have got some
19 turnover. I could use some time. May I also add
20 that I requested the transcript. I kind of lost
21 track of what was admitted and what was not. My
22 request for the transcript was denied. So it's going
23 to take me a little longer than I would like. But
24 I'll state whatever you want.

25 THE COURT: You mean the transcript of the prior

1 hearing?

2 MR. PETRANO: Yeah. Your Honor, can we just
3 have one second?

4 THE COURT: Sure.

5 (Pause - attorneys conferring)

6 MR. BLUME: I think we're trying to work out --
7 he would like -- as I understand it, you were denied
8 the transcript from internally.

9 MR. PETRANO. Yes. And I could --

10 THE COURT: Internally in your department?

11 MR. PETRANO: The deputy chief denied my funding
12 request.

13 THE COURT: Would a call help to check that
14 list?

15 MR. PETRANO: That would certainly help, Your
16 Honor. And with the transcript, I could --

17 THE COURT: Who was the court reporter? Was it
18 you?

19 COURT REPORTER: (Nods head affirmatively).

20 MR. PETRANO: And I already have an invoice and
21 a proposal and all of that.

22 MR. BLUME: Well, can we go ahead and ask,
23 assuming that this all works out, how long would it
24 take to produce the transcript?

25 COURT REPORTER: Not very long, if I am out of

1 court. If I can have typing days, I can get it done
2 in two days.

3 THE COURT: If she is adequately compensated.

4 MR. PETRANO: If I had the transcript, I could
5 do it within 30, Judge.

6 COURT REPORTER: I am on vacation next week,
7 however.

8 THE COURT: That's all right. Is this a
9 McIntosh decision? When is your term? November the
10 2st?

11 MR. PETRANO: Yes, Judge. That's with Your
12 Honor.

13 THE COURT: He's got a full term.

14 MR. BLUME: That's fine with me, Judge. You
15 want to go 45? 60? It doesn't matter to me.

16 THE COURT: How about December 31st?

17 MR. BLUME: To get it to you? That's fine.

18 THE COURT: That should give everybody time.

19 MR. BLUME: Yes. That will be fine.

20 MR. PETRANO: Sorry for the awkward explanation,
21 Judge.

22 THE COURT: No. I understand your problems.
23 And even that may not work.

24 MR. PETRANO: Well, the irony is one of us is
25 going to order it anyway. So it's only a matter of

1 time.

2 THE COURT: That's true.

3 MR. BLUME: That's fine, Your Honor.

4 THE COURT: That's fine. Okay. Approach the
5 bench just a minute, counsel, just for my -- just
6 sort of an off the record.

7 (Whereupon, a bench conference is had)

8 THE COURT: All right. December 31st.

9 MR. PETRANO: Thank you, Your Honor.

10 MR. BLUME: Thank you, Your Honor.

11 THE COURT: Thank you.

12 (Whereupon, the proceedings are concluded)

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1 CERTIFICATE OF REPORTER:
2
3

4 STATE OF SOUTH CAROLINA)
5 COUNTY OF RICHLAND)

6
7
8 I, Jenny H. Williams, Official Court Reporter for the
9 Fifth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the hearing of the captioned case,
13 relative to appeal, in the Court of Common Pleas for
14 Richland County, South Carolina, on the 8th day of
15 October, 2009.

16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18

19 November 10, 2009
20

21 _____
22 Jenny H. Williams, Court Reporter
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA)

v.)

EDWARD E. FREIBURGER)
DEFENDANT)

IN THE GENERAL SESSIONS COURT

WARRANT NO.: 01-GS-40-02955

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO
DISALLOW CERTAIN WRITINGS
PURSUANT TO THE
INAPPLICABILITY OF RULE 803(16)
(1st Set # 1)**

Defendant, through his undersigned attorney, submits this Memorandum in support of his Motion to Disallow Evidence, which the state seeks to introduce as a violation of the Ancient Documents Rule (SCRE 803/16) case law and due to lack of any precedent in South Carolina as well as Rule 403 of South Carolina Rules of Evidence.

I. Factual Background

The investigation leading to the arrest of defendant Edward Freiburger began in March of 1961. At that time the Richland County Sheriff enlisted the aid of various law enforcement agencies to assist him in the investigation into the crime for which the defendant is now charged. As most of the participants in the investigation are no longer available, the evidence in this case consists primarily of writings from 1961. These writings include letters from the Richland County Sheriff to other law enforcement agencies and military personnel, investigative summaries prepared by the police, written statements by witnesses that may or may not be available to appear in court and various other papers and writings. Much of this writing conveys the theories and speculations of law enforcement in 1961. A lot of the information contained in these writings cannot be substantiated independently.

II. Law and Analysis

The undersigned attorney anticipates that the state will attempt to introduce numerous documents into evidence under South Carolina Rules of Evidence 803 (16), commonly referred to as the Ancient Documents Rule. The Ancient Documents Rule provides that statements in a document in existence more than twenty years, the authenticity of which is established are not excluded by the hearsay rule.

The Ancient Documents Rule arose out of the authentication requirement for documents. In prior South Carolina case law, it was used to establish the authenticity of documents more than 30 years old. The Ancient Documents Rule has been primarily limited to cases involving real property. The term "document" is not defined in the South Carolina Rules of Evidence. However, the Ancient Documents Rule had been used to validate maps and plats,¹ deeds,² wills,³ and letters referencing title.⁴ These cases refer to the Ancient Documents Rule in conjunction with a muniment of title, which do not contain hearsay. Use of the Ancient Documents Rule as an exception to hearsay is relatively recent.

In 1995, South Carolina adopted a modified version of the Federal Rules of Evidence, which included the Ancient Documents Rule as an exception to hearsay. Since that time, the Ancient Documents Rule has not been subjected to judicial interpretation. However, the South Carolina Court of Appeals adopted the ancient documents rule as an

¹ *Atlantic Coast Line R. Co. v. Searson*, 137 S.C. 468, 135 S.E. 567 (1926), *Goings v. Mitchell*, 110 S.C. 380, 96 S.E. 612 (1918).

² *Thompson v. Brannon*, 14 S.C. 542, 1881 WL 5857 (1881).

³ *Duncan v. Beard*, 11 S.C.L. 400 (1820).

⁴ *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990).

exception to hearsay for the first time in 1990. *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct.App.1990) (duly authenticated ancient documents of thirty years or more constitute an exception to the hearsay rule). In *Johnson*, the Court of Appeals recognized that the modern trend to use ancient documents as an exception to hearsay began in 1977 when several states adopted the Uniform Rules of Evidence. *Id* at 444.

The Ancient Documents Rule has never been used in a criminal case in South Carolina. It was never contemplated by the General Assembly that the ancient documents rule should be used in a criminal trial. Due to a lack of legal precedent for the use of ancient documents as an exception to hearsay in a criminal trial, these writings should be excluded from evidence in the case at bar.

The majority of the writings that the state will seek to introduce should not be considered documents as the ancient document case law refers only to documents which establish title. The ancient documents exception to hearsay should apply only to documents of legal significance such as deeds and wills. There is no precedent in South Carolina to use the ancient documents rule to admit writings which would not be legally recognized as documents. Writings consisting of hearsay gathered from unknown sources should not be allowed into evidence merely because of their age. The South Carolina Supreme Court has recognized that the age does not affect the character of a writing. *Wilson v. Moseley*, 113 S.C. 278, 102 S E 330 (1920) (Record book more than 30 years old, in which deeds were copied, is not admissible as an ancient document; its age not affecting its character.)

The theory behind the ancient document rule, as enumerated in *Johnson v Pritchard*, is "that the documents were created long before the current litigation was

1
begun or contemplated so there is no motive to create a false document or information.”⁵

Use of ancient documents in the case at bar runs directly contrary to the theory of the ancient documents rule, because most of the items the state will attempt to introduce were made in anticipation of litigation. Such items include but are not limited to investigative reports from the Richland County Sheriff's Department written in 1961 and letters from the Richland County Sheriff to other law enforcement officials. Because these writings were made in contemplation of litigation, they do not bear an adequate indicia of reliability necessary to overcome suspicion on the face of the document.

There are three criteria, which must be met for documents to be introduced using the Ancient Document Rule. The document must be “relevant to the inquiry and produced from proper custody and are on their face free from suspicion.” *Johnson v Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct.App.1990). None of the evidence the state will seek to introduce meets all three of these criteria.

Most of the writings should be prohibited as being suspicious on their face. These include, but are not limited to, unsigned writings, police investigative summaries and papers that appear to have been altered or have extraneous marks which could cause a prejudicial effect in violation of South Carolina Rule of Evidence 403. With much of this evidence, it is unknown who authored it, who typed it or what factual information formed the basis of the conclusions contained therein.

Evidence offered under the ancient documents exception to hearsay is subject to the requirements applicable to hearsay exceptions, such as the first hand knowledge rule and Rule 403's prohibition on unduly prejudicial evidence. Writings which contain

⁵ *Id.* at 445.

information that is not within the personal knowledge of the writer should not be admitted into evidence because the document does not contain the adequate indicia of reliability that justifies the exception of evidence from hearsay.

According to *Johnson v Pritchard*, in order for the ancient documents rule to be applicable, the documents sought to be introduced must be produced from proper custody. Before any of these documents are introduced, the state should bear the burden of proving chain of custody evidence on each document in order to establish that it has been in proper custody. The defense has not received any information about where any of the writings contained in the discovery came from or where these papers have been for the last 40 years.

Unfair Prejudice

According to South Carolina Rules of Evidence Rule 403, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. All or most of the writings the state will attempt to introduce create the danger of unfair prejudice which outweighs the probative value. Among the writings are letters from the Sheriff and investigative summaries. These items detail the sheriff's opinions and theories of the case as of 1961. These are written in such a way as to create the misconception that the information relayed is proven fact as opposed to speculation and unfounded conclusion. Introduction of this evidence would create an unfair prejudice against the defendant.

Due Process

Failure to suppress the written evidence in this case denies the defendant due process of law under applicable state and federal constitutional provisions as Rule 403's

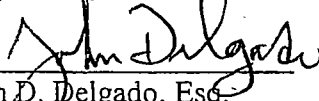
prohibition on unfairly prejudicial evidence requires that the evidence be suppressed.

U.S. Const., Amendments V, and XIV; S.C. Const., art. I, §§ 3, and 14. Furthermore, the Ancient Documents Rule was intended for use in civil cases, primarily property disputes. Use of the Ancient Documents Rule in a criminal trial would deny the defendant due process of law under applicable state and federal constitutional provisions U.S. Const., Amendments V, and XIV; S.C. Const., art. I, §§ 3, and 14.

III. Conclusion

For the above enumerated reasons defendant submits that all or some of the written evidence in this case should be suppressed.

Respectfully submitted


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This 15th day of July 2002

STATE OF SOUTH CAROLINA) IN GENERAL SESSIONS COURT
COUNTY OF RICHLAND) INDICTMENT NO. 01-GS-40-02955
State of South Carolina)
v.)
Edward Freiburger,)
Defendant)

Certificate of Service

FILED
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C.C.C. & G.S.

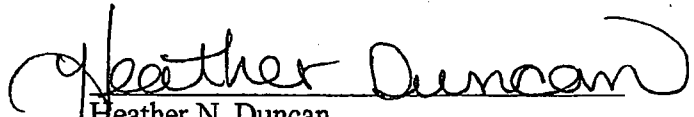
I, the undersigned employee of John Delgado, attorney for the defendant, certify that I have served the foregoing documents on the individuals listed below by hand delivery

PERSONS SERVED

R. Knox McMahon, Deputy Solicitor
K. Luck Campbell, Assistant Solicitor
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Post Office Box 1987
Columbia, South Carolina 29202

DOCUMENTS.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO DISALLOW
CERTAIN WRITINGS PURSUANT TO THE
INAPPLICABILITY OF RULE 803 (16)
(1ST Set #1)**



Heather N. Duncan
Assistant to John Delgado
914 Richland St. Suite A-102
Columbia, South Carolina 29201
(803) 254-7745

This 25th day of July 2002

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA)

v.)

EDWARD E. FREIBURGER)
DEFENDANT)

IN THE GENERAL SESSIONS COURT

WARRANT NO.: 01-GS-40-02955

DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO
DISALLOW CERTAIN WRITINGS
PURSUANT TO DENIAL OF
CONFRONTATION CLAUSE AND
DUE PROCESS CLAUSE
(1st Set # 3)

Defendant, through his undersigned attorney, submits this memorandum in support of his motion in opposition to the use of the ancient documents rule to admit evidence as a violation of the Confrontation Clause and Due Process Clause of state and federal constitutions as well as Rule 403, South Carolina Rules of Evidence.

I. Factual Background

The investigation leading to the arrest of defendant Edward Freiburger began in March of 1961. At that time the Richland County Sheriff enlisted the aid of various law enforcement agencies to assist him in the investigation into the crime for which the defendant is now charged. As most of the participants in the investigation are no longer available, the evidence in this case consists primarily of writings from 1961. Most of these papers were written by persons who are no longer available to appear in court for cross-examination. Furthermore, the defendant was never afforded an opportunity to question these witnesses. A lot of the information contained in these writings cannot be substantiated independently.

II. Law and Analysis

A. Case Law

The undersigned attorney anticipates that the state will attempt to introduce numerous documents into evidence under South Carolina Rules of Evidence 803 (16), commonly referred to as the Ancient Documents Rule. The Ancient Documents Rule provides that statements in a document in existence more than twenty years, the authenticity of which is established are not excluded by the hearsay rule.

The Ancient Documents Rule arose out of the authentication requirement for documents. In prior South Carolina case law, it was used to establish the authenticity of documents more than 30 years old. Use of the Ancient Documents Rule as an exception to hearsay is relatively recent.

In 1995, South Carolina adopted a modified version of the Federal Rules of Evidence, which included the Ancient Documents Rule as an exception to hearsay. Since that time, the Ancient Documents Rule has not been subjected to judicial interpretation. However, the South Carolina Court of Appeals had previously adopted the ancient documents rule as an exception to hearsay in 1990 *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct.App.1990) (duly authenticated ancient documents of thirty years or more constitute an exception to the hearsay rule).

Use of the Ancient Documents Rule has been primarily limited to cases involving real property. As the ancient documents rule has evolved in South Carolina, it is clear that the rule's use in criminal proceedings has not been contemplated.

The theory behind the ancient document rule, as enumerated in *Johnson v. Pritchard*, is "that the documents were created long before the current litigation was

begun or contemplated so there is no motive to create a false document or information.” *Johnson v Pritchard*, 302 S.C. 437, 395 S.E.2d 191 (Ct App.1990). Use of ancient documents in criminal proceedings runs directly contrary to the theory of the ancient documents rule, and denies the defendant’s rights of confrontation and cross-examination under the applicable state and federal constitutional provisions. U.S. Const., Amendments VI and XIV; S.C. Const., art. I, § 14.

The Sixth Amendment provides “In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U S. Const , Amendment VI.

The Confrontation Clause must be read in context with the rest of the Sixth Amendment. In this context, it is more than a defense to hearsay. It is an obligation on the part of the government to go out and produce witnesses instead of relying on affidavits to obtain convictions. It embodies a principle much broader than hearsay. The Sixth Amendment guarantees the accused a certain type of trial. See generally, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *U.S. v. Wade*, 388 U.S. 218, 87 S Ct 1926, 18 L.Ed 2d 1149 (1967). Each phrase of the Sixth Amendment is a reinforcing requirement to ensure that the accused gets a trial of a certain caliber. The Confrontation Clause should not be taken out of this broader context.

The Confrontation Clause guarantees a defendant the right to confront witnesses against him. U S Const., Amendments VI and XIV; S.C. Const., art. I, § 14. The right of confrontation promotes reliability in criminal trials and ensures that individuals will not be convicted based on testimony from witnesses who cannot be challenged at trial. *State v Martin*, 292 S.C. 437, 357 S.E. 2d 21 (1987). One of the purposes of having the witness testify under oath and submit to cross-examination is to allow the jury to observe the witness's demeanor and assess his credibility. *State v Cooper*, 291, S.C. 351, 353 S E.2d 451 (1987). These protections help to ensure that the accused has a fair trial with an opportunity to present a meaningful defense. By admitting the writings the state would deprive the defendant of this right.

In South Carolina, "[a]n incriminating statement admissible under an exception to the hearsay rule also is admissible under the Confrontation Clause only if it bears adequate 'indicia of reliability.' " *State v. Dennis*, 337 S.C. 275, 286, 523 S.E.2d 173, 178 (1999). If a hearsay statement falls within a firmly rooted exception to the hearsay rule, then the statement meets the "indicia of reliability" requirement. *Id* at 286, 523 S E.2d at 178.

The use of ancient documents as an exception to hearsay is not a firmly rooted exception to hearsay. The South Carolina Court of Appeals adopted the ancient documents rule as an exception to hearsay for the first time in 1990. *Johnson v. Pritchard*, 302 S.C. 437, 395 S E.2d 191 (Ct.App.1990) (duly authenticated ancient documents of thirty years or more constitute an exception to the hearsay rule). In *Johnson*, the Court of Appeals recognized that the modern trend to use ancient documents

as an exception to hearsay began in 1977 when several states adopted the Uniform Rules of Evidence. *Id* at 444.

Hearsay statements can also meet the “indicia of reliability” standard by a showing of “particularized guarantees of trustworthiness” *Ohio v Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. In *Idaho v Wright*, the U.S. Supreme Court set forth the standards for showing the “particularized guarantees of trustworthiness.” The Court found that the “particularized guarantees of trustworthiness required for admission under the Confrontation Clause must ... be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.” *Idaho v Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 3149, 111 L.Ed.2d 638 (1990). The Court also found that evidence admitted under the “particularized guarantees of trustworthiness” standard “must be so trustworthy that adversarial testing would add little to its reliability. *Id* at 821. The Court concluded that “unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.” *Id*.

Furthermore, the Court found that “to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Id* at 822.

The courts have recognized that the Confrontation Clause and the rule against hearsay are not exactly parallel. The writings at issue in this case do not possess the adequate indicia of reliability necessary to overcome Confrontation Clause issues. The writings consist of hearsay gathered from unknown sources. With many of the writings

the State will seek to introduce, the author is unknown as are the circumstances surrounding the making of the writings. To allow these writings into evidence merely because of their age would constitute a flagrant violation of the defendant's rights under the Confrontation Clause and the Sixth Amendment as a whole. The South Carolina Supreme Court has recognized that age does not affect the character of a writing. *Wilson v Moseley*, 113 S.C. 278, 102 S.E. 330 (1920) (Record book more than 30 years old, in which deeds were copied, is not admissible as an ancient document; its age not affecting its character.) A writing, which would definitely have been inadmissible in court when it was created, should not be used to gain a conviction in a criminal case simply because forty years has passed. The defendant must be given some opportunity to challenge and test the evidence. By using the ancient documents exception to hearsay in this manner, this opportunity is absent. By the passage of time, the defendant has been deprived of an opportunity to mount a defense.

B. Unfair Prejudice

According to South Carolina Rules of Evidence Rule 403, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The defendant in this case at bar is faced with mountains of ancient writings, which are overflowing with unsubstantiated allegations. If admitted, the defendant will be denied all rights to confront and cross-examine witnesses. This, in turn, will create unfair prejudice against the defendant in violation of the South Carolina Rules of Evidence, Rule 403 because the defendant will

not be afforded an opportunity to develop a meaningful defense due to the passage of time and loss of material witnesses.

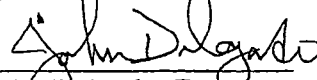
C. Due Process

The opportunity of the accused to contest and confront witnesses goes to the very essence of due process of law and a fair trial. Use of the ancient documents exception to hearsay to admit all or some of the writings in this case in violation of the Confrontation Clause would deprive the defendant of his right to due process of law under applicable state and federal constitutional provisions. U.S. Const., Amendments V, VI, and XIV; S.C. Const., art. I, §§ 3, and 14.

III. Conclusion

For the above enumerated reasons defendant submits that all or some of the written evidence in this case should be suppressed.

Respectfully submitted



John D. Delgado, Esq.
914 Richland Street, Suite A-102
Columbia, South Carolina 29201
(803) 254-7745

This 25th day of July 2002.

Certificate of Service

2002 JUL 25 AM 11:44
C.C.C. & G.S.
dant certify

R. Knox McMahon, Deputy Solicitor
K Luck Campbell, Assistant Solicitor
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Post Office Box 1987
Columbia, South Carolina 29202

DOCUMENTS

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO DISALLOW
CERTAIN WRITINGS PURSUANT TO
DENIAL OF CONFRONTATION CLAUSE
AND DUE PROCESS CLAUSE (1ST Set #3)**

This 25th day of July 2002

Heather N Duncan
Assistant to John Delgado
914 Richland St. Suite A-102
Columbia, South Carolina 29201
(803) 254-7745

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
State of South Carolina)
v.)
Edward Frieburger)

IN THE COURT OF GENERAL SESSIONS

Indictment # 01-GS-40-02955

Motion to Exclude Evidence of Prior Bad Act

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C.C.C. & G.S.
FILED

Counsel for the defendant respectfully request that the Court conduct an *in limine* hearing to determine if any alleged prior bad act evidence is admissible under Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Counsel is uncertain if the State will attempt to introduce evidence of any alleged prior bad acts at trial. If the State seeks to introduce evidence of any alleged prior bad acts, counsel respectfully reserves argument and application of the proceeding case law to the specific facts of this case until a hearing can be scheduled in the matter.

Evidence of other "bad acts" is inadmissible to prove the bad character of the defendant or criminal propensity. Such evidence is, however, admissible if it tends to establish motive, identity, a common scheme or plan, the absence of mistake or accident or intent. See Rule 404(b), SCRE, State v. Lyle, *supra*. In addition, the "bad act" must logically relate to the crime to which the defendant is charged. State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000). See State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused."). Even if the prior bad act evidence meets the above criteria, the evidence of the prior bad act must be clear and convincing in order to be admissible. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996);

State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000); State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct App. 2000).

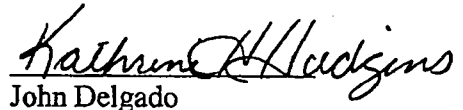
If the Court finds that the prior bad act evidence meets an exception under Lyle, and finds that there is clear and convincing evidence of the prior bad act, the Court must still exclude the evidence if the probative value is outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE.

In certain cases, prior bad act evidence may be admissible under the res gestae theory. Under the res gestae theory, the prior bad act evidence is only admissible if it “ ‘furnishes part of the context of the crime’ or is necessary to a ‘full presentation’ of the case, or is so much a part of the setting of the case and its ‘environment’ that its proof is appropriate in order ‘to complete the story of the crime on trial by proving its immediate context or the res gestae’ or the ‘uncharged offense is so linked together in point of time and circumstance with the crime charged that one cannot be fully shown without proving the other’ . . .” State v. Owens, 346 S.C. 637, 552 S.E.2d at 753 (2001)(quoting State v. Adams, 322 S.C. 114, 470 S.E.2d at 370-371).

If the Court finds the prior bad act evidence relevant under the res gestae theory, the Court must still exclude the evidence unless the probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

Based on a review of the 962 pages of discovery provided by the State, counsel moves to exclude any evidence of alleged prior bad acts on the ground that the evidence is inadmissible under Lyle. Additionally, counsel moves to exclude any evidence of alleged prior bad acts because the evidence does not form part of the res gestae of the case. Counsel reserves more specific argument until a hearing can be scheduled.

Respectfully submitted,



John Delgado

Kathrine H. Hudgins

Attorneys for Edward Frieburger

July 25th, 2002

.) IN GENERAL SESSIONS COURT

)
) INDICTMENT NO.. 01-GS-40-02955

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CHAS. W. SCOTT
C.C.C. & G.S.

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PERSONS SERVED:

DOCUMENTS.


Heather N. Duncan
Assistant to the Judge

This 25th day of July 2002.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

COURT OF GENERAL SESSIONS
01-GS-40-2955

THE STATE)

VS.)

EDWARD FREIBURGER)

DEFENDANT,)

TRANSCRIPT OF RECORD
MOTIONS HEARING

JULY 25TH, 2002
COLUMBIA, SOUTH CAROLINA

BEFORE:

THE HONORABLE HENRY F. FLOYD, JUDGE.

APPEARANCES:

R. KNOX MCMAHON, ASSISTANT SOLICITOR
KATHERINE LUCK CAMPBELL, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

KATHRINE HUDGINS, ESQ.
JOHN DELGADO, ESQ.
ATTORNEYS FOR THE DEFENDANT

KAREN TRACY
OFFICIAL COURT REPORTER

RECEIVED

JAN 27 2003

JOHN DELGADO
ATTORNEY AT LAW

C O N T E N T S

INDEX OF EXHIBITS:

(THERE WERE NO EXHIBITS INTRODUCED.)

INDEX OF WITNESSES:

(THERE WERE NO WITNESSES CALLED.)

1 THE COURT: ALL RIGHT. YOU ALL ARE MY LAST
2 PROJECT.

3 THE CLERK: NO.

4 THE COURT: OH, TWO PROJECTS, SORRY.

5 OKAY. MR. DELGADO.

6 MR. DELGADO: YOUR HONOR, WE HAD FILED MOTIONS
7 IN LIMINE ON JULY 3RD, JULY 15TH AND THEN EARLIER TODAY,
8 AND I'D REFER TO THEM AS THREE DIFFERENT SETS OF MOTIONS
9 IN LIMINE.

10 IT MIGHT BE, AND THE WAY WE STARTED THESE, WE
11 THOUGHT THAT WE WOULD GET AT LEAST THE FIRST SET, NUMBERS
12 ONE, TWO, THREE, AND FOUR SEEM TO GO TO THE SAME ISSUE,
13 WHICH IS CONTAINED IN THE DISCOVERY THAT WE PROVIDED FOR
14 YOU AND ALLISON RELATIVE TO THE DOCUMENTS, WRITINGS,
15 PAPERS THAT WERE PROVIDED FOR US BY THE STATE.

16 IF THE COURT WOULD LIKE US TO GO THROUGH FIRST
17 THE SET AND TALK ABOUT OUR FIRST MOTION UNDER SET ONE,
18 WHICH IS THE ANCIENT DOCUMENTS RULE EXCEPTION TO HEARSAY,
19 803(16). I'LL DO IT ANY WAY THE COURT WANTS TO DO IT. IT
20 JUST SEEMS TO US THAT MIGHT BE A FAIR WAY TO START.

21 THE COURT: THAT'S FINE.

22 MR. DELGADO: YOUR HONOR, HAS THE COURT HAD THE
23 OPPORTUNITY TO REVIEW OUR MEMORANDUMS WE SUBMITTED? I
24 THOUGHT I HAD MY CLERK HAND DELIVER THEM NOW.

25 THE CLERK: YOU DID.

1 MR. DELGADO: OKAY. YOU MAY NOT HAVE HAD A
2 CHANCE TO REVIEW IT.

3 BASICALLY, LET'S JUST DO IT THIS WAY, I STAND ON
4 THE MUCH MORE ARTICULABLE POSITION FOUND IN OUR
5 MEMORANDUM.

6 BASICALLY, IT'S THIS: YOUR HONOR, ALREADY I
7 NOTICED THAT THE BAILIFF IS BRINGING IN THE DISCOVERY FOR
8 IT. THAT'S THE SAME TYPE OF THING THAT WE HAVE. I MEAN,
9 IT'S MASSIVE. I MEAN, IT'S 900-AND-SOME PAGES.

10 THE VAST MAJORITY OF THAT, YOUR HONOR, IS
11 COMPILED 41 YEARS AGO AS A RESULT OF THE INVESTIGATION
12 INTO THIS MURDER BY BOTH CIVILIAN AND MILITARY
13 AUTHORITIES.

14 I DO NOT BELIEVE THAT -- I COULD BE WRONG. I DO
15 NOT BELIEVE THAT THERE IS ANY INDIVIDUAL ALIVE WHO WAS
16 PART OF THE INVESTIGATIVE TEAM, EITHER CIVILIAN OR
17 MILITARY, THAT CAN THEREFORE TESTIFY.

18 IT SEEMS TO US, YOUR HONOR, THAT THE INVOCATION
19 OF THE ANCIENT DOCUMENTS RULE EXCEPTION TO THE HEARSAY
20 RULE, FIRST OF ALL, IS EXTRAORDINARILY RARE.

21 IN OUR RESEARCH, WE HAVE FOUND THE IMPLICATION
22 OF IT THREE DIFFERENT TIMES, ALL IN CIVIL CASES, ALL
23 RELATING TO SPECIFIED DOCUMENTS, WILLS, DEEDS, MONUMENTS
24 OF TITLE RELATING TO ASPECTS OF CASES THAT ARE NOT PROVEN.

25 AGAIN, I MAY CORRECTED BY MY FRIEND,

1 MR. MCMAHON, BUT I HAVE NEVER FOUND ONE RELATIVE TO A
2 CRIMINAL CASE.

3 THE COURT: WELL, LET ME MAKE THIS SUGGESTION TO
4 YOU: I'VE LOOKED AT THE FILE, AND I DON'T BELIEVE, UNLESS
5 MR. MCMAHON TELLS ME TO THE CONTRARY, THAT VERY LITTLE OF
6 WHAT'S IN THERE THEY'RE PROPOSING TO OFFER INTO EVIDENCE
7 UNDER AN ANCIENT DOCUMENT RULE.

8 IF I'M INCORRECT -- I THINK THIS IS JUST STUFF
9 TO LET YOU KNOW WHAT THEY DID ABOUT THE CASE. YOU KNOW,
10 THE PAWNSHOP RECEIPTS, I COULD SEE THERE'S SOME ISSUES
11 THERE, THE HOTEL RECORDS, I DON'T KNOW, SOME PHOTOGRAPHS,
12 OBVIOUSLY, THEY WERE TAKEN.

13 MR. DELGADO: YES, SIR.

14 THE COURT: AND THEY INDICATED TO US THE LAST
15 TIME WE MET THAT THEY WERE USING AN EXPERT WITNESS TO
16 ESTABLISH THE FORENSIC PATHOLOGY ISSUES TO DEAL WITH THAT.
17 I REALLY THINK IT'S RATHER A FEW DOCUMENTS. AM I WRONG,
18 MR. MCMAHON?

19 MR. MCMAHON: NO, SIR.

20 THE COURT: I AM RIGHT OR WRONG?

21 MR. MCMAHON: NO, SIR, YOU ARE NOT WRONG.

22 THE COURT: OKAY.

23 MR. MCMAHON: YES, SIR, YOU ARE RIGHT.

24 THE COURT: WHY -- IN AN EFFORT TO NARROW IT
25 DOWN, COULD YOU IDENTIFY THOSE DOCUMENTS --

1 MR. MCMAHON: SURE.

2 THE COURT: -- THAT YOU INTEND TO RELY ON THE
3 ANCIENT DOCUMENT RULE AND MAYBE THAT WILL HELP US FOCUS
4 THE ARGUMENT.

5 MR. DELGADO: AND IT MIGHT BE HELPFUL MAYBE FOR
6 ALL OF US IF WE COULD REFER TO THE BATES STAMP THAT -- I'M
7 SORRY I HAD TO DO THAT. THAT SOUNDS SO ELEMENTARY, BUT
8 IF -- THAT MIGHT BE MORE HELPFUL IF WE COULD ALL REFER
9 THEM TO THAT NUMBER SO WE'RE ALL SINGING OFF THE SAME
10 PAGE.

11 THE COURT: I HAVE NO PROBLEM WITH THAT. I MEAN
12 THAT'S EASY ENOUGH TO DO.

13 MR. MCMAHON: I'M NOT SURE I HAVE THE BATES
14 STAMP NUMBER IN THIS PARTICULAR FILE. I HAVE THE BATES
15 STAMP NUMBER. I'M TRYING TO FIND IT.

16 THERE ARE FOUR PRIMARY AREAS AS FAR AS THE PAWN
17 SHOP AND THE HOTEL ARE CONCERNED. IT'S BERRY'S LOAN.
18 IT'S A RECEIPT FOR AN ELECTRIC RAZOR THAT WAS PAWNED FOR
19 \$4 ON FEBRUARY 17TH, 1961.

20 THERE IS THE REPORT OF THAT ITEM ALSO
21 FEBRUARY 16TH, 1961, THAT WOULD HAVE BEEN REQUIRED BY THE
22 COLUMBIA POLICE DEPARTMENT. I INTEND TO OFFER AN
23 INDIVIDUAL THAT CAN AUTHENTICATE THE BERRY'S LOAN AND ALSO
24 CHIEF -- NOW RETIRED CHIEF CHARLIE CLARK TO AUTHENTICATE
25 THE PAWN RECORDS THAT WOULD HAVE BEEN REQUIRED IN 1961,

1 THAT THIS IS SUCH A DOCUMENT.

2 THEN THERE IS -- YES, I THINK THE BATES STAMP
3 MAY BE 000023 AND 24.

4 MS. CAMPBELL: THAT'S CORRECT.

5 THE COURT: THAT'S RIGHT.

6 MR. MCMAHON: FREED'S JEWELRY AND LUGGAGE,
7 THERE IS A PAWN FOR THE RADIO ON FEBRUARY 25TH. THERE IS
8 A REDEMPTION OF THE RADIO ON FEBRUARY 28TH. THERE IS THE
9 DAILY REPORT. I THINK THOSE ARE 25, 26, AND 27.

10 I HAVE AN INDIVIDUAL THAT CAN IDENTIFY THOSE
11 ITEMS WHO IS THE SON OF THE OWNER. THE OWNER, HUSBAND AND
12 WIFE, ARE BOTH DECEASED. I HAVE THEIR SONS THAT IS AN
13 ATTORNEY IN NEW YORK, A LITTLE BIT OLDER THAN ME, I THINK,
14 OR HE TOLD ME I WAS YOUNG, SO I TAKE IT HE'S OLDER, THAT
15 WILL TESTIFY TO THOSE DOCUMENTS; CAPITAL CITY LOAN
16 RECORDS, 28, 29, 30, 31. NO, EXCUSE ME, THERE IS NO 31,
17 28, 29, 30, 32, 33.

18 I THINK THESE DOCUMENTS SHOW UP MORE THAN ONCE
19 IN THE DISCOVERY. THIS IS THE PURCHASE OF THE WEAPON.
20 THE BACK OF THAT PAWN TICKET, THE DAILY REPORT FOR
21 FEBRUARY 27TH AND 28TH OF 1961, AND THE BOOK THAT WAS
22 REQUIRED TO HAVE BEEN KEPT BY THE FIREARMS DEALER BACK IN
23 1961.

24 I HAVE TWO INDIVIDUALS WHO WILL TESTIFY TO THOSE
25 ITEM, BOTH MS. LILA RUSH, WHO IS THE DAUGHTER OF THE OWNER

1 OF CAPITAL LOAN.

2 CAPITAL LOAN IS STILL IN BUSINESS. I HAVE THE
3 CURRENT CUSTODIAN OF THE '61 BOOKS THAT -- IT'S WITH THE
4 BUSINESS RECORDS, WHO WILL ALSO TESTIFY AS FAR AS THE
5 CAPITAL CITY LOAN, AND THE GRESHAM HOTEL.

6 THE GRESHAM HOTEL IS A ONE-PAGE DOCUMENT SHOWING
7 THAT THE DEFENDANT IN THE CASE SPENT THE NIGHT IN THE
8 GRESHAM MOTEL, OR AT LEAST WAS A REGISTERED GUEST, ON
9 MARCH 2ND OF 1961.

10 I HAVE THE SON OF THE MANAGER OF THE GRESHAM
11 HOTEL. HE WAS ACTUALLY RAISED IN THE GRESHAM HOTEL. HE
12 LIVED THERE FROM 1933 UNTIL THE LATE -- OR THE EARLY '60S,
13 I THINK. HE'S A RETIRED DENTIST. HE WILL TESTIFY TO THAT
14 DOCUMENT. HE WORKED THERE AS A KITCHEN HELPER. HE WORKED
15 THERE AT THE DESK AT TIMES. HE WORKED THERE AS A BELLHOP,
16 AND HE WILL AUTHENTICATE THAT DOCUMENT.

17 THE VARIOUS PHOTOGRAPHS I HAVE SHOWING THE
18 PHOTOGRAPH -- WELL, I KNOW WHAT THE AREA LOOKS LIKE NOW
19 AND, OBVIOUSLY, IT SHOWS THAT THE STORE THAT YOU SEE IN
20 THE BACKGROUND IS STILL AT THAT LOCATION, THE BRIDGE IS
21 STILL AT THAT LOCATION WHERE THE BODY WAS FOUND.

22 I DID NOT INTEND TO GET INTO -- I MEAN, UNLESS
23 THERE'S PARTICULAR DOCUMENTS NOW THAT WE'RE REFERRING TO,
24 I DO HAVE THE RECORD OF THE 32 CALIBER BULLET THAT WAS
25 RECOVERED FROM PRIVATE ABERSOLD IN 1961. HE WAS STATIONED

1 IN GERMANY AT THE TIME. I HAVE PRIVATE ABERSOLD COMING.

2 THE DOCUMENT HAS SOME NAMES ON IT THAT ARE NO
3 LONGER LIVING. ONE OF THE NAMES ON THE DOCUMENT IS A
4 DECEASED MEMBER OF THE RICHLAND COUNTY SHERIFF'S
5 DEPARTMENT.

6 I INTEND TO USE THAT, A PERSON THAT WOULD
7 IDENTIFY A. B. PRICE AS A RETIRED DECEASED MEMBER OF THE
8 RICHLAND COUNTY SHERIFF'S DEPARTMENT FOR THAT PARTICULAR
9 DOCUMENT.

10 IF THERE ARE OTHER PARTICULAR ONES. THERE MAY
11 BE OTHERS. I JUST CAN'T BRING THEM TO MY MEMORY NOW.
12 THAT'S MAINLY...

13 THE COURT: THAT AMOUNTS TO ABOUT A DOZEN PAGES.

14 MR. MCMAHON: YES, SIR. NOW, I HAVE, JUDGE, OF
15 COURSE, THE RECORDS, THE MILITARY RECORDS, OF
16 MR. FREIBURGER THAT ARE UNDER SEAL, AND THERE WILL BE
17 CERTAIN ITEMS THAT I WOULD USE FROM THEM.

18 THERE ARE SOME RECORDS THAT MR. DELGADO, AS A
19 MATTER OF FACT, GOT THEM BEFORE I DID. I ASSUME THIS
20 WOULD BE PART OF THE ANCIENT DOCUMENT RULE, AND THAT'S THE
21 RECORDS FROM COBB COUNTY, TENNESSEE WHERE MR. FREIBURGER
22 WAS ARRESTED MARCH 29TH OF '61.

23 I HAVE THE TROOPER COMING THAT'S NOW RETIRED
24 THAT WILL TALK ABOUT THAT. I HAVE THOSE DOCUMENTS, A
25 DOCUMENT SHOWING WHERE HE WAS FOUND OR PLED GUILTY OF THE

1 UNLAWFUL WEAPONS CHARGE.

2 FOR EXAMPLE, JUDGE, I HAVE A LETTER THAT WAS
3 WRITTEN IN 1964 BY MR. CATE, MILLARD CATE AT S.L.E.D. TO
4 TROOPER MEREDITH. TROOPER MEREDITH GAVE US A COPY OF THE
5 LETTER. THERE IS ALSO -- BECAUSE HE STILL HAD HIS COPY
6 FROM '64, AND THERE'S THE COPY OF A LETTER IN THE S.L.E.D.
7 CASE FILE.

8 OF COURSE, I'D HAVE TROOPER MEREDITH
9 AUTHENTICATE THAT PARTICULAR LETTER, AND THAT GOES TO THE
10 ISSUE OF FOLLOWING IN THE CHAIN ON THE GUN.

11 ITS GOT THE SAME SERIAL NUMBERS ON IT, 9948, THE
12 WEAPON, THAT IS THE SERIAL NUMBER ON THE WEAPON, ONE OF
13 THE TWO WEAPONS WE STILL HAVE IN LAW ENFORCEMENT CUSTODY
14 IN THIS CASE.

15 I'M NOT INTENDING TO OFFER, FOR EXAMPLE,
16 QUESTIONNAIRES FROM THE SOLDIERS THAT WERE SENT OUT. I'M
17 NOT INTENDING TO OFFER THAT.

18 IF THERE IS A PARTICULAR ITEM THAT HE OR THE
19 COURT WANTS TO ASK ME ABOUT, YOU KNOW, I WILL ANSWER IT.
20 IF I DO INTEND TO OFFER IT, I'LL TELL YOU. IF I DON'T,
21 I'LL TELL YOU NOW AS AN OFFICER OF THE COURT I DON'T, IF
22 THERE ARE OTHER PARTICULAR ITEMS.

23 THE COURT: ALL RIGHT. MR. DELGADO, AS FAR AS
24 THE RECORDS UNDER THE BATES NUMBERS 23, FOUR, FIVE, SIX,
25 SEVEN, 28, 29, 30, 32, 33.

1 MR. DELGADO: THAT'S BERRY'S, FREED'S AND
2 CAPITAL?

3 THE COURT: YES.

4 MR. DELGADO: OKAY.

5 THE COURT: THOSE ARE REALLY BUSINESS RECORDS,
6 THOUGH, AREN'T THEY?

7 MR. DELGADO: YOUR HONOR, I MAY NOT HAVE AN
8 OBJECTION TO THAT. I MEAN, I'M NOT GOING TO SAY I DO NOW,
9 BUT LET ME -- I WILL THINKING OF THIS IN A MUCH LARGER
10 CONTEXT. THOSE DON'T BOTHER ME AS MUCH, BUT I MAY
11 STILL -- WE JUST RESERVE THE OBJECTION, BUT I DON'T SEE
12 THAT THAT -- WITH THE AUTHENTICATION THAT MR. MCMAHON
13 PROMISES.

14 THE COURT: WELL, WHAT I WAS TRYING TO ALLEVIATE
15 YOUR MIND ABOUT IS THAT THERE MIGHT BE A DOZEN PAGES OUT
16 OF ALL THIS THAT WOULD BE OFFERED INTO EVIDENCE.

17 MR. DELGADO: ALL RIGHT, SIR.

18 THE COURT: AND ALL THAT OPINION STUFF.

19 MR. DELGADO: I THINK THAT --

20 THE COURT: I DON'T THINK THAT'S EVEN AN ISSUE.

21 MR. DELGADO: FINE.

22 THE COURT: SO REALLY IT'S NOT NECESSARILY AN
23 ANCIENT DOCUMENT AS MUCH AS IT IS BUSINESS RECORDS.

24 MR. MCMAHON: AND JUDGE, I THINK GRESHAM HOTEL
25 IS 31. I THINK THAT'S WHY I DIDN'T SEE THE ORIGINAL 31.

1 THE COURT: OKAY 31.

2 MR. MCMAHON: I THINK THAT'S CORRECT.

3 THE COURT: AND THE PHOTOGRAPHS, OBVIOUSLY, CAN
4 BE AUTHENTICATED. THEY'RE NOT -- THEY WOULD --

5 MR. MCMAHON: JUDGE, THERE IS -- FOR EXAMPLE,
6 WHEN OFFICERS INTERVIEWED MR. FREIBURGER IN INDIANA IN
7 2000, THEY SHOWED HIM A PHOTOGRAPH OF HIMSELF WHEN HE WAS
8 IN THE MILITARY IN '61. I WOULD OFFER THAT.

9 I MEAN, I'M NOT TRYING TO HIDE THAT I'M GOING TO
10 OFFER THAT. I DIDN'T SEE THAT AS EITHER A BUSINESS
11 RECORD, NOR AS AN ANCIENT DOCUMENT, ALTHOUGH IT'S A
12 PICTURE TAKEN 40 YEARS AGO, IF YOU UNDERSTAND WHAT I'M
13 SAYING.

14 I'M NOT TRYING TO SANDBAG THAT. I'M JUST SAYING
15 THAT TYPE OF THING ALSO EXISTS, AND I'LL BE GLAD TO
16 ADDRESS ANY OF THOSE ON AN ITEM-BY-ITEM BASIS.

17 THE COURT: ALL RIGHT. SO WHAT'S THE --
18 ASSUMING WE'RE IN THAT KIND OF...

19 MR. DELGADO: POSTURE.

20 THE COURT: MOVING ALONG THAT BASIS THERE, WHAT
21 WOULD BE -- YOU REALLY WOULDN'T BE ARGUING ABOUT THE
22 APPLICABILITY OF THE ANCIENT DOCUMENTS RULE, WOULD YOU?

23 MR. DELGADO: I THINK, YOUR HONOR, THAT THEN
24 MOOTS, UNDER OUR FIRST SET OF MOTIONS IN LIMINE, NUMBERS
25 ONE, TWO, THREE AND FOUR, I BELIEVE THAT DOES.

1 THE COURT: NOW, I WOULD TELL YOU THIS: THE WAY
2 I ANALYZE IT GENERALLY IN MY MIND, WITH THE EXCEPTION OF
3 FORENSIC EVIDENCE, ANY OPINIONS, ANYTHING IN PREPARATION
4 FOR THE PROSECUTION OF THIS CASE, EVEN THOUGH IT'S OVER 30
5 YEARS, WOULD VIOLATE THE CONFRONTATION CLAUSE.

6 MR. DELGADO: YES, SIR.

7 THE COURT: BUT ANYTHING THAT WAS MADE BEFORE OR
8 BY PEOPLE NOT ENGAGED IN THE PROSECUTION TO PROVE THINGS
9 SUCH AS PAWNSHOP RECORDS OR THOSE KIND OF THINGS WOULD NOT
10 BE --

11 MR. DELGADO: THAT MAY VERY WELL BE, YOUR HONOR,
12 A BUSINESS RECORDS EXCEPTION.

13 THE COURT: ALL RIGHT.

14 MR. DELGADO: BUT AGAIN, YOUR HONOR, I HOPE THE
15 COURT WOULD ALLOW ME TO REVIEW THAT.

16 THE COURT: OH SURE. I'M JUST TRYING TO --

17 MR. DELGADO: I THINK THAT CLEARS A LOT OF THE
18 UNDERBRUSH.

19 THE COURT: YOU ALL SCARED ME TO DEATH WHEN YOU
20 TALKED ABOUT THIS CASE GOING OVER FIVE DAYS.

21 MR. DELGADO: WELL, THIS MIGHT HAVE --

22 MR. MCMAHON: AND JUDGE, I WILL TAKE AN ITEM --
23 IN OTHER WORDS, IF I WERE TO ATTEMPT TO OFFER -- IF AN
24 ISSUE COMES UP ON DIRECT OR CROSS AND THEN I ATTEMPT TO
25 OFFER AN ITEM THAT I HAVEN'T TALKED ABOUT TODAY, I WOULD

1 CERTAINLY BRING THAT TO THE COURT'S ATTENTION BEFORE I
2 ATTEMPTED TO OFFER IT, BUT I DON'T THINK -- I MEAN, AS AN
3 OFFICER OF THE COURT, I DON'T THINK I CAN GET AN INCIDENT
4 REPORT IN JUST BECAUSE IT'S 40 YEARS OLD NO MORE THAN I
5 COULD TODAY. IF I COULD, I WOULD TRY TO GET OFFICERS TO
6 WRITE BETTER INCIDENT REPORTS.

7 I MEAN, I UNDERSTAND THAT, BUT I DON'T WANT TO
8 FORECLOSE THAT CONCLUSION EITHER. I'LL BRING IT TO THE
9 COURT'S ATTENTION IF SOMETHING COMES UP THAT I WANT TO
10 OFFER AT A LATER TIME.

11 THE COURT: ALL RIGHT. TO ANSWER ISSUES FIVE
12 AND SEVEN, THAT'S GOING TO REQUIRE SOME TESTIMONY, I
13 THINK, THAT IS THE EVIDENCE OBTAINED DURING THE SEARCH OF
14 THE DEFENDANT'S PERSON AND THE CHAIN OF CUSTODY. WE CAN'T
15 DO THAT TODAY.

16 MR. DELGADO: YES, SIR.

17 THE COURT: WHAT'S YOUR ISSUE ABOUT NUMBER SIX?

18 MR. DELGADO: WELL, FIVE --

19 THE COURT: FIVE AND SEVEN WILL REQUIRE
20 TESTIMONY.

21 MR. DELGADO: YES, SIR, I AGREE.

22 YOUR HONOR, MS. HUDGINS IS TASKED WITH THE
23 RESPONSIBILITY OF NUMBER SIX, AND IF THE COURT WISHES TO
24 HEAR THE -- MAYBE JUST LET HER OUTLINE THAT PROBLEM, AND
25 THEN MAYBE ARGUMENT ON IT UNLESS YOU WANT TO --

1 THE COURT: WELL, LET ME ASK THE STATE AGAIN.
2 IT MAY NOT BE AN ISSUE.

3 MR. DELGADO: ALL RIGHT.

4 THE COURT: IS THERE GOING TO BE EVIDENCE
5 OFFERED OF PRIOR BAD ACTS?

6 MR. MCMAHON: JUDGE, I DON'T KNOW WHAT ONES
7 THEY'RE TALKING ABOUT. I HATE TO PUSH THE BALL BACK OVER
8 THERE.

9 THE COURT: OKAY.

10 MR. MCMAHON: HE WAS A.W.O.L., IF THEY'RE
11 TALKING ABOUT THAT. HE WAS ARRESTED WITH THE GUN, THE
12 MURDER WEAPON, IF THEY'RE TALKING ABOUT THAT.

13 YOU KNOW, I THINK THAT'S EVIDENCE OF FLIGHT AS
14 FAR AS A.W.O.L. IS CONCERNED. I MEAN, WE HAVE AN ARGUMENT
15 ALONG THOSE LINES. THERE IS ALSO EVIDENCE WHERE HE GAVE A
16 32 CALIBER BULLET TO PRIVATE ABERSOLD THAT I SPOKE ABOUT
17 EARLIER.

18 ABERSOLD STILL HAD THAT BULLET AND LATER ON
19 TURNED IT OVER TO MILITARY AUTHORITIES IN GERMANY, AND IT
20 LATER ON FOUND ITS WAY TO CHIEF PRICE OF THE RICHLAND
21 COUNTY SHERIFF'S DEPARTMENT.

22 NOW, AT THE TIME HE TURNS THAT BULLET OVER TO
23 MR. ABERSOLD, PRIVATE ABERSOLD, HE ALSO GAVE HIM PLAYING
24 CARDS. NOW, THOSE PLAYING CARDS BECOME IMPORTANT BECAUSE
25 THEY TIME, IN MY MIND, WHEN THE BULLET WAS TURNED OVER,

1 BECAUSE ACCORDING TO C.I.D. RECORDS, CRIMINAL
2 INVESTIGATION RECORDS OF THE UNITED STATES ARMY, THERE WAS
3 A TRAILWAYS TICKET OFFICE BROKEN INTO AT FORT JACKSON ON
4 THE NIGHT OF MARCH THE 1ST OF '61 AND EARLY MORNING HOURS
5 OF MARCH 2ND, '61, WHICH WOULD, IN OUR VIEW OF THE
6 EVIDENCE, WOULD HAVE BEEN -- WE BELIEVE THE MURDER WAS
7 COMMITTED DURING THE EARLY MORNING HOURS OF MARCH 1ST OF
8 '61. THEN THAT NIGHT MARCH 1ST, '61, EARLY MORNING HOURS
9 OF MARCH 2ND, THIS TRAILWAYS BUS TICKET OFFICE WAS BROKEN
10 INTO AT FORT JACKSON. STOLEN WAS AN ADDING MACHINE, A
11 TYPEWRITER, AND A NEW AMOUNT -- DECK OF PLAYING CARDS.

12 FREIBURGER BECAME A SUSPECT, AND THOSE MAY NOT
13 YET BE CAUGHT IN YOUR DISCOVERY, BECAUSE I JUST -- THERE
14 WAS INFORMATION IN THERE ABOUT THE BREAK IN, BUT I DIDN'T
15 HAVE THE C.I.D. RECORDS UNTIL VERY RECENTLY.

16 FREIBURGER WAS A SUSPECT. IN FACT, LATER ON
17 GAVE A STATEMENT THAT HE BOUGHT THESE ITEMS FROM A SUBJECT
18 UNKNOWN TO HIM, A SOLDIER, AND THEN PAWNED THEM AT
19 COLUMBIA LOAN LOCATED AT [REDACTED] [REDACTED] [REDACTED], A TYPEWRITER
20 AND AN ADDING MACHINE.

21 WELL, THE IMPORTANCE OF THAT IS THAT IF HE GIVES
22 THE BULLET TO ABERSOLD AND ALONG WITH THE DECK OF PLAYING
23 CARDS, THAT PUTS HIM IN POSSESSION OF A BULLET CONSISTENT
24 WITH A MURDER BULLET AFTER THE TIME OF THE MURDER. OF
25 COURSE, I THINK THAT'S CIRCUMSTANTIAL EVIDENCE.

1 NOW, I'M NOT TRYING TO GET IN, NECESSARILY, THAT
2 HE BROKE INTO THE TRAILWAYS PLACE BUT, AND I DON'T KNOW IF
3 THAT'S ONE OF THE ISSUES HE'S GOING INTO, BUT I WANT TO
4 PUT HIM IN POSSESSION OF THOSE ITEMS AND LINK THAT DECK OF
5 PLAYING CARDS WITH THAT BULLET FOR PURPOSES OF TIMING THAT
6 EXCHANGE WITH MR. ABERSOLD. I THINK IT GOES TO
7 MR. ABERSOLD'S MEMORY AND CREDIBILITY.

8 THE COURT: ALL RIGHT. MS. HUDGINS, WHAT'S THE
9 ISSUES YOU'RE CONCERNED ABOUT?

10 MS. HUDGINS: WELL, YOU KNOW, OBVIOUSLY, SINCE
11 THE STATE DOES NOT HAVE TO PROVIDE US WITH WHAT THEY MAY
12 BE RELYING ON IN TERMS OF PRIOR BAD ACTS, WE HAVE NO WAY
13 OF KNOWING SPECIFICALLY WHAT PRIOR BAD ACTS THEY WERE
14 GOING TO RELY ON, SO I HAD FILED WITH THE COURT A VERY
15 GENERAL MOTION TO EXCLUDE PRIOR BAD ACTS UNDER LYLE AND
16 JUST IN GENERAL.

17 THE COURT: SO THAT'S JUST TO PROTECT YOURSELF.

18 MS. HUDGINS: YES, SIR.

19 THE COURT: WELL, AS YOU KNOW, THERE WILL BE AN
20 IN CAMERA HEARING TO DETERMINE ITS ADMISSIBILITY AT THE
21 TIME THE STATE INTENDS TO OFFER IT.

22 MS. HUDGINS: ABSOLUTELY. MY CONCERN WITH --
23 YOU KNOW, OBVIOUSLY, WE WOULD OBJECT TO ANYTHING COMING
24 INTO EVIDENCE ABOUT THE ALLEGED -- THAT ED FREIBURGER
25 ALLEGEDLY BROKE INTO THIS TRAILWAYS SHOP ON POST.

1 YOU KNOW, FIRST OF ALL, I DON'T SEE THAT IT
2 MEETS ONE OF THE FIVE EXCEPTIONS UNDER LYLE. I DON'T SEE
3 HOW IT POSSIBLY COULD. I THINK IT'S THEIR BURDEN TO TRY
4 TO PROVE THAT. I THINK I UNDERSTOOD MR. MCMAHON CORRECTLY
5 THAT HE'S NOT ALL THAT INTERESTED IN BRINGING ALL THAT
6 INTO EVIDENCE. OBVIOUSLY, WE WOULD HAVE AN OBJECTION TO
7 THAT, SO THAT MAY NOT BE AN ISSUE. THAT MAY NOT BE A
8 PROBLEM.

9 THE COURT: I DON'T THINK THAT'S A PRIOR BAD ACT
10 ISSUE, NOT SOMETHING WE NEED TO WORRY ABOUT. LET'S HEAD
11 IN ANOTHER DIRECTION.

12 MS. HUDGINS: ALL RIGHT.

13 THE COURT: ALL RIGHT. SO REALLY, WHAT THAT IS,
14 IS JUST TO KIND OF FISH A LITTLE BIT?

15 MS. HUDGINS: NO, JUDGE. I WAS AWARE THAT THERE
16 WERE SOME PRIOR BAD ACTS, NOT NECESSARILY CONVICTIONS,
17 WHICH WE ARE CONCERNED WITH AND WHICH WE WOULD LIKE TO
18 HAVE THE COURT ADDRESS.

19 THE COURT: OKAY. YOU KNOW I'LL DO THAT.

20 ALL RIGHT. THAT TAKES CARE OF YOUR FIRST SET OF
21 MOTIONS. WHAT'S YOUR SECOND SET?

22 MR. DELGADO: YOUR HONOR, MAY I JUST VISIT THAT
23 AGAIN WITH MR. MCMAHON?

24 THE COURT: YES.

25 MR. DELGADO: AND AGAIN, CERTAINLY, HIS MEMORY

1 OF THE FACTS OF THIS ARE BETTER THAN MINE. MR. ABERSOLD,
2 ALONG WITH A HOST OF OTHER INDIVIDUALS, IS IN TRAINING
3 WITH ED FREIBURGER IN A SUPPLY SCHOOL AT FORT JACKSON IN
4 FEBRUARY, MARCH OF 1961.

5 ABERSOLD AND A WHOLE LARGE NUMBER OF FOLKS IN
6 THAT SUPPLY SCHOOL SHIP OUT TO GERMANY, VARIOUS LOCATIONS
7 IN GERMANY.

8 ABERSOLD IS INTERVIEWED BY C.I.D. FOLKS IN
9 GERMANY AT THE REQUEST OF SHERIFF SLY, AND ABERSOLD SAYS
10 AT ONE TIME, "I DON'T KNOW WHO GAVE THAT TO ME. I DON'T
11 KNOW WHEN I GOT IT." HE DOESN'T SAY ANYTHING ABOUT
12 PLAYING CARDS. THEN THE SHERIFF ASKED THAT HE BE
13 REINTERROGATED.

14 WE HAVE SOMETHING IN THE DISCOVERY WHERE
15 SOMEBODY'S HANDWRITING SAYS SEE IF YOU CAN GET ABERSOLD
16 AND SOME OTHER FELLOW, STITSWORTH OR SOMETHING TO REHEARSE
17 THEIR TESTIMONY A LITTLE BIT MORE AND SEE IF YOU CAN COME
18 TO A CLEAR UNDERSTANDING. THEN ABERSOLD THEN REMEMBERS
19 THAT IT WAS ED FREIBURGER.

20 I GUESS WHAT I'M SAYING TO YOU, JUDGE, IS THAT
21 THE 32 CALIBER ROUND OF AMMUNITION THAT ABERSOLD SAYS HE
22 HAS IN GERMANY IS GIVEN TO, I WOULD IMAGINE HIS COMMANDING
23 OFFICER OR C.I.D., AND SOMEHOW THAT'S SENT BACK HERE TO
24 RICHLAND COUNTY, BUT IF MR. MCMAHON SAYS HE HAS THAT, I'VE
25 NEVER SEEN IT.

1 MR. MCMAHON: I NEVER SAID I HAD IT.

2 MR. DELGADO: OKAY.

3 MR. MCMAHON: I NEVER SAID THAT. I ALWAYS TOLD
4 HIM THAT, JUDGE.

5 MR. DELGADO: NO PROBLEM. WELL, IF THAT'S THE
6 CASE THEN, YOUR HONOR, ISN'T THAT 403 MATERIAL? ISN'T
7 THAT MORE PREJUDICIAL THAN PROBATIVE?

8 MR. MCMAHON: I DIDN'T KNOW WE WERE GOING TO
9 ARGUE THAT MOTION TODAY.

10 THE COURT: I UNDERSTAND THAT, MR. MCMAHON.

11 MR. DELGADO: I JUST WANT TO ALERT YOU TO THAT,
12 YOUR HONOR. PLUS, IF MR. MCMAHON CAN TELL ME THAT
13 MR. ABERSOLD AT ANY TIME SAYS THAT HE GIVES TO ANYONE ELSE
14 A PACK OF PLAYING CARDS THAT'S THEN SHIPPED BACK TO THE
15 UNITED STATES, I'D APPRECIATE REFERENCE TO WHAT PAGE
16 BECAUSE I DON'T REMEMBER THAT.

17 I'M NOT ACCUSING HIM OF ANYTHING. I'M SIMPLY
18 SAYING I DON'T RECALL THAT.

19 THE COURT: ALL RIGHT.

20 MR. MCMAHON: JUDGE, I THINK HE COULD TALK TO
21 MS. CONNIE WILSON, WHO IS A PRIVATE INVESTIGATOR WHO
22 VISITED MR. ABERSOLD AT HIS REQUEST ON JULY 2ND OF 2002
23 AND TALKED WITH MR. ABERSOLD ABOUT THAT.

24 I MEAN, HE'S HAD INDIVIDUALS THAT HAVE
25 INTERVIEWED MR. ABERSOLD. I DIDN'T KNOW FOR PURPOSES OF

1 THE LYLE THAT WE WERE GETTING INTO THIS.

2 THE COURT: WELL, THE LYLE ISSUE IS WHETHER OR
3 NOT -- I TAKE IT THEIR CONCERN WAS THEY'RE GOING TO BE
4 SURE THEY'RE GOING TO HAVE A HEARING. THAT'S WHAT THEY'RE
5 GOING TO HAVE.

6 NEXT SET. -

7 MR. DELGADO: YOUR HONOR. YOUR HONOR, THE
8 SECONDS SET NUMBER ONE, THERE IS INFORMATION CONTAINED
9 IN -- WELL, THEY'RE NOT INCIDENT REPORTS. THEY'RE NOT
10 TYPED ON THE STANDARD RECOGNIZED INCIDENT REPORT
11 LETTERHEAD OF THE RICHLAND COUNTY SHERIFF'S DEPARTMENT.
12 THEY'RE BLANK SHEETS OF PAPER RECOUNTING TWO
13 INVESTIGATOR'S TRIPS TO INDIANA, WHERE MR. FREIBURGER
14 LIVES, IN OCTOBER OF THE YEAR 2000.

15 WHAT HAPPENED, YOUR HONOR, IF THE COURT IS NOT
16 FAMILIAR WITH THIS, THE CASE SITS UNRESOLVED FOR SOME 40
17 YEARS UNTIL THE RICHLAND COUNTY SHERIFF'S DEPARTMENT HAS
18 THEIR COLD CASE UNIT ASKS, AGAIN, THAT THE BALLISTICS BE
19 EVALUATED:

20 IN 1961, MR. MILLARD CATE, THE BALLISTICS
21 EXAMINER, RULES THAT THE GUN AND BULLET FRAGMENTS, AND THE
22 GUN THAT WAS FOUND ON MR. FREIBURGER AND THE BULLET
23 FRAGMENTS ARE INCONSISTENT.

24 IN THE YEAR 2000, FALL OF 2000, MR. CRAIG WITH
25 THE COLD CASE UNIT AND MR. BRYAN METZ OF THE SHERIFF'S

1 DEPARTMENT GO AND FIND OUT THAT THE BULLETS AND THE GUN
2 STILL WERE IN THE POSSESSION OF LAW ENFORCEMENT. THEY'RE
3 STILL OUT AT S.L.E.D.

4 WELL, THEY GO AND MAKE A TRIP TO
5 MR. FREIBURGER'S HOME IN WHITLEY COUNTY, INDIANA. THEY
6 CALL HIM INTO THE WHITLEY COUNTY SHERIFF'S DEPARTMENT.
7 THEY SEND OUT A STATE POLICEMAN AND ASK HIM TO COME IN,
8 AND WHEN HE COMES IN, MR. CRAIG AND MR. METZ INTERROGATE
9 HIM ABOUT A CRIME THAT OCCURRED HERE SOME 40 YEARS AGO.

10 NOW, THE REPORTS OF MR. CRAIG, MR. CRAIG SAYS
11 THINGS LIKE THE DEFENDANT IMMEDIATELY STARTED TO SHOW A
12 SELECTIVE MEMORY MODE.

13 HE GOT -- HE COULDN'T REMEMBER THINGS THAT WOULD
14 HAVE BEEN OBVIOUS. I THINK HE TALKS ABOUT HE GOT PALE,
15 SOMETHING LIKE THAT.

16 YOUR HONOR, I WOULD SUBMIT TO YOU THAT THOSE
17 SUBJECTIVE REACTIONS AND SUBJECTIVE ANALYSES BY MY FRIENDS
18 AT THE SHERIFF'S DEPARTMENT ARE SUBJECTIVE EVALUATIONS
19 WITH NO BASIS IN FACT, THAT THERE'S NO RECORDING OF WHAT
20 GOES ON.

21 THE NOTES ARE SIMPLY OFTEN COUCHED IN THE FAVOR
22 OF LAW ENFORCEMENT, BUT I AM -- I WOULD LIKE TO ASK THE
23 COURT, MAYBE WE COULD DO THIS -- YOUR HONOR, MAYBE THE WAY
24 I CAN DO THIS IS JUST ASK YOU TO REVIEW SOME PAGES OF
25 THE -- YOUR HONOR, YOU KNOW WHAT, I STILL HAVEN'T GOTTEN

1 MY INDEX TO THAT -- DOGGONE.

2 I'M SORRY, JUDGE, IT'S GOING TO BE AROUND 550,
3 560, SOMEWHERE IN THERE. IT'S A SERIES OF REPORTS FROM
4 MR. CARL CRAIG OF THE SHERIFF'S DEPARTMENT TO SHERIFF LEON
5 LOTT.

6 HE TALKS ABOUT SELECTIVE MEMORY LOSS, HOW HE
7 COULDN'T REMEMBER OBVIOUS THINGS, HOW THEY GO ON TO SAY HE
8 HAS A GOOD MEMORY OTHERWISE. 571, MY CLERK INDICATES,
9 YOUR HONOR, MIGHT BE THE START OF THE PAGE AREA. THAT'S
10 THE BEGINNING OF SEVERAL PAGES, MAYBE SIX OR EIGHT
11 DIFFERENT PAGES, BY MR. CRAIG.

12 THE COURT: I'M NOT SO SURE I UNDERSTAND -- IS
13 MS. CRAIG GOING TO TESTIFY?

14 MR. DELGADO: YES, SIR. I WOULD IMAGINE. I
15 DON'T KNOW THAT, YOUR HONOR. I JUST...

16 THE COURT: WELL, HE'S TESTIFYING AS TO WHO
17 WHAT, WHEN, WHERE, AND HOW WITNESS BUT NOT AN EXPERT.

18 MR. DELGADO: YES.

19 THE COURT: SO WHAT'S YOUR PROBLEM?

20 MR. DELGADO: MY PROBLEM WITH IT, YOUR HONOR, IS
21 WHEN HE STARTS EVALUATING HOW THE DEFENDANT RESPONDS TO
22 HIS QUESTIONS.

23 IN OTHER WORDS, YOUR HONOR, IF YOU GO DOWN TO
24 PAGE 572, DO YOU SEE THE HIGHLIGHTED PORTION IN THE
25 MIDDLE, OR THE END OF THAT THIRD PARAGRAPH, AN ABSOLUTE

1 SELECTIVE LOSS OF MEMORY WHEN WE DISCUSSED EVERYTHING THAT
2 HAD GONE ON.

3 FREIBURGER APPEARED TO HAVE REVERSED HIS
4 ANSWERS. YOUR HONOR, THAT'S GOING TO BE INTERESTING,
5 REHEARSED HIS ANSWERS OVER 40 YEARS AND NOT KNOWING THAT
6 THIS IS COMING, HE'S RESEARCHED HIS ANSWERS, BUT SHOULD HE
7 EVER BE INTERVIEWED ABOUT THIS CASE, AND, IN FACT,
8 REMARKED AFTER EACH QUESTION WE ASKED, "I DON'T RECALL" OR
9 "I DON'T KNOW ANYTHING ABOUT THAT."

10 THE COURT: WHAT DO YOU WANT ME TO DO ABOUT
11 THAT? I DON'T UNDERSTAND.

12 MR. DELGADO: I WOULD SUBMIT IT IS CONJECTURE
13 AND SUBJECTIVE RESPONSE BY MR. CRAIG OR MR. METZ TO BE
14 ABLE TO SAY THAT HE FEIGNED A MEMORY LOSS OR HE HAS
15 SELECTIVE MEMORY LOSS.

16 THE COURT: WELL, YOU CERTAINLY MIGHT BE ABLE TO
17 RAISE AN OBJECTION --

18 MR. DELGADO: ALL RIGHT.

19 THE COURT: -- IF YOU FEEL LIKE IT'S OPINION
20 RATHER THAN AN OBJECTIVE OBSERVATION.

21 MR. DELGADO: ALL RIGHT, FAIR ENOUGH.

22 MR. MCMAHON: YOUR HONOR, WE INTEND TO OFFER
23 THAT, JUDGE. WE DO INTEND TO OFFER THAT, BUT I FIGURED WE
24 WOULD TAKE IT UP AT THE JACKSON VERSUS DENNO HEARING ON
25 THE SUBSTANCE OF THAT ENTIRE CONVERSATION.

1 THE COURT: WELL, LET ME SUGGEST TO YOU,
2 GENTLEMEN, THERE IS A VERY GOOD ARTICLE OUT THERE. I
3 CAN'T TELL YOU RIGHT OFF THE TOP OF MY HEAD. I'LL TRY TO
4 FIND IT TODAY OR TOMORROW, THAT GOES TO CHALLENGING POLICE
5 OFFICERS' TESTIMONY WHEN THEY INTEND TO BE AN EXPERT ABOUT
6 EVERYTHING. IT'S A PRETTY GOOD CASE. THERE'S A PRETTY
7 GOOD ANALYSIS ABOUT THAT.

8 MR. MCMAHON: I ACTUALLY GOT THAT FROM YOUR
9 OFFICE ONE DAY, JUDGE, BUT I ANALOGIZE THIS TO THE
10 SITUATION. FOR EXAMPLE, P.B. SMITH, WHERE A PRIVATE
11 CITIZEN, CAN TESTIFY ABOUT INSANITY.

12 THE COURT: SURE.

13 MR. MCMAHON: OR INTOXICATION. AND, YOU KNOW, I
14 ASSUME WE WOULD TAKE UP BOTH PROCEDURAL AND SUBSTANTIVE
15 ISSUES OF MR. CRAIG AND MR. METZ'S TESTIMONY IN ANY
16 JACKSON VERSUS DENNO HEARING, AND THEN YOU WOULD READ THAT
17 OR HOPEFULLY NOT READ THAT, DEPENDING ON WHOSE POINT OF
18 VIEW YOU'RE LOOKING AT ON WHAT MAY OR MAY NOT BE
19 ADMISSIBLE.

20 I AM NOT ATTEMPTING TO OFFER THAT IN ANY WAY AS
21 AN EXPERT OPINION OR ATTEMPTING TO QUALIFY HIM IN ANY WAY
22 AS AN EXPERT ON THE MEMORY OR ANYTHING OF THAT NATURE.

23 THE COURT: ALL RIGHT. WELL, I --

24 MR. MCMAHON: I'LL JUST ASK YOU TO HOLD THAT
25 RULING IN ABEYANCE.

1 THE COURT: I'M NOT RULING ON ANYTHING TODAY.
2 I'M TRYING TO GET SOME INFORMATION ON WHAT I'M FACING.

3 MR. DELGADO: YOUR HONOR, COULD YOU GIVE US A
4 LITTLE MORE, INDICATE WHERE THAT ARTICLE?

5 THE COURT: MR. MCMAHON, DID YOU MAKE A COPY OF
6 THAT ARTICLE? IF NOT, I'LL TRY TO FIND THAT.

7 MR. MCMAHON: IT WAS IN THAT A.B.A. JOURNAL, I
8 THINK.

9 THE COURT: YES, IT WAS. IT WAS AN A.B.A.
10 JOURNAL.

11 MR. MCMAHON: I WAS WAITING ON YOU ONE DAY. I
12 JUST SAT THERE AND HAPPENED TO PICK IT UP AND ASKED IF I
13 COULD BORROW IT. I HOPE I BROUGHT IT BACK. IF I DIDN'T,
14 I'LL GO LOOK.

15 MR. DELGADO: WITHIN THE LAST YEAR OR SO?

16 THE COURT: WHILE I'VE BEEN HERE.

17 THE CLERK: WITHIN THE LAST SIX MONTHS.

18 MR. DELGADO: THANK YOU, SIR.

19 THE COURT: YES, SIR.

20 MR. DELGADO: YOUR HONOR, GOING TO NUMBER TWO IN
21 OUR DEFENDANT'S SECONDS SET OF MOTIONS, I BELIEVE THAT HAS
22 TO WAIT UNTIL EITHER THE PRESENCE OF MR. CAYTON. IT ALSO
23 DOES, YOUR HONOR, RELATE TO THE THIRD SET OF MOTIONS,
24 NUMBER FIVE.

25 THE COURT: FIVE HAS TO DO WITH THE QUALITY

1 ASSURANCE MANUAL.

2 MR. DELGADO: YES, SIR.

3 THE COURT: AND WHAT'S YOUR ISSUE?

4 MR. DELGADO: WELL, YOUR HONOR, IT'S NOT JUST
5 THE INDIVIDUALS THEMSELVES WHO MAY OR MAY NOT QUALIFY AS
6 AN EXPERT, BUT IT'S HIS RESOURCES THAT HAVE TO, UNDER
7 COUNCIL, ALSO HAVE TO BE QUESTIONED.

8 I HAVE WRITTEN MR. CAYTON, CALLED HIM IN
9 FEBRUARY, WROTE HIM IN MARCH, SENT A COPY TO MR. MCMAHON
10 ASKING HIM TO SEND ALL THIS TO ME. I HAVEN'T BEEN ABLE TO
11 GET ANYTHING BACK FROM HIM, SO I NEED TO BE ABLE TO HAVE
12 THAT TO USE AS A BASIS FOR POSSIBLE CHALLENGE CONCERNING
13 HIS OUTFIT CALLED ACCESS FORENSIC LABORATORY.

14 THE COURT: IS THIS THE BALLISTICS EXPERT?

15 MR. DELGADO: YES, SIR. I JUST WANTED TO LINK
16 THEM FOR YOU IN THEIR OWN SYBOTIC WAY. IN OTHER WORDS, A
17 MOTION TO PROHIBIT HIS TESTIMONY AND MOTION TO COMPEL
18 THOSE ITEMS ARE LINKED TOGETHER.

19 THE COURT: DOES THE STATE HAVE A POSITION ABOUT
20 THAT, MR. MCMAHON?

21 MR. MCMAHON: JUDGE, MR. DELGADO WROTE ME A
22 LETTER. I GOT SOME INFORMATION FROM MR. CAYTON. IF THIS
23 WAS PART OF IT, I DON'T REMEMBER.

24 I KNOW IT WAS IN HIS NEW MOTIONS TODAY. I'LL BE
25 GLAD TO CALL HIM TOMORROW AND ASK HIM WHAT HE HAS, TELL

1 HIM TO SEND IT TO ME. I DON'T MIND DOING THAT. I JUST
2 HAVEN'T HAD AN OPPORTUNITY TODAY.

3 THE COURT: WELL, I MEAN, I THINK UNDER THOSE
4 D.N.A. CASES ABOUT --

5 MR. MCMAHON: SURE. I DON'T HAVE ANY POSITION
6 ABOUT HIM NOT HAVING THEM. I'LL CALL AND ASK HIM.

7 THE COURT: HE'D BE ENTITLED TO THAT.

8 MR. DELGADO: YOUR HONOR, NOW TO NUMBER THREE IN
9 DEFENDANT'S SECOND SET, THE VICTIM IN THIS CASE, YOUR
10 HONOR, WAS A GENTLEMAN BY THE NAME OF JOHN ORNER,
11 O-R-N-E-R.

12 MR. ORNER WAS RETIRED FROM THE MILITARY, AND
13 AFTER HIS RETIREMENT, BEGAN DRIVING A CAB IN OR AROUND THE
14 FORT JACKSON AREA.

15 I WOULD IMAGINE LIKE OTHER THINGS, YOU KNOW,
16 FOLKS STAKE OUT THEIR TERRITORIES AND PRETTY MUCH STAY
17 DRIVING THAT GENERAL AREA.

18 MR. ORNER IS ALLEGED TO HAVE HAD A HABIT OF
19 DRIVING THROUGH THE FORT WHEN HE COMPLETED HIS DUTY FOR
20 THE DAY, HIS WORK FOR THE DAY.

21 THE PROBLEM WITH THAT, YOUR HONOR, IS THAT
22 AGAIN, THAT WOULD BE SUBSTANTIATED BY INDIVIDUALS WHO ARE
23 NO LONGER WITH US, AND WHICH ARE CONTAINED IN ANCIENT
24 DOCUMENTS PREPARED FOR A CRIMINAL TRIAL.

25 THE REASON THE STATE -- AND I'M NOT GOING TO PUT

1 WORDS IN THEIR MOUTH, YOUR HONOR, IS THIS: THEY WILL SAY
2 THAT MR. ORNER ON THE EVENING OF FEBRUARY 28TH, 1961, AT
3 LEAST THIS IS THEIR -- I'M NOT GOING TO SAY THIS IS THEIR
4 CONTENTION. I WOULD IMAGINE THIS IS THEIR CONTENTION,
5 LEAVES THE CAB STAND AT GATE NUMBER ONE AT FORT JACKSON,
6 WHICH IS RIGHT AT THE FORT JACKSON BOULEVARD, AND DRIVES
7 THROUGH THE BASE, EXITS ON WHAT USED TO BE GATE TWO, WHICH
8 EXITED ON PERCIVAL ROAD, DROVE UP MAYBE ANOTHER HALF MILE,
9 THREE QUARTERS OF A MILE, TURNED LEFT ON DECKER BOULEVARD,
10 WENT ANOTHER MILE, TURNED RIGHT ON TWO NOTCH TO HIS HOME.

11 NOW, THE PROBLEM WITH THAT, YOUR HONOR, IS THAT
12 THERE IS NO ONE THAT CAN OFFER TESTIMONY ABOUT THAT HABIT.
13 I WOULD IMAGINE NO ONE CAN TESTIFY ABOUT THAT HABIT.
14 THAT'S ALL CONTAINED IN POLICE INVESTIGATIVE REPORTS.

15 THE REASON THAT I WOULD THINK THE STATE IS GOING
16 TO WANT TO HAVE THAT ADMITTED IS THAT MR. ORNER WOULD HAVE
17 HAD TO HAVE DRIVEN IN CLOSE PROXIMITY TO A BARRACKS WHERE
18 MR. FREIBURGER WAS HEADQUARTERED.

19 IF MR. ORNER IS ALIVE AT 11:30 TO 11:45 THAT
20 NIGHT, MR. FREIBURGER IS IN HIS BARRACKS AT 10 O'CLOCK, SO
21 IN OTHER WORDS, THERE'S AN HOUR-AND-A-HALF. IF FREIBURGER
22 IS ON THE BASE AND MR. ORNER IS JUST OUTSIDE THE BASE, AS
23 MR. ORNER LEAVES, ACCORDING TO HIS HABIT, HE DRIVES CLOSE
24 BY WHERE FREIBURGER WAS IN THE BARRACKS.

25 THEY SAY -- I WOULD IMAGINE THEY'RE GOING TO SAY

1 THAT SOMEHOW FREIBURGER FLAGS HIM DOWN, DOES SOMETHING,
2 SOMEHOW GETS IN THE CAB. OBVIOUSLY, THERE'S NO EYEWITNESS
3 TO THAT. THERE'S NO TESTIMONY TO THAT, BUT IT'S THE
4 RANKEST SPECULATION, FIRST OF ALL, THAT THAT HAPPENED THAT
5 NIGHT OR THAT THEY CAN THEN EVEN ESTABLISHED THAT
6 HAPPENED.

7 I GUESS WHAT I WANT TO JUST START WITH IS I
8 DON'T THINK THEY CAN ADMIT THAT EVIDENCE BECAUSE NO ONE
9 CAN TESTIFY TO IT.

10 THE COURT: I DON'T KNOW AT THIS MOMENT.

11 DO YOU HAVE A RESPONSE, MR. MCMAHON, OR DO YOU
12 HAVE A WITNESS?

13 MR. MCMAHON: I HAVE A WITNESS, AND I THINK THE
14 TESTIMONY IS ADMISSIBLE.

15 THE COURT: I MEAN, ASSUMING THE WITNESS -- YOU
16 HAVE A PRIVATE?

17 MR. MCMAHON: SIR?

18 THE COURT: YOU'RE TALKING ABOUT THE PRIVATE?

19 MR. MCMAHON: THIS HAS TO DO WITH THE CAB
20 DRIVER. I'M GOING TO HAVE A MEMBER OF HIS FAMILY THAT
21 KNOWS WHAT HIS WORK HABITS WERE AT THE TIME, KNEW WHERE HE
22 HUNG OUT, KNEW HE WAS RETIRED MILITARY, WORLD WAR I AND
23 WORLD WAR II VETERAN, LIKED TO WORK FORT JACKSON ON
24 PAYDAYS. HIS NORMAL ROUTE HOME WOULD TAKE HIM THROUGH THE
25 FORT OFF PERCIVAL, TURN LEFT ON DECKER AT TWO NOTCH, TURN

1 LEFT, GO TO [REDACTED] [REDACTED] [REDACTED] [REDACTED].

2 AS A MATTER OF FACT, THAT WITNESS IS A FORMER
3 BAILIFF AT THE RICHLAND COUNTY COURTHOUSE, ONE OF MANY
4 WITNESSES THAT WILL TESTIFY.

5 THE COURT: ALL RIGHT. THEN I'LL GET MYSELF UP
6 TO SPEED ON THAT.

7 MR. DELGADO: YOUR HONOR, MAY I ASK THE COURT TO
8 INQUIRE OF MR. MCMAHON, DOES THAT WITNESS HAVE FIRSTHAND
9 KNOWLEDGE OF THAT OR THAT'S TOLD? SEE, BECAUSE WHAT
10 HAPPENS IS THE BAILIFF, WHO IS A GENTLEMAN KNOWN TO ALL OF
11 US HERE, HE MARRIES THE STEPDAUGHTER OF MR. ORNER,
12 PROBABLY LONG AFTER MR. ORNER HAS DIED.

13 SO IN OTHER WORDS, HE IS TOLD THAT, BUT I DON'T
14 THINK THAT --

15 MR. MCMAHON: WELL, HE HAS FIRSTHAND KNOWLEDGE
16 OF HIS HABITS.

17 MR. DELGADO: AS TOLD TO HIM BY SOMEBODY ELSE,
18 PROBABLY.

19 MR. MCMAHON: JUDGE, HE CAN ASK HIM THESE
20 QUESTIONS.

21 THE COURT: THAT WOULDN'T BE FIRSTHAND
22 KNOWLEDGE.

23 MR. DELGADO: THAT'S WHAT I'M SAYING.

24 THE COURT: HE SAYS HE HAS A WITNESS WHO HAS
25 FIRSTHAND KNOWLEDGE.

1 MR. DELGADO: THAT'S FINE.

2 THE COURT: THIS IS NOT A DISCOVERY PROCEEDING.

3 MR. DELGADO: YEAH, I AGREE. I AGREE.

4 YOUR HONOR, THE SECOND SET OF MOTIONS, NUMBER
5 FOUR, YOUR HONOR, THIS COMES IN THE DISCOVERY IN THIS
6 MATTER.

7 THIS COMES LATE, YOU PROBABLY DIDN'T GET THIS
8 UNTIL SOMETIME IN JULY, THIS MONTH. THERE ARE MILITARY
9 RECORDS THAT I DID NOT HAVE COPIES OF THAT RELATE TO
10 SUPPOSEDLY THE UNFITNESS OF ED FREIBURGER FOR MILITARY
11 SERVICE.

12 IN OTHER WORDS, THERE ARE SOME PSYCHIATRIC
13 EVALUATIONS BY A CAPTAIN WHO SAYS SOME THINGS ABOUT
14 MR. FREIBURGER THAT NOT ONLY WOULD BE IN VIOLANCE OF
15 COUNCIL, BUT IT WOULD BE 403 MATERIAL. IT WOULD BE
16 ANCIENT DOCUMENTS MATERIAL THAT'S LOADED WITH OBJECTIONS.

17 MAYBE I COULD ASK MR. MCMAHON TO RESPOND TO
18 WHETHER OR NOT THOSE PORTIONS OF THE MILITARY RECORDS ARE
19 GOING TO COME IN OR IF THERE'S GOING TO BE TESTIMONY OF
20 THAT. MAYBE WE COULD DO THAT RIGHT NOW.

21 MR. MCMAHON: JUDGE, WE DON'T INTEND TO OFFER
22 THEM IN OUR CASE IN CHIEF BASED ON SOME EVIDENCE THAT THEY
23 HAVE PRESENTED TO US UNDER DISCOVERY, WE MAY INTEND TO
24 OFFER IT IN REPLY.

25 THE COURT: DEPENDS ON HOW YOU HANDLE YOUR

1 DEFENSE.

2 MR. DELGADO: THANK YOU.

3 YOUR HONOR, NUMBER FIVE, AGAIN, IS A MOTION THAT
4 NEEDS TO BE TAKEN UP, I IMAGINE, WHEN MR. MEREDITH IS
5 PRESENT.

6 THE COURT: YES, SIR.

7 MR. DELGADO: THE THIRD SET OF MOTIONS, YOUR
8 HONOR, I THINK IS MOOTED AS A RESULT OF THE VERY FIRST
9 MOTIONS WE MADE. CONTAINED IN THE DISCOVERY IS AN 82-PAGE
10 STATEMENT THEY SAY THEY'RE NOT GOING TO INTRODUCE OR
11 DISCUSS.

12 YOUR HONOR, MAY I JUST ASK THE COURT, WITH ALL
13 DUE RESPECT TO MY FRIENDS AT THE SHERIFF'S DEPARTMENT,
14 SOMETIMES THEY WILL REFERENCE THINGS THAT ARE NOT ADMITTED
15 TO EVIDENCE. I SAY THAT ADVISEDLY, AND I SAY IT WITH A
16 SENSE OF RESERVATION.

17 I JUST DON'T WANT ANYBODY TO SAY ANYTHING ON THE
18 STAND ABOUT SOME SORT OF STATEMENT THAT HE MAKES AT FORT
19 LEAVENWORTH OR SOME OTHER PLACE THAT'S NOT BEEN ADMITTED
20 TO EVIDENCE. I OBJECT TO THOSE FACTS NOT INTO EVIDENCE.
21 WELL, THAT BELL HAS BEEN RUNNING. THAT'S THE REASON I'M
22 SAYING IT, OUT OF PRECAUTION.

23 THE COURT: I UNDERSTAND.

24 MR. MCMAHON: EXCUSE ME, I DIDN'T MEAN TO
25 INTERRUPT THE COURT.

1. THE COURT: GO AHEAD.

2. MR. MCMAHON: I DIDN'T -- I'M NOT GOING TO USE
3. THE STATEMENT WHAT ON FORT LEAVENWORTH IN MY CASE IN
4. CHIEF.

5. I THINK THAT'S A DIFFERENT ISSUE AS TO WHETHER
6. OR NOT SOMEBODY SAYS THE STATEMENT WAS MADE VERSUS THE
7. SUBSTANCE OF THE STATEMENT. I THINK THOSE ARE DIFFERENT
8. ISSUES IF THAT'S WHAT HE WAS REFERRING TO.

9. MR. DELGADO: WELL, WHO COULD MAKE A STATEMENT
10. WITH ANY SENSE OF RELIABILITY AS TO WHAT THAT STATEMENT
11. WAS ABOUT OR ITS RELEVANCE UNDER 402.

12. THE COURT: I DON'T KNOW THAT YET. I MEAN, THE
13. DISTINCTION HE DRAWS FROM THE STATEMENT MADE AS OPPOSED TO
14. WHAT THE STATEMENT SAYS.

15. MR. MCMAHON: AND MAYBE I MISUNDERSTOOD
16. MR. DELGADO'S POINT ON THAT.

17. THE COURT: THE STATEMENT AS TO WHAT WAS SAID IN
18. THE CASE IN CHIEF IS NOT BEING OFFERED. I DON'T KNOW THE
19. CONTEXT OF THE STATEMENT, A REFERENCE THAT THE STATEMENT
20. WAS MADE. THAT MIGHT BE BECAUSE -- I DON'T KNOW THAT YET.
21. I'LL HEAR IT IN CONTEXT.

22. MR. MCMAHON: JUDGE, JUST TO QUALIFY THIS A
23. LITTLE BIT FURTHER, OF COURSE, I LIMIT THIS REMARK AS FAR
24. AS THE TRANSCRIBED STATEMENT TO MY CASE IN CHIEF.

25. THE COURT: RIGHT, I UNDERSTAND THAT.

1 MR. MCMAHON: THANK YOU.

2 THE COURT: ALL RIGHT. WHAT ELSE DO WE HAVE?

3 MR. DELGADO: YOUR HONOR, THE THIRD SET, NUMBER
4 TWO, IF THERE IS GOING TO BE ANY IDENTIFICATION OF THE
5 DEFENDANT, WE WERE UNCLEAR AS TO, OBVIOUSLY, WE DON'T KNOW
6 EXACTLY WHAT THEY'RE GOING TO PUT ON. IN OTHER WORDS,
7 THEY MAY HAVE SOMEBODY WHO IS GOING TO SAY, "I SAW THAT
8 MAN BUY A GUN AT A PAWNSHOP." WE DON'T KNOW WHAT THEY'RE
9 GOING TO PUT ON.

10 OBVIOUSLY, WHAT MR. MCMAHON IS SAYING TODAY, IN
11 FACT, IS NOT THE CASE. SO WHILE NOT WITHDRAWING THAT, I
12 THINK THE FOCUS OF MY MOTION WHEN I MADE IT WAS RELATIVE
13 TO MATERIAL ACTS RELATIVE TO THE PURCHASE OF THE GUN, BUT
14 THERE MAY BE OTHER ITEMS.

15 THE COURT: MY UNDERSTANDING IS HE INTENDS TO
16 PROVE THE PURCHASE AND SO FORTH THROUGH BUSINESS RECORDS.

17 MR. DELGADO: YES, SIR. YOUR HONOR, I THINK
18 MOVING DOWN IN THE THIRD ONE, THE THIRD SET OF MOTIONS IN
19 LIMINE'S ARGUMENT HAS BEEN NOTED.

20 THE FOURTH ONE, YOUR HONOR, IS THIS. LET ME SEE
21 IF I CAN -- THIS CASE, YOUR HONOR, AT LEAST FOR THE
22 DEFENSE AND MAYBE FOR THE PROSECUTION, BECAUSE OF THE
23 EXTRAORDINARY LENGTH OF TIME THAT HAS TRANSPIRED BETWEEN
24 THE EVENTS IN QUESTION AND OUR DEFENSE RAISES ALL SORTS OF
25 ISSUES THAT I HAVE NEVER ENCOUNTERED BEFORE, AND I DARE

1 SAY WILL NOT ENCOUNTER AGAIN IN MY CAREER.

2 I FILED A NOTICE OF ALIBI, YOUR HONOR, UNDER
3 OBJECTION. NOW, THE REASON I DID THAT WAS BECAUSE IN THE
4 STANDARD RULE 5 REQUEST, THEY SAY NAME ALL THE INDIVIDUALS
5 UPON WHOM YOU WILL ESTABLISH YOUR ALIBI.

6 WELL, SPECIFICALLY THE ONE PERSON THAT WE WOULD
7 ESTABLISH AN ALIBI WITH HAS DIED BECAUSE OF THE INTERVAL
8 OF 41 YEARS.

9 I'VE NEVER FILED A NOTICE OF ALIBI UNDER
10 OBJECTION BEFORE. IT JUST CAME TO MY MIND. THERE IS NO
11 OTHER WAY FOR ME TO DO THAT, BUT I WANTED TO COMPLY WITH
12 THE RECIPROCAL DISCOVERY REQUEST SO I DID THAT.

13 WHAT THAT PROMPTED ME TO, YOUR HONOR, WAS TO
14 INQUIRE WHETHER OR NOT THE DEFENDANT IS DENIED HIS SIXTH
15 AMENDMENT RIGHTS TO COMPEL WITNESSES ON HIS BEHALF BECAUSE
16 THESE INDIVIDUALS HAVE DIED.

17 I'LL GIVE YOU AN EXAMPLE OF THAT, YOUR HONOR.
18 THERE IS AN INDIVIDUAL WHO WOULD HAVE BEEN ABLE TO HAVE
19 SAID THAT AT 21:00 HOURS, 9:30, 22:00 HOURS ON THE EVENING
20 OF FEBRUARY 28TH, 1961, THAT'S 9:30 TO 10 P.M., HE WAS
21 WITH ED FREIBURGER OUTSIDE THE BARRACKS AT FORT JACKSON;
22 THAT AT APPROXIMATELY 22:00 HOURS, MAYBE SOME TIME SHORTLY
23 AFTER THAT, THEY WENT INSIDE THE BARRACKS.

24 THIS INDIVIDUAL WHOSE NAME WAS SCOTT, JAMES
25 FRANKLIN SCOTT, GOES INTO HIS BARRACKS DORM WHICH IS ON

1 THE FIRST FLOOR AND FREIBURGER GOES TO THE SECOND FLOOR.

2 AT THAT TIME, YOUR HONOR, IF THIS CASE HAD
3 OCCURRED THREE YEARS AGO, I WOULD HAVE WANTED MR. SCOTT TO
4 HAVE VERIFIED WHERE ED FREIBURGER WAS AT A TIME THAT IS
5 COMING INTO FOCUS VIS-A-VIS MR. ORNER AND HIS WHEREABOUTS,
6 BUT BECAUSE MR. SCOTT DIED IN 1996, I CAN'T CALL HIM.

7 NOW, IT WOULD SEEM TO ME, YOUR HONOR, THAT IF
8 THE DEFENDANT ELECTS TO TAKE THE STAND, THAT MAY PROVE THE
9 ALIBI. IF THE DEFENDANT ELECTS NOT TO TAKE THE STAND,
10 THEN HOW ELSE DO I PROVE THE ALIBI AS TO WHERE
11 MR. FREIBURGER WAS ON THAT EVENING?

12 THERE IS, YOUR HONOR, AND LET ME JUST SAY THIS
13 TO YOU: I WOULD IMAGINE FROM THE STATE AND THE DEFENSE,
14 THERE HAS BEEN A LOT OF WORK IN PREPARATION FOR THIS CASE.

15 ONE OF THE THINGS THAT MY FRIENDS FROM THE
16 SHERIFF'S DEPARTMENT HAVE SAID, AND THEY SAY IT IN THEIR
17 REPORTS, WAS THAT ED FREIBURGER WAS A.W.O.L. ON THE DAY
18 AFTER THE KILLING, WHICH WOULD HAVE BEEN MARCH 1ST. IT'S
19 IN HIS REPORT TO SHERIFF LOTT. WELL, THERE'S NO EVIDENCE
20 OF THAT WHATSOEVER, NONE.

21 IF MR. CRAIG SAYS SOMETHING LIKE THAT ON THE
22 STAND, WELL, FIRST OF ALL, IT'S INCREDIBLY PREJUDICIAL.
23 IT'S 403 MATERIAL, AND THERE'S NO FACTS TO SUBSTANTIATE
24 THAT WHATSOEVER.

25 BUT THAT BROUGHT ME TO THINK HOW CAN I PROVE AND

1 HOW CAN I COMPEL WITNESSES TO COMPLY WITH HIS
2 CONSTITUTIONAL RIGHT TO HAVE WITNESSES ON HIS BEHALF IF
3 THEY HAD DIED AS A RESULT OF EVERYTHING THAT'S TRANSPIRED.

4 THE COURT: WELL, I MEAN, IT'S LIKE IF A WITNESS
5 GETS SHOT ON THE WAY TO COURT, I DON'T KNOW IF THAT'S --
6 THAT'S JUST A PROBLEM WITH LIFE, BUT THERE ARE A NUMBER OF
7 OTHER SOLDIERS IN THAT BARRACKS THAT YOU OBVIOUSLY HAVE
8 ACCESS TO WHO PROBABLY SLEPT UNDERNEATH HIM, ON TOP OF THE
9 BUNK, OR BESIDE HIM.

10 IN FACT, THOSE QUESTIONNAIRES KIND OF TELL YOU
11 SOME OF THAT INFORMATION, SO I REALLY DON'T THINK --

12 MR. DELGADO: I UNDERSTAND, BUT SPECIFICALLY
13 ABOUT RELATING TO THE ALIBI, YOUR HONOR, THERE'S NO ONE
14 ELSE I COULD HAVE CALLED ABOUT THAT BECAUSE NO ONE ELSE
15 WAS WITH ED ON THAT NIGHT EXCEPT FOR MR. SCOTT.

16 I'M NOT TRYING TO SAY THAT THEY DON'T HAVE A
17 RIGHT TO ARREST SOMEBODY 40 YEARS AFTER THE FACT, BUT IT
18 CERTAINLY DOES STRAIN OUR ABILITY TO BE ABLE TO OBTAIN
19 WITNESSES AND HAVE THEM TESTIFY WHEN THE STATE ELECTS TO
20 TRY SOMEBODY 40 YEARS AFTER AN ALLEGED INCIDENT.

21 THE COURT: WELL, MY UNDERSTANDING OF THE
22 ARGUMENT WAS THAT THE STATE'S ALLEGED TIME OF THE EVENT OR
23 THE PROPOSED TIME OF THE EVENT --

24 MR. MCMAHON: THE EARLY MORNING HOURS OF
25 MARCH 1ST, '61.

1 THE COURT: SEE, I UNDERSTOOD YOUR ARGUMENT TO
2 BE THAT HE WAS IN THE BARRACKS AT 22:00.

3 MR. DELGADO: BETWEEN 22 -- YES, SIR.

4 THE COURT: SO IT DOESN'T MAKE ANY DIFFERENCE
5 WHERE HE WAS BETWEEN 9:30 AND 10. IT'S WHAT HAPPENED
6 AFTER TEN, ISN'T IT?

7 MR. DELGADO: YES, SIR. BUT AGAIN, YOUR HONOR,
8 HOW DO I PROVE THAT IF AT LEAST ONE OF THE WITNESS, THE
9 ONLY WITNESS WHO WOULD BE ABLE TO, THAT WE KNOW OF,
10 THROUGH THOSE QUESTIONNAIRES, WOULD HAVE SAID I WAS WITH
11 HIM AT 10 P.M., 22:00 HOURS, AND I WENT ONE WAY AND HE
12 WENT THE OTHER WAY UPSTAIRS.

13 THE COURT: WELL, THAT DOESN'T CREATE YOU AN
14 ALIBI. THAT DOESN'T CREATE AN ALIBI FOR YOU BECAUSE THE
15 STATE SAYS THE TIME OF THE EVENT IS WELL AFTER THAT TIME.

16 MR. DELGADO: DOES IT NOT, YOUR HONOR, THEN
17 RESTRICT MY ABILITY TO PRESENT A DEFENSE UNDER CHAMBERS
18 VS. MISSISSIPPI? BY THAT I MEAN THAT WOULD HAVE -- IF
19 THIS CASE HAD HAPPENED THREE YEARS AGO AS OPPOSED TO 41
20 YEARS AGO, I WOULD NOT HAVE HAD MR. SCOTT AVAILABLE.

21 COINCIDENTALLY, YOUR HONOR, MR. SCOTT DIES IN
22 1996 IN MONCKS CORNER, SOUTH CAROLINA. THESE FELLOWS ARE
23 SPREAD ALL OVER THE COUNTRY, BUT THIS ONE HAPPENS TO BE
24 RIGHT DOWN IN BERKELEY COUNTY WHERE WE COULD HAVE FOUND
25 HIM.

1 I MEAN, I UNDERSTAND, OBVIOUSLY, THINGS HAPPEN
2 TO CASES. THE PROBLEM WITH IT IS THESE THINGS ARE
3 MAGNIFIED BECAUSE OF THE PASSAGE OF 41 YEARS BETWEEN THE
4 TIME OF THE OCCURRENCE AND THE TIME OF THE TRIAL.

5 THE COURT: WELL, IF YOU'RE ASKING ME
6 PRELIMINARILY IS THE SIXTH AMENDMENT VIOLATED,
7 PRELIMINARILY I'D SAY NOT. I HAVEN'T SEEN ENOUGH TO
8 CONVINCE ME OF THAT. I DON'T BELIEVE THE STATE -- THE
9 STATE'S RECEIVED MORE FORENSIC. IN TERMS OF POSSESSING A
10 GUN AND MATCHING THE GUN, THAT'S KIND OF WHERE THEY'RE
11 TRYING THE CASE FROM.

12 MR. DELGADO: YES, SIR, BUT IF WE WERE TO DEFEND
13 THAT CASE, IT WOULD HAVE BEEN -- OUR BEST CASE WOULD BE TO
14 HAVE PLACED HIM AT SOME PLACE ELSE OTHER THAN IN THE
15 PRESENCE OR THE VICINITY OF MR. JOHN ORNER, WHICH WE COULD
16 HAVE HAD IF WE HAD A NORMAL CASE, OR IF THERE HADN'T BEEN
17 A PASSAGE OF 41 YEARS.

18 YOUR HONOR, THE REASON I SAY THAT IS I HAVE
19 NEVER ENCOUNTERED A CASE 41 YEARS OLD. I DON'T KNOW IF
20 THIS COURT EVER HAS, BUT WHEN THAT HAPPENS, IT STRAINS THE
21 ABILITY, THE FUNDAMENTAL FAIRNESS THAT WE HAVE TO HAVE TO
22 HAVE A FAIR SHOT AT A FAIR TRIAL.

23 IN OTHER WORDS, WE DON'T HAVE A STATUTE OF
24 LIMITATIONS PROBLEM. THE PROBLEM WITH IT IS IT STRAINS TO
25 BE ABLE TO JUST SAY, WELL, JUST GO OUT AND SUBPOENA YOUR

1 WITNESSES. IT DOESN'T HAPPEN LIKE THAT AFTER 41 YEARS.
2 THAT'S THE PROBLEM.

3 THE COURT: WELL, IF I WERE TO ENTERTAIN SUCH A
4 MOTION, I WOULD WANT TO HEAR THE CASE BEFORE I EVEN -- OR
5 AT LEAST THE STATE'S CASE BEFORE I GOT TO THE SUBSTANCE OF
6 THAT MAGNITUDE.

7 MR. DELGADO: ALL RIGHT, SIR.

8 THE COURT: SO DON'T STOP WORKING THIS WEEKEND.
9 DON'T TAKE OFF.

10 MR. DELGADO: YOUR HONOR, MOVING -- I THINK
11 WE'VE ALREADY TALKED ABOUT NUMBER FIVE.

12 NUMBER SIX WOULD BE THE DEFENDANT'S MOTION TO
13 DECLARE THE DEFENDANT'S GUILTY PLEA TO THE CHARGE OF
14 CARRYING ARMS UNDER THE GIDEON VS. WAINWRIGHT.

15 THE COURT REPORTER: I'M SORRY, WHAT WAS THAT?
16 I DIDN'T HEAR THE CASE YOU CITED AT ALL.

17 MR. DELGADO: WELL, THE CASE, MA'AM, AND THE
18 REASON YOU'VE NEVER HEARD OF IT IS BECAUSE IT'S SO OLD,
19 GIDEON VS. WAINWRIGHT.

20 YOUR HONOR, HERE'S WHAT HAPPENS, THE DEFENDANT
21 IS COMING BACK TO COLUMBIA, SOUTH CAROLINA, AT LEAST WITH
22 THE THEORY OF THE STATE, WITH THE MURDER WEAPON COMING
23 BACK TO THE SCENE OF THE CRIME WHEN HE IS STOPPED BY A
24 HIGHWAY PATROLMAN BY THE NAME OF MEREDITH, DON MEREDITH,
25 LIKE THE FOOTBALL PLAYER.

1 MR. MEREDITH ARRESTS HIM OR CHARGES HIM WITH THE
2 TENNESSEE OFFENSE KNOWN AS CARRYING ARMS.

3 I'VE GIVEN MR. MCMAHON MY COPY OF THE CERTIFIED
4 COPY FROM COOK COUNTY, TENNESSEE -- THEY CALL IT THE
5 SESSIONS COURT. I WOULD IMAGINE THAT'S THEIR CRIMINAL
6 COURT.

7 THE PROBLEM WITH IT, YOUR HONOR, IS THAT THE
8 SESSION'S COURT BOOK SHOWS THAT HE PLEADS GUILTY AND IS
9 SENTENCED TO 30 DAYS SUSPENDED ON HAVING THE MILITARY
10 AUTHORITIES COME AND PICK HIM UP.

11 YOUR HONOR, OBVIOUSLY, I THINK I WAS IN JUNIOR
12 HIGH SCHOOL IN 1963. SOME FOLKS IN THIS ROOM WEREN'T EVEN
13 CONCEIVED IN 1963, SO FOR US TO GO BACK NOW AND ATTEMPT TO
14 FIND OUT WHAT CONSTITUTIONAL RIGHTS AN INDIVIDUAL HAD IN
15 THE STATE OF TENNESSEE IN 1963 AND WHETHER OR NOT GIDEON
16 VS. WAINWRIGHT WOULD HAVE ALLOWED HIM TO HAVE PLED GUILTY
17 WITHOUT THE ADVICE OF COUNSEL UNDER THE SIXTH AMENDMENT IS
18 A VERY NEW UNDERTAKING FOR US.

19 THE COURT: WELL, ACTUALLY THE GIDEON VS.
20 WAINWRIGHT IS IN '63. THIS GUN CHARGE AROSE IN '61 WHICH
21 PRECEDES GIDEON.

22 MR. DELGADO: YES, SIR. EXCEPT, YOUR HONOR,
23 THAT THERE IS CONSTITUTIONAL GRIFFITH VS. KENTUCKY WHICH
24 IS A CASE DETERMINED BY THE UNITED STATES SUPREME COURT IN
25 1986 OR 1988 THAT TALKS ABOUT THE RETROACTIVITY OF

1 CONSTITUTIONAL RIGHTS IF A CASE IN WHICH THEY ARE TO BE
2 USED HAVE NOT BEEN ADJUDICATED.

3 BY THAT I MEAN IF WE ARE TO CONTEST THE GUILTY
4 PLEA AS A KNOWING AND VOLUNTARY GUILTY PLEA OF ED
5 FREIBURGER TO THIS CHARGE, IN COOK COUNTY, TENNESSEE IN
6 MARCH OR APRIL OF 1961, HE HAD A RIGHT TO COUNSEL, EVEN --

7 THE COURT: WHY WOULD HE DO THAT, BECAUSE HIS
8 EXPOSURE DID NOT EXCEED SIX MONTHS? EVEN TODAY, YOU'RE
9 NOT ENTITLED TO RIGHT TO COUNSEL IN MAGISTRATE'S COURT.

10 MR. DELGADO: WELL, YOUR HONOR, I'M UNCLEAR
11 ABOUT THAT. I BELIEVE THAT, IN FACT, IS NOT THE CASE. I
12 MEAN, I THINK --

13 THE COURT: I'M PRETTY SURE I'M RIGHT ABOUT
14 THAT.

15 MR. DELGADO: YOU MAY VERY WELL BE.

16 THE COURT: YOU CAN RESEARCH IT.

17 IF HE WASN'T EXPOSED TO MORE THAN -- IT'S JUST A
18 30-DAY OFFENSE, I'M NOT SURE HE'S ENTITLED, THEN OR NOW,
19 TO COUNSEL.

20 MR. DELGADO: YOU MAY BE CORRECT.

21 THE COURT: AM I RIGHT, MR. STRICKLER?

22 MR. STRICKLER: I BEG TO DIFFER WITH YOU, YOUR
23 HONOR.

24 THE COURT: YOU THINK SO?

25 MR. STRICKLER: YES, SIR. UNDER CARTER VS.

1 HAMILTON AND SCOTT V. ILLINOIS, THAT WHOLE LINE.

2 THE COURT: JUST RESEARCH IT.

3 MR. DELGADO: THIS DISCOVERY MAYBE WILL HELP US
4 TO ALERT YOU.

5 THE COURT: SURE, THE LAST MOTION.

6 MR. DELGADO: YOUR HONOR, THE LAST MOTION AND
7 HERE'S --

8 MR. MCMAHON: HAVE YOU RULED ON THIS MOTION?
9 I'M SORRY.

10 THE COURT: NO, I HAVEN'T RULED ON IT.

11 MR. MCMAHON: I DON'T THINK GIDEON APPLIES AT
12 ALL. I JUST WANT TO GET THAT ON THE RECORD.

13 THE COURT: I UNDERSTAND THAT.

14 MR. MCMAHON: BECAUSE GIDEON WAS A FELONY CHARGE
15 WHERE HE REQUESTED A LAWYER AND WAS DENIED A LAWYER. I
16 THINK THAT'S VERY DIFFERENT WHEN THIS WAS IN '63, AND THIS
17 WAS '61 WHERE IT'S A GUILTY PLEA AND THE NATURE OF IT IS
18 30 DAYS SUSPENDED TO THE ARMY.

19 ALSO, THERE IS EVIDENCE IN HIS MILITARY RECORDS
20 UNDER SEAL OF THE SAME THING. I HAVE A COPY I CAN HAND TO
21 YOU. I THINK IT'S VERY DIFFICULT THAN THE CASES THEY'RE
22 REFERRING TO. I DON'T THINK GIDEON WOULD APPLY AT ALL TO
23 THE FACTS IN THIS PARTICULAR CASE.

24 THE COURT: WELL, WE'LL DO A LITTLE RESEARCH
25 OVER THE WEEKEND.

1 MR. DELGADO: YOUR HONOR, IF WE'RE GOING TO DO
2 RESEARCH, I MAY JUST ALERT YOU TO THE NEXT ONE THAT
3 FOLLOWS BECAUSE IF HE HAD COUNSEL, WOULD COUNSEL HAVE
4 OBJECTED TO THE SEARCH AND/OR THE SEIZURE PURSUANT TO
5 GIDEON?

6 I GUESS MAYBE WE JUST NEED TO USE SOME MORE --
7 YOU KNOW, YOUR HONOR, MR. STRICKLER JUST SAID CARTER VS.
8 HAMILTON, IF MY MEMORY -- I CAN'T RECALL, YOUR HONOR,
9 WHICH OF THOSE TWO WAS FIRST. IT MAY VERY WELL BE -- JUST
10 LET US DO SOME MORE WORK ON THAT. HOW ABOUT THAT.

11 THE COURT: THAT'S ALL.

12 MR. DELGADO: THANK YOU. YOUR HONOR, THAT'S
13 BASICALLY -- THAT'S EVERYTHING, AT LEAST FOR THE DEFENSE.

14 THE COURT: ALL RIGHT. ARE YOU STILL HANGING ON
15 TO MORE THAN FIVE DAYS? DID THIS CUT OUT A LOT OF THIS,
16 SEVERAL DAYS?

17 MR. MCMAHON: JUDGE, I THINK WE COULD DO THE
18 MOTIONS, EVIDENTIARY, MONDAY BEFORE THE JURY COMES AND
19 START TUESDAY.

20 THE COURT: WELL, ONE OF THE CONSIDERATIONS, THE
21 REASON I'M ASKING IS I WAS GOING TO ENLARGE THE PANEL TO
22 60 IF WE WERE GOING TO CARRY OVER BEYOND A WEEK.

23 NORMALLY, WE SEND ABOUT 40 SOMETHING NAMES UP
24 HERE, BUT I WAS GOING TO ENLARGE IT TO ABOUT 60. WE MAY
25 HAVE SOME HARDSHIPS, I DON'T KNOW. IF I DON'T NEED TO DO

1 THAT, I DON'T WANT TO DO THAT.

2 MR. MCMAHON: JUDGE, I DON'T KNOW HOW TO ANSWER
3 THAT QUESTION. I APOLOGIZE.

4 THE COURT: OKAY. MAYBE WE'LL KNOW MORE MONDAY.

5 MR. MCMAHON: JUDGE, I HAVE A COUPLE OF MOTIONS
6 REAL QUICK --

7 THE COURT: ALL RIGHT.

8 MR. MCMAHON: -- ON DISCOVERY ISSUES.

9 LAST FRIDAY, I THINK, WE GOT A PHONE CALL FROM
10 MS. HUDGINS TO OUR SECRETARY SAYING THAT THEY HAD GOTTEN A
11 HANDWRITING EXAMINER TO EXAMINE CERTAIN ITEMS.

12 I THINK THE ITEM WHICH THEY FAXED TODAY IS THE
13 PAWN RECEIPT, AS I RECALL IT, FOR THE PURCHASE OF THE
14 WEAPON. I THINK THIS IS THE ITEM THEY'RE REFERRING TO.

15 JUDGE, WHAT WE WOULD LIKE TO DO IS TO GET A COPY
16 OF THE -- THEY FAXED US THAT DOCUMENT. I THINK THAT IS
17 WHAT THEY COMPARED.

18 WE WOULD ALSO LIKE TO GET ACCESS TO WHATEVER
19 THEY COMPARED THAT AGAINST, THE NAME OF THEIR EXPERT, AND
20 THE REPORT OF THEIR EXPERT AS FAR AS THE HANDWRITING.

21 NOW, THIS CAME TO LIGHT LAST FRIDAY. LAST
22 FRIDAY WAS THE, I THINK -- WHAT DATE WAS LAST FRIDAY?

23 THE CLERK: NINETEENTH.

24 MR. MCMAHON: NINETEENTH, WHICH WAS FOUR DAYS
25 AFTER THIS CASE WAS ORIGINALLY SCHEDULED TO START ON

1 JULY 15TH. SO IT KIND OF HAMSTRINGS US TO EVEN GET AN
2 EXPERT NOW, BUT WE FILED THE APPROPRIATE DISCOVERY,
3 RECIPROCAL DISCOVERY MOTIONS, IN THE PAST.

4 THE COURT: ALL RIGHT. CAN YOU MAKE THAT
5 AVAILABLE?

6 MR. DELGADO: YOUR HONOR, WITHOUT SAYING YES,
7 MAY I SAY TO THE COURT, I'M SORRY TO SAY THAT I'VE PASSED
8 THAT TO KATHRINE. KATHRINE ISN'T HERE TO ANSWER THAT.
9 SHE HAD CHILDCARE RESPONSIBILITIES AT FIVE TODAY, SO I
10 WILL ASK HER. I DIDN'T KNOW WE WERE GOING TO DO THIS
11 TODAY. IT SHOWS WHAT I KNOW ABOUT WHAT'S GOING ON ABOUT
12 THE HANDWRITING ASPECT OF THIS.

13 I WILL ASK HER, I WILL CALL HER TONIGHT TO ASK
14 HER TO RESPOND MS. CAMPBELL AND/OR MR. MCMAHON.

15 MR. MCMAHON: JUDGE, OUR PROBLEM IS TOMORROW IS
16 FRIDAY. TOMORROW IS FRIDAY. WE NEED THE MATERIALS IF
17 WE'RE GOING TO HAVE TO HAVE AN EXPERT LOOK AT THEM.

18 MR. DELGADO: I'LL GIVE MS. CAMPBELL HER HOME
19 TELEPHONE NUMBER, LET HER CALL HER AT HOME.

20 MS. CAMPBELL: WELL, JUDGE, I'VE TALKED TO HER
21 ABOUT THIS ISSUE. SHE TOLD ME SHE WOULD PROVIDE ME WITH
22 EVERYTHING TODAY.

23 SPECIFICALLY, I WAS ASKING -- SHE DID PROVIDE ME
24 WHAT DOCUMENT THEY WERE COMPARING. SHE INDICATED TO ME
25 THAT THERE WERE SAMPLES OF HIS HANDWRITING FROM SOME

1 REPORT CARDS HE HAD SIGNED, SOME CHECKS, AND SOME OF THE
2 MATERIAL WE HAD PROVIDED TO HIM.

3 SHE STILL HAS NOT TOLD ME WHAT HIS OPINION IS,
4 SHE HAS STILL NOT GIVEN ME ANY REPORT HE HAS PRODUCED.
5 SHE STILL HAS NOT GIVEN ME ANY OF THE KNOWN DOCUMENTS SHE
6 HAS COMPARED IT TO.

7 EVEN AS SHE INDICATED, SHE IS AT LEAST GETTING
8 TO THE KNOWN DOCUMENTS AND HIS -- I ASSUME THIS IS WHAT
9 SHE MEANT FOR ME, HIS OPINION TODAY. WE DISCUSSED THAT
10 SPECIFICALLY.

11 SHE TOLD ME SHE WOULD BE IN CONTACT WITH ME THIS
12 MORNING. SHE TOLD ME THAT SHE THOUGHT SHE COULD HAVE THE
13 STUFF AROUND LUNCHTIME OR SHORTLY THEREAFTER, BECAUSE I
14 WANTED IT YESTERDAY. SHE SIMPLY TOLD ME SHE COULDN'T GET
15 IT YESTERDAY.

16 THE COURT: 9:30 IN THE MORNING, MR. DELGADO.

17 MR. DELGADO: OKAY.

18 MR. MCMAHON: JUDGE, THESE OTHERS ARE DISCOVERY
19 ISSUES. IF IT'S ALL RIGHT WITH HIS HONOR, I'M GOING TO
20 ASK MS. CAMPBELL TO COVER THOSE ISSUES.

21 MS. CAMPBELL: YES. JUDGE, WE ALSO RECEIVED, I
22 BELIEVE TODAY, TWO OTHER SUPPLEMENTAL ANSWERS TO OUR
23 REQUEST FOR DISCOVERY.

24 IN THOSE TWO REQUESTS, I BELIEVE IT'S THE SECOND
25 AND THE THIRD SUPPLEMENTAL ANSWERS. HE INDICATES THAT HE

1 HAS HIRED TWO MORE EXPERTS, ONE OF THEM IS DR. DONNA
2 SCHWARTZ-WATTS, WHO IS GOING TO TESTIFY ABOUT THE
3 DEFENDANT'S MEMORY. I THINK JUST TO GENERALIZE IT, THAT
4 HE SUFFERS FROM SOME KIND OF PSYCHOLOGICAL DISORDER FROM
5 HIS EXPOSURE TO ARSENIC, AND I'M SUMMARIZING THIS, YOUR
6 HONOR.

7 ANYWAY, IN THAT MOTION IT ALSO INDICATES THAT WE
8 WILL GET A COPY OF HER REPORT FOR TESTING.
9 DR. SCHWARTZ-WATTS, I BELIEVE YOU'RE FAMILIAR WITH HER,
10 JUDGE. SHE DOES PSYCHOLOGICAL TESTING.

11 AS OF LAST NIGHT, KATHRINE HAS ALSO INFORMED ME
12 THAT SHE WOULD NOT PROVIDE THAT TO US, THAT THERE WAS NO
13 REPORT, THAT WE HAD EVERYTHING SHE HAD, SHE WASN'T GETTING
14 ANYTHING ELSE THAT I WAS AWARE OF.

15 WE WOULD SIMPLY MOVE AT THIS TIME, YOUR HONOR,
16 THAT THE DEFENSE DOES HAVE TO, AND I THINK UNDER THE
17 RULES, THEY HAVE TO PROVIDE US WITH A COPY OF HER REPORT.

18 WE WOULD ASK IF SHE DOESN'T HAVE A REPORT THAT
19 ONE BE PROVIDED FOR US. IN ADDITION TO THAT, WE WANT
20 COPIES OF ALL THE TESTING, HER NOTES AND THINGS OF THAT
21 NATURE THAT WE USUALLY GET.

22 IN ADDITION TO THAT, YOUR HONOR, WE HAVE A
23 SECOND PSYCHOLOGIST, THIS OTHER PSYCHIATRIST. THAT'S
24 DR. TORY BRAWLEY.

25 DR. BRAWLEY, THEY INDICATE, HAD AN EVALUATION

1 WITH THE DEFENDANT THAT TALKS ABOUT HIS MANUAL DEXTERITY,
2 POOR VERBAL LEARNING. HE'S GOT SOME STUFF GOING ON.
3 THERE'S A PATTERN OF NEUROPSYCHOLOGICAL DEFICITS,
4 DIAGNOSTICS IMPRESSIONS AT THIS TIME ARE A COGNITIVE
5 DISORDER.

6 I ASKED MS. HUDGINS YESTERDAY FOR HER REPORT, AS
7 WELL AS HER TESTING RESULTS AND HER TESTS. SHE TOLD ME
8 AGAIN THERE WERE NO REPORTS DONE BY DR. TORY BRAWLEY, AND
9 THAT DR. BRAWLEY'S POLICY WAS NOT TO RELEASE ANY OF HER
10 TESTING.

11 WE WOULD SIMPLY ASK THE COURT AT THIS TIME TO
12 ASK THE DEFENSE TO PROVIDE ALL THE REPORTS, THE TESTING,
13 THE NOTES, SO THAT WE WOULD AT LEAST HAVE THE WEEKEND.
14 THAT'S ALL WE'RE ASKING IS AT LEAST THE WEEKEND TO LOOK AT
15 THEM.

16 THE COURT: MR. DELGADO.

17 MR. DELGADO: YES, SIR. LET ME SEE IF I CAN
18 ANSWER THOSE IN THE SEQUENCE WHICH MS. CAMPBELL GAVE.

19 YOUR HONOR, THE ONLY TESTING -- IT WAS MY POOR
20 WORDING. I SAID, "DR. WATTS' TESTING AND RESULTS WOULD BE
21 IMMEDIATELY DELIVERED TO THE STATE UPON RECEIPT OF THE
22 UNDERSIGNED."

23 THE ONLY RESULT WE HAVE, YOUR HONOR, IS WHAT
24 THEY CALL A HEAVY METAL SCREEN WHICH I THEN GAVE TO THEM
25 YESTERDAY, PROBABLY WITHIN THREE HOURS OF MY RECEIVING IT

1 BY FAX FROM DR. WATTS' OFFICE.

2 THEY DO HAVE -- THAT IS THE ONLY THING THAT SHE
3 HAS TESTED, AND THIS WASN'T TESTED BY HER. THIS WAS SENT
4 BY HER. SO IN OTHER WORDS, WE HAVE GIVEN THEM THE THINGS
5 THAT SHE WILL RELY ON. THERE ARE NO OTHER PSYCHIATRIC
6 TESTINGS THAT SHE HAS COMPILED.

7 SHE HAS -- I HAVE SENT TO THE STATE SOME
8 PICTURES OF THE DEFENDANT AND A CARD EARLIER IN THE
9 DISCOVERY. THAT'S THE FIRST RESPONSE TO --

10 MS. CAMPBELL: THE FIRST RESPONSE.

11 MR. DELGADO: BACK TO JULY 5TH.

12 THE COURT: I'LL TAKE THAT REPRESENTATION AND
13 WILL EXCLUDE ANY OTHER TESTIMONY, EXCEPT AS PROVIDED BY
14 THE ARSENIC RECORD.

15 MS. CAMPBELL: THE ARSENIC RECORD AND I ASSUME
16 SHE DIDN'T INTERVIEW HIM OR HAVE ANY NOTES OR ANYTHING OF
17 THAT NATURE.

18 THE COURT: I MEAN, SHE RELIED --

19 MS. CAMPBELL: RELIED SOLELY ON THAT ONE TEST,
20 AND WE WOULD FOR A LEGIBLE COPY OF IT, TOO.

21 MR. DELGADO: WELL, ALL I HAVE IS WHAT YOU'VE
22 GOT.

23 YOUR HONOR, WHAT SHE WILL SAY IS THAT -- WHAT I
24 DO SAY IS THAT DR. WATTS -- THE DEFENDANT, AS A RESULT OF
25 CHRONIC ARSENIC EXPOSURE, SUFFERS FROM POOR MEMORY. SHE

1 GIVES A DIAGNOSIS OF DEMENTIA NOT OTHERWISE SPECIFIED.

2 NOW, THE REASON SHE GIVES THAT, YOUR HONOR, IS
3 BECAUSE A THIRD SUPPLEMENTAL ANSWER FOR THE STATE'S
4 REQUEST FOR DISCOVERY IS, IN EFFECT, THE REPORT BY
5 DR. BRAWLEY.

6 DR. BRAWLEY IS A NEUROPSYCHOLOGIST. THEY DO
7 NOT, UNDER THEIR PROFESSION, DO NOT GIVE AWAY DATA EXCEPT
8 TO ANOTHER NEUROPSYCHOLOGIST. SHE WOULDN'T GIVE IT TO ME.
9 SHE WOULDN'T GIVE IT TO DR. WATTS, BUT DR. WATTS WILL USE
10 DR. BRAWLEY'S REPORT, WHICH IS BASICALLY AS MS. CAMPBELL
11 HAS STATED, "DOESN'T REVEAL WHETHER THIS EVALUATION
12 INCLUDES BELOW AVERAGE ATTENTION TO DETAIL, DA DA DA DA."

13 "THESE RESULTS ARE MOST CONSISTENT WITH A SUB
14 CORTICAL PATTERN OF NEUROPSYCHOLOGICAL DEFICITS.
15 DIAGNOSTIC IMPRESSIONS AT THIS TIME ARE COGNITIVE
16 DISORDERS, NOT OTHERWISE SPECIFIED. THAT'S THE REPORT.

17 I MEAN, I CAN'T --

18 MS. CAMPBELL: THIS IS HIS TYPEWRITTEN RESPONSE.
19 I DON'T HAVE A REPORT.

20 MR. DELGADO: SHE HAS NOT -- SURE. I'LL GIVE
21 THE WHOLE -- I GAVE YOU THE -- SHE SAYS HE'S 60 YEARS OLD.
22 HE'S RIGHT HANDED. I MEAN, I'LL GIVE THAT TO A JURY.
23 I'LL DO THAT BY 9:30 IN THE MORNING. I'LL BE GLAD TO.

24 MS. CAMPBELL: AND THE TESTING, YOUR HONOR.

25 MR. DELGADO: THE TESTIMONY?

1 MS. CAMPBELL: THE TESTING.

2 MR. DELGADO: I DON'T HAVE THE TESTING.

3 THE COURT: I DON'T SEE HOW YOU CAN HAVE AN
4 EXPERT, JUST LIKE HE'D WANT THE UNDERLYING STUFF AND
5 COUNSEL FOR AN EVALUATION OF FORENSIC EVIDENCE OR D.N.A.
6 HE'D BE ENTITLED TO THE UNDERLYING SUBSTANCE.

7 I DON'T THINK ANY NEUROPSYCHIATRIST OR
8 PSYCHIATRIST -- I'M NOT GOING TO LET HIM TESTIFY OR
9 ANYBODY TO ALLOW AN OPINION UNLESS THEY'RE GOING TO GIVE
10 THE TEST RESULTS.

11 MR. DELGADO: WELL, I MEAN, LET ME PUT IT THIS
12 WAY: THE TEST RESULTS ARE DIFFERENT MAYBE THAN RAW DATA.
13 LET'S PUT IT THAT WAY. THE TEST --

14 THE COURT: YEAH, BUT YOU HAVE GOT TO BE ABLE TO
15 DETERMINE --

16 MR. DELGADO: WELL --

17 THE COURT: YOU HAVE TO HAVE THE RAW DATA TO
18 DETERMINE IT.

19 MR. DELGADO: WELL, THEY SAY, THE
20 NEUROPSYCHOLOGIST, AND THIS IS NOT --

21 THE COURT: I'M NOT ARGUING, I'M NOT
22 DISAGREEING. I'M JUST NOT GOING TO DO THAT. I MEAN, THEY
23 ARE GOING TO DO IT, IF IT'S GOING TO BE RELIED ON HERE IN
24 THIS COURTHOUSE.

25 MR. DELGADO: ALL RIGHT.

1 THE COURT: DON'T TAKE THIS THE WRONG WAY.

2 MR. DELGADO: I UNDERSTAND.

3 THE COURT: I AM A FAN OF DR. JOYCE CAPLIN. SHE
4 WROTE A BOOK ON THE D.S.M. IV. THE TITLE OF THAT BOOK IS,
5 "THEY SAY WE'RE ALL CRAZY." SO I'M NOT BUYING IT.

6 MR. DELGADO: ALL RIGHT.

7 THE COURT: I AM JUST CAUTIOUS. WILL CALL THE
8 DOCTOR, YOUR HONOR. I WILL ATTEMPT TO GET EVERYTHING THAT
9 HE HAS, AND I'LL TRY TO TRANSMIT THAT TO THEM BEFORE NOON
10 TOMORROW.

11 MS. CAMPBELL: AND AGAIN, YOUR HONOR, FOR THE
12 RECORD, DR. SCHWARTZ-WATTS HAS NOTHING OTHER THAN WHAT
13 DR. BRAWLEY PROVIDED AND THAT ONE PIECE OF PAPER, WHICH I
14 WOULD JUST LIKE TO SEE IF YOURS IS A BETTER COPY THAN
15 OURS.

16 MR. DELGADO: YOUR HONOR, I'M NOT CERTAIN THAT
17 HER NOTES ARE NECESSARILY DISCOVERABLE UNDER RULE 5, ARE
18 THEY? WELL, I MEAN, SHE'S RELYING ON INTERVIEWS -- CAN I
19 JUST SAY THIS TO YOU, YOUR HONOR? BECAUSE OF HIS MEDICAL
20 CONDITION AND BECAUSE OF THE SURGERY THAT REQUIRED THE
21 POSTPONEMENT, WE WOULD HAVE HAD A LOT OF THIS DONE BEFORE
22 NOW.

23 HE'S COMING INTO TOWN TOMORROW TO MEET WITH
24 DR. SCHWARTZ-WATTS. WHAT I DON'T HAVE TODAY I MAY HAVE BY
25 TOMORROW, AT THIS TIME. THAT'S WHAT I'M SAYING HERE.

1 THE COURT: WELL, I THINK THEY'RE ENTITLED TO
2 NOTES AND THINGS JUST LIKE YOU'D WANT TO LOOK AT THE
3 NOTES.

4 MR. DELGADO: ALL RIGHT.

5 THE COURT: ALL RIGHT.

6 MS. CAMPBELL: IN THAT SAME VEIN, YOUR HONOR, WE
7 WOULD ALSO BE MOVING, I MEAN JUST ON A MOTION IN LIMINE
8 BASIS, WE WOULD ALSO MOVE FOR AN ORDER REQUIRING ALL THE
9 DEFENDANT'S MEDICAL RECORDS, ESPECIALLY ANY -- YOU KNOW,
10 THAT THEIR EXPERTS HAVE VIEWED OR ANYTHING OF THAT NATURE.

11 MR. DELGADO: YOUR HONOR, I THINK THAT'S FAIR.
12 I MEAN, OBVIOUSLY, WE CAN'T TURN AROUND AND GO BACK TO
13 FORT WAYNE, INDIANA. WHAT WE HAVE, I'LL SUBMIT TO THEM.

14 MS. CAMPBELL: OF COURSE, NONE OF THOSE DOCTORS
15 HAVE SEEN ANYTHING OTHER THAN WHAT YOU HAVE, WOULD THAT BE
16 CORRECT?

17 MR. DELGADO: NO, I'M NOT UNDER
18 CROSS-EXAMINATION, MS. CAMPBELL.

19 THERE ARE SOME EXAMPLES OF RESEARCH THAT
20 DR. WATTS HAS ENGAGED IN TO HELP. SHE HAS NOT DECIDED --
21 I MEAN, I TALKED TO HER LAST NIGHT.

22 SHE SAID, "I DON'T KNOW WHETHER OR NOT THIS IS
23 MY FINAL DIAGNOSIS," SO SHE'S STILL EVALUATING HIM.

24 I WILL GIVE -- I'LL TALK TO DR. WATTS TONIGHT,
25 TOO, JUDGE.

1 THE COURT: LISTEN, YOU KNOW THE RULE, AND IF
2 YOU WANT TO STOP IN THE MIDDLE OF THE TRIAL AND ASK FOR A
3 TWO OR THREE-DAY RECESS TO SORT THIS THING OUT, WHICH I
4 KNOW YOU DON'T WANT TO DO, WE'LL DO IT. LET'S JUST GET
5 COMPLIANCE HERE.

6 MR. DELGADO: YES, SIR.

7 THE COURT: SAME THING IF YOU WANT IT AND THE
8 STATE HAS IT, AND VICE VERSA, IF YOU'RE ENTITLED TO IT.

9 MR. DELGADO: YES, SIR.

10 MS. CAMPBELL: AND IN THAT SAME VEIN, YOUR
11 HONOR, JUST FOR THE RECORD, ANY PSYCHOLOGICAL RECORDS SHE
12 MAY HAVE VIEWED, OR ANY OF THE DOCTORS WHO MAY HAVE SEEN
13 HIM, ANY EMPLOYMENT RECORDS OR ANYTHING THAT THEY INTEND
14 TO USE THAT THE DOCTORS MAY HAVE REVIEWED AND ANY OTHER
15 RECORDS THAT THEY MAY HAVE BEEN PROVIDED.

16 I DON'T MEAN TO -- I'M NOT TRYING TO -- I DON'T
17 WANT TO QUIBBLE OVER WORDING HERE. WE WANT ANYTHING THAT
18 THEY RELIED ON, PERIOD.

19 THE COURT: THAT'S CLEAR TO ME.

20 MS. CAMPBELL: THANK YOU, JUDGE.

21 THE COURT: THAT'S CLEAR TO MR. DELGADO.

22 MR. DELGADO: YES, SIR.

23 MS. CAMPBELL: FINALLY, YOUR HONOR, BASED ON THE
24 DEFENSE'S MOTIONS -- OR WHAT THEY PROVIDED US TODAY AND
25 WHAT THEY'LL BE GETTING FOR US TOMORROW, WE WOULD ALSO

1 MOVE FOR AN ORDER REQUIRING THE DEFENDANT TO SUBMIT TO A
2 MENTAL AND PHYSICAL EVALUATION WHERE WE'RE CONTEMPLATING
3 GETTING A STATE EXPERT TO DO PSYCHOLOGICAL TESTING ON THE
4 DEFENDANT ALSO.

5 THE COURT: IS THERE SOME ISSUE ABOUT HIS
6 COMPETENCY?

7 MS. CAMPBELL: NONE.

8 THE COURT: OKAY. WHY --

9 MS. CAMPBELL: THERE IS AN ISSUE, YOUR HONOR, AS
10 TO HIS MEMORY.

11 MR. DELGADO: WHICH WILL BE INTRODUCED BY THE
12 SHERIFF'S DEPARTMENT, YOU SEE. SO NONE OF THIS WOULD BE
13 COMING IN EXCEPT TO COUNTER WHAT THEY PLACE.

14 THIS IS NOT AN ELEMENT OF DEFENSE. THIS IS NOT
15 GUILTY BY REASON OF INSANITY OR -- NOT GUILTY BY REASON OF
16 INSANITY OR GUILTY BUT MENTALLY ILL. THAT'S NOT THE
17 DEFENSE.

18 THEY, THE SHERIFF'S DEPARTMENT, WILL SAY THAT
19 WHEN WE WENT UP TO INTERVIEW HIM; HE HAD SELECTIVE MEMORY;
20 HE HAD LOSS OF MEMORY. HE HAD -- WE ALL AGREED THAT HE
21 WAS FAKING.

22 WELL, WHAT WE'VE COME TO FIND OUT, HE DEFINITELY
23 DOES HAVE MEMORY PROBLEMS, ABSOLUTELY.

24 MS. CAMPBELL: YOUR HONOR, WE MAY BE ABLE TO
25 HOLD THIS ONE IN ABEYANCE DEPENDING ON WHAT DEVELOPS. I

1 DON'T THINK THIS WILL BE SOME KIND OF LENGTHY THING WE
2 NEED TO DO.

3 THE COURT: OKAY.

4 MS. CAMPBELL: AT THIS POINT, I JUST WANTED TO
5 MAKE THE COURT AWARE WE MAY BE MOVING FOR THIS. WE WOULD
6 NOT DELAY THIS TRIAL IN ANY WAY TO DO THAT.

7 THE COURT: WELL, IT MAY BE JUST STAY AWAY FROM
8 THEIR OBSERVATIONS AND THOUGHT PROCESSES. NONE OF IT MAY
9 BECOME RELEVANT.

10 MR. DELGADO: THAT'S RIGHT.

11 THE COURT: ALL RIGHT. ANYTHING ELSE?

12 MR. MCMAHON: ONE OTHER THING, JUDGE, THE ISSUE
13 ON MR. CAYTON, IT'S STILL -- I TAKE IT YOU STILL HAVE THAT
14 UNDER ADVISEMENT?

15 I FILED A MOTION IN LIMINE CONCERNING THE
16 MISTAKEN BALLISTICS IDENTIFICATION PRIOR TO 16, 17 YEARS
17 AGO. I JUST WANT TO MAKE SURE AT THE APPROPRIATE TIME I
18 GET A RULING ON THAT BEFORE MR. CAYTON TAKES THE STAND. I
19 REALIZE IT'S NOT FOR TODAY, BUT I JUST WANT TO PUT IT ON
20 THE RECORD.

21 THE COURT: OKAY. I HAVE A GENERAL IDEA ABOUT
22 IT, BUT I DON'T HAVE A FINAL CONCLUSION ABOUT IT.

23 MR. MCMAHON: THANK YOU, YOUR HONOR.

24 THE COURT: ALL RIGHT. YOU GET IN COMPLIANCE BY
25 9:30 ON ONE THING AND MOVING ON THE OTHER.

1 MR. DELGADO: YES, SIR.

2 THE COURT: ALL RIGHT. HAVE A NICE DAY.

3 MS. CAMPBELL: THANK YOU, JUDGE.

4 MR. DELGADO: THANK YOU.

5 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, KAREN TRACY, OFFICIAL COURT REPORTER FOR THE 5TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 25TH DAY OF JULY, 2002.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

JANUARY 25TH, 2003

Karen Tracy

KAREN TRACY, COURT REPORTER

MY COMMISSION EXPIRES: 07/06/04

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
CA No. 06-CP-40-3866

EDWARD FREIBURGER # 286115,)
Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent,)

RECEIVED
NOV 16 2011
S.C. Supreme Court

AFFIDAVIT OF JOHN DENNIS DELGADO

John Dennis Delgado, who appeared personally before me, affirms and states the following under penalty of perjury:

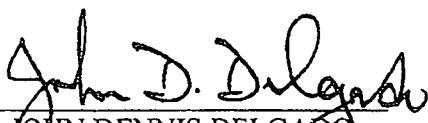
- 1 I am an attorney, licensed to practice law in South Carolina. I was admitted to the South Carolina Bar in 1975. I was retained as trial counsel by Mr. Edward Freiburger in connection with his trial for the murder of Mr. John Orner. The trial commenced on July 29, 2002, and concluded with Mr. Freiburger's conviction on August 2, 2002. I was lead counsel at trial, assisted by Ms. Kathrine Hudgins. Mr. John S. Nichols, Ms. Hudgins and I represented Mr. Freiburger on direct appeal to the South Carolina Supreme Court. Mr. Nichols was lead counsel on appeal and he was responsible for all appellate strategic decisions.
2. I have reviewed the Fourth Amended Application for Post-Conviction Relief and the Pre-Trial Brief filed by Mr. Freiburger's current counsel, Mr. John H. Blume. The purpose of this Affidavit is to respond to the allegations contained in the Application.
3. With regard to the Confrontation Clause claims, as the record shows, I attempted at trial to exclude or limit the testimony offered through Charles Clarke, Gary Abersold and other witnesses by objecting on hearsay grounds. I did not raise a formal Confrontation Clause objection and I can think of no strategic reason why I failed to do so.
4. I considered the ballistics evidence to be the crux of the case against Mr. Freiburger. Indeed, absent Mr. Cayton's testimony exclusively matching the bullet recovered from Mr. Orner to the gun retrieved from Mr. Freiburger there was, and is, very little evidence linking Mr. Freiburger to Mr. Orner's murder. It was our strategy at trial to undermine the testimony of Mr. John Cayton and I made a strategic decision not to retain an independent firearms and tool mark examiner to conduct additional testing of the gun or bullet fragments. I decided to

rely upon the testimony of the multiple SLED firearm and tool mark examiners who had examined the bullet and found no match to the gun retrieved from Mr. Freiburger. At the time of trial, I did not consider making a challenge to firearm and tool mark identification generally or to attempt to limit Mr. Cayton's testimony. It did not occur to me to make such a challenge.

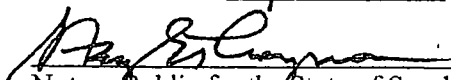
- 5 I have reviewed a letter dated July 19, 1961, from J P Strom, the former Chief of SLED, to J. Edgar Hoover, the former Director of the Federal Bureau of Investigation. I understand this letter was introduced as Applicant's Exhibit 11, and a transcript of the letter as Applicant's Exhibit 12, at Mr. Freiburger's PCR hearing of August 13, 2009. The letter indicates that Lt. Millard Cate of SLED concluded that a weapon recovered from the Dreher house, rather than the gun recovered from Mr. Freiburger, was the murder weapon. Even though it appears that this letter was provided to us in discovery, I have no recollection of having seen this letter before. I did not use this letter at trial but it would have been helpful to have done so. Lt. Cate was held in the highest esteem by South Carolina firearm and tool mark examiners, and his conclusion that another gun had been used, or even may have been used, to commit the murder would have been powerful evidence. I do not presently remember why I did not use the letter at trial and I cannot think of any strategic reason why I would have decided not to use it.
- 6 I have also had an opportunity to review Ira Parnell's report of March 2001, which I understand was admitted as Applicant's Exhibit 14 at Mr. Freiburger's PCR hearing of August 13, 2009. In that report Mr. Parnell concluded that either the Dreher gun or the Freiburger gun or any other gun in the world could have fired the bullet which killed Mr. Orner. In contrast, Mr. Cayton concluded that Mr. Freiburger's gun to the exclusion of all other guns in the world fired the bullet which killed Mr. Orner. However, at trial, Mr. Parnell insisted that there was no material difference between his conclusions and the conclusions of Mr. Cayton save for a difference in degree of certainty. I do not presently remember why I did not cross-examine Mr. Parnell on the specific conclusions of his report which are adverse to the conclusions of Mr. Cayton. I cannot currently think of a strategic reason why I did not do so.
7. I have recently been provided with information which indicates that Mr. Cayton was terminated by the Kansas Bureau of Investigation for failing to follow policies, procedures and protocols of the KBI laboratory section. I did not know this at the time of trial when Mr. Cayton indicated that he had "retired" from his employment in Topeka, Kansas. Had we known the truth of Mr. Cayton's employment history at trial, we would have been able to impeach Mr. Cayton's veracity for misrepresenting his employment history and we would have been able to impeach the reliability of his firearms and tool mark examination's conclusions. Therefore, the fact that Mr. Cayton had been terminated for his failure to follow policies, procedures and protocols would have been very important information.

- 8 The Fourth Amended Application for Post-Conviction relief filed by Mr. Freiburger's current counsel claims that the prosecution engaged in an improper argument during closing argument to which the defense failed to object. I do not recall the portion of the prosecution's closing argument referred to in the PCR Application and I can currently think of no reason why I failed to object.
- 9 The Fourth Amended Application for Post-Conviction Relief alleges that trial counsel failed to present evidence that another individual committed the crime. I was aware at trial that there was evidence of third party guilt. I do not recall why I failed to use this evidence and I know of no strategic reason why I would have chosen not to use the evidence.
10. At the time of Mr. Freiburger's trial I was aware of the range and depth of positive character evidence which could have been presented in favor of Mr. Freiburger. I knew that Mr. Freiburger was regarded as a peaceful man who had a reputation as a law-abiding citizen. I knew that Mr. Freiburger was heavily involved with his local Catholic church where he was Eucharistic Minister. I knew that Mr. Freiburger virtually never missed a Mass. Mr. Freiburger was also known to be a good husband, a good father and a good grandfather who was a role model to his children. I was aware that Mr. Freiburger had donated years of service to the Catholic Youth Organization sports program. Mr. Freiburger has never had a reputation for violence in his community. I made a strategic decision not to present this positive character evidence at trial because I was afraid using it would open the door to rebuttal evidence by the prosecution. Specifically, I was concerned that the prosecution might be able to introduce evidence that Mr. Freiburger had been subject to a court martial while in the Army and that he had served time at Fort Leavenworth.

Further affiant sayeth naught.


JOHN DENNIS DELGADO

Sworn to and subscribed before me
this 16th day of September, 2009.


Notary Public for the State of South Carolina

My commission expires: 3/23/2011

1 IN THE THIRTEENTH JUDICIAL DISTRICT
2 DISTRICT COURT OF BUTLER COUNTY, KANSAS
3 FOURTH DIVISION
4

5 STATE OF KANSAS,)
6)
7 Plaintiff,)
8)
9 vs.)Case No. 2005-CR-395
10)
11 MATT DENNY,)
12)
13 Defendant.)
14)
15

16 VOLUME 5
17 TRANSCRIPT
18 OF
19 JURY TRIAL - DAY 5

20 PROCEEDINGS held on the 12th day of
21 September, 2005, Division IV of the District Court
22 of Butler County, Kansas, Butler County Judicial
23 Center, 201 West Pine, Courtroom C, in the City of
24 El Dorado, County of Butler, and State of Kansas,
25 before the Honorable Mike Ward, District Judge.

APPEARANCES

The Plaintiff, State of Kansas, appeared by counsel, Mr. Stephen D. Maxwell, Office of the Attorney General, 120 S.W. 10th Street, Room 200, Topeka, Kansas 66612; and Mr. Lanny D. Welch and Mr. David M. Lind, Assistant United States Attorneys, 301 North Main, Suite 1200, Wichita, Kansas 67202.

The Defendant, Matt Denny, appeared in person and by counsel, Mr. Paul S. McCausland of Young, Bogle, McCausland, Wells & Blanchard, P.A., 106 West Douglas, Suite 923, Wichita, Kansas 67202-3392.

1	I N D E X				
2					
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6		W I T N E S S E S			
7	FOR THE STATE:	DIRECT	CROSS	REDIRECT	RECROSS
8	J DEMO	138	--	--	--
9	FOR THE DEFT. .				
10	J. CAYTON	28	111	125	133
11					
12	FOR THE STATE:	E X H I B I T S			
13	Exhibit No. 193	MARKED	OFFR'D	REC'D	
14		42	112	122	
15	FOR THE DEFT:				
16	Exhibits AG-1 thru 3	--	56	56	
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19	Exhibit AG-20	--	98	98	
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24	Exhibits V-21, 22, 34	--	53	54	
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1 (STATE vs. DENNY - DAY 5)

2 (THEREUPON, the following
3 proceedings were had outside the
4 presence of the jury.)

5 THE COURT: All right. We're taking this
6 matter up outside the presence of the jury. And
7 counsel and defendant are present and I think
8 there's a question that needs to be resolved about
9 whether or not the Court is going to admit testimony
10 from Special Agent J. T. Hupp of the Kansas Bureau
11 of Investigation. It concerns whether or not --
12 well, the background of that issue is that when
13 Belinda Cooper testified, she was asked on
14 cross-examination by Mr. McCausland whether or not
15 she had made certain statements to Agent Hupp during
16 his interview of her. As I recall, she said
17 something to the effect of: "I don't recall making
18 those statements."

19 The statements that are of interest to the
20 defendant here are contained at Page 2, Paragraph 4,
21 of Agent Hupp's report. And the issue really isn't
22 whether Agent Hupp should be allowed to get back up
23 there. I mean, the issue isn't the Belinda Cooper
24 side of this, it's the Scott Cheever side of this
25 formula, whether or not there's a hearsay exception

1 that would get this information in. Because under
2 normal circumstances, if a witness denies making
3 statements to an officer, I mean, generally, the
4 officer gets to get on the stand and say: "That's
5 what she told me." But in this case, what she was
6 relating to Agent Hupp was something someone else
7 told her. That someone else was Scott Cheever. So
8 the Court has to look at whether or not there's a
9 hearsay exception to allow the Scott Cheever
10 statement to her into evidence. I think you cited
11 60-460(1), is that right?

12 MR. McCAUSLAND: Yes, Your Honor

13 THE COURT: I mean, if this was simply
14 something that Belinda Cooper said that she didn't
15 remember saying, then I don't think there would be a
16 problem at all with putting Agent Hupp on the stand
17 to relate that. But since it contains another level
18 of hearsay, the Court has to go a little further
19 than that. Did you have any other argument on that?

20 MR. McCAUSLAND. Well, I know the Court has
21 Judge Barbara's book, and it cited the case of State
22 vs. Hobson, 234 Kan. 133. What the case says is
23 that: (As read)

24 "This particular provision, 460(1),
25 is concerned with the declarant's

1 state of mind existing at the
2 time of the utterance. Such
3 declarations necessarily include
4 an element of res gestae, if not
5 true spontaneity."

6 And then that case goes on to discuss that
7 this type of evidence is admitted all the time to
8 show an accused's state of mind for purposes of
9 showing intent, plan, motive, design.

10 Our position is that it's being offered for
11 the same reason, to show the state of mind of Scott
12 Cheever, that it is part of res gestae; that it has
13 an element of -- it's almost spontaneous to her
14 telling him. "Get out of here. The sheriff is
15 coming." And we think it's relevant to the causal
16 relationship between what the sheriff was trying to
17 effect and what Scott Cheever was doing when he shot
18 the sheriff. We believe it should be admissible
19 just like it would be for any declarant, including a
20 defendant, which it's been recognized it's
21 admissible for that purpose.

22 THE COURT: Anything else, Mr. Maxwell?

23 MR. MAXWELL. Well, Your Honor, it's
24 hearsay. So it has to fit squarely within one of
25 these rules. He cites 60-460(1), I believe it is.

1 THE COURT: Yes.

2 MR. MAXWELL: And that exception is
3 designed -- we got to go back to the legislative
4 intent and the reason this exception is used. It's
5 used to narrate an event that -- as it's being
6 perceived.. It's not talking about future action
7 It's like: "Oh, there's that red car that went by,"
8 or "Oh, the lightning just struck," or as he
9 perceives the events He's talking about something
10 in the future, not what he's perceiving at the time
11 So, therefore, the defense -- it just doesn't fit in
12 that exception.

13 THE COURT: Well, it seems like I had a
14 couple scenarios that I suggested when we were
15 talking about this last. This is the present state
16 of mind exception to the hearsay rule, right? I
17 think that's what they called it in law school And
18 looking at the content of Paragraph 4 of Page 2 of
19 Agent Hupp's report and looking at the exact words
20 that Scott Cheever is alleged to have said to
21 Belinda Cooper, I don't think that those comments
22 are declarations of his present state of mind or
23 mental condition. Basically, what he's telling her
24 is that - as I think Mr. Maxwell correctly stated -
25 he's telling her what he's not going to do at some

1 point in the future, rather than him simply relating
2 out loud what he has just perceived or his present
3 condition at that point. So I don't think it fits
4 within 60-460(1), and so I'm not going to permit
5 that line of questioning.

6 I don't know if you wanted Agent Hupp up
7 there for any other reason, Mr. McCausland.

8 MR. McCAUSLAND No, Your Honor.

9 THE COURT: If not, you may want to give
10 him a call, I guess, and let him know he's not
11 needed.

12 MR. McCAUSLAND: We'll release him All I
13 would like to do is mark the report just so it's in
14 the record And it's our proffer that if he
15 testified, he would so testify that he took this
16 interview and this is what he recorded from Belinda
17 Cooper on January 20, 2005, and what she told him

18 THE COURT: Okay.

19 MR. McCAUSLAND: We make that proffer. And
20 that would be, I believe, Exhibit CJ.

21 THE COURT: All right. That will be
22 included in the record as a proffer only.

23 (THEREUPON, the court reporter
24 marked for identification
25 Defendant's Exhibit CJ.)

1 MR. MAXWELL: Your Honor, we do have
2 another issue

3 THE COURT. What's that?

4 MR. MAXWELL: The State was informed this
5 morning that the defense is going to call this John
6 Cayton, who's a purported defense expert. I
7 understand his -- and I've been provided with his --
8 what he claims is his CV. The problem that I'm
9 facing here this morning is -- the reason I brought
10 it up outside the presence of the jury is that I
11 anticipate - and, of course, the defense told me -
12 that Mr. Cayton is going to attempt to testify about
13 his interpretation of the pictures of the wounds on
14 Sheriff Samuels' body, for example the hand wounds,
15 his interpretation of that, as well as the wounds on
16 Sheriff Samuels -- the rest of his body

17 The problem is, is this person by, at
18 least, his CV has no qualifications whatsoever in
19 medical basis to state such an opinion. He's,
20 basically -- if he's qualified at all, it's to
21 determine firearms ballistics, that such thing. He
22 has no degrees. He has no training, it appears. He
23 doesn't have any ability to have a basis to testify
24 about that.

25 The defense offered -- showed me -- let me

1 see those photographs of the autopsy.

2 MR. McCAUSLAND: (Handing photos to
3 counsel.)

4 MR. MAXWELL: The defense told me this
5 morning that he's going to try to get into with
6 Sheriff Cay -- or Mr Cayton pictures of the autopsy
7 of the defendant -- or of the sheriff And he
8 wasn't at the autopsy. All he's looking at is
9 pictures. He's not a medical doctor It just seems
10 to be completely irrelevant and outside his basis to
11 testify. And, you know, I bring it up because I
12 just don't think the jury should have to be
13 subjected to that with the witness in the middle of
14 it. We might as well deal with it now as opposed to
15 when he gets on the stand

16 THE COURT Okay Well, I don't know that
17 it would be irrelevant. My question here is whether
18 or not he has the qualifications to render an expert
19 opinion.

20 MR. McCAUSLAND: Well, Your Honor has his
21 curriculum vitae. This man was the chief forensic
22 firearms and tool mark examiner for the Regional
23 Criminalistics Laboratory for the Kansas City,
24 Missouri, Police Department for over 30 years. Then
25 he was the chief criminalist for that department

1 from 1997 to 1999 when he retired. He has worked,
2 literally, 100 or more homicides a year throughout
3 his career. He's attended autopsies. He has
4 studied the effects of gunshots on human tissue and
5 human body. He has conducted tests. He's going to
6 testify to this. So I find it a little odd that
7 they're challenging his credentials before the Court
8 has even had a chance to hear his experience and his
9 training.

10 THE COURT: Let me see his CV.

11 MR. McCAUSLAND. You should have it. It's
12 Exhibit AK, Your Honor, in our exhibit book.

13 THE COURT. Okay. All right. I have it.
14 Thank you (Reviewing CV) Have you seen his CV,
15 Mr. Maxwell?

16 MR. MAXWELL: Yes, Your Honor.

17 THE COURT. Did you tell me he had no
18 degrees?

19 MR. MAXWELL: Well, he has no degrees in
20 medicine or -- that's what I said, Judge. He's got
21 no degrees in medicine or any apparent medical
22 training. You know, Judge, we've -- the problem
23 that we face is he's going to offer him as a
24 firearms ballistics expert. And although, arguably
25 he could do that, the problem he's facing is -- now

1 is -- now he's wanting to testify about the cause of
2 Matt Samuels' wounds, the death. He wants to show
3 the jury multiple autopsy photographs. He wants to
4 ask the witness to interpret palm injuries on the
5 sheriff's hand, which you heard from the medical
6 examiner. The problem with that is it doesn't have
7 any -- those aren't within his expertise. It,
8 simply, is a matter of he can get on the stand and
9 try to testify within his expertise, but to comment
10 on -- here's what he knows. He went to the scene
11 six months after the event on August 12th, which you
12 heard the scene dramatically changed since then.
13 We've already discussed that. The sheriff's body
14 wasn't there. And he looked at autopsy photographs

15 If that was the basis for which someone
16 could testify as an expert about wounds on someone
17 or medical opinions, if that's all you needed, then
18 anybody could do it. And this man, that's all he's
19 seen. He doesn't have any training. He doesn't
20 have any medical degrees in order to allow the basis
21 of that. I think that Mr. McCausland is offering
22 it, and it's a gigantic stretch, Judge.

23 THE COURT. What do you intend for him to
24 get into, Mr. McCausland?

25 MR. McCAUSLAND. Your Honor, based on his

1 experience and his training, he would be able to
2 discuss the effects of contact wounds on -- or the
3 effect of contact gunshots on human tissue. He's
4 able to talk about maximum gas blast and what that
5 does to the human body. He has personally conducted
6 tests that demonstrate the gas blast effect of shots
7 fired into gels and other things that simulate what
8 happens when the human body has been shot. He's
9 attended autopsies in gunshot cases. He has over
10 30 years of experience. He has been admitted to
11 testify in federal, state, local, and military
12 courts in these areas. He has expertise in wound
13 and tissue analysis.

14 THE COURT: Where did he get that
15 expertise?

16 MR. McCAUSLAND: I assume that, for the
17 most part, it is through years and years and years
18 of experience. His advanced training goes on here
19 for pages. He's a charter member of the
20 International Wound Ballistics Association. He's
21 been the president of the Association of -- the
22 Firearms and Tool Mark Examiners Association. He
23 has done this kind of work and studied not only the
24 ballistics but the effects of gunshots, including
25 large caliber guns, like the one we have in this

1 case, and what it does with wounds.

2 MR. MAXWELL: Just because you say you're
3 an expert doesn't mean you are. I mean, you look at
4 his CV, he's got -- there's no experience that he
5 lists or no job that he lists or no degree that he
6 lists that has anything to do with training --
7 specific training or specific experience in deciding
8 what wound is this, what wound is that. He's -- I
9 mean, for example, he mentioned -- he doesn't
10 mention to the Court that he was also going to bring
11 up the evidence of those palm injuries on the
12 sheriff. What does that have to do with firearms
13 and tool marks or how this wound occurred? This
14 guy -- this man just doesn't have the training.

15 THE COURT: To render any testimony?

16 MR. MAXWELL: No. No I'm not talking
17 about that, Judge. He can testify about the
18 firearms and tool marks or his -- or, you know,
19 whatever he -- I mean, he did a report. And in the
20 report, he testifies about his opinion that the
21 shots were from the top of the stairs. I think
22 he's, arguably, qualified to, at least, render his
23 opinion, for what it's worth, to this jury about
24 that. But to go further than that outside the
25 firearms ballistics area is just -- (interrupted)

1 THE COURT: Now, the "further" that you're
2 talking about are the wounds to the hand?

3 MR. MAXWELL: The wounds to the hand to the
4 sheriff, the pictures of the autopsy. He's got 25
5 pictures of the autopsy in here that we're going to
6 be discussing I mean, he saw pictures of the
7 autopsy. How is he qualified to comment on the
8 autopsy and what he interprets from a photograph
9 from an autopsy he wasn't at and has no training in
10 doing autopsies? Maybe the pictures of the scene
11 where - he went there - he's doing calculations or
12 whatever, that's all, arguably, within his
13 qualifications. But pictures of the sheriff's
14 autopsy?

15 THE COURT: Well, do you intend to have him
16 get into the injuries to the palm of the sheriff's
17 hand?

18 MR. McCAUSLAND: Let me show the Court what
19 we're talking about, if I can get this up here Oh,
20 here we go. (Displays a photo) He did a test with
21 a piece of cloth draped over one of these New Super
22 Blackhawk .44 Magnum pistols and fired it. And he's
23 going to be prepared to say that if you have your
24 hand in proximity to the barrel of the gun, you're
25 gonna get gunshot residue on it and you're gonna get

1 it on there from the blast that comes out from the
2 gap between the cylinder and the barrel, that he has
3 reviewed the autopsy report, the photographs, and
4 that there's no evidence of that in this case; nor
5 is there any described by Doctor Mitchell This
6 is -- one of Doctor Mitchell's theory is the
7 sheriff, at some point, had the barrel of the gun in
8 his hand.

9 In addition, Mr. Cayton has been to the
10 scene, and he's going to testify about the other
11 irregular and rough and sharp surfaces that he found
12 at the scene, Your Honor He's not going to try to
13 reconstruct or explain exactly how the hand injuries
14 happened, but he is qualified to talk about what
15 would happen if you were holding the barrel of a gun
16 of a .44 Magnum in your hand and it was discharged,
17 as is shown by this demonstrative -- by this exhibit
18 that we have here. That's the kind of thing he's
19 going to do.

20 He's going to talk about -- and I don't
21 want to put these up right now, but he would talk
22 about the view of the entrance wound, itself, and
23 the abrasion around the wound and what that means
24 and what causes that. And he has seen this over and
25 over again, working cases for 30 years And he's

1 eminently qualified to talk about that type of
2 thing. I'm not going to have him go into a
3 discourse -- a medical discourse, but I think you
4 will find he's qualified to talk about this maximum
5 gas blast, which is a concept that has to do with
6 the energy disbursed by a high caliber pistol

7 He'll also talk about the effects of
8 mushrooming of the hollow point jacketed shells that
9 are involved in this matter as well. This man --
10 you know, in addition to that -- well, I think it's
11 being premature for them to be objecting until they
12 hear what his qualifications and experience are. I
13 think there's enough on his CV to more than qualify
14 him, because he's testified about these things
15 before.

16 MR MAXWELL. Well, Your Honor, he puts the
17 gun up. The problem is he's wanting to interpret
18 that the sheriff -- what Doctor Mitchell said was
19 that the object was pulled through his hand, so his
20 hand wasn't on the gun. So -- and he's trying to
21 interpret wounds that he's seen pictures of and
22 that's it. And he's not qualified to render a
23 medical opinion on how injuries occur. He could
24 maybe -- the best we could hope for from him was
25 that he would be qualified to talk about the

1 firearms and ballistics and stuff like that. But to
2 render an opinion on how wounds occur, he's not
3 qualified to do that. He's not a medical doctor.
4 He can't tell us his medical training

5 THE COURT: Is a medical doctor the only
6 kind of witness who can render an opinion about a
7 wound?

8 MR. MAXWELL: No. But you have to have, at
9 least, some -- either involvement or experience on
10 the matter. How is a guy who is a police -- or was
11 involved with police as a criminalist testify --
12 able to testify about what, essentially, are doctor
13 or medical examiner issues? And that's,
14 essentially, where he's going here. He's wanting to
15 use this guy as a quasi-medical examiner or a
16 quasi-doctor because he can interpret these wounds,
17 especially on the hand. I mean, that doesn't have
18 anything to do with ballistics or gunshots or
19 anything like that I mean, it just doesn't.

20 THE COURT. Well, it sounds like, based on
21 what I've read in the curriculum vitae and based on
22 what Mr. McCausland has said, that this witness has
23 many years of training and experience in a lot of
24 areas involving criminal homicides and death
25 investigations, et cetera

1 It seems like now in every big case that I
2 preside over, there's always an issue about an
3 expert witness. And the last two times I kept out
4 an expert witness, we had to try the case again.
5 And I'm not sure anybody in this courtroom wants to
6 try this case again. And you may be confident that
7 we won't try this again on this issue, but I sure
8 wouldn't be confident of it, Mr. Maxwell. The
9 Supreme Court has made it clear to me in two cases
10 they sent back that I got a little overzealous as
11 the gatekeeper and a little too stringent in my
12 requirements of expert witnesses, especially in the
13 Bob White case where the Court, basically, said that
14 the defendant has a right to present a defense. I
15 didn't think she was qualified, and that's why I
16 didn't let her testify the first time. The Court
17 said. "Put her on, let her testify." So Doctor
18 Hutchinson testified in the second trial, and the
19 jury rendered a quicker guilty verdict than it did
20 in the first trial.

21 So I think what I've heard so far tells me
22 that he marginally is qualified and, maybe,
23 eminently qualified. I don't know. I don't know
24 what word to use. But I'm certainly not prepared to
25 sit here and say that I'm not going to let him

1 testify. I think that we need to put him on the
2 stand and let the jury hear his qualifications I,
3 certainly, think that your arguments go to the
4 weight of his testimony that the jury should give.
5 And you have every right to cross-examine him,
6 certainly, about his qualifications or lack thereof.
7 But for me just to say, at this point, that I don't
8 think he's qualified to get up there and talk about
9 certain areas, I think would be very risky. I think
10 the better approach is to put him on the stand, let
11 him lay out his qualifications, and we'll see where
12 we get from there.

13 MR MAXWELL: Well, Judge, I understand the
14 Court's ruling. Let me -- you know, there's already
15 pictures in the evidence about the sheriff -- the
16 wounds on the sheriff, and they're in the State's
17 exhibits. We went over them. Now he wants to add
18 more. The same wounds, the same pictures, and he
19 wants to add more. These pictures came from the
20 State. These are State's pictures. Additional
21 pictures that we didn't add, they're unnecessary
22 He can use the State's pictures. It's just, simply,
23 unnecessary. These -- this (indicating) is a
24 gruesome photograph, Judge. I mean, we had to put
25 one in, in order to explain Doctor Mitchell's

1 testimony. But this (indicating) -- I mean, we
2 certainly don't need to compound it and -- you know,
3 why can't he use the State's?

4 THE COURT: Well, I don't know I haven't
5 seen what he intends to use. That's a good
6 question. And I think, as the Court said earlier,
7 generally speaking, all death photographs are fairly
8 gruesome. And I've wondered throughout this trial
9 why we have two sets of a lot of photographs in, but
10 we do. I guess I'd need to see them to see if they
11 add anything to what's already there.

12 Are you using any of the same photographs
13 or intend to?

14 MR. McCAUSLAND: I don't think these are
15 the same photographs.

16 THE COURT: Okay

17 MR. MAXWELL I could provide you with the
18 ones that are in.

19 MR. McCAUSLAND: The other thing, Your
20 Honor, is that I don't have access to their computer
21 and putting up and locating their photographs
22 That's why we have our own.

23 THE COURT Right.

24 MR. MAXWELL: (Handing the Court the
25 State's photos)

1 THE COURT. I have a set up here.

2 MR. McCAUSLAND: I guess the other thing I
3 would say is I don't think the quality of the
4 State's printed photographs that are going to go to
5 the jury are as good as the ones that we have here,
6 which more accurately and clearly show what we're
7 talking about, Judge.

8 THE COURT. All right. Let's go
9 off-the-record while I look at these pictures,
10 again.

11 MR. McCAUSLAND. While you do that, can I
12 take a quick break?

13 THE COURT: Yes.

14 MR. McCAUSLAND. Thank you

15 (THEREUPON, a short recess was had;
16 WHEREUPON, the following
17 proceedings were had outside the
18 presence of the jury.)

19 THE COURT. All right The Court has had a
20 chance to review the photographs that the defense
21 has marked and intends to use, I think, in its
22 examination of their expert witness. And although
23 there is some duplication of photographs between the
24 two sets, it's my understanding that what they
25 intend to focus on are the entrance wounds and the

1 nature and characteristics of those entrance wounds.
2 These photographs are pretty much all about the
3 entrance wounds, as well as the bullets. And if
4 they can qualify their expert to render an opinion
5 about those areas, then I believe that those
6 photographs would assist that expert in that
7 testimony. Yes, they're gruesome, but they're
8 relevant to the line of defense that I'm hearing.

9 Again, I would offer to the family members
10 the same thing that I did earlier. When it comes to
11 that point, certainly, you would have an opportunity
12 to be absent from the courtroom. I don't like it
13 any more than anyone else does, but that's just the
14 nature of what we're here to do. So there's no
15 getting around it.

16 So are we ready to proceed?

17 MR. McCAUSLAND: One housekeeping matter,
18 Your Honor. We discussed and used and viewed
19 Exhibits X-9 and X-10, which are two photographs of
20 the crime scene, but our court reporter tells me
21 that they were never formally admitted into
22 evidence. So we would move to admit those into
23 evidence at this time.

24 THE COURT: X-9 and 10?

25 MR. McCAUSLAND. Yes

1 MR. MAXWELL: And what we're asking -- I
2 don't have any objection, Judge

3 THE COURT: Okay. X-9 and 10 will be
4 admitted.

5 MR. MAXWELL: We've got one more issue,
6 Judge. You noticed on the -- on Mr. Cayton's resume
7 that he was employed by the KBI And he lists on
8 his resume, actually, a one-month time frame where
9 he was employed as a forensic scientist with the
10 KBI. What I discovered, when asking about that, was
11 that he was employed for about two months, and he
12 was terminated by the KBI for failure to follow
13 protocols, failure to follow procedures,
14 insubordination, among other things I have a copy
15 of the termination letter And I would like the
16 Court to review that before we get to it, because I
17 think we're gonna have a fight on that issue when we
18 get there

19 THE COURT: It just keeps getting better,
20 doesn't it?

21 MR. MAXWELL: October 29, 1999, is the
22 termination letter, Judge. I'm handing it to the
23 Court.

24 THE COURT: Well, Mr. Maxwell -- or Mr
25 McCausland, any comment on that? I assume you're

1 aware of this.

2 MR. McCAUSLAND Yes. In fact, I discussed
3 it -- I was given a copy of it on Friday. I visited
4 with Mr. Cayton about it today Mr. Cayton, of
5 course, will talk freely about his short experience
6 with the KBI in their lab He does not recall
7 whether he was ever shown this letter. He does not
8 recall receiving this letter He will say that they
9 were mutually unhappy and that, you know, at the end
10 of October of 1999, he left the services of the KBI.
11 And they can ask all they want to, I guess, about
12 that short unhappy period. I'm not sure that the
13 letter, itself, is probative or that it's fair,
14 unless they can show he actually received it. And
15 he does not recall receiving it.

16 THE COURT. Well, my view on this letter,
17 having just been handed it, it looks like a
18 termination letter of John Cayton 10-29 of '99,
19 signed by Larry Welch And I assume that the KBI
20 follows the protocol that most agencies follow; that
21 is, that these letters are given to them personally,
22 I assume. I don't know that for a fact. But the
23 fact that he was terminated in a lab position, to
24 me, is certainly relevant information that this jury
25 should be entitled to know, the process, and weigh

1 and evaluate.

2 The only thing I would say is that with
3 respect to the letter, itself, you're going to need
4 to meet one of the hearsay exceptions to get it in,
5 unless you want to bring Mr Welch down here.

6 MR. MAXWELL: I understand, Judge. Just
7 for the record, Judge. The letter was handed
8 directly to Mr. Cayton from T L Price, his
9 supervisor, at the time. Mr. Price is in the
10 courtroom He was presented with the letter
11 directly -- (interrupted)

12 THE COURT: Okay

13 MR. MAXWELL: -- at 8 08 a'm. when he was
14 terminated.

15 MR. McCAUSLAND: That's fine

16 THE COURT. That's what I had assumed.
17 But, again, getting the letter in, I think you're
18 going to have to find some exception to the hearsay
19 rule to do that, unless it's stipulated to So I'll
20 give that back to -- is that yours, Mr. Maxwell?

21 MR. McCAUSLAND: This is my copy, Your
22 Honor.

23 MR MAXWELL: No. That was my copy

24 MR McCAUSLAND: Was it your copy? I'm
25 sorry.

1 THE COURT. But I will permit
2 cross-examination on that question if it hasn't
3 already been brought up on direct So are we now
4 ready?

5 MR. McCAUSLAND: We are.

6 MR. MAXWELL. Could I have two minutes?

7 THE COURT: Let's take about 10 minutes to
8 kind of get geared up here a little bit.

9 MR. MAXWELL. (Heading to the door of the
10 jury room.)

11 THE COURT: Don't go through that door. We
12 have a jury sitting in there Let's take a
13 10-minute recess Thank you.

14 (THEREUPON, after a short recess,
15 the jury enters the courtroom;
16 WHEREUPON, the following
17 proceedings were had in the
18 presence of the jury)

19 THE COURT: Good morning, ladies and
20 gentlemen.

21 THE JURY Good morning

22 THE COURT. I hope everyone had a pleasant
23 weekend. It was certainly nice outside. The record
24 will reflect the presence of the jury, counsel, and
25 the defendant. You may call your next witness

1 MR. McCAUSLAND: The defendant calls John
2 Cayton, Your Honor.

3 THE COURT: All right

4 MR. CAYTON: (Approaching)

5 THE COURT. (Swearing in the witness.)

6 Thank you

7 JOHN CAYTON,
8 called as a witness on behalf of the Defendant,
9 was duly sworn, and testified as follows.

10 DIRECT EXAMINATION

11 BY MR. McCAUSLAND:

12 Q. Please state your full name and your address.

13 A. John Charles Cayton, Osborn, Missouri.

14 Q. And what is your occupation, Mr. Cayton?

15 A. I'm a forensic firearms and tool mark examiner

16 Q. And what disciplines -- strike that. Tell us what
17 degrees you have.

18 A. I have a Bachelor of Science and Master of Science
19 in Criminal Justice from Central Missouri State
20 University in Missouri.

21 Q. All right. Tell us about your experience -- your
22 job experience. What positions have you held?

23 A. I started with the Kansas City, Missouri, Police
24 Crime Lab in January of 1969 as a firearms and tool
25 mark examiner, and I was promoted in January of 1975

1 to supervisor of the section. And then with a title
2 change, I was classified as a chief criminalist in
3 the Firearms and Tool Mark Division. Also, I have a
4 position with the Army Crime Laboratory in the U.S.
5 Army Reserves as a warrant officer in the C I.D. --

6 (THEREUPON, the court reporter asks
7 the witness to speak into the
8 microphone and repeat the answer.)

9 A -- C.I D. Laboratory in Frankfurt, Germany, Fort
10 Gordon, Georgia, and Fort Gillem, Georgia, where I
11 currently am still assigned as a Chief Warrant
12 Officer 5 -- or 4 with the Army lab. And, also,
13 I've been trained in crime scenes: police evidence
14 collection, recognition, preservation, and
15 examination of various types of evidence, clothing
16 involved in shootings, car accidents, firearm
17 components, various items that are recovered at
18 crime scenes

19 Q. (BY MR. McCAUSLAND) Do you have experience in
20 firearm and tool mark examinations and comparisons?

21 A. Yes.

22 Q And what is that -- what do you do in that
23 discipline?

24 A. In firearm and tool mark examinations, we examine
25 all different types of evidence relating to

1 handguns, long guns, rifles, shotguns; ammunition
2 components, clothing involved that the victim may
3 have worn; articles that may have been shot at by --
4 like an automobile, different environments where a
5 firearm might have been used; examining gunpowder
6 pattern and residue, and also looking at wounds --
7 examining wounds for direction, entry, exit, and
8 also proximity, distance determinations, just
9 various wound examinations.

10 (THEREUPON, the court reporter,
11 again, asks the witness to speak up
12 and into the microphone.)

13 Q. (BY MR. McCAUSLAND) How many homicide
14 investigations have you worked?

15 A. In Kansas City I worked both as a member of the
16 Major Case Squad from 1971 until '99 in both Kansas
17 City and the metropolitan area, and in Eastern
18 Kansas and Western Missouri. We had approximately
19 140 to 150 homicides a year, and I was involved in
20 working a big part of those for over 31 and a half
21 years

22 Q. In the course of working hundreds or thousands -- I
23 guess that would be thousands of homicides, correct?

24 A Yes.

25 Q. All right. In the process of working thousands of

1 homicide investigations, have you had cases that
2 involved the use of a large caliber Magnum revolver?

3 A. Yes.

4 Q. And in working thousands of homicide investigations,
5 have you had experience in cases where there were
6 contact wounds?

7 A. Yes.

8 Q. Describe for the jury what is a contact wound,
9 please.

10 A. All right. A contact wound is when the firearm is
11 against the clothing or the object or the person,
12 the tissue, flesh, that's shot. It could be hard
13 contact, which would be under pressure where you,
14 actually, had it against somebody and you pushed it
15 in. And then there's loose contact where it just
16 touches. And in each case, what you have is a
17 combination of the effect of the projectile coming
18 out. And right behind the projectile, along with
19 it, is burning gunpowder residue and unburned
20 gunpowder particles and a lot of gas pressure that's
21 coming out of the muzzle from the burning
22 chamber/barrel pressure area

23 Q. All right

24 A. So what you have is the effect of the projectile
25 hitting the object or the person, as well as

1 follow-up pressure and tearing from the pressure of
2 the gas as it escapes from the muzzle to the area
3 between the flesh and the muzzle.

4 (THEREUPON, the court reporter,
5 again, asks the witness to speak
6 up.)

7 Q (BY MR. McCAUSLAND) All right And have you had
8 experience, also -- have you attended autopsies
9 involving gunshot wounds?

10 A. Yes.

11 Q. How many have you done?

12 A. I don't have a count. It'd, probably, be several
13 hundred.

14 Q Have you studied the injury caused to tissue by a
15 gunshot?

16 A. Yes.

17 Q. In addition to your actual experience, have you had
18 training in the area of firearm and tool mark
19 examinations?

20 A. Yes I've attended several of the medical
21 examiners' homicide investigations and seminars that
22 are conducted in the Kansas City area and conducted
23 by the medical examiner, which includes guest
24 speakers bringing cases that they've worked, which
25 includes slides, photographs of both the victim, the

1 wounds, and the firearm that caused the wound.

2 Q. Have you -- and you've indicated that you have done
3 crime scene investigations as well. In these
4 thousands of homicides, on how many occasions would
5 you have gone to the crime scene?

6 A. Well, initially, we did all the crime scenes before
7 we had a crime scene unit. So we would go to the
8 scene, collect the evidence and bring it to the lab,
9 and conduct the examination. So starting in '69,
10 when I was hired, until sometime in the middle of,
11 probably, '72, we went to almost all the homicides
12 and assisted some way in collecting and recording
13 the scene. In early '72 our crime scene unit did
14 most of that work. And we do go out sometimes to do
15 trajectories and assist in that. So it's quite a
16 few less since we have the crime scene unit, but we
17 still do go out.

18 Q. And is that something, crime scene investigations,
19 that you would have done on a regular basis
20 throughout your career up through 1999?

21 MR. MAXWELL: I'm gonna object to leading

22 THE COURT Overruled.

23 A Yes.

24 Q. (BY MR. MCCAUSLAND) And you mention trajectories
25 Have you also done trajectory analysis?

1 A. Yes.

2 Q. All right. And you have training in that?

3 A. Yes. I've had training and, also, lectured on crime
4 scene gunshot reconstruction at the FBI Academy in
5 Quantico

6 Q. Let me hand you what we've marked as Defendant's
7 Exhibit AK. What is Defendant's Exhibit AK, please?

8 A. It's a copy of my curriculum vitae, and it includes
9 part of the history of the cases and work that I've
10 done, studies and training, lectures that I've done,
11 and articles that I've written.

12 Q. During your years that you worked for the Kansas
13 City -- Greater Kansas City Regional Crime
14 Laboratory, did you ever have occasion to do work
15 with the Kansas Bureau of Investigation?

16 A Yes, I have.

17 Q And what work did you do with the Kansas Bureau of
18 Investigation, sir?

19 A. Well, the first case was in 1999. They had a
20 problem with the case, and the director and the
21 firearms examiner, Bill Tucker, brought it over for
22 me to help them with it We were able to resolve
23 it And after that, there was other times that I
24 was called. There was a homicide in, I believe,
25 Great Bend, Kansas, a liquor store robbery. The

1 director called me and asked if I would help him and
2 his examiner look at the evidence. We did that and
3 was able to resolve that. But there were several
4 cases over the years that I helped them.

5 Q. All right. And for a period of time -- a short
6 period of time, did you actually work for the KBI?

7 A. About two months.

8 Q. All right. And how was that?

9 A. Well, I retired from the Kansas City Crime Lab as
10 chief criminalist in September of '99, and the next
11 week I went to work at the KBI in Topeka. And L. J.
12 Stephenson was there, who was an examiner that we
13 trained in my division at the lab. And T. L. Price
14 was the other examiner, the supervisor. And I
15 worked at that time with them.

16 (THEREUPON, the court reporter,
17 again, asks the witness to speak
18 up.)

19 Q. (BY MR. McCAUSLAND) Why did you leave the KBI Crime
20 Lab?

21 A. Well, it wasn't working out. I don't think I was
22 accepted. I think T. L. Price was intimidated from
23 my experience and qualifications, and I think, from
24 the start, there was kind of a moot to see that it
25 wouldn't work out. So there was some things that

1 came up that were documented. We had a meeting, and
2 it was agreed that I would resign.

3 Q. Okay. Since you resigned from the KBI Lab, what
4 other work experience have you had?

5 A. Well, I worked at the Johnson County Sheriff's
6 Department for a little over a year. I worked for
7 the Defense Department working cases for the Army,
8 Navy, Air Force, Marines continuing on from 1980 to
9 now. And I take proficiency tests every year and
10 pass those. I do casework. I also worked for the
11 Metropolitan Washington D C. Police Crime Lab as a
12 contractor in 2003. I worked several hundred
13 shooting cases, including many homicides, several
14 hundred. And I've gone to court back there since
15 then on those. And last year I worked three months,
16 about 870 hours, working homicides in shooting cases
17 for the Capitol Police. In fact, I'm going back
18 Wednesday to testify in one of the trials of the
19 cases that I worked. I have several cases going on
20 back there.

21 Q. And do you have your own business today?

22 A. Yes, I do.

23 Q. What's the name of that business?

24 A. Access Forensic Laboratory.

25 Q. And where is that located?

- 1 A. It's at Osborn, Missouri.
- 2 Q. What is Access Forensic Laboratory?
- 3 A. It's a laboratory that conducts examinations, case
4 review, evidence tests on evidence relating to
5 firearms and tool marks, shooting scenes, various
6 types of evidence to be examined.
- 7 Q. Have you taught and lectured on the subjects that
8 we've been discussing, firearm and tool mark
9 examinations?
- 10 A. Yes, I have.
- 11 Q. Gunpowder distance range reviews?
- 12 A. Yes
- 13 Q. Wound and tissue analysis?
- 14 A. Yes
- 15 Q. Contact wounds?
- 16 A. Yes
- 17 Q. Crime scene reconstruction?
- 18 A. Yes.
- 19 Q. Have you trained any firearms examiners?
- 20 A. Yes, I have.
- 21 Q. Are those examiners that you trained certified?
- 22 A. Well, I'm not sure. Certifications have only been
23 within the last few years offered by the Association
24 of Firearms and Tool Mark Examiners. I was the
25 secretary of the Peer Group Certification Review

1 Committee from, I think, the late 70s, maybe '78,
2 until '86 or '85, somewhere in there. We met in
3 several cities across the United States, formulating
4 guidelines and qualifications for firearms examiners
5 to be certified. And I've been involved in training
6 the examiners both in our laboratory and in the Army
7 laboratory and other agencies' laboratories And
8 examiners are sent to our laboratory for a training
9 process.

10 Q. What professional societies do you belong to?

11 A. I'm a life member of the National Rifle Association.
12 I'm past-president and distinguished member of --
13 life member of the Association of Firearms and Tool
14 Mark Examiners I'm a charter member of what used
15 to be the Wound Ballistics Association. I'm a
16 member of the Missouri Division International
17 Association for Identification. I'm a member of the
18 Kansas Division International Association for
19 Identification.

20 (THEREUPON, the court reporter,
21 again, asks the witness to speak
22 up.)

23 Q (BY MR McCAUSLAND) Have you ever held any offices
24 in any of those professional societies?

25 A. Yes, I have I've been on the bylaws committee,

1 nominating committee. I was second vice-president,
2 first vice-president, and president of the
3 international group known as the Association of
4 Firearms and Tool Mark Examiners I also was on the
5 (inaudible) panel, 1 of 12, that were selected to
6 take a series of tests on distance determination,
7 firearms identification and tool mark
8 identification, and then a week-long process of
9 testing in Sacramento, California. I also was
10 past-president and served as a chairman of the Board
11 of the Missouri Division International Association
12 for Identification

13 (THEREUPON, the court reporter,
14 again, asks the witness to speak
15 up.)

16 Q. (BY MR. McCAUSLAND) Have you been accepted as an
17 expert witness in these areas of your disciplines in
18 federal, state, military, and local courts?

19 A Yes, I have.

20 Q. How many times have you testified?

21 A. Several hundred to, probably, over 500 times.

22 Q And where have you testified?

23 A I've testified in Pennsylvania, Ohio, Louisiana,
24 Virginia, South Carolina, Florida, Texas, Kansas,
25 Missouri, Iowa, Illinois, Nebraska - there may be

1 some others - and in France in the military
2 court-martial.
3 Q Do you know how many cases you have worked that
4 involve a gunshot wound by a .44 Magnum revolver?
5 A. I don't know the exact number, but .44 Magnums don't
6 occur that often in the cases. I would say probably
7 10 or 15.
8 Q. Have you worked cases involving contact gunshot
9 wounds?
10 A. Yes.
11 Q. How many?
12 A. Again, I don't have a count, but I recall seeing a
13 couple of them
14 Q All right.
15 MR. McCAUSLAND. Your Honor, we'd offer
16 Mr. Cayton's curriculum vitae, Defendant's Exhibit
17 AK.
18 THE COURT: Okay.
19 MR. MAXWELL: I'd like to voir dire.
20 THE COURT: On that curriculum vitae --
21 (interrupted)
22 MR. MAXWELL: Yes, Honor.
23 THE COURT: -- as to its admission?
24 MR. MAXWELL. Yes.
25 THE COURT: Okay

1 VOIR DIRE EXAMINATION

2 BY MR. MAXWELL.

3 Q. Mr Cayton, Defense Exhibit AK, that's your CV --

4 (pause)

5 A. Yes.

6 Q. -- that you put together?

7 A. Yes.

8 Q. On there it refers to your experience, is that true,

9 that you say you have?

10 A. Yes.

11 Q. Okay. And one of the things it says is that you

12 worked for the KBI Laboratory in -- let me make sure

13 I quote it. It says you worked for the KBI

14 Laboratory -- when does it say?

15 A. Well, it says 9-99 to 11-99, and it's not the whole

16 month or whatever; it's in that period of time

17 Q Where does it say that, what page?

18 A It's on the front page.

19 MR. MAXWELL: Can I see it, Judge?

20 (Approaching)

21 THE COURT: Right in the middle of the

22 page, "Past Employment."

23 MR. MAXWELL: (Reviewing document)

24 Q (BY MR. MAXWELL) You were actually -- okay. I see

25 it Never mind. That's a two-month period that you

1 worked there?

2 A. It's in that time frame. It was not exact days or
3 anything

4 Q. Okay. You were actually fired from the KBI, weren't
5 you?

6 A. Well, we had a meeting, and T. L. was there. And
7 they talked about all the problems they was having
8 with my performance and work. And it was pretty
9 clear that I was not wanted there. And I was asked
10 if I would resign, and I resigned

11 Q. Actually, you were fired for failing to follow KBI
12 protocols and policies. And they actually handed
13 you a termination letter, didn't they?

14 A. I think that's obvious.

15 Q. So let me show you what's -- (pause)

16 (THEREUPON, the court reporter
17 marked for identification State's
18 Exhibit No. 192, which was later
19 changed to State's Exhibit No.
20 193.)

21 Q. (BY MR. MAXWELL) Sir, I'm handing you what's marked
22 now for identification as State's Exhibit 192 (sic)
23 Do you recognize that?

24 A. Well, I may have seen it. I don't recall actually
25 getting one, but I think they did show it to me

1 there.

2 Q Okay That letter is actually your termination

3 letter dated October 29, 1999?

4 A. Yes, it says that on there.

5 Q. Read the first line

6 A (As read) "This letter is to advise you of your

7 termination from your probationary status as a

8 Forensic Scientist III with the Kansas Bureau of

9 Investigation, pursuant to K.S.A. 75-2946 and K.A.R.

10 1-10-6(c). This termination is based on the

11 following facts..."

12 Q And it doesn't say anything about you resigning,

13 does it?

14 A. I'm talking about a conversation we had.

15 Q Well, sir, my question is. Does the letter say

16 anything about you resigning?

17 A. No.

18 Q The letter is signed by who? Go to the last page.

19 A (Complies with counsel's request.) Larry Welch

20 Q And who is Larry Welch?

21 A. The director.

22 Q. Of the KBI?

23 A Yes.

24 Q And it says, in one of the very first paragraphs

25 citing the reasons, it was that you failed to follow

1 policies, procedures, and protocols of the KBI
2 Laboratory section. Is that fair?

3 MR. McCAUSLAND: Your Honor, I understand
4 the right of the State to voir dire, and I
5 understand the right of him to go into these things
6 on cross-examination. But I don't know that this
7 voir dire is proper just to go into the admission of
8 a CV, which is always done

9 THE COURT: I agree.

10 MR. MAXWELL: Very well. I'll save it for
11 later, Judge.

12 Q (BY MR. MAXWELL) Mr. Cayton, let's look at your CV,
13 again. Are you a medical doctor?

14 A No, I'm not.

15 Q Do you have any medical degrees?

16 A No, I don't.

17 Q Are you a forensic pathologist?

18 A No, I'm not.

19 Q A clinical pathologist?

20 A No

21 Q Any type of college medical training?

22 A No.

23 Q Have you ever actually performed an autopsy
24 yourself?

25 A No

1 MR. MAXWELL: That's all I have, Judge

2 THE COURT: All right. Defendant's Exhibit

3 AK will be admitted.

4 DIRECT EXAMINATION

5 (Continued)

6 BY MR. McCAUSLAND:

7 Q. Mr Cayton, are you aware of any degrees that -- or
8 formal college course you can take to learn about
9 contact wounds?

10 A. No.

11 Q. Are you aware of any formal courses you can take to
12 learn about the damage done to tissue by gunshot
13 wounds?

14 A. No.

15 Q. And is your experience that you've obtained in those
16 areas what you've gotten over 30 years of working
17 thousands of homicides?

18 MR MAXWELL. Objection, leading

19 THE COURT: Sustained.

20 MR McCAUSLAND: That's all right. I'll
21 move on, Your Honor

22 THE COURT: Okay.

23 Q (BY MR McCAUSLAND) Were you contacted by me in
24 connection with this case to review the autopsy
25 report, autopsy photographs, physical evidence, and

1 investigation reports related to these fatal wounds
2 suffered by Sheriff Samuels?
3 A. Yes, I was.
4 Q. And what were you asked to do?
5 A. I was asked to go to the scene and look at the crime
6 scene at Hilltop in Greenwood County and, later, go
7 to the laboratory and look at the evidence collected
8 in connection with the shooting.
9 Q. All right. Did I ask you to view this evidence for
10 the purpose of making some determinations?
11 A. Yes, you did.
12 Q. What determinations did you understand you were to
13 make?
14 A. To see if it was possible to tell if this was a
15 contact shot or something else.
16 Q. All right. Did I also ask you to determine whether
17 the gunshot wounds suffered by Sheriff Samuels were
18 consistent with shots fired from the top of the
19 stairway in that house at Hilltop?
20 A. Yes.
21 Q. And did I ask you to see if you could determine the
22 exact distance between the .44 Magnum revolver and
23 Sheriff Samuels when the fatal shots were fired?
24 A. Well, to make an exact determination on distance, I
25 was measuring the distance that was available there

1 between the top rail and the opening where the
2 sheriff was.

3 Q. All right. And did I also ask you to look at the
4 surfaces on the inside of the stairwell there to
5 determine if there were any irregular or sharp
6 surfaces?

7 A. Yes.

8 Q Let's talk about what you did in your investigation.
9 First of all, were you provided materials to review?

10 A. Pardon me.

11 Q Were you provided some materials, documents,
12 reports, and photographs to review?

13 A. Yes.

14 Q. What all did you review?

15 A. Well, there was quite a lengthy list of items.

16 MR. MAXWELL: Judge, excuse me. Judge, may
17 we approach?

18 THE COURT: Why?

19 MR MAXWELL. To bring up something to the
20 Court.

21 THE COURT. All right.

22 (THEREUPON, the following bench
23 discussion was had outside the
24 hearing of the jury.)

25 MR. MAXWELL: Judge, he's going to offer

1 now that this man reviewed evidence not admitted or
2 referred to in this trial, nor offered by the
3 defense, which includes all the evidence that you've
4 previously said wasn't admissible after this thing
5 was over, including the submachine gun used by KHP
6 troopers when they subdued the residence, using all
7 of that evidence, the ballistics shield, all kinds
8 of stuff like that, and that's just not appropriate.

9 MR. McCAUSLAND Well, first of all, I
10 understand the Court's ruling, and I don't intend to
11 offer any of those things. And I've also instructed
12 Mr. Cayton about the Court's ruling and that we're
13 not to go into those things. What we're going to
14 talk about -- (interrupted)

15 THE COURT: Go ahead.

16 MR. McCAUSLAND -- are the autopsy report,
17 autopsy photographs, crime scene, physical evidence
18 that he saw And I guess if I'm allowed a little
19 latitude to lead on that - "Did you see this; did
20 you see that" - then we can totally avoid any
21 problem.

22 THE COURT: As I recall this was the
23 State's motion to keep this limited in time frame to
24 the shooting and not go into the post -- I mean, the
25 shooting of the sheriff and not go into the post-gun

1 battle. It was a relevancy issue, basically, and I
2 agreed with the State on that. I'll give you a
3 little leeway to ask this witness to talk about, you
4 know, the items that he was provided and considered
5 in rendering his opinions, but I don't want to lay
6 out a picture of this gun battle that I've already
7 determined is not relevant, really, to how the
8 sheriff was killed.

9 MR. McCAUSLAND. I don't intend to get into
10 that. I'm going to talk about the 44 and the 44
11 bullets, the wounds, the crime scene dimensions, and
12 those things. And we'll stay away from all of that.
13 We don't plan to talk about any of that with
14 Mr. Cayton

15 THE COURT. As I recall, this was a
16 six-shot revolver, two of which ended up in the
17 sheriff, two of which another witness said were
18 fired at him while trying to pull the sheriff out,
19 and two --

20 (THEREUPON, the court reporter,
21 informs the Court she can barely
22 hear the bench discussion.)

23 THE COURT. They're, basically, all
24 accounted for. But you don't have a problem with
25 that, Mr. Maxwell -- (interrupted)

1 MR. MAXWELL. No.

2 THE COURT: -- keeping to the .44. Then I
3 think we're fine.

4 MR. McCAUSLAND: That is what we're going
5 to do.

6 THE COURT: All right.

7 MR. McCAUSLAND: Thank you.

8 (THEREUPON, the bench discussion
9 was concluded; WHEREUPON, the
10 following proceedings were had in
11 the hearing of the jury.)

12 THE COURT: All right. Proceed Thank
13 you.

14 DIRECT EXAMINATION

15 (Continued)

16 BY MR. McCAUSLAND:

17 Q. Mr. Cayton, did you review the autopsy report by
18 Doctor Mitchell?

19 A. Yes, I did.

20 Q Did you review the autopsy photographs?

21 A Yes.

22 Q Did you review the laboratory report by David
23 Wright, who you understand has testified here?

24 A Yes.

25 Q And did you review the crime scene photographs taken

1 by the trajectory expert, Bruce Coffman, and his
2 assistant, Susan Lee?

3 A. Yes.

4 Q. And for purposes of your determination, were those,
5 basically, the ones that are relevant?

6 A Yes

7 Q. All right. And from the autopsy photographs -- and
8 there were lots of them, correct?

9 A Yes.

10 Q. Have we selected a few that might be helpful to you
11 in explaining to the jury what you saw, what you
12 found, and in rendering your opinions?

13 A Yes

14 MR. MAXWELL: Judge, I'm -- before he
15 starts showing them, I'm going to ask to voir dire
16 the witness on his qualifications

17 THE COURT: Okay. Well, I'll permit you to
18 do that briefly

19 VOIR DIRE EXAMINATION

20 BY MR MAXWELL:

21 Q. Mr. Cayton, did you attend the autopsy of Sheriff
22 Samuels?

23 A No, I didn't

24 Q. Did you take any of the photographs?

25 A. No.

1 Q. So you just looked at the photographs taken by
2 someone else?

3 A. Yes, I did.

4 MR. MAXWELL: Your Honor, I object If
5 that's all he's done here, he's, certainly, not
6 stated the qualifications -- (interrupted)

7 THE COURT: I believe that he has
8 sufficiently established his qualifications in the
9 area of criminalistic investigations He's attended
10 hundreds of autopsies, and I believe he's -- the
11 Court will permit him to testify as to his
12 observations of these photographs.

13 Now, before you start putting them on, I
14 would offer what I have several times earlier; that
15 if there are any family members present who wish to
16 leave the courtroom, you're certainly welcome to do
17 that at this time.

18 MR. McCAUSLAND: Your Honor, at this point,
19 we're just trying to identify what we're going to
20 talk about. I will advise the Court and the jury
21 and the people in the gallery when we're ready to
22 actually start projecting those

23 THE COURT I'm sorry to have people go in
24 and out, but I certainly don't want you to be here
25 if you don't want to be So when you get to that

1 point, please let us know explicitly so the folks
2 that do want to leave will have the opportunity to
3 do so.

4 MR. McCAUSLAND: All right.

5 DIRECT EXAMINATION

6 (Continued)

7 BY MR. McCAUSLAND.

8 Q. And just for the record, Mr Cayton, we've gone over
9 these photographs that are a part of our "V" series
10 They're V-21, 22, 34, 49, 57, 83, 91, and 94,
11 correct? Well, let me show those to you again.
12 I'll also show you Defendant's Exhibits V-33, 39,
13 and 58, which previously have been identified and
14 admitted. Have you seen those?

15 A. Yes.

16 Q. Did you rely on all of these photographs in
17 making -- in forming your opinion?

18 A. Yes.

19 MR. McCAUSLAND. We would offer the
20 additional "V" series exhibits, Your Honor.

21 MR. MAXWELL: I need to see them

22 MR. McCAUSLAND (Handing said exhibits to
23 counsel.)

24 MR. MAXWELL: No objection

25 THE COURT: Those are defendant's exhibits,

1 what, again?

2 MR. McCAUSLAND: V-21, 22, 34, 49, 57, 83,
3 91, and 94.

4 THE COURT: All right. Those will be
5 admitted. What were the other ones, 30...

6 MR. McCAUSLAND: V-33, 39, and 58
7 previously were admitted, Your Honor.

8 THE COURT: All right. They were already
9 admitted. Okay. Thank you

10 Q. (BY MR. McCAUSLAND) Let's talk about what you did
11 when you went to the crime scene, Mr. Cayton. When
12 did you go to the crime scene?

13 A. I went on the 12th of August to Hilltop, a house
14 there. I met you and Bruce Reesman, and I took an
15 assistant, Steve Carrillo (phonetic), with me

16 (THEREUPON, the court reporter,
17 again, asks the witness to speak
18 up.)

19 Q (BY MR. McCAUSLAND) All right. And what did you do
20 at the crime scene?

21 A. We kind of concentrated on the area around the
22 stairwell from the kitchen, the opening that had
23 been cut through the wall to the staircase, and then
24 to the upstairs, the banister area above the
25 staircase.

1 Q. All right. And what were you looking for -- what
2 did you do?

3 A We made measurements; took photographs of the
4 staircase and the banisters, showing the distance
5 and the angle to the opening where the sheriff had
6 come through; also, observed the area where the
7 bullet -- two bullets had gone through the wall and
8 down into the floor, the kitchen area; took
9 measurements, photographs, and examined that area.

10 Q. Okay. Let me show you photographs that we've marked
11 as Defendant's AG-1 through AG-12 and ask you to
12 look at those, please

13 A. (Complies with counsel's request)

14 Q. All right. Have you looked at those photographs,
15 Mr Cayton?

16 A. Yes, I have.

17 Q. And what are they, please?

18 A They are photographs that we took at the scene,
19 showing the area of the opening from the kitchen
20 into the stairway, and then along the environment
21 around the stairway, the wall and up the stairway,
22 and then from the top of the stairway down over the
23 banister

24 Q Do they accurately depict what you saw when you made
25 your scene investigation?

1 A. Yes.

2 MR. McCAUSLAND: We'd offer AG-1 through
3 12, Your Honor.

4 MR. MAXWELL: One question.

5 THE COURT: Okay.

6 VOIR DIRE EXAMINATION

7 BY MR. MAXWELL

8 Q. Mr. Cayton, those pictures were taken on what day?

9 A. It was, I believe, about the 12th of August.

10 Q. Last month?

11 A. Yes.

12 Q. Those would have been, what, seven months after the
13 homicide?

14 A. Approximately, yes.

15 Q. And that area had changed significantly. Walls had
16 actually been torn out since the homicide occurred?

17 A. There was some paneling and things gone, yes.

18 MR. MAXWELL: That's all I have.

19 THE COURT: Do you have any objection to
20 their admission.

21 MR. MAXWELL: No

22 THE COURT: All right AG-1 through 12
23 will be admitted.

24 DIRECT EXAMINATION

25 (Continued)

1 BY MR. McCAUSLAND:

2 Q. For example, Mr. Cayton, AG-2 shows you making a
3 particular measurement, correct?

4 A. Yes.

5 Q. What is the height of that door?

6 A. I believe it was a 6-foot opening.

7 Q. All right And that is from the kitchen in under
8 the stairwell, correct?

9 A. Yes.

10 MR. McCAUSLAND: (Displays an exhibit on
11 the screen.)

12 Q. (BY MR. McCAUSLAND) Here is AG-1. What dimension
13 is that?

14 A. That's the width, and it was approximately 38 and a
15 half inches wide.

16 MR. McCAUSLAND: (Displays an exhibit on
17 the screen)

18 Q. (BY MR. McCAUSLAND) This is AG-3. What area are
19 you measuring there, sir?

20 A. This is an area in the stairwell -- under the
21 stairwell there that had been cut out. I think that
22 was approximately 31 inches wide.

23 Q. Can you indicate -- there's a diagram behind you
24 It's not to scale, but can you show the jury where
25 that measurement is made. (

- 1 A. Yes. It's right in here (indicating), in this area
2 here (indicating)..
3 Q. All right. And this is an area where paneling had
4 been removed; is that right?
5 A. Yes.
6 MR. McCAUSLAND: (Displays an exhibit on
7 the screen.)
8 Q. (BY MR. McCAUSLAND) This is AG-5 What opening is
9 that?
10 A. Again, I believe that's the opening here
11 (indicating) between the kitchen and the stairway.
12 Q. And how wide is that opening?
13 A. That's approximately 38 and a half inches wide
14 MR. McCAUSLAND (Displays an exhibit on
15 the screen.)
16 Q. (BY MR. McCAUSLAND) And then in AG-6, what did
17 you -- what are you measuring?
18 A. That's the width of the stairway there. It's
19 approximately 35 inches wide
20 Q. All right. Did you measure the height of the
21 risers?
22 A. Yes They're probably 8 inches each.
23 Q How many steps are there from the base of the
24 stairway up to the landing?
25 A. From the base to the landing was 6 steps, and then

1 the landing on the -- to the top, there were 10
2 steps.

3 Q. And are all of those risers 8 inches?

4 A. Yes.

5 MR. McCAUSLAND. (Displays an exhibit on
6 the screen.)

7 Q. (BY MR. McCAUSLAND) And this is AG-7. What is
8 this, please?

9 A. This was showing the opening there It's
10 approximately 6 feet tall.

11 MR. McCAUSLAND (Displays an exhibit on
12 the screen.)

13 Q. (BY MR. McCAUSLAND) All right. And AG-8, what were
14 you measuring there?

15 A. The width from the area where the flashlight was
16 found to the opening of the door, and it looks like
17 it was approximately 62 inches.

18 Q. And that's the kitchen door?

19 A. Yes.

20 MR. McCAUSLAND. (Displays an exhibit on
21 the screen.)

22 Q. (BY MR. McCAUSLAND) And what view is this, please.

23 A. This is from the landing -- the first landing down,
24 looking into the opening into the living room. I
25 think the material had been taken away There was

1 some paneling there earlier.

2 Q. All right Had you seen the crime scene
3 photographs?

4 A. Yes.

5 Q. And did you understand that that area was blocked
6 off by paneling on the day that the sheriff was
7 murdered?

8 A. Yes.

9 MR. McCAUSLAND: (Displays an exhibit on
10 the screen.)

11 Q (BY MR. McCAUSLAND) This is AG-10 What is that
12 view, please?

13 A. This is down by the opening from the kitchen. On
14 the left you can see the area where the kitchen
15 opening has been cut. And then straight at the
16 bottom is the original opening into the living room.
17 And the top is the banister area straight above that
18 opening at the bottom of the stairs.

19 MR. McCAUSLAND: (Displays an exhibit on
20 the screen.)

21 Q (BY MR. McCAUSLAND) And what is AG-11?

22 A. This is a view from the top of the banister, looking
23 down, seeing the opening to the right that's been
24 cut through the wall from the kitchen. And then to
25 the bottom is the original opening that was blocked

1 off into the living room and seeing the stairway.

2 MR. McCAUSLAND: (Displays an exhibit on
3 the screen.)

4 Q. (BY MR. McCAUSLAND) What is AG-12, please?

5 A. This is an area along the top of the banister at the
6 top of the stairs just to the right in the upper
7 corner. You can see part of that. And then there's
8 an opening underneath the staircase, and you can see
9 an area on the floor where, I believe, a bullet was
10 recovered from the flooring. Also, there's -- it
11 looks like a bullet hole in the trim of the
12 staircase there.

13 Q. All right. And you had seen the crime scene
14 photographs. Did you understand that there was a
15 piece of linoleum hanging over this opening in the
16 wall under the stairs at the time of the murder?

17 A. Yes. There was material removed.

18 MR. McCAUSLAND: (Displays an exhibit on
19 the screen)

20 Q. (BY MR. McCAUSLAND) All right. I'll show you now
21 what is Defendant's AB-11. And do you recognize
22 that?

23 A. Yes.

24 Q. You understand that's a crime scene photograph taken
25 by David Coffman and/or Susan Lee when they did

1 their trajectory analysis?

2 A. Yes.

3 Q. All right. Did -- on the day that you were at the
4 crime scene, did you attempt to go back and locate
5 any bullet holes that would correspond to the two
6 downward trajectories -- the diagonal downward
7 trajectories that we see in AB-11?

8 A. Well, some of the holes were still there, but I
9 think some of the material had been removed that had
10 bullet holes in them

11 Q All right. And in making your review, were you able
12 to confirm or come up with any conclusions about the
13 accuracy of the trajectories in AB-11?

14 MR. MAXWELL: I'm gonna object to him
15 commenting on other people's testimony. That's a
16 veiled way to do that, Judge.

17 THE COURT: I'm sorry?

18 MR. MAXWELL: It's a veiled way to ask him
19 to comment on the veracity of someone else's
20 testimony.

21 THE COURT: Well, I think you need to lay a
22 little better foundation if he's going to render an
23 opinion as to whether or not he agrees or disagrees
24 with a previous witness' opinion.

25 MR. McCAUSLAND: I'll do so.

- 1 Q. (BY MR. McCAUSLAND) Were there holes in the wall
2 under the stairs?
- 3 A. Yes.
- 4 Q. Were there holes in the framework two-by-four's and
5 other boards inside the staircase under the stairs?
- 6 A. Yes.
- 7 Q And was there still a hole in the floor in the
8 kitchen?
- 9 A. Yes.
- 10 Q. Were you able to line up those trajectory holes?
- 11 A. Well, approximately. I didn't use rods and so forth
12 because some things were missing. But from the view
13 and the photographs that I took, they appeared to
14 line up close to what this represents.
- 15 Q All right. And so as to the two diagonal downward
16 rods, do those appear to be accurate to you?
- 17 A I believe so
- 18 Q. Did you make any measurements of the distance from
19 the top of that railing that we see in AB-11 down to
20 the floor at the base of the stairs?
- 21 A Yes.
- 22 Q. And what is the total distance from the top of the
23 railing to the base of the stairwell?
- 24 A. Approximately 152 inches from the top of the rail of
25 the banister to the floor

1 Q. What else did you do, if anything, at the scene?

2 A. Well, we did a measurement from the rail into the
3 kitchen floor where the bullet hole was, and that
4 was approximately 175 inches from the top of the
5 rail; then, also, a measurement at the top of the
6 banister rail to the top of the cutout kitchen door
7 into the opening, and it was approximately
8 88 inches.

9 Q. All right Tell me which dimension that is, please

10 A. It's the -- from the top of the rail to the cutout
11 to the top of the opening is 88 inches this
12 (indicating) way.

13 Q Across?

14 A. Yes. From up on this (indicating) end of the rail
15 to the top of the opening that was cut out

16 Q. All right. Did you make any other measurements?

17 A. The landing was 60 inches wide between the two sets
18 of staircases and 30 inches deep. The top banister
19 post was approximately 34 inches high. That's about
20 it.

21 (THEREUPON, the court reporter,
22 again, asks the witness to speak up
23 and asks for clarification that it
24 was 60 wide and 30 deep.)

25 MR. CAYTON: Yes

1 Q (BY MR. McCAUSLAND) Did you do anything else at the
2 scene, Mr. Cayton, that is significant to the
3 opinions you're going to render?

4 A. No

5 Q. Then after you went to the crime scene, did you go
6 to the KBI Laboratory in Topeka and review physical
7 evidence?

8 A. I did

9 Q. All right. And in that review, did you inspect the
10 .44 Magnum revolver involved in this case?

11 A. Yes, I did.

12 Q. Did you also inspect the .22 caliber target pistol
13 that has been identified in this case?

14 A. Yes.

15 Q. And did you inspect the sheriff's jacket and shirt,
16 which have been already, previously, admitted as
17 State's Exhibits 102 and 103?

18 A. Yes.

19 Q. When you -- tell us what examination you made of the
20 jacket and shirt.

21 A. I examined both the areas of the entry holes on the
22 jacket, on the right front shoulder area and then
23 one -- well, the jacket just had the one hole, but
24 the shirt had two. I examined the series of holes
25 that was caused by the diagonal or kind of

1 elliptical or angular shot. Then I examined the
2 shirt. The left collar area had a double hole, two
3 holes in that. And the right front shoulder area of
4 the shirt had a series of holes.

5 Q. And what type of an inspection did you make of the
6 sheriff's garments?

7 A I did a visual examination, and then I did a
8 microscopic examination using an American Optical
9 Bench Scope. And I had it on variable power from
10 probably 10 to 15 power.

11 Q. I'm going to show you photographs AG-13 through
12 AG-19 and ask if those are photographs that were
13 taken during your inspection at the Kansas Bureau of
14 Investigation Laboratory?

15 A (Reviewing photographs) Yes, they are.

16 Q And Exhibits AG-13 through 19 are photographs that
17 will assist the jury in understanding your findings
18 and your opinions?

19 A. Yes.

20 MR. McCAUSLAND. We would offer AG-13
21 through AG-19, Your Honor. (Handing exhibits to
22 counsel.)

23 MR. MAXWELL: No objection.

24 THE COURT: I'm sorry

25 MR. MAXWELL. No objection.

1 THE COURT. All right. AG-13 through 19
2 will be admitted

3 Q. (BY MR. McCAUSLAND) While you were at the KBI
4 Laboratory, did you also examine the piece of carpet
5 that you understood had been over the opening from
6 the kitchen into the stairwell?

7 A. Yes, I did.

8 Q. And did you also examine the sheriff's trousers and
9 belt and holster?

10 A. Yes.

11 Q. And do you recall which side his holster was on?

12 A. I believe it was the left side

13 Q. I also show you what's previously marked as State's
14 Exhibit 150, which is --

15 MR. McCAUSLAND: And it's been admitted,
16 Your Honor.

17 Q. (BY MR. McCAUSLAND) -- a bag with a gray sock and a
18 quantity of rounds of ammunition. Did you examine
19 that?

20 A. Yes.

21 Q. And what type of ammunition is that, please?

22 A. Well, most of it is .44 Magnum PMC brand. I believe
23 there's one live 45 Auto Wolf brand cartridge in
24 there, also

25 Q. All right The .44 Magnum PMC brand cartridges are

- 1 those hollow point?
- 2 A. Yes, sir, semi-jacketed hollow point.
- 3 Q Did you, also at the lab, examine the bullets and
- 4 bullet fragments that had been removed from Sheriff
- 5 Samuels during the autopsy?
- 6 A. Yes.
- 7 Q Did you examine the cartridge shells which had been
- 8 found in the 44 Magnum revolver when it was taken
- 9 into evidence?
- 10 A. Yes.
- 11 Q. And those cartridge cases that were in the revolver,
- 12 what type were they?
- 13 A. They were .44 Magnum -- Remington Magnum caliber PMC
- 14 brand.
- 15 Q Is that the same type of cartridge that is in the
- 16 bag, the plastic bag, Exhibit 150?
- 17 A Yes, it is
- 18 Q. In looking at the bullets that were removed during
- 19 the autopsy, did you compare those to the type of
- 20 bullets that are -- that you've identified as .44
- 21 Magnum PMC hollow point?
- 22 A Yes.
- 23 Q Were you able to make any comparisons between what
- 24 had been removed at the autopsy with the live rounds
- 25 that you have there?

1 A. I didn't actually do a microscopic comparison, but
2 they appeared to be similar.

3 Q. All right.

4 MR. McCAUSLAND: (Displays an exhibit on
5 the screen.)

6 Q. (BY MR. McCAUSLAND) I'm going to show you a
7 photograph now which has been marked AG-13. What is
8 that, Mr. Cayton?

9 A. It's a photograph of one of the holes on the jacket
10 that the sheriff was wearing.

11 Q. All right. What is the significance of that hole?

12 A. Well, looking at -- what I would have expected on a
13 contact wound, it would have some muzzle flash,
14 tearing, searing, and melting of the fibers. And I
15 didn't see any of that. There was loose, torn
16 fibers, but none with gunpowder residue, that I
17 would expect, or the melting or tearing of the
18 material.

19 Q. And is this the photograph of the entrance of the
20 gunshot into the jacket?

21 A. Yes.

22 Q. We have here a manikin, Mr. Cayton, that has on it a
23 jacket, State's Exhibit 103, and a shirt, State's
24 Exhibit 102. Are these the garments that you
25 inspected at the KBI Laboratory in Topeka?

- 1 A Yes, I believe so.
- 2 Q. Where is the entrance in the jacket from the gunshot
3 located?
- 4 A. It's in the front of the right shoulder area.
5 Actually, it's, I believe, within the tear area
6 that's been clothespinned back together.
- 7 Q. Were you able -- when you inspected this, was this
8 the condition of the jacket?
- 9 A. Yes
- 10 Q. And did it appear it had been cut open all the way
11 from the shoulder all the way down to the end of the
12 sleeve?
- 13 A. Yes.
- 14 Q. Is that something you typically see in cases where a
15 victim has been in a hospital or emergency room?
- 16 A. Well, when there's an attempt to render first aid,
17 they do cut off the clothing. If there's no attempt
18 made, then, normally, they leave the clothing
19 intact.
- 20 Q. In this case, were you able to, through your
21 inspection, locate the exact portion of the outer
22 shell where the bullet first went through?
- 23 A. Yes.
- 24 Q. And is that what we see in AG-13?
- 25 A. Yes.

1 Q. If this had been "contact," what would you have
2 expected to see?

3 A. I would expect to see more tearing and melting of
4 the fabric from the muzzle blast. And I didn't see
5 that melting and tearing of the fabric that you
6 normally associate with a .44 Magnum being up
7 against this type of material and the effect it has;
8 the gas, as well as the projectile, going in the
9 flesh, the tissue, underneath; the action of the
10 tissue, what effect it has on supporting the
11 material during the impact. There's a transfer of
12 energy from this high speed/high energy hollow point
13 bullet that causes a maximum temporary cavity that,
14 actually, causes the swelling of the tissue; a real
15 fast ballooning that causes not only secondary
16 tearing of some of the material, but also bruising
17 and injuries to the surrounding tissue, such as the
18 underarm area and -- but I didn't see that in this
19 entry hole.

20 Q. All right Now, did you do a -- (pause)

21 MR. McCAUSLAND: (Displays an exhibit on
22 the screen)

23 Q (BY MR. McCAUSLAND) Let me show you AG-14. What is
24 that?

25 A These are some of the fibers from the area of the

1 entry hole.

2 Q By the way, what type of material is the outer shell
3 of the jacket?

4 A. I believe it's a polyester/nylon-type fabric.

5 Q. All right It's a synthetic?

6 A. Yes

7 Q. And in a contact shot against synthetic fabric, what
8 do you expect to see?

9 A. Well, it depends on the type of gun and so forth.

10 But with this type of gun where you have a lot of
11 pressure and gas, I expect to see some melting.

12 Q All right. And do you see that in this microscopic
13 shot taken, AG-14?

14 A. No.

15 MR. McCAUSLAND: (Displays an exhibit on
16 the screen)

17 Q. (BY MR. McCAUSLAND) And here's AG-15. Is this just
18 another view of the same entrance through the outer
19 shell of the synthetic outer lining -- or outer
20 shell of the jacket?

21 A. Yes.

22 Q. All right. And do you see any evidence of melting
23 of the fibers there?

24 A. No.

25 Q In addition to examining the outer shell of the

- 1 jacket, did you examine the inner lining?
- 2 A. Yes.
- 3 Q And what did you see there?
- 4 A There was associated tearing and a sequence of holes
- 5 that lined up, similarly, with the holes in the
- 6 shell.
- 7 Q. Why is there a sequence of holes?
- 8 A. Well, the way the material was folded -- depending
- 9 on how you articulate the arm in this case, because
- 10 of the wounds, the injuries, in the photographs at
- 11 the autopsy, there's associated bruising underneath
- 12 the right arm And the wound, itself, is in the
- 13 right chest So that associated bruising is from
- 14 that temporary cavity when that tissue expands from
- 15 that transfer of energy from the hollow point bullet
- 16 expanding and transferring that energy. It's kind
- 17 of a hydroshock wave bruising associated area under
- 18 the arm So that series of shots indicates an angle
- 19 from above down in relation to the position of the
- 20 sheriff -- his relative position to the direction of
- 21 the shot.
- 22 Q The fact that there's bruising, is that indicative
- 23 of a contact wound?
- 24 A Well, it can be. But in this case, I think it's
- 25 associated with the maximum temporary cavity caused

1 by that expansion of the tissue at the time the
2 bullet hit him.

3 Q. Does that happen with any gunshot wound?

4 A. It depends on the velocity and the energy of the
5 bullet. The higher speed/more energy bullet you
6 have, the more chance you have of that happening. A
7 slow bullet, like a .45 Auto or a .22 long or long
8 rifle or something like that, you wouldn't,
9 probably, have that. But in a high velocity where
10 you have a lot of pressure transfer or high energy
11 transfer, you do have.

12 Q. What is the maximum number velocity of a 44 Magnum
13 bullet like we have in this case?

14 A. Well, it would, probably, be approximately
15 1,600 feet per second, something like that, and have
16 probably 1000 pounds of muzzle energy, somewhere in
17 that area.

18 Q. All right. And is that what causes this maximum gap
19 that you're talking about?

20 A. Yes. If you could visualize -- and I've conducted a
21 lot of wound tests using ballistics gel, which is a
22 close substitute of human flesh. And we used
23 18-inch long blocks of gelatin. And when you shoot
24 into that, the energy transfer at the beginning of
25 the block shows that the maximum cavity is starting.

1 If you saw a cross-section, it would be like a
2 bowling pin with the base being the entry part with
3 a big cavity, and then it tapers off to the wound
4 tract as the bullet energy is dissipated into the
5 tissue.

6 So, initially, you have a very large
7 ballooning, and then it collapses back down. So
8 what you have is, depending on the distance, you
9 have a hole from the entry, and then you have a
10 permanent track through the tissue, if it's tissue
11 that's very dense like the liver and heart and
12 kidneys. Then you get a cracking or fracturing if
13 it's soft tissue like skin, muscle, things like
14 that. Sometimes you don't have that dramatic effect
15 of the wound tract.

16 MR McCausland: (Displays an exhibit on
17 the screen.)

18 Q. (BY MR. McCausland) Let me show you Exhibit V-91,
19 which is one of the autopsy photographs. This is
20 one of the bullets removed from Sheriff Samuels.
21 Describe to the jury what we see here, please.
22 A. This is a fragmented, jacketed bullet. The bottom
23 left is the copper jacket, and then you have three
24 larger fragments of lead. And what happens -- the
25 hollow point design is made to use like hydraulics.

1 When you have liquid in a cavity, it can't compress
2 it. So what happens when that bullet hits wet
3 tissue and so forth, it causes the bullet to expand.
4 The design of the bullet with the copper is to
5 support that lead expansion to control the rate of
6 expansion and so forth. But this bullet is
7 approximately less than half an inch in diameter.
8 It's about a .429. That's a published diameter So
9 it would -- in the maximum capacity where it expands
10 all the way out, you might double that temporarily
11 while the bullet is mushrooming, until it either
12 comes apart or it petals back around the base of the
13 bullet. So in that area where you have the large
14 transfer of energy is where you have this large
15 temporary cavity

16 Q. And that is caused, in part, by the mushrooming of
17 the hollow point bullet as it strikes human tissue?

18 A. It's a combination of velocity and bullet weight
19 energy and the expansion - using up that energy - of
20 the bullet in the tissue

21 MR. McCAUSLAND: (Displays an exhibit on
22 the screen.)

23 Q. (BY MR. McCAUSLAND) I'll show you here the other
24 bullet removed by Doctor Mitchell during his
25 autopsy. Describe to the jury what -- this is

- 1 Photograph V-83. Explain what we have here, please.
- 2 A. On the left is the copper bullet jacket that has
3 expanded and mushroomed. You can see it petaled
4 back around towards the base. And on the right is
5 the fragmented -- one fragmented main core piece of
6 the bullet that's expanded. Again, you can see the
7 width of the copper or the lead bullet fragment. It
8 comes pretty close to almost doubling the
9 diameter -- the original diameter of the bullet.
- 10 Q When you inspected the inner lining of the jacket,
11 were you able to determine a point where the hollow
12 point went through the material?
- 13 A There is an indication -- there's a pressure -- it
14 looks like a pressure contact that has a crescent
15 shape that's similar in size and shape and dimension
16 to the rim of the hollow point on the live
17 ammunition that was in Exhibit 150.
- 18 Q In this case, did the bullet tear the shell and the
19 inner liner?
- 20 A. Yes.
- 21 Q. All right. If there had been a contact shot against
22 the shell and inner liner, what would you have
23 expected to find with regard to material and the
24 wound track?
- 25 A. Well, you always have some tearing. It depends on

1 the shape of the bullet. We have a hollow point
2 here. It looks like right at the edge of the entry,
3 there is a part of that shape of the bullet. When
4 you have a bullet hitting something perpendicular,
5 then it pretty well puts a symmetrical mark there.
6 But any time you have an oblique or angle, the part
7 of the bullet that hits first can start pushing as
8 it's coming through or penetrating. So you can have
9 an elliptical or angular tear in the clothing, as
10 well as in the tissue.

11 MR. McCAUSLAND: (Displays an exhibit on
12 the screen)

13 Q (BY MR. McCAUSLAND) Let me show you AG-16. What
14 are we looking at here, please?

15 A This is a piece of the fabric on the lining. In the
16 center there looks like a little hole. And right
17 below it there's a little pattern that looks like --
18 you can see an area where the material has been
19 pushed and -- it's kind of semicircular. It
20 actually shows up better on the fabric than on this,
21 but this is the area that that mark is.

22 Q. That's on the inside of the jacket?

23 A Yes.

24 Q. When you examined the jacket, did you find any --
25 first of all, what is gunshot residue?

- 1 A. Gunshot residue is a combination of burned and
2 partially burned gunpowder. And, typically, it
3 leaves -- these (indicating) are particles. You can
4 see partially burned or unburned flakes of powder,
5 and, also, you see some of the residue from the gray
6 sooting from the combustion of the powder that's
7 burned in combination with some of the graphite
8 that's on gunpowder to control or regulate the rate
9 of burning. So you can have a combination of
10 color -- sooting and color from the graphite and the
11 burning residue.
- 12 Q If a shot was made at contact to this jacket, folded
13 through the layers the way it is, what would you
14 expect to find in terms of gunshot residue evidence?
- 15 A. Well, if it was contact -- you know, it's not a
16 tight seal because the material is porous. And if
17 it has an angle, there's no -- then you lose even
18 more of the seal. So you would have a directional
19 thing where at one point where the gun is tighter
20 against it, you would have less residue; and then
21 where it's looser, you would have a heavier deposit
22 of gunshot residue.
- 23 Q. Would you expect to see gunshot residue on the inner
24 liner that we're looking at here in Exhibit AG-16?
- 25 A. Yes.

1 Q And what would that look like, in your experience?

2 A. There would be a darkening, a dark gray or even
3 black, residue pattern concentration of that near
4 the area of the entry hole.

5 Q. Likewise on the -- (pause)

6 MR. McCAUSLAND: (Displays an exhibit on
7 the screen.)

8 Q (BY MR. McCAUSLAND) On the outer shell that we see
9 here in Photograph AG-13, would you expect to see
10 some evidence of gunshot residue?

11 A. Yes.

12 Q And what would you expect to see?

13 A. I would expect to see -- particularly because of the
14 angle, one area would have a heavier deposit,
15 showing more of a directionality to the -- that
16 would coincide with the angle and the direction of
17 the holes in the jacket and in the liner and in the
18 shirt underneath.

19 Q. And did you see any evidence of that when you did
20 your examination in this case, sir?

21 A. No.

22 MR. McCAUSLAND: (Displays an exhibit on
23 the screen.)

24 Q. (BY MR. McCAUSLAND) Did you also inspect the shirt
25 inside the area of the right chest where this entry

1 wound occurred?

2 A. Yes.

3 MR. McCAUSLAND: (Displays an exhibit on
4 the screen)

5 Q. (BY MR McCAUSLAND) Let me show you the photograph
6 that's marked as AG-17. What is that, please?

7 A. That's a series of holes from the entry in the right
8 front shoulder area of the denim shirt.

9 Q. All right. What is the significance of what we see
10 here, Mr. Cayton?

11 A. Well, it shows there's an angle, and it's coming
12 from the top of the sleeves down into the body of
13 the shirt itself. It indicates that there's an
14 overlapping of material. There's kind of a
15 bunching-up effect, because you have a
16 combination -- there's only one shot, but there --
17 it looks like in and out because of the folds and
18 the way the material is folded or wrinkled right
19 there.

20 Q. Okay. Are you able to tell, looking at this
21 photograph, where the actual entry is through the
22 shirt into -- that went through the shirt and into
23 Sheriff Samuels?

24 A. Well, it would be further toward the bottom of the
25 series of holes, I believe, on that area.

- 1 Q. This area right here (indicating)?
- 2 A. Yes.
- 3 Q. What caused these other tears along this
- 4 (indicating) line?
- 5 A. That's the track of the bullet going through the
- 6 material as it's folded in and out. And then it's
- 7 starting to -- this (indicating) is all folded --
- 8 opened out. But in the actual situation, it was
- 9 probably closer, bunched up, in that arm area.
- 10 MR. McCAUSLAND: (Displays an exhibit on
- 11 the screen)
- 12 Q (BY MR. McCAUSLAND) Is this just another close-up
- 13 of part of that same area, AG-18?
- 14 A. Yes.
- 15 Q All right. On the shirt, if this had been a contact
- 16 wound, what would you have expected to see?
- 17 A. I would expect to see some visible graying or dark
- 18 gunpowder deposits -- residue deposits.
- 19 Q. Did you see any evidence of that?
- 20 A. No.
- 21 Q All right. Then you told us that you also examined
- 22 the defect in the upper left chest or collar area of
- 23 the shirt, correct?
- 24 A Yes.
- 25 Q. Describe for us what you saw there.

1 A. It was a pretty symmetrical entry wound that had
2 some abraded bruising around the -- you're talking
3 about the shirt itself?

4 Q. The shirt itself.

5 A. The shirt In the fold area right below the top
6 collar button area, there's a series of two holes,
7 which, again, can be explained by the material being
8 folded over. And those holes were made at the same
9 time by the same single shot.

10 Q. All right. And did -- you examined this both
11 visually and with your microscope?

12 A. Yes.

13 Q. And what were you looking for with the microscope?

14 A. I was looking for anything that would indicate
15 visible gunshot residue.

16 Q. And did you find any gunshot residue?

17 A. No.

18 Q. Now, in addition to looking at the clothing, did you
19 actually inspect the entry wounds that are shown in
20 some of the autopsy photographs?

21 A. Yes, I did.

22 Q. All right. And are those helpful to explain your
23 findings and your opinions?

24 A. Yes.

25 MR. McCAUSLAND: Your Honor, I don't know

1 if you want to take a morning recess, but this might
2 be a good time.

3 THE COURT: Yes, I think it would. Ladies
4 and Gentlemen of the Jury, we'll take the morning
5 recess. Just remember the admonition I've given you
6 all along - it continues to apply - not to discuss
7 the case among yourselves; don't let anyone discuss
8 it with you, and don't form or express any opinions
9 about the case. We'll be in recess for probably
10 15 minutes Thank you.

11 (THEREUPON, a short recess was
12 had; WHEREUPON, the following
13 proceedings were had in the
14 presence of the jury.)

15 THE COURT: All right. The jury is
16 present. Counsel and the defendant are present
17 And you may continue

18 MR. McCAUSLAND: All right At this time,
19 Your Honor, we are going to look at a few of the
20 photographs of these gunshot wounds. So I would
21 just tell the Court that and anyone who would want
22 to exit themselves from the courtroom.

23 (THEREUPON, some people left the
24 courtroom.)

25 Q (BY MR McCAUSLAND) All right. Let's talk about

- 1 the upper left chest/collar area wound, Mr. Cayton.
- 2 When you inspected it, what were you looking for?
- 3 A. Well, I looked at the photographs to see what the
- 4 photographs could tell me. And they had photographs
- 5 both of before the sheriff was cleaned up and then
- 6 afterward. In neither one of those I saw any gray
- 7 sooting or residue associated with the area around
- 8 the entrance hole. What I did see was some
- 9 abrasion. It was almost a symmetrical round hole
- 10 and some abrasions. That's caused not only by the
- 11 bullet as it goes in but, also, by the ring of the
- 12 fabric as it's pulling the fabric into the wound
- 13 path. That abrades and rubs the skin. So you have
- 14 the bullet causing some of the injury you see around
- 15 the margin of the hole and, also, the area that the
- 16 material is causing as the bullet pushes it into the
- 17 material (sic), causing an abrasion ring around the
- 18 entry hole.
- 19 Q. All right. I'm going to show you Photograph V-22.
- 20 MR. McCAUSLAND (Displays an exhibit on
- 21 the screen.)
- 22 Q. (BY MR. McCAUSLAND) Now, you understand that's the
- 23 entry wound in the upper left chest/collar region?
- 24 A Yes.
- 25 Q. And if there had been a contact wound here, what

1 would you have expected to see?

2 A. Well, this is a -- it was a heavy gun and a heavy
3 recoil. And you would expect to see the gun move
4 It wouldn't be stationary So you would -- since
5 the line axis of the bullet is above the gun, for
6 the most part, the cylinder, the handle, the grip is
7 below it. So when you have all this energy going
8 out this way (indicating), the opposite and equal
9 reaction is for the gun to recoil back and up. And
10 you can't hold that down You can't -- depending
11 how strong you are, you can control it somewhat
12 But the front of the gun, the top of it, has a site
13 on it. And if there's anything closely associated
14 with that site, it is going to catch it. Like the
15 chin overhangs that area pretty well. There's no
16 associated secondary injury from gun contact. I
17 would expect to see something if it was a contact
18 wound.

19 Q. All right. Now, the actual entry wound -- you
20 described an abrasion. Can you show the jury what
21 you're talking about

22 A. (Indicating.)

23 Q. Here use mine. (Handing pointer to the witness.)

24 (THEREUPON, the witness, once again,
25 turns away from the microphone and can

1 barely be heard.)

2 A. In this (indicating) area around the hole, you can
3 see -- you can see petals here (indicating), a
4 little bit of a scallop shape, but the hole, itself,
5 seems symmetrical. And right here (indicating), you
6 can see more of an abrasion on the upper part. And
7 that's probably where the material is a little bit
8 thicker, causing more pressure there

9 THE COURT. Mr. Cayton, would you push the
10 head of that microphone over in front of you.

11 MR. CAYTON: Sorry (Complies with the
12 Court's request.)

13 THE COURT: That's all right. Just keep
14 that there in front of you.

15 A. The entry is from the top. You have more pressure
16 here (indicating) And as it goes down -- the
17 bullet path going down, this ring around here
18 (indicating) is caused both by the bullet wipe as
19 the bullet is going through rubbing that area and
20 causing bruising But, also, the clothing that's
21 bunched up in front of the bullet causes that
22 abrasion.

23 Q. (BY MR. McCAUSLAND) And that's -- is that the
24 portion of the clothing that is pushed in, but then
25 it comes back out again?

- 1 A. Well, it's not pulled in all the way. The hole has
2 actually cut through it, and so it's -- obviously,
3 there's some material missing, but it goes on
4 through with the bullet. It could be lost in the
5 bullet expansion. It could be in the body cavity
6 somewhere. But, for the most part, the clothing --
7 the ring around where the bullet passes is still on
8 the cloth.
- 9 Q. All right. If this were a contact wound, what else
10 would you expect to see in terms of gunshot residue?
- 11 A. Well, you would see the gray sooting associated
12 around an entry contact wound, even though there's
13 clothing over it. Under this kind of pressure, you
14 would have a lot of leakage, and there would be an
15 obvious heavy deposit of gray residue and sooting.
16 And there's none of it here. And, obviously, you
17 have other things that make up the bullet. You have
18 the bullet lead and the copper that are trace
19 elements that would also show up in the wound tract.
- 20 Q. All right. But would you find lead and copper
21 traces in any wound tract from any distance?
- 22 A. Well, it depends on if the bullet has lead in it.
23 But if it has lead in it and expands and it's not
24 totally enclosed, then I would expect to see -- it
25 kind of depends on the velocity, if it's near

1 terminal velocity --

2 (THEREUPON, the court reporter, again,
3 asks the witness to speak up and into
4 the microphone and repeat the answer.)

5 A. -- terminal velocity. If it's lost a lot of its
6 velocity, then you would have less chance of it.
7 But if the bullet is damaged, mutilated, and
8 mushroomed, then there's a lot of chance of finding
9 trace metal from the jacket and the core.

10 Q (BY MR. McCAUSLAND) All right Now, after -- you
11 know, after a medical exam or during an autopsy, if
12 a body is cleaned up, will there still be evidence
13 of gunshot residue if it's a contact wound?

14 A Yes.

15 Q. And why is that?

16 A Well, because of the pressure. They don't try to
17 wipe it all away. They try to clean the wound up so
18 they can examine the wound. And so there would
19 still be some because of the pressure. It actually
20 can blow it into the tissue (inaudible) and be
21 embedded into the tissue. And sometimes they refer
22 to the term as "tattooing" or "stippling" where you
23 have -- under pressure you have the particles pushed
24 into the surrounding area.

25 (THEREUPON, the following proceedings

1 are taken down to the best of the
2 court reporter's ability because the
3 witness refuses to speak into the
4 microphone so he can be heard.)

5 Q. (BY MR. McCAUSLAND) And is that what you would have
6 expected to see in this wound?

7 A Yes.

8 Q. And did you?

9 A. No.

10 Q. All right. Did you examine the other wound in the
11 upper right chest/armpit area?

12 A. Yes.

13 Q. And what did you find there?

14 A I found an elliptical irregular shape, which was
15 consistent with the angle of going through the
16 several layers of material and the associated
17 abrasion around the entry wound, along with the
18 bruising of the surrounding tissue from that maximum
19 temporary cavity where the tissue expands and went
20 over and transferred some of that energy to the
21 underneath side of the right arm, causing bruising
22 there.

23 MR McCAUSLAND: (Displays an exhibit on
24 the screen.)

25 Q. (BY MR McCAUSLAND) Let me show you a photograph,