

VOLUME FOURTEEN

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge

RECEIVED

OCT 18 2013

S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

PLAINTIFF'S EXHIBIT #72 (PHOTOGRAPH)
PLAINTIFF'S EXHIBIT #73 (PHOTOGRAPH)

1 A Yes, sir.

2 Q First of all it's written to Gene Dukes,
3 among other people?

4 A Yes. That is my attorney.

5 Q Okay. You refer to him as the Dorchester
6 County Public Defender, don't you?

7 A Yes, sir.

8 Q Is that what he was?

9 A Yes, sir.

10 Q All right. And in there don't you say things
11 like you want to know when you're going to get a
12 second attorney in this death penalty case?

13 A Yes, because that is what I was being
14 charged.

15 Q Okay. So, you thought you could get death,
16 you feared death?

17 A Yes.

18 Q All right, you feared for your life.

19 (Plea agreement marked as Plaintiff's Exhibit
20 Number 3).

21 BY MR. BROWN:

22 Q And let's take a look at, let's take a look
23 at Plaintiff's 3. Is that a plea agreement you
24 entered into, a four page document?

25 A Yes, sir.

1 Q All right. And that document also references
2 the death penalty, doesn't it?

3 A What page do you see that on?

4 Q That's on the third page, paragraph nine.

5 A No.

6 Q Paragraph nine B, does it not say if you fail
7 to cooperate with the prosecution that they can
8 reinstate the murder charge, seek death and you
9 can't object to it?

10 A I don't see nothing about a death penalty.

11 Q Nine B, "The State may vacate the plea"?

12 A Yes.

13 Q Reinstate murder, seek the death penalty and
14 you waive any objection to the death penalty?

15 A Yes, sir.

16 Q That is what it says, doesn't it?

17 A Yes.

18 (Warrant marked as Plaintiff's Exhibit
19 Number 4).

20 BY MR. BROWN:

21 Q If you will take a look at Plaintiff's 4.
22 That is an arrest warrant for you, isn't it?

23 A Yes.

24 Q And that warrant was sworn out by Detective
25 Coker?

1 A Uh-huh.

2 Q In that warrant it says, "James Tawain Gadson
3 did shoot and kill one Kandee Martin," didn't it?

4 A "Did commit the offense of murder."

5 Q "Section," it has a code, "Common Law, of the
6 South Carolina Code of Law 1976 as amended."

7 A Yes.

8 Q "In that he did," he meaning you, right?

9 A Yes.

10 Q "Willfully and unlawfully with malice
11 aforethought shoot and kill one Kandee Martin"?

12 A Yes.

13 Q That thing says you shot the gun that killed
14 Kandee Martin, the warrants says you shot Kandee
15 Martin?

16 A Yes.

17 Q And the indictment says you shot Kandee
18 Martin?

19 A Yes.

20 Q Ricky Davis says you shot Kandee Martin?

21 A Ricky Davis?

22 Q You know who Ricky Davis is?

23 A That dude in the holding cell?

24 Q Have you ever been in A side of the
25 Dorchester County Detention Center with Ricky

1 Davis?

2 A I know him as Crab. I don't know him by his
3 real name.

4 THE COURT: For the court reporter, you know
5 him as what?

6 A Crab.

7 THE COURT: C-r-a-b?

8 A Crab, however you spell it. I never knowed
9 his real name.

10 THE COURT: Okay.

11 Q Were you on A side with him at one time?

12 A I remember seeing his face but I ain't never
13 told him I killed nobody.

14 Q Wayne Mood says you shot Kandee Martin?

15 A Who?

16 MR. WATERS: Your Honor, I object to the form
17 of that question.

18 THE COURT: Is that something in the record
19 here, sir?

20 MR. BROWN: It will be.

21 THE WITNESS: No.

22 MR. WATERS: Your Honor, that pits witnesses
23 even if it is. He can ask if he has ever made a
24 statement to someone.

25 THE COURT: I know, I'm aware if there were a

1 jury. So far there is nothing in the record.

2 MR. BROWN: Not yet.

3 THE COURT: You're asking him if this
4 gentleman said he did it?

5 MR. BROWN: Yes.

6 THE COURT: Tell me the name of the
7 gentleman.

8 MR. BROWN: Wayne Mood, M-o-o-d.

9 THE COURT: Your question was, "Does Wayne
10 Mood say you did it?"

11 MR. BROWN: Yes, sir.

12 THE WITNESS: No.

13 BY MR. BROWN:

14 Q He doesn't say --

15 A No.

16 Q Did you ever hear he had said you did this?

17 A No.

18 Q Do you know who Wayne Mood is?

19 A Yes, I know him.

20 Q Mr. Dukes has never mentioned that to you?

21 A No.

22 Q Solicitor Bailey never mentioned that to you?

23 A No.

24 Q Now, you mentioned Gene Dukes the Public
25 Defender?

1 A Yes.

2 Q We talked a little bit at the deposition
3 about that?

4 A Yes.

5 Q Tell me who Marva Hardee-Thomas is.

6 A I don't know. She's a black woman.

7 Q Where did she work?

8 A Public Defender's office, I guess.

9 Q Okay. As for as you know she always worked
10 in the Public Defender office?

11 A Not that I know of. I didn't know she was a
12 PD, I just know she's a black woman.

13 Q Did you not say in your deposition that she
14 worked in the Public Defender's office?

15 A I guess. Her and Gene Dukes used to talk a
16 lot.

17 Q What do you mean by that?

18 A I guess they worked in the same law firm, I
19 guess.

20 Q Okay.

21 MR. BROWN: Your Honor --

22 Q Let me ask you, Mr. Gadson, if you recall
23 testifying back at that deposition in July? We had
24 a deposition with a court reporter in Orangeburg.

25 A Yes.

1 Q And if I showed you that transcript would
2 that refresh your memory of what you said at that
3 time?

4 A Yes. Let me see it.

5 MR. BROWN: Could I open it?

6 THE COURT: Have you asked him a specific
7 question?

8 MR. BROWN: Yes, sir.

9 THE COURT: What was it?

10 MR. BROWN: What his understanding of who
11 Marva Hardee-Thomas was.

12 THE WITNESS: I said no.

13 MR. BROWN: That is not not what he said.

14 THE COURT: What did you say, sir?

15 THE WITNESS: No.

16 THE COURT: You don't know her?

17 THE WITNESS: I seen her, I don't know who
18 she is.

19 THE COURT: Did you not say -- do you have a
20 copy of the deposition there?

21 MR. BROWN: Yes, sir, I've got a copy.

22 THE COURT: Did he not say -- just hand me
23 the deposition while you're doing that.

24 MR. BROWN: I'm sorry, Your Honor, I have it
25 with my own stuff here. As Mr. Waters indicates,

1 the record is voluminous.

2 THE COURT: Let this record reflect I am
3 opening the deposition of Mr. James T. Gadson taken
4 on the 14th of July, 2008.

5 MR. BROWN: I direct the Court's attention to
6 page 17 and it begins at line 13, it talks about
7 Mr. Dukes, line 15 it starts talking about --

8 THE COURT: Why don't you ask him that
9 question?

10 BY MR. BROWN:

11 Q Now, was Mr. Dukes your Public Defender?

12 A Yes.

13 Q And did he work in the same office as Marva
14 Hardee-Thomas?

15 A I guess he did.

16 MR. BROWN: I would like --

17 THE COURT: Did you not say yes back in July
18 of '08?

19 THE WITNESS: No.

20 THE COURT: All right. I will let the record
21 reflect that the record, the deposition reflects he
22 answered yes to the following question, "Okay. Did
23 he, referring to Gene Dukes, work in the same
24 office as Marva Hardee-Thomas?" And Mr. Gadson
25 said yes.

1 BY MR. BROWN:

2 Q And Mr. Dukes continued to represent you
3 throughout the whole case, didn't he?

4 A Yes.

5 Q And he was employed as a Public Defender at
6 that time?

7 A Yes.

8 Q And did he ever tell you he worked separately
9 from the Public Defender office?

10 A No.

11 Q Now let's talk about what you testified at
12 trial about -- do you remember testifying at the
13 trial?

14 A Yes, sir.

15 Q Do you remember stating that you went out
16 with Kandee Martin and Marion Bowman on Nursery
17 Road?

18 A Yes.

19 Q At trial you never mentioned that Marion told
20 you he was going to kill Kandee before you got out
21 there, did he?

22 A No.

23 Q You never said that at trial, did you?

24 A No.

25 Q And you never mentioned any sex between

1 Marion and Kandee that night, did you?

2 A No.

3 Q And you stated you saw Kandee being shot?

4 A Yes, sir.

5 Q And you stated Marion threatened to blow your
6 brains out?

7 A Yes, sir.

8 Q And you stated, "I went to the Allen Murray
9 Club with Marion, Darien and Hiram"?

10 A Yes.

11 Q Now, you gave a couple statements back in
12 February of the year before, didn't you?

13 A The year before?

14 Q February, 2001.

15 A Yes, sir.

16 Q Take a look at Plaintiff's Exhibit 5 and
17 Plaintiff's Exhibit 6. Are you familiar with those
18 items?

19 A Yes.

20 Q All right. And the first statement that you
21 gave the police was the statement that is in your
22 handwriting, which is five, isn't it?

23 A Yes, sir.

24 Q Okay. And that statement was given on
25 February 18th, 2001?

1 A Yes, sir.

2 Q And you said you were dropped off after
3 Marion and Kandee pulled a drive-off at the gas
4 station, didn't you?

5 A Yes, sir.

6 Q You never said you saw Kandee being shot, did
7 you?

8 A No.

9 Q And you never said you saw Travis Felder, did
10 you?

11 A No.

12 Q And you never said you saw Marion on Nursery
13 Road, did you?

14 A No.

15 Q You never said Marion and Kandee had sex that
16 night, did you?

17 A No.

18 Q And you never said Marion threatened to blow
19 your brains out, did you?

20 A No.

21 Q And you said the last thing Kandee said was
22 to give her a lighter?

23 A Yes, sir.

24 Q Did you give her that lighter?

25 A No.

1 Q What would you say if I told you later your
2 fingerprints was found on Nursery Road?

3 A My fingerprints wasn't on no lighter.

4 Q Now, do you recall speaking to an
5 investigator T. E. Stephenson?

6 A No.

7 Q Let me direct you back real quick. In the
8 statement it clearly says you gave, you did give
9 her the lighter, that is all on page three of the
10 fifth exhibit, the handwritten, "The last words
11 Kandee said to me, let me hold your lighter, and I
12 did. I told her I had more at the house."

13 A Yes, sir.

14 Q Did you give her that lighter?

15 A No.

16 Q So, you lied in that statement?

17 A Yes, sir.

18 Q Now, do you remember a fellow named T. E.
19 Stephenson?

20 A No.

21 Q Dorchester Sheriff's Department?

22 A No, sir.

23 (Statement marked as Plaintiff's Exhibit
24 Number 7).

25 BY MR. BROWN:

1 Q I will show you Plaintiff's Exhibit 7. Do
2 you remember being questioned after you wrote that
3 four page statement out? Do you see that document?

4 A Yes, sir.

5 Q Do you remember being examined by T. E.
6 Stephenson?

7 A Yes, sir.

8 MR. WATERS: Your Honor, I think he needs to
9 be asked if he has ever seen that document before.
10 I don't think he has seen it.

11 THE COURT: Have you seen that document
12 before?

13 THE WITNESS: No.

14 THE COURT: He asked the question had he ever
15 seen Mr. Stephenson, whether it's on that document
16 or not, the man said he had. What is the next
17 question?

18 BY MR. BROWN:

19 Q Did T. E. Stephenson question you about
20 shooting Kandee?

21 A He didn't ask me where I been that night.

22 Q He asked you if you shot Kandee Martin?

23 A No.

24 Q He did not ask you that?

25 A No.

1 Q You didn't tell him no, you didn't shoot
2 Kandee Martin?

3 A Yes. He kept asking me, I came out and told
4 him.

5 Q He asked, you said, "No, I didn't shoot her"?

6 A Yes.

7 Q You answered without being asked a question?

8 A Yes. Scared.

9 Q He asked you if you shot Kandee near
10 Reevesville?

11 A No.

12 Q He never asked you that question?

13 A Huh-uh.

14 Q He never asked you either one of the
15 questions that are indicated on this form?

16 A No.

17 Q And you didn't tell him nothing?

18 A No.

19 Q You didn't lie to him?

20 A No.

21 Q You didn't change your story after you had
22 spoken to T. E. Stephenson?

23 A Of course I did, after he said I killed
24 somebody, of course I changed it.

25 Q You changed your story after you spoke to

1 him?

2 A Yes.

3 Q Did you change your story because you learned
4 you failed a polygraph?

5 A Of course. I was trying to help Black out.

6 THE COURT: Help who?

7 THE WITNESS: Marion Bowman.

8 THE COURT: What did you use, sir?

9 THE WITNESS: Black.

10 THE COURT: B-l-a-c-k?

11 THE WITNESS: Yes.

12 THE COURT: Nothing else other than that,
13 sir?

14 THE WITNESS: No.

15 BY MR. BROWN:

16 Q So I make make sure I understand this, you
17 said you lied to T. E. Stephenson and then changed
18 your mind about what happened, you changed your
19 story because you failed a polygraph examination?

20 A Yes.

21 Q And the questions on that polygraph were,
22 "Did you shoot Kandee Martin?"

23 A No.

24 Q "Did you shoot Kandee Martin near
25 Reevesville?"

1 A No.

2 Q This was not the questions?

3 A Huh-uh (negative).

4 Q If Stephenson said that would he be lying?

5 MR. WATERS: Your Honor, I object to that
6 question.

7 MR. BROWN: I withdraw it.

8 THE COURT: Well, that would be pitting.
9 Just ask him a question about what he did.

10 BY MR. BROWN:

11 Q But you do admit you changed your story
12 because you failed the polygraph?

13 A Yes, after he brought a warrant for me
14 talking about I killed somebody, somebody I didn't.

15 MR. BROWN: Your Honor, on that note, among
16 the other things, we allege defective impeachment
17 by counsel, so we don't raise another claim. You
18 mentioned if something comes up, the case of U.S.
19 v. Moore, in which it was allowed.

20 THE COURT: What specifically?

21 MR. BROWN: At some point in time we need to
22 address whether or not he could have been impeached
23 at trial because of the fact he changed his story
24 because of a polygraph he failed. That is a Fourth
25 Circuit case that allows that.

1 MR. WATERS: Well --

2 MR. BROWN: I just, not trying to get into an
3 argument, I want to put it up while we're at it now
4 so we can cross this bridge later. We do raise a
5 claim there was defective impeachment of this
6 witness.

7 THE COURT: Keep on going, sir.

8 MR. BROWN: Thank you.

9 THE COURT: What he was going to answer but
10 he changed his story because he failed a polygraph.
11 BY MR. BROWN:

12 Q Now, you gave a statement marked as
13 Plaintiff's Exhibit 6, didn't you, the statement
14 typed out?

15 A Yes.

16 Q Now, in this statement you said you knew
17 Marion was going to kill Kandee before they got to
18 Nursery Road, before you rode out there?

19 A Yes, sir.

20 Q Okay. And you said Kandee Martin smoked
21 crack cocaine?

22 A Yes.

23 Q And you did not go to the Allen Murray Club
24 after you said Marion shot Kandee, did you,
25 according to that statement?

1 A No.

2 Q This statement says you drove back to
3 Branchville and you got dropped off?

4 A Yes.

5 Q You never said you saw Marion and Kandee have
6 sex that night, did you?

7 A No.

8 Q And you never said Marion threatened to blow
9 your brains out, did you?

10 A No.

11 Q Now, that's not what you said at trial,
12 though, was it?

13 A Yes.

14 Q Which part?

15 A He threatened to kill me.

16 Q You never said that in your written
17 statement, Exhibit 5, did you?

18 A No.

19 Q And you never said that to T. E. Stephenson,
20 did you?

21 A No.

22 Q And you never said that in the typed
23 statement after you changed your story, did you?

24 A No.

25 Q Did you ever tell or write down anywhere

1 during this investigation that Marion Bowman had
2 threatened to blow your brains out if you talked
3 about this?

4 A No.

5 Q The first time you revealed that was at
6 trial?

7 A Yes.

8 Q How about going to the Allen Murray Club?

9 A What about it?

10 Q You didn't put that in your first handwritten
11 statement, did you?

12 A No.

13 Q And you didn't put it in the statement after
14 you failed the polygraph, did you?

15 A No.

16 Q And you didn't tell Stephenson that, did you?

17 A No.

18 Q But then at some point, I guess at trial, you
19 said you went to the Allen Murray Club?

20 A Because we did.

21 Q Did you tell the prosecutor that you went to
22 the Allen Murray Club?

23 A No.

24 Q The first time you said it was when you took
25 the stand?

1 A Yes, because they said tell the truth,
2 nothing but the truth, so help you, God, so I tell
3 the truth.

4 Q When did you change your story?

5 A That was my story, I just didn't put it on
6 paper.

7 Q That was your story when you wrote that
8 handwritten statement?

9 A Look here, I wrote that statement there
10 before they brought the warrant and talked about I
11 killed somebody, I was trying to help that man
12 there, I wrote this statement right there, had them
13 type this one.

14 Q You typed that one and you had been charged
15 with killing her?

16 A When he brought the warrant in.

17 Q That is when you typed that statement?

18 A Yes.

19 Q And you didn't tell him you went to Allen
20 Murray Club then either, did you?

21 A No.

22 Q In fact you lied about it?

23 A Not necessarily.

24 Q Tell me in there where it says you went when
25 you came back from Nursery Road?

1 A It's not in here.

2 Q What does it say you did?

3 A I didn't put it all on paper to tell what I
4 did.

5 Q You don't say you went back to the Villas
6 Apartments?

7 A Yes, I did.

8 Q And it doesn't say, "Then I went to Meeka's
9 apartment"?

10 A Yes.

11 Q And then it says you spent the night, Chance
12 Bennett came over?

13 A Yes.

14 Q You never mentioned going anywhere else, did
15 you?

16 A No.

17 Q So, when did you change that story?

18 A When I got on the stand, I put my hand on
19 that Bible.

20 Q That's when you changed your story?

21 A That is when I told the truth.

22 Q Is that after you signed that plea agreement?

23 A No, that is before I signed the plea
24 agreement.

25 Q You told that story before you signed your

1 plea agreement?

2 A No, it was after, after I signed the plea
3 agreement.

4 Q So, after they threatened to give you death
5 without objection?

6 A They didn't threaten to give me nothing.

7 Q Does it not say if you don't cooperate you
8 get the death and you can't object to it?

9 A They said the hand of one is the hand of all.

10 Q Does that document not say in paragraph nine
11 B that if you don't cooperate --

12 A It ain't got nothing to do with it.

13 Q You changed your story after you signed that
14 agreement, didn't you?

15 A Yes.

16 Q Because he had threatened to kill you. I
17 want to make sure I understand this. You changed
18 your story after you signed the agreement or before
19 you signed it?

20 A After I signed it.

21 Q Who did you first tell that?

22 A What you mean who I told?

23 Q Who did you first tell this latest version
24 to?

25 A The Court.

1 Q In trial?

2 A Yes.

3 Q You never told the prosecutor?

4 A No.

5 Q So, he had no idea you were going to say, "I
6 went to the Allen Murray Club"?

7 A No.

8 Q And let's go back to that plea agreement. It
9 says that if you omit facts or testimony that you
10 breach your plea agreement, doesn't it? Let's look
11 at paragraph ten. In this plea agreement right
12 here marked as Plaintiff's Exhibit 3, paragraph 10,
13 it says you understand that you may not omit any
14 facts while on the witness stand?

15 A Yes.

16 Q Doesn't it say that?

17 A Yes, sir.

18 Q At trial you never mentioned that you knew
19 Kandee was going to be killed when you all got to
20 Nursery Road, did you?

21 A No.

22 Q You never said that at trial?

23 A No.

24 Q But you did say that earlier, didn't you?

25 A Yes.

1 Q Did you omit that testimony?

2 A No.

3 Q Was it true or not?

4 A Yes, it was true.

5 Q Is it true that he told you he was going to

6 kill her?

7 A Yes.

8 Q That's true?

9 A Yes.

10 Q And you did omit this?

11 A Yes.

12 Q So, you breached this plea agreement?

13 A Yes.

14 Q It says when you breach your plea agreement

15 that they may vacate your plea and subject you to

16 murder and the death penalty?

17 A Yes.

18 Q And that that would be determined by a judge?

19 A Yes.

20 Q And has that happened yet?

21 A No.

22 Q Now I want to make sure I understand this.

23 At your deposition didn't you testify that the

24 first time you knew there was going to be, not

25 going to be a robbery was when Marion actually

1 started shooting Kandee Martin?

2 A Yes, sir.

3 Q That's what you said at your deposition?

4 A Yes, sir.

5 Q Now, was that true?

6 A Yes, that's true.

7 Q Now, how can you tell me that it's true you
8 didn't know there was going to be a killing until
9 the bullets were fired, when it is also true that
10 you knew before you got to Nursery Road that there
11 was going to be a killing? Which one is true,
12 Tawain?

13 A When he started shooting.

14 Q So, I want to make sure I understand this.
15 When you gave the statement earlier that said that
16 you saw him indicate with his finger, acting like
17 his finger was a gun, that he was going to shoot
18 her, before you got to Nursery Road, that you knew
19 there was going to be a killing?

20 A I didn't really know right offhand right then
21 but he was leaning back in his seat, had his hand
22 behind her head.

23 Q In your statement you said he pointed his
24 finger like a gun at the back of her head?

25 A He didn't point it directly at the back of

1 her head but he had it laying behind her.

2 Q So, did you know before you got to Nursery
3 Road there was going to be a killing or not?

4 A No.

5 Q So, you lied in this statement about that
6 finger pointing?

7 A Yes.

8 Q You didn't know that until you got out there,
9 until you saw the bullets being fired?

10 A Yes.

11 Q And let's talk about that. You believed
12 there was going to be a robbery?

13 A Yes.

14 Q Kandee believed there was going to be a
15 robbery?

16 A Yes.

17 Q You thought there was going to be a robbery?

18 A Yes.

19 Q You really did believe that?

20 A Yes.

21 Q Let's talk about your deposition where you
22 said, we talked about whether or not there was any
23 sex between Marion and Kandee.

24 A Yes.

25 Q Was there any sex that night while you were

1 with Marion and Kandee?

2 A No.

3 Q That's from the time they picked you up at
4 the apartments in Branchville, to the time that you
5 went back to the apartment in Branchville?

6 A Yes.

7 Q There was absolutely no sex?

8 A No.

9 Q No sex with a corpse?

10 A No.

11 Q No sex beforehand?

12 A Beforehand, no.

13 Q Before the shooting?

14 A No.

15 Q Was there any sex?

16 A No.

17 Q Did you ever, was there ever a time when they
18 weren't in your sight and there was sex?

19 A No.

20 Q Never sex?

21 A No.

22 Q So, if you found out that Kandee and Marion
23 would have had sex that day sometime it would not
24 have been that night at the time you were picked up
25 when you said Kandee Martin was killed?

1 A What you talking about?

2 Q If there was sex that night it wouldn't have
3 been during the killing, it would have been --

4 A No.

5 Q If you were asked that question at trial back
6 in 2002 would you have answered it the same way?

7 A Yes.

8 Q I want to make sure. No sex while she was
9 alive?

10 A No.

11 Q No sex after she was killed?

12 A No.

13 Q No rape?

14 A No.

15 Q And let me ask you, when you all went out
16 there to pull a caper what did Kandee do to
17 participate in that?

18 A Nothing but drove the car.

19 Q She didn't suggest houses?

20 A No.

21 Q She didn't point out any houses?

22 A No.

23 Q All right. Let's talk about the drinking
24 that day.

25 A All right.

1 Q February 16th, do you recall talking about
2 drinking?

3 A Yes. That was on Joe's birthday.

4 Q Joe who?

5 A Fogle.

6 Q Joe Fogle's birthday?

7 A Yes.

8 Q Okay. Let's talk about who was drinking.
9 Who was drinking out there?

10 A Everybody that had been out there.

11 Q Does that include Marion Bowman?

12 A Yes.

13 Q And do you recall testifying at your
14 deposition that Marion Bowman was drinking for four
15 to five hours that day?

16 A I ain't even sure what the time, however long
17 it was but everybody was out there drinking that
18 day, had big bottles of gin.

19 Q If I told you that during the deposition, if
20 the Court follows, I think the original deposition
21 is up there, how long, if I said how long did
22 Marion sit out out there with you all and drink, do
23 you agree you answered, "I would say about four or
24 five hours"?

25 A I was just giving an estimate.

1 Q Would you agree that is an accurate estimate?

2 A No.

3 Q You lied about him drinking for four to five
4 hours?

5 THE COURT: Now, an accurate estimate, aren't
6 those sort of --

7 MR. BROWN: Actually, Your Honor, if I can
8 just get him --

9 THE COURT: You mean a good faith estimate,
10 is what you meant?

11 MR. BROWN: Sure.

12 BY MR. BROWN:

13 Q Is that a good faith estimate?

14 A No.

15 MR. BROWN: May I impeach him with his
16 testimony?

17 THE COURT: What page are you on?

18 MR. BROWN: Page 13, lines 5 through 10.

19 Q When you were asked this question back in
20 July at this deposition, Mr. Gadson, did you say in
21 response to the question, "So, he dranked? No."
22 When asked, "How long did Marion sit out there with
23 you all and drink," did you say, "I would say about
24 four or five hours tops, something like that"?

25 THE WITNESS: Yes, something like that, just

1 estimate.

2 THE COURT: "He dranked for four or five
3 hours, tops?" What did you answer? Did you
4 answer, "Off and on"?

5 THE WITNESS: Yes.

6 THE COURT: All right. He admits he said he
7 drank for four or five hours, tops?

8 THE WITNESS: Yes.

9 THE COURT: What do you mean by that, what
10 does that answer mean when you said that?

11 THE WITNESS: Like off and on, not just
12 sitting constantly drinking but every now and then
13 he would come back, drink, leave, come back, drink.
14 Everybody was doing that.

15 BY MR. BROWN:

16 Q And when I asked you about him using drugs
17 you said no, didn't you?

18 A Yes.

19 Q And you said all he would do is drink?

20 A Yes.

21 Q And I said, "All he does is drink, like
22 regularly?" And your response was?

23 A Yes.

24 Q "Beer?" "Beer, yes. Every day he get a
25 beer." And I said, "Every day?" And you said

1 every day, didn't you?

2 A Yes.

3 Q "That's what he used to drink, 800 Old
4 English"? "Yes, a big bottle." I asked, "Is it
5 his normal habit for him to drink Old English 800
6 every day?"

7 A Yes.

8 Q "And when would he start drinking, Tawain"?

9 A I used to see him early in the morning with
10 one.

11 Q "Early in the morning and would he drink all
12 day?"

13 A I wouldn't be with him all day.

14 Q "Did he drink every day?"

15 A Every day I used to see him with one.

16 Q Every day, and I said, "Every day all day?"
17 And you said every day, didn't you?

18 A Yes. I see him every day.

19 Q And that day, because I guess it was a
20 birthday, you all were also drinking liquor,
21 weren't you?

22 A Beer, too.

23 Q And liquor?

24 A Yes.

25 Q Yes. And did Marion drink some of that

1 liquor?

2 A Might have drunk a little bit of it, he
3 didn't drink much.

4 Q I think I asked you was he drinking and you
5 said yes. And I said, and you said everybody,
6 unsolicited, "Everybody was drinking liquor that
7 day." And I said, "Did he drink liquor?" And you
8 said yes, didn't you?

9 A I said a little bit.

10 Q Okay.

11 MR. WATERS: Your Honor, if he wants to show
12 him the testimony and ask him questions and refresh
13 his recollection, but he is just reading answers
14 into the record.

15 THE COURT: I know. He has already answered
16 this, I've read it.

17 MR. BROWN: Okay. Well, but I need it in the
18 record, Your Honor.

19 THE COURT: I know, but he has already
20 answered it four or five times.

21 MR. BROWN: I want to make sure. That was
22 beer, now he also drank liquor that day.

23 THE COURT: All right, what is your next
24 question.

25 BY MR. BROWN:

1 Q And you said you would characterize him as
2 tipsy, wouldn't you?

3 A Yes.

4 Q So, he was tipsy that day?

5 A Yes.

6 Q And I asked you if you dranked alcohol that
7 day, so could you feel the effect of that alcohol?

8 THE COURT: Why don't ask you him now, go
9 ahead and ask him did he drink and see if he agrees
10 or disagrees.

11 Q Did you drink that day to feel the effects of
12 alcohol?

13 A Yes. I told you everone was drinking.

14 Q Okay. And did Marion drink so he could feel
15 the effects of the alcohol.

16 THE COURT: You mean did he drink? The
17 question is did he drink, which you have already
18 asked him.

19 MR. BROWN: No, I'm asking him whether he was
20 drunk to the point, did he drink alcohol to the
21 point that he felt the effects.

22 THE COURT: Wait one second. How does he
23 know what Mr. Bowman felt? You mean what he could
24 observe, is what you mean?

25 MR. BROWN: Yes, sir.

1 THE COURT: You have to ask Mr. Bowman.

2 MR. BROWN: Well, the prior testimony --

3 MR. WATERS: It is in discovery deposition
4 where all objections are reserved.

5 THE COURT: I'm not going to let the witness
6 testify what Mr. Bowman did or didn't feel. If
7 it's in the deposition it's in the deposition.
8 This is the trial. You can ask him what he
9 observed, if Mr. Bowman was tipsy, drunk or
10 whatever.

11 BY MR. BROWN:

12 Q You thought he was tipsy?

13 A Yes.

14 Q Meaning that there was some effect from the
15 alcohol?

16 A Yes.

17 Q You thought he was affected by the alcohol?

18 A I guess.

19 Q Alcohol influenced him to the point where you
20 saw it?

21 A Yes.

22 Q Okay. And if you were questioned about that
23 back in May of 2002 at the trial would you have
24 testified the same way?

25 A Yes.

1 Q Now, you've got a memory problem, don't you?
2 Tawain, you've got a memory problem, don't you? Do
3 you remember being evaluated?

4 A Yes.

5 Q In Columbia?

6 A Yes.

7 Q Did they tell you you have a memory, verbal
8 memory disorder?

9 A No.

10 Q You don't recall them saying that?

11 A No.

12 Q Impairment of verbal memory?

13 A No.

14 Q Did you ever review -- I apologize. I'll go
15 ahead and mark this.

16 (Mental evaluation marked as Plaintiff's
17 Exhibit Number 8).

18 BY MR. BROWN:

19 Q I will show you Plaintiff's Exhibit 8. Do
20 you recall going to Columbia August 20, 2001?

21 A Yes, sir.

22 Q And did you speak with a doctor there?

23 A Yes.

24 Q Was your attorney there?

25 A No.

1 Q Was there anyone else there besides this one
2 doctor?

3 A Just him.

4 Q I'm sorry, just him?

5 A Yes.

6 Q Did you ever meet with a psychologist?

7 A No.

8 Q They never performed any testing on you?

9 A No.

10 Q Never did?

11 A No, not I know of.

12 Q Not that you remember? And did they ever ask
13 you about what happened on February 16th and
14 February 17th?

15 A Not that I remember, that I can recall.

16 Q They never asked you about why you were
17 charged?

18 A No.

19 Q They never --

20 A This was for evaluation.

21 Q As part of that evaluation they asked you why
22 you were charged?

23 A No.

24 Q Did they ask you about your warrants?

25 A No.

1 Q Because at that time you were still charged
2 with murder, weren't you?

3 A Yes.

4 Q And they didn't ever once ask you about the
5 murder?

6 A No.

7 Q And they never asked you to give your version
8 of the events?

9 A No.

10 Q They never asked you to give a recollection
11 of the alleged offense?

12 A No.

13 Q Do you recall speaking to them about your
14 blackouts?

15 A Yes. I have seizures.

16 Q You told them sometimes you would just,
17 quote, just black out. Does that sound right?

18 A Yes, sometimes.

19 Q Okay. Did you also tell them about your use
20 of marijuana?

21 A Yes.

22 Q Did you tell them that you used to smoke six
23 Blunts of marijuana a day on a daily basis?

24 A Yes.

25 Q And is that true?

1 A Yes.

2 Q Was that true up until the time of your
3 incarceration?

4 A Yes, it still was.

5 Q And did you tell them that you heard voices?

6 A No.

7 Q You never told them that you heard a voice?

8 A No.

9 Q I would ask you what that voice told you but
10 you didn't hear it?

11 A I wish I would have known.

12 Q Did you tell them that you heard beeping
13 noises?

14 A No.

15 Q You never told them that?

16 A No. I ain't no psycho or nothing.

17 Q Now, who's Margaret Hawkins?

18 A I don't know.

19 Q You don't know who that is?

20 A No.

21 Q And Tiara Coleman?

22 A I don't know.

23 Q Does Margaret Hawkins live in the apartments
24 at Branchville? Let's make sure I understand this.
25 The apartments in Branchville, are they also known

1 as projects?

2 A Yes.

3 Q And they are also known as the Villas?

4 A Yes.

5 Q It is all the same place?

6 A Yes..

7 Q Okay. Did you know Tweety?

8 A Yes.

9 Q And could that be Tiara Coleman?

10 A I never knew her real name.

11 Q Did Meeka live in the apartments?

12 A Yes.

13 Q Does Tweety live in the apartments?

14 A No.

15 Q Does Tweety hang out at the apartments?

16 A Used to hang out.

17 Q Tell me about shooting a High Point .380 in
18 those apartments back in February, 2001.

19 A Shooting a .380?

20 Q Yes.

21 A What about it?

22 Q First of all you owned a High Point .380,
23 didn't you?

24 A I did at one time, yes.

25 Q You testified about a High Point .380 that

1 was introduced in evidence at trial, didn't you?

2 A Yes.

3 Q They asked you to take a look at that gun?

4 A Yes.

5 Q That gun looked like your gun, didn't it?

6 A Yes. It looks like a bunch of them but yes.

7 Q Okay. Didn't you shoot a High Point .380 at
8 the Villas Apartment project in Branchville
9 February of 2001?

10 MR. WATERS: Your Honor, I object to the
11 relevance.

12 MR. BROWN: I will tell you exactly, because
13 those casings are linked to him shooting that gun
14 at those projects before Kandee Martin was killed
15 and are linked to the case.

16 THE COURT: In trial?

17 MR. BROWN: It was brought out at the trial
18 by the Solicitor's expert.

19 THE WITNESS: If I did shoot it why would I
20 hide the gun?

21 THE COURT: Ask the question.

22 BY MR. BROWN:

23 Q Did you shoot a High Point .380 at the Villas
24 projects in February, 2001?

25 A Yes, I did. That is way before the murder

1 even happened, weeks before.

2 Q Weeks before the murder you shot a High Point
3 .380?

4 A Yes.

5 Q High Point .380?

6 A Yes.

7 Q At the projects?

8 A Yes.

9 Q In Branchville?

10 A Yes.

11 Q Now let's talk about your plea agreement
12 again for a second. You pled guilty to accessory
13 after the fact of murder?

14 A Yes.

15 Q And you went into court after Marion Bowman's
16 trial?

17 A I don't remember before.

18 Q When did you enter your guilty plea?

19 A Before trial.

20 Q And when did you go to sentencing?

21 A I don't know exactly.

22 Q Were you sentenced the same day you pled
23 guilty?

24 A Yes. I was still in the county. I hadn't
25 been sent up the road, I was still in the county.

1 (Sentencing sheets marked as Plaintiff's
2 Exhibit Numbers 9 and 10).

3 BY MR. BROWN:

4 Q I'm going to show you what has been marked
5 Plaintiff's Exhibit 9 and what has been marked
6 Plaintiff's Exhibit 10. And on the front of that
7 sheet, Plaintiff's Exhibit 9, it is two pages, two
8 different sentencing sheets, isn't it.

9 A 6/19.

10 Q Both of them marked 6/19/02, aren't they?

11 A Yes.

12 Q I want to make sure I understand this. This
13 is the day you were sentenced. You know,
14 Plaintiff's Exhibit 9 are two different sentencing
15 sheets, aren't they?

16 A Yes.

17 Q And one is for accessory after the fact of
18 murder?

19 A Both of them are accessory after the fact of
20 murder.

21 Q Exhibit 9 --

22 A Yes.

23 Q -- is two sentencing sheets stapled together?

24 A One for accessory after the fact and one
25 misprison of a felony.

1 Q Okay. Both of those are dated the 19th,
2 aren't they?

3 A Yes, '02.

4 Q Okay. And that was the day you were
5 sentenced, wasn't it?

6 A Yes.

7 Q All right. Is that the same day you pled
8 guilty?

9 A Yes.

10 Q And, so, if you pled guilty and were
11 sentenced in June of '02 and Mr. Bowman's trial was
12 in May of '02 you didn't plead guilty until after
13 the trial, did you?

14 A I pleaded before the trial.

15 Q Did you plead the same day you were
16 sentenced?

17 A No, I pleaded before the trial, I didn't
18 plead after the trial.

19 Q Let me make sure you understand the question.
20 Did you plead guilty the same day you were
21 sentenced?

22 A Yes, the same day I was sentenced.

23 Q Okay. Is that sentencing sheet accurate?

24 A I don't get that. I pleaded guilty before
25 the trial.

1 Q You entered a plea agreement before the
2 trial, didn't you?

3 A Yes.

4 Q But you didn't go in front of a judge and
5 say, "I'm guilty," did you?

6 A No, not right away.

7 Q That was after the trial, wasn't it?

8 A Yes.

9 Q Okay. And then you got a second set of
10 sentencing sheets marked as Number 20, I mean
11 Number 10, on June 20?

12 A Yes.

13 Q And first of all, I don't know the answer to
14 this, what happened, why did you go back the next
15 day?

16 A I don't know, you got to ask the judge. The
17 judge brought me back over.

18 Q The judge brought you back?

19 A Yes.

20 Q And what did they do?

21 A Said something about five years, something
22 about the five years about to run out since I been
23 sitting in the county almost a year and a half or
24 something.

25 Q Because you had been sitting in the county so

1 long, they switched your sentences or something?

2 A I don't know what happened, you got to ask
3 the judge that one. He the one brought me back
4 over there, it was his call on that.

5 Q You did go back?

6 A Yes, I went back. I was still in the county,
7 I didn't have no choice but to go back.

8 Q Now, what did the prosecutor say when you
9 were sentenced, about your testimony?

10 A What do you mean, what he said?

11 Q What did he tell the judge about your
12 testimony?

13 A I don't know what he told the judge.

14 Q You weren't there?

15 A No.

16 Q He didn't say anything to the judge when you
17 were sentenced?

18 A No.

19 Q He didn't tell him you cooperated?

20 A Not that I remember.

21 Q Did he tell the judge that you left out
22 important facts in your testimony at trial?

23 A I can't remember.

24 Q Did he ask the judge to judicially determine
25 whether you had breached your plea agreement?

1 A I don't remember.

2 Q Did he honor your plea agreement?

3 A I don't remember.

4 Q Did you get the plea agreement that you
5 bargained for?

6 A I don't remember.

7 Q Did he tell you you were going to face the
8 death penalty?

9 A I don't remember.

10 Q You don't remember that?

11 A No.

12 Q Now, your plea agreement again told you you
13 faced the death penalty, right?

14 A That is what they got in the paper, the
15 paperwork.

16 Q You signed it, right?

17 A Yes.

18 Q And tell me about being debriefed by
19 Solicitor Bailey. What did he tell you?

20 A What do you mean, what he told me?

21 Q What did you tell him, what did he ask you on
22 May 13th when you signed that plea? It has your
23 signature, your lawyer's signature and Solicitor
24 Bailey's signature. First of all did you write a
25 statement that day?

1 A No.

2 Q Did he write notes?

3 A Did he write notes?

4 Q Did he write down what you said?

5 A He got a pad and pencil.

6 Q He did?

7 A He wrote something down, I don't remember.

8 Q What did you tell him that day about whether

9 or not you knew there was going to be a killing?

10 A I never mentioned it.

11 Q You never mentioned it one way or the

12 another?

13 A No.

14 Q And what did you tell him about Marion Bowman

15 threatening to blow your brains out?

16 A I told him at trial -- I never told him.

17 Q You didn't tell him that day that either?

18 A Not that I can remember.

19 Q Now, what did you tell the judge you did when

20 you pled guilty? That you put her body in a car?

21 A No. I wasn't there.

22 Q Did you burn the car?

23 A No.

24 Q Did you drive the car away from the scene of

25 the murder?

1 A No.

2 Q Did you plant the gun in any apartment or any
3 river?

4 A No.

5 Q Did you cover up the shell casings?

6 A No.

7 Q What did you do to be guilty of anything?

8 A Nothing, just being there.

9 Q Just being there? Did your lawyer tell you
10 just being there is not a crime?

11 A No.

12 Q Did he tell you that the law says being
13 present at the scene of the crime is not a crime?

14 A No.

15 Q You didn't do anything?

16 A No.

17 Q And why did you plead to accessory to the
18 murder, to aiding him?

19 A Because they said the hand of one is the hand
20 of all and they say if I plead guilty to accessory
21 after the fact, misprison of a felony, I wouldn't
22 get life in prison.

23 Q And what did the Solicitor tell you about
24 what sentence you would get?

25 A I just told you.

1 Q And do you recall testifying in deposition
2 about that? I asked you what did the Solicitor
3 tell you and you said, "He told me if I pled guilty
4 and testified against Marion Bowman," that they
5 would give you fifteen years and five years?

6 A Yes.

7 Q And you agreed?

8 A Yes.

9 Q And I asked you, "What did he say you would
10 have to do? Did you have to testify against
11 Marion?" And you said yes. And I asked you, "What
12 did he tell you about testifying truthfully?" And
13 didn't you answer --

14 THE COURT: Why don't you ask him these
15 questions here today?

16 Q What did Solicitor Bailey tell you about
17 testifying truthfully?

18 A I don't remember.

19 Q Did you not say in the deposition, "He didn't
20 say nothing about truthful, he just told me about
21 the sentence." And I said, "So, he didn't say he
22 wanted you to testify truthfully, he said you just
23 had to testify against Marion?" Is that true?

24 A He told me to testify, he said he would give
25 me fifteen years for accessory after the fact, five

1 years for misprisonment.

2 Q If you testified against Marion?

3 A The hand of one was the hand of all.

4 Q And, so, just for being there they were going
5 to kill you?

6 A Give me life.

7 Q But if you testified against Marion they
8 would give you twenty?

9 A Yes.

10 Q And he didn't mention testifying truthfully,
11 did he?

12 A No.

13 Q Let me hear that again.

14 A No.

15 Q Let me ask you about the statement you gave
16 to the police at the time you were polygraphed.
17 Did they tape record those statements?

18 A Yes.

19 Q You're sure they did?

20 A They had one in there.

21 Q Was it going?

22 A I'm not sure.

23 Q Did you see them turn it on?

24 A I can't remember, it been so long ago, but he
25 had one, you know.

1 Q And when you say they had it in there, who
2 was it?

3 A I know one detective from Orangeburg, Coker.

4 Q Colter?

5 A Coker, and one detective from Orangeburg.

6 Q Coker had a tape recorder?

7 A One of them had it, I don't know if the
8 detective from Orangeburg or Coker.

9 Q And who questioned you, you said Coker?

10 A Yes.

11 Q All right. And I think you were asked
12 before, I'm going to ask you again, did they record
13 the statements?

14 A No, not that I know of.

15 Q At the deposition when I asked you did they
16 record the statements didn't you say yes?

17 A Yes.

18 Q For the Court's record, I'm referring to page
19 59, line 11 through 12 of the deposition.

20 "Did they record it?" "Yes." "They tape
21 recorded it?" What was your answer then?

22 A I said yes, because they had one in there,
23 I'm not sure if they were recording or not but they
24 had one.

25 Q And I asked you, "Did they tape record the

1 second statement?"

2 Did they?

3 A They had one in there, too, I'm not sure if
4 they had it on or not. I didn't see them press
5 start or nothing.

6 Q And I asked you, "Did the tape cut off in
7 between the statements?"

8 A I told you no.

9 Q And I said, "Did it run the entire time?"

10 THE COURT: Why are we continuing to read the
11 deposition?

12 Q Did it run the entire time?

13 A I don't know. When I got finished I left out
14 of the room.

15 MR. BROWN: Your Honor, if I may impeach him
16 with the deposition?

17 THE COURT: He said it ran the entire time in
18 the deposition, I see that.

19 Q Okay. Including the paragraph, polygraph, I
20 mean?

21 MR. WATERS: Your Honor, I think he needs to
22 be shown the testimony. He is just asking him --

23 THE COURT: Give him that.

24 MR. WATERS: I think he deserves a chance to
25 look at it.

1 THE COURT: Do you see what we're talking
2 about there, Mr. Gadson? It says A where you
3 answered, Q is where he asked questions.

4 THE WITNESS: Yes.

5 THE COURT: What is your question?

6 BY MR. BROWN:

7 Q My question is did they tape record your
8 statement you gave on February 18th, 2001?

9 THE COURT: Is that the one with the
10 polygraph or without?

11 MR. BROWN: All three were that one day,
12 handwritten statement, the polygraph and the typed
13 statement.

14 A Yes.

15 Q So --

16 THE COURT: Wait one second. He's not asking
17 you just to read what is on your deposition. What
18 he is asking you is the question. If you know the
19 answer to the question, fine. If not, you can just
20 let me know you're reading the deposition. He
21 would rather first see if you know the answer to
22 the question.

23 THE WITNESS: Yes.

24 THE COURT: All right, listen to his
25 question.

1 BY MR. BROWN:

2 Q Did they tape record the entire questioning
3 on February 18th, 2001?

4 A I don't know.

5 THE COURT: All right, do you want to read
6 what it says there? What line is it?

7 Q Line 21, I asked you, "It ran the entire
8 time?"

9 A Yes.

10 Q Your answer was yes. And you said that
11 Detective Coker was there, is that right?

12 A Yes.

13 Q And did also an Officer Van Doran come in?

14 A I don't remember.

15 THE COURT: Next question?

16 Q Did Officer Van Doran come in? I'm sorry, I
17 didn't hear the answer.

18 A I don't remember.

19 Q And at the deposition you were asked whether
20 Officer Van Doran came in, page 58, line 23.

21 A I'm trying to look.

22 Q 58, line 23.

23 A He came in afterwards.

24 Q And after you had started talking?

25 A Yes.

1 Q Let me ask you, was he in there when you were
2 talking to the police?

3 A No.

4 Q And when I asked you did he come in before
5 you started talking you said --

6 A He never come in before we started talking.

7 Q Page 59, line 3, "Before you started
8 talking?"

9 A No.

10 Q What was your response?

11 A "Yes, but he never had come in right there."

12 Q And I asked you, "So, it wasn't just Coker,"
13 didn't I?

14 A Yes.

15 Q And it wasn't just Coker in there?

16 A No.

17 Q It wasn't just Coker in there, was it?

18 A It was a detective from Orangeburg.

19 Q And Coker?

20 A No, Coker wasn't in there.

21 Q You just testified earlier just a few minutes
22 ago that it was Coker in there.

23 A It was a detective from Orangeburg.

24 Q And Coker, so there was Coker and another
25 fellow in there?

1 A Yes.

2 Q So, there was more than one officer in there,
3 when the tape recorder was running, that is?

4 A When they had the tape recorder, you know,
5 I'm not sure if it was running or not.

6 Q You said it was running before.

7 A It could have been, it could have been. I
8 know it was one in there, I don't know if he had it
9 on or not. I wasn't paying that much attention to
10 no tape recorder.

11 Q Now, what did you mean when you say they put
12 the body in the trunk of the car?

13 A I wasn't there when they put nobody in the
14 trunk. How I know who put a body in a trunk?

15 Q Would you look at page 72 of your deposition?

16 A Yes.

17 Q And you were asked about Kandee Martin
18 wearing a wire, by the Attorney General?

19 A Yes.

20 Q And he asked you to flesh that out a little
21 bit and what did you say?

22 A Where you at, which number you at?

23 Q It would be line 10, "Can you flesh that out
24 a little bit," and what did you say? Your part
25 starts with the A, for answer. Did you not say,

1 "All I know was when we were driving back they done
2 put the body in the woods."

3 Who is they if you weren't there? Who is
4 they?

5 A The ones you have for accessory after buring
6 the car.

7 Q You were accessory, too?

8 A I didn't burn no car because I wasn't there.

9 Q You were accessory to the whole killing, that
10 is what you told the judge under oath you did?

11 A No, I didn't have nothing to do with no
12 burning of no car.

13 MR. BROWN: Beg the Court's indulgence.

14 MR. BROWN: No further questions at this time
15 until cross-examination.

16 THE COURT: All right. Mr. Waters?

17 MR. WATERS: Thank you, Your Honor.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Mr. Gadson, you were arrested and brought in
4 by the police in this case, right?

5 A Yep.

6 Q And you gave that first statement, correct?

7 A Yes.

8 Q And in that statement you stated that you had
9 seen Kandee and Marion and they were talking about
10 going and pulling a caper, right?

11 A Yes.

12 Q Or pulling a lick, which means what?

13 A Rob a house.

14 Q Rob a house, okay. And you said that you
15 were with them but eventually you left them and
16 that was the last time you saw Kandee that night,
17 correct?

18 A Yes.

19 Q Okay. That is the first statement you gave?

20 A Yes.

21 Q Okay. Then after that you found out that Mr.
22 Bowman was saying you were the one who killed
23 Kandee, is that correct?

24 A Yes.

25 Q Okay. So, what did you decide to do at that

1 point?

2 A Tell the truth.

3 Q All right. And at that point you gave this
4 second statement here, the typewritten one, is that
5 correct?

6 A Yes.

7 Q Okay. And let me look at these documents
8 real quick. You know, this arrest warrant right
9 here that has been marked Plaintiff's Exhibit 4,
10 that one right there, that was the one that they
11 signed against you based on what Marion Bowman had
12 said you did, correct?

13 A Yes.

14 Q It says in there what Marion says, that you
15 were the one who killed Kandee or shot her the
16 first three times, correct?

17 A Uh-huh.

18 Q Okay. All right, then you gave the second
19 statement in here, I'm going to show it to you
20 again. This has been marked as Plaintiff's Exhibit
21 6, right there, and that's the one where you kind
22 of came clean about the whole thing, correct?

23 A Yes.

24 Q Okay. And in there you talk about initially
25 there was some lady named Lilly or Lil who had come

1 up there and Marion said she owed him some money
2 for crack. Right?

3 A Yes.

4 Q And he had the .380 and he was going to go
5 over there and whip her with it, correct?

6 A Yes.

7 Q Okay. And you also talk in there about,
8 about Marion and Kandee again wanting to go pull a
9 caper. Is that correct?

10 A Yes.

11 Q And that meant to rob a house, right?

12 A Yes.

13 Q You also talked about when you all were in
14 there you drove around looking for houses to rob,
15 correct?

16 A Yes, spotted the big house, big brick house.

17 Q All right. Now, you were asked a lot of
18 questions about whether or not Marion Bowman was
19 leaning back and pointing his finger at Kandee's
20 head with a gun motion, correct?

21 A Uh-huh.

22 Q Did that happen?

23 A No. He was like leaning his hand like this,
24 he could have been pointing at a house or anything,
25 he didn't directly point at her head, it may have

1 seemed like that, it wasn't exactly like that.

2 Q You don't know if he was pointing at a house
3 or he was making a gun motion to her head? Is that
4 correct?

5 A Yes.

6 Q Okay. But he did do that?

7 A Yes.

8 Q He did point his finger in the direction of
9 her head, correct?

10 A Yes.

11 Q Okay.

12 MR. WATERS: I'm going to ask the record
13 reflect he was pointing with more than one finger.

14 THE WITNESS: Like this.

15 MR. WATERS: That wasn't the motion before.

16 THE COURT: What did you do, sir?

17 THE WITNESS: I did like this.

18 MR. BROWN: First of all he did this with his
19 hand as opposed to one finger, then he just did one
20 finger.

21 MR. WATERS: Thank you.

22 BY MR. WATERS:

23 Q You also put in your statement there once you
24 got there Marion Bowman gave Kandee a hit of crack,
25 is that right?

1 A Yes.

2 Q You and Marion kind of went walking off and
3 Kandee was in the car smoking the crack, correct?

4 A He didn't walk off, I did.

5 Q You walked off, they were back at the car, is
6 that correct?

7 A Yes, sir.

8 Q Okay. So, there was a period of time when
9 they were alone, that you didn't see them, correct?

10 A Yes, but it wasn't that long.

11 Q Wasn't that long, but he was at the time
12 giving her crack cocaine to smoke, is that correct?

13 A Uh-huh.

14 Q All right. You were asked a few questions
15 about this series of letters here marked
16 Plaintiff's Exhibit 2?

17 A Yes.

18 Q Do you recall those?

19 A Yes.

20 Q Other than your signature at the bottom, did
21 you write those?

22 A No.

23 Q So, you went to some jailhouse lawyer in
24 Dorchester County to get to help you, correct?

25 A The dude nextdoor.

1 Q He wrote them up for you?

2 A Yes. All I had to do was sign them.

3 Q You told him what you had been charged with,
4 what you knew and he wrote those things up, right?

5 A Yes.

6 Q You signed them at the bottom?

7 A Yes.

8 Q So, you never actually drafted those,
9 correct?

10 A No. I didn't know nothing about law.

11 Q What was that?

12 A I don't know nothing about the law, then I
13 didn't.

14 Q Were you ever served with a document called a
15 notice of intent to seek the death penalty?

16 MR. BROWN: We concede there is not one in
17 the file, Your Honor.

18 Q That wasn't my question. Were you served
19 with a document?

20 A No.

21 MR. BROWN: Your Honor, we would ask the
22 Court be aware neither the prosecutor's office nor
23 the Clerk of Court can locate his indictment.

24 THE COURT: All right, let's proceed.

25 MR. BROWN: There is no copy except the one

1 that we have entered today, the only true copy of
2 that indictment for murder.

3 THE COURT: All right.

4 BY MR. WATERS:

5 Q Mr. Dukes was your attorney, correct?

6 A Yes.

7 Q Not Marva Hardee-Thomas?

8 A No.

9 Q You never talked to Marva Hardee-Thomas about
10 your case?

11 A Never a day in my life.

12 Q You never talked to her?

13 A No.

14 Q You only talked to Mr. Dukes?

15 A Yes.

16 Q Did Mr. Dukes say he talked to Marva
17 Hardee-Thomas and, "She told me to do something"?

18 A No.

19 Q Mr. Dukes told you you could potentially be
20 on the hook for murder because the hand of one was
21 the hand of all, is that right?

22 A That's exactly what he said.

23 Q All right. Now, you were shown this plea
24 agreement right here, Plaintiff's Exhibit 3. Let
25 me show that to you again. Again, you had Mr.

1 Dukes as your lawyer, right?

2 A Yes.

3 Q You just said you don't know much about law,
4 right?

5 A No.

6 Q You're not a lawyer?

7 A No.

8 Q You relied on Mr. Dukes of course to explain
9 that to you?

10 A Yes.

11 Q You didn't peruse every single word in there
12 looking for words of legal meaning and the like?

13 A No.

14 Q Was your understanding of that plea
15 agreement, just in general, what did you have to do
16 and what was going to happen if you did what you
17 had to do?

18 A I seen a way of seeing freedom one day so I
19 took the fifteen years and the five and I ran with
20 that.

21 Q Okay. And what did you have to do for the
22 State to be willing to give you the fifteen and the
23 five?

24 A I had to plead.

25 Q You had to plead?

1 A I had to testify.

2 Q And you had to testify. How did you have to
3 testify?

4 A Against the murderer.

5 Q Did you have to testify a certain version of
6 facts or did you have to just tell the truth?

7 A I had to tell the truth.

8 MR. BROWN: Your Honor, we would move to
9 strike that, leading.

10 MR. WATERS: I'm on cross-examination.

11 THE COURT: Proceed on.

12 BY MR. WATERS:

13 Q In fact, let's ask a little bit about that.
14 Now, you were asked about your deposition and
15 whether or not the Solicitor told you you had to
16 testify truthfully. Correct?

17 A Yes.

18 Q And what did the Solicitor tell you?

19 A I could get, I could be charged with before
20 the fact or after the fact, before the fact carried
21 life, after the fact carried fifteen, I could get
22 five for misimprisonment.

23 MR. WATERS: The Court's indulgence one
24 second. Let me get my copy of the deposition.

25 Q All right. What did Mr. Dukes tell you about

1 your obligation to testify truthfully?

2 A I can't remember.

3 Q All right. I'm going to show you page 30 of
4 this deposition and ask you to start reading at
5 line 12, down to the end there. Does that refresh
6 your recollection about what Mr. Dukes told you?

7 A Yes. He told me to tell the truth when I get
8 up there.

9 Q Mr. Dukes was clear for you to honor that
10 plea agreement you had to get up and tell the
11 truth, correct?

12 A Yes.

13 Q Okay. He didn't tell you you have to say it
14 a certain way, he said you've got to get up and
15 tell the truth?

16 A Yes.

17 Q Is that correct?

18 A Yes.

19 Q Okay. All right, let's talk about you said
20 you never saw Marion Bowman and Kandee have sex
21 that night. Correct?

22 A No.

23 Q But you were not with Marion Bowman that
24 entire day, were you?

25 A No.

1 Q You saw him a little bit in the morning,
2 correct?

3 A A little bit in the afternoon. When it got
4 dark, that is when I seen them again.

5 Q So, there was a period of time in the morning
6 when you were not with Marion Bowman, correct?

7 A Yes.

8 Q And there was a period of time in the
9 afternoon when you were not with Marion Bowman,
10 correct?

11 A Yes.

12 Q But then they picked you up at that point and
13 that is when all these events took place?

14 A Yes.

15 Q Okay. So, you don't know if they had sex
16 before that or not?

17 A No.

18 Q All right. Let's talk a little bit about the
19 drinking here. Do you remember that deposition we
20 had?

21 THE COURT: The one you have been reading
22 from?

23 Q The one we've been reading from. I will get
24 it, hold on. I'll get to it. Remember you were
25 asked about whether or not Marion Bowman was

1 drinking, intoxicated and you said no. Correct?

2 A Yes.

3 Q You said he was tipsy, which you defined as
4 your lowest level of drinking?

5 A Yes.

6 Q That's just having a couple drinks, right?

7 A Yes.

8 Q Marion Bowman wasn't staggering, was he?

9 A No.

10 Q He wasn't slurring, was he?

11 A No.

12 Q He didn't display any outward signs of being
13 intoxicated, did he?

14 A No

15 MR. BROWN: Your Honor, I had asked whether
16 he was intoxicated as well. These are exactly the
17 same questions.

18 THE COURT: This is the witness. If he is
19 answering different in your view, he's answering
20 different in your view.

21 MR. BROWN: I was not allowed to ask --

22 THE COURT: No, no, I wouldn't let you read
23 that. If you want to come back, come back and ask
24 him questions.

25 MR. BROWN: Sure, no problem.

1 THE COURT: I wouldn't stop you from asking
2 those questions. If I did, we had a
3 miscommunication.

4 MR. BROWN: Thank you.

5 BY MR. WATERS:

6 Q Okay. So, to reiterate, he was not
7 staggering?

8 A No.

9 Q He was not slurring his words?

10 A No.

11 Q He didn't display any outward sign of
12 drinking, correct?

13 A No.

14 Q Okay. And you said that you, you were
15 hanging out at Hank Koger's house most of the day,
16 correct?

17 A Yes, I was.

18 Q And Marion Bowman was coming and going?

19 A Yes, he was.

20 Q You were drinking pretty steady but Marion
21 Bowman wasn't there all the time, isn't that right?

22 A Yes.

23 Q Okay. All right. And didn't you say when
24 you were defining tipsy, if you're tipsy you
25 wouldn't be worried about being pulled over by the

1 police, correct?

2 A Correct.

3 Q In your view if you're drunk that is when
4 you're worried about being pulled over by the
5 police, but not just when you're tipsy, correct?

6 A Yep.

7 Q When you said Marion Bowman was tipsy that's
8 all you meant, correct?

9 A Yes.

10 Q Now, when they asked you in the deposition,
11 and as Mr. Brown has asked you recently, you said,
12 when they asked you if Marion Bowman drank or if he
13 did drink you said all he did was drink. You don't
14 mean he just drinks all the time, you just meant he
15 doesn't do drugs, the only way he gets high is by
16 drinking. Correct?

17 A Yes.

18 Q Marion Bowman wasn't a total drunk, just all
19 the time drunk laying in the street, right?

20 A No.

21 Q He wasn't like that?

22 A No.

23 Q He might get him a beer every day but he was
24 not off his rocker all the time?

25 A No.

- 1 Q You didn't mean he was drunk all the time?
- 2 A No, not no stone cold drunk.
- 3 Q Okay. All right. Just a couple little
- 4 questions here. When you refer to Black, that's
- 5 Marion Bowman's street name, right?
- 6 A Yes.
- 7 Q You are Gap, correct?
- 8 A Yes.
- 9 Q Did Hiram Johnson have a street name?
- 10 A No.
- 11 Q They just knew him as Hiram?
- 12 A Yes.
- 13 Q You were asked a little bit about firing a
- 14 High Point .380, and you had a High Point .380,
- 15 right?
- 16 A Yes, I did.
- 17 Q You bought that legally in a pawn shop,
- 18 correct?
- 19 A Willie's Pawn Shop.
- 20 Q What happened to that gun?
- 21 A It got stole.
- 22 Q Whenabouts did it get stolen?
- 23 A It was out of my sister's Escort, she had a
- 24 '97 Escort.
- 25 Q I'm sorry?

1 A She had a '97 Escort, it was stolen out of
2 that.

3 Q When did it get stolen?

4 A That was way before the accident happened,
5 that was back in 2000 my gun come up missing.

6 Q It was 2000 it got stolen?

7 A Yes.

8 Q Did you report it stolen?

9 A Yes. I went to the pawn shop. They told me
10 I should have went to the police.

11 Q You didn't go to the police, you went to the
12 pawn shop?

13 A Went to the pawn shop.

14 Q Which .380 were you firing at the Villas that
15 they were asking about?

16 A The one Marion bought from the dude in
17 Orangeburg.

18 Q That was Marion's gun?

19 A Uh-huh.

20 Q He let you borrow it?

21 A It was a dude standing in front of the
22 apartments talking as if he had a knife, he handed
23 me the gun, I started shooting it.

24 Q Marion Bowman was there?

25 A Yes, he was there.

1 Q At the time that happened your High Point was
2 long gone?

3 A Yes.

4 Q The only silver and black High Point around
5 you knew of was the gun Marion Bowman had?

6 A Yes.

7 Q You were asked a lot of questions about
8 whether or not they were tape recording your
9 statements.

10 A Yes.

11 Q And just so I understand, you are saying that
12 they did have a tape recorder in there?

13 A Yes.

14 Q But you just don't know whether or not it was
15 running?

16 A Yes. Whether it was on, off, what, I wasn't
17 paying attention to it.

18 Q Did they reach over and press start or stop?

19 A I couldn't really tell because I know one
20 officer was on this side, one was on this side but
21 I mainly had my eyes focused on the one from
22 Orangeburg. I can't remember his name, he's a tall
23 dude, tall blonde headed dude, he was a detective,
24 he was talking to me at the same time because he
25 kept saying Marion had outstanding warrants from

1 Orangeburg County, he had a warrant, he was already
2 looking for him.

3 Q You say it was a tall guy, blonde hair?

4 A Yes. I can't remember his name. I knew he
5 worked for Orangeburg County.

6 Q All right. You were asked about a guy named
7 Ricky Davis?

8 A Yes.

9 Q Do you know anybody named Ricky Davis?

10 A No, I ain't never knew him until today they
11 put me in the holding cell with him.

12 Q That's when you figured out that was the guy
13 named Crab, correct?

14 A Yes.

15 Q Do you know Crab?

16 A Yes.

17 Q Did you know Crab back in 2001 when this
18 crime happened, when you first went to jail?

19 A I never talked to him but he had a home boy
20 right here from Summerville when he first come
21 here, they told me never mess with him because he
22 wasn't nothing but a Crab, that is what I got that
23 name from, he was getting people cases and trying
24 to flip it on them, but me and him bump heads in
25 the holding cell and he said Marion --

1 MR. BROWN: Objection, hearsay.

2 THE COURT: What is the purpose of your
3 asking this question?

4 MR. WATERS: Your Honor, there is an
5 allegation, there is a piece of paper --

6 THE WITNESS: He had a written paper.

7 THE COURT: Hold on.

8 MR. WATERS: There is a piece of paper that
9 Ricky Davis wrote in which he says that, "James
10 Tawain Gadson told me that he shot Kandee and the
11 police told him to just say that Black," which is
12 Marion Bowman, "did it because his family had a
13 grudge." Now, Mr. Davis says that he and Bowman
14 were on the same block and Bowman asked him to
15 write that and that he doesn't know anything about
16 the case, and I'm asking Mr. Gadson if he ever said
17 that to this man.

18 THE WITNESS: He told me that back there,
19 too.

20 MR. BROWN: I don't understand what asking
21 him about hearsay has got to do with anybody.
22 Davis is here.

23 THE COURT: Well, do you want Mr. Gadson to
24 testify whether Mr. Davis ever told him Mr. Bowman
25 told him to do this?

1 MR. WATERS: No, sir. I was asking him,
2 number one, if he knew Ricky Davis. Number two,
3 how did he know Ricky Davis and if he ever said
4 that to Ricky Davis.

5 THE COURT: Said what to Mr. Davis?

6 MR. WATERS: That he shot Kandee Martin.

7 MR. BROWN: Already asked.

8 THE COURT: Is your question did Mr. Davis
9 ever tell Mr. Gadson that Mr. Davis, is your
10 question Mr. Gadson ever told Mr. Davis --

11 MR. WATERS: My question is did Mr. Gadson
12 ever tell Mr. Davis that he shot Kandee?

13 THE COURT: You can ask that question.

14 MR. WATERS: I was trying to get whether or
15 not he even knew this man and how he knew him. Mr.
16 Gadson started talking about some other things but
17 that was my question.

18 THE COURT: Yes.

19 BY MR. WATERS:

20 Q When did you come to know him? In Leiber, is
21 that correct?

22 A No, in the county jail.

23 Q In the county jail?

24 A Yes.

25 Q Did you ever tell him you shot Kandee Martin?

1 A No, I never discussed my case with anyone in
2 the county jail, even in prison.

3 Q Okay. Did you ever tell him that the police
4 told you to just say that Black did it?

5 A No.

6 Q Did you ever tell him that because Black's
7 family had been caught with a gun, that that is
8 what you should say?

9 A No.

10 Q Have you ever had a conversation with Ricky
11 Davis?

12 A No.

13 Q Did you have one today with him in lockup?

14 A Yes, right back there in the holding cell.
15 If I would commit a crime why would I give my gun
16 to his family for them to go hide? I got family of
17 my own.

18 MR. BROWN: Move to strike, Your Honor,
19 unresponsive.

20 THE COURT: Noted. I'll let it stand.

21 Mr. Brown?

22 MR. BROWN: I'm sorry.

23 MR. WATERS: The Court indulge us one moment,
24 please.

25 MR. BROWN: I'm sorry, Your Honor.

1 THE COURT: Any other questions?

2 MR. WATERS: The Court's indulgence.

3 MR. WATERS: Your Honor, I have nothing
4 further at this time. Again, we don't release
5 anyone from their subpoena at this point.

6 THE COURT: All right.

7 MR. BROWN: May it please the Court.

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q Did you not tell the police that you had
4 reported this gun stolen to the pawn shop?5 A I reported it to the pawn shop, I never went
6 to the police.

7 Q Did you tell the police that?

8 A No.

9 Q You didn't ever talk to the police about the
10 gun being stolen?

11 A No.

12 Q And if you would refer to page 56 of the
13 deposition, Mr. Gadson, line 10.

14 A Yes, I've got it right here.

15 Q "You told the police that day that the gun
16 had been stolen, you reported it to the pawn shop."
17 What was your answer?18 A Yes, I reported it to the pawn shop. I
19 talked to the police when he questioned me, asked
20 me about the gun.21 THE COURT: Did you want to read what the
22 answer says?

23 Q The answer says yes, doesn't it?

24 A Yes, I reported it to the pawn shop. That is
25 what it says, reported it to the pawn shop, yes.

1 Q It doesn't say that, does it? It says, "Did
2 you tell the police that day that the gun had been
3 stolen and you reported it to the pawn shop?"

4 A Yes, that is what I did.

5 Q You told the police that you had reported it
6 to the pawn shop?

7 A Yes. I never reported it to --

8 Q At some point in time before Mr. Bowman's
9 trial you told the police about the alleged theft
10 of your .380?

11 A No, that was way before the trial.

12 Q Sometime before his trial you told them that,
13 didn't you?

14 A No, no.

15 Q I'm confused, Mr. Gadson. Explain how you
16 said at your deposition that yes, you had told the
17 police about reporting the gun stolen.

18 A That is during my questioning after I done
19 failed the polygraph, when I talked to the police
20 about the gun being stolen, I never mentioned about
21 it before no trial.

22 Q Did you mention it --

23 A You got things twisted.

24 Q When did you mention that, I'm sorry, I
25 didn't hear you?

1 A When I got questioned about the polygraph
2 test, that is when I was telling the police about
3 my gun being stolen.

4 Q Is that in your statement?

5 A No. I ain't never put it in there.

6 Q Wait a second, now. You gave a statement
7 right here after your polygraph. Isn't that right?

8 A Yes.

9 Q I want to make sure I understand this. Did
10 you put the truth in that statement?

11 A No.

12 Q No? You lied in that statement, too?

13 A I didn't have to put everything in there to
14 tell the truth when I get up on the stand.

15 Q You didn't think it was important to put in
16 there you had a High Point.380 but it had been
17 stolen?

18 A No.

19 Q I'm sorry?

20 A No.

21 Q You didn't find that to be important but you
22 told them that?

23 A But I told them, yes.

24 Q Okay. And who decided what was important to
25 put in here?

- 1 A The police, they the one typed that.
- 2 Q They're the ones that typed it?
- 3 A Yes.
- 4 Q You told them some things but they didn't put
5 everything in that statement?
- 6 A No.
- 7 Q They just put some things?
- 8 A Yes.
- 9 Q But the tape recorder would have it all on
10 there, wouldn't it?
- 11 A Yes, if it would have been recorded, yes, it
12 would.
- 13 Q Now, let's make sure we understand about Mr.
14 Bowman drinking. Was he in a habit of drinking all
15 the time?
- 16 A Like I said, when I see him every day he have
17 beer in his hand, he be drinking.
- 18 Q Every day he had a beer in his hand, he was
19 drinking?
- 20 A Every day I seen him he got one.
- 21 Q Is that just the one moment you saw him or
22 every time you saw him he had a beer in his hand?
- 23 A Every few times I seen him. I ain't seen him
24 all those times.
- 25 Q Is he your first cousin?

1 A Yes.

2 Q Does he live in Branchville?

3 A Yes.

4 Q You live in Branchville?

5 A Yes, I do.

6 Q How big a town is Branchville?

7 A A small town but I had a car during that

8 time.

9 Q Every time you saw him he had a beer in his

10 hand?

11 A Yes.

12 Q That day he also had some liquor, too, didn't

13 he?

14 A Yes.

15 Q He had a beer and liquor every time you saw

16 him?

17 A Not every time he didn't have no liquor but

18 he had a beer.

19 Q That day he had the liquor and the beer all

20 the time?

21 A No, not all the time, not the liquor.

22 Q He had the beer all the time?

23 A And had some liquor to top it off.

24 Q And he was drinking and was tipsy?

25 A Yes, I call it tipsy.

1 Q You call it tipsy?

2 A Yes.

3 Q Okay. And that doesn't mean sober, does it?

4 A No.

5 Q Let me ask you about the polygraph that they
6 gave you after you signed your plea agreement.

7 A They ain't never given a polygraph.

8 Q They required in that plea agreement you had
9 to take and pass a polygraph?

10 A No.

11 Q They didn't?

12 A No. I ain't took a polygraph but one time.

13 Q And you served less than five years in jail,
14 didn't you?

15 A Something like that.

16 Q You went in, you got credit back to February,
17 2001, didn't you?

18 MR. WATERS: Your Honor, this is beyond the
19 scope of redirect.

20 THE COURT: Continue on.

21 A I believe they give me credit for that, yes

22 Q Then you were released on July 7th, 2005,
23 weren't you?

24 A Yes, on parole.

25 Q That is not even four and a half years, is

1 it?

2 A Something like that.

3 Q But you don't know why you went back and got
4 that re-sentencing, do you?

5 A No. You got to ask the judge that.

6 Q They never took you in and talked about you
7 omitting facts from your testimony in violation of
8 your plea agreement.

9 A No.

10 Q Mr. Dukes as a good lawyer went through all
11 this, didn't he, he went through your plea
12 agreement? Mr. Waters asked you about him going
13 through this plea agreement?

14 A Yes.

15 Q He went through it?

16 A Yes.

17 Q And you didn't call him a drunk?

18 A No.

19 Q No, you never called him that, you didn't
20 call him a drunk in these statements?

21 A The man that wrote that put that in there, he
22 knew Gene Dukes more than I did, I never knew the
23 man.

24 Q You didn't say in your deposition you had to
25 be your own lawyer because he was a drunk?

1 A I let the man do it.

2 Q I'm asking you whether you let Mr. Dukes do
3 your lawyering or you had to do it on your own?

4 A I mainly did most of it on my own, get help
5 to do it on my own.

6 Q Did he go over the plea agreement with you?

7 A Afterwards.

8 Q After you signed it?

9 A After he brought my indictment papers.

10 Q Where it says you were charged with shooting
11 her, didn't it -- let me make sure I understand
12 that. He went over that, that is what you just
13 said, this document right here marked as
14 Plaintiff's Exhibit 1 said that you did shoot one
15 Kandee Martin?

16 A Yes.

17 Q And he went over that, didn't he?

18 A No, just handed me a paper.

19 Q You can read?

20 A I can read it myself.

21 Q Okay. So you read it?

22 A Yes.

23 Q And you know shooting and killing somebody,
24 you can get the death penalty, don't you?

25 A Not exactly. You can get life.

1 Q What is Marion Bowman facing the death
2 penalty for?

3 A I don't know.

4 Q Did you not sign this agreement that said you
5 faced the death sentence?

6 A Yes.

7 Q Mr. Dukes went over that as a good lawyer?

8 A Yes.

9 Q And doesn't it say that you can either
10 testify truthfully or cooperate. It doesn't have
11 an or in there?

12 A I don't think so.

13 Q It says if you do not testify truthfully, at
14 all times tell the complete and absolute truth or
15 you fail to cooperate?

16 A Uh-huh.

17 Q So, just failing to cooperate, it doesn't say
18 anything about the truthful, does it?

19 A No.

20 Q We talked about that at your deposition,
21 didn't we?

22 A Yes.

23 Q And Solicitor Bailey said you get the
24 sentence to the lesser charges if you testify
25 against Marion, didn't he?

1 A Yes.

2 Q What did you say at the deposition?

3 A Yes.

4 Q Now, right here you said that Marion stayed
5 back at the car. Now let's turn to your trial
6 testimony, page 3998. Do you have a copy of that?

7 THE COURT: He doesn't have it.

8 A No.

9 THE COURT: That's the deposition.

10 Q If you had a copy of that testimony would it
11 refresh your recollection of what it said back
12 then?

13 A No.

14 Q It won't?

15 A Huh-uh.

16 Q You're testifying, page 3998 of the trial
17 testimony, doesn't it say, line 15, you were asked
18 what happened, you said, "We were walking down the
19 road and then she came down the road." Who is the
20 we, Tawain?

21 A Me and Marion.

22 Q Okay. So, Marion is not back at the car, he
23 is walking down the road with you, isn't he?

24 A Yes. During the time Mr. Waters talked about
25 he was at the car, he was giving her the crack, I

1 ain't talking about walking down the road.

2 Q It says, "When you and Marion got out what
3 did you do?" That is on 3997. Line 22 is your
4 answer.

5 A Yes.

6 Q And you said, "We was walking down the road,"
7 didn't you?

8 A Yes.

9 Q And was that a lie?

10 A No. He turned around and went back to the
11 car.

12 Q He went back to the car?

13 A Yes.

14 Q That's the third version I've heard.

15 MR. WATERS: Your Honor, I object to that.

16 THE COURT: Well, let's continue on. What is
17 your --

18 Q The question is, did you lie here today when
19 you said he stayed at the car or did you lie back
20 in the trial when you say you both walked away?

21 A We was both walking, he went back to the car,
22 that is where he give her the crack at.

23 Q Did you lie when you told the Attorney
24 General that he stayed at the car?

25 A No. He had walked, we walked a little piece,

1 about from here to that table, he turned around and
2 went back to the car, that is when he gave her the
3 crack.

4 Q Did you testify to that in this trial?

5 A No.

6 Q Why didn't you testify that he went back?

7 THE COURT: While he's doing that, I just got
8 a message from the Department of Corrections.
9 Because of the situation with gasoline, they are
10 going to have a tough time getting people back if
11 we send them back. Had you all planned to have Mr.
12 Bowman here all week? I assume, right, he's in
13 Dorchester?

14 MR. BROWN: I'm sorry?

15 THE COURT: Is Dorchester housing Mr. Bowman
16 all week?

17 MR. BROWN: He's at Leiber. It is even
18 closer than Dorchester jail.

19 THE COURT: Where is Mr. Gadson.

20 MR. BROWN: I have no idea.

21 THE COURT: We have Davis and Williams.

22 MR. BROWN: I have a feeling he's going to be
23 done today.

24 THE COURT: Hold on a second. Davis and
25 Williams, where are they at?

1 MR. BROWN: Davis is at Leiber.

2 THE COURT: Close by here?

3 MR. BROWN: Very close.

4 THE COURT: Here's the problem when we get
5 the bureaucracy of the State, although Leiber is
6 close, they don't want to bring them back. Is
7 Davis and the other gentleman at the Dorchester
8 County jail now? Where are they? Who can work out
9 seeing that St. George can keep them overnight?
10 See if they would? You know, I'm just concerned
11 about the bureaucracy of them going back to Leiber
12 and Leiber not willing to bring them, although it's
13 not that far. Let me tell you what, let me step
14 off and talk to this individual. You say both Mr.
15 Davis and Mr. Williams are at Leiber.

16 SCDC GUARD: Gadson is at Richland.

17 THE COURT: Who's at Leiber?

18 SCDC GUARD: He's at Leiber.

19 THE COURT: Where is Mr. Williams?

20 DEPUTY SHERIFF: He's nextdoor now.

21 SCDC GUARD: The ones at Leiber, Davis and
22 Mr. Gadson, is the farthest.

23 THE COURT: I'm aware of that. I'm only
24 trying to find out where they are serving their
25 time. Davis is at Leiber, is that correct?

1 SCDC GUARD: Yes.

2 MR. BROWN: Yes, sir.

3 THE COURT: Mr. Bowman is at Leiber?

4 MR. BROWN: Yes, sir.

5 THE COURT: This gentleman is in a prison in
6 Richland County, Columbia?

7 MR. BROWN: Jasper County.

8 THE COURT: Jasper County, Ridgeland? Now,
9 we don't know where Mr. Williams is being housed
10 but isn't someone with SCDC with Mr. Williams?

11 SCDC GUARD: He's in the Columbia area, sir.

12 THE COURT: In the Columbia area? Can you
13 check to see if someone would bring, would hold Mr.
14 Williams and Mr. Davis here? Can you come back and
15 talk to this lady back here for me to make sure,
16 tell her, come in my office back here and let her
17 know that we can always bring him back later on if
18 we need to, you're almost through with him, we need
19 Mr. Williams and Mr. Davis to be close by, if you
20 can work out something with them so we keep
21 Williams and Davis.

22 MR. WATERS: Your Honor, if we're going to
23 keep them, get to them tomorrow, I mean, they are
24 going to have to send a crew back and come and get
25 him anyway. It would be the same amount of trips,

1 wouldn't it?

2 THE COURT: Exactly. You are not familiar
3 with bureaucracy.

4 MR. WATERS: Yes, sir.

5 THE COURT: It would be a lot easier to have
6 them here than to bring them back. It is more
7 facilitory to the finishing and continuing of this
8 trial for them that stay here.

9 MR. WATERS: Yes, sir.

10 THE COURT: I can work a lot better with the
11 Dorchester County Sheriff's Department than I can
12 with the South Carolina Department of Corrections
13 and all their budgetary formalities right now.
14 This woman standing right here can attest to that.

15 MR. BROWN: I know my hotel has continental
16 breakfast every morning.

17 THE COURT: Let's continue with the questions
18 for Mr. Gadson.

19 MR. BROWN: Okay.

20 BY MR. BROWN:

21 Q Now, my question to you, at the trial, if at
22 trial you said that Marion walked away, walked away
23 with you, but now you say that he walked back to
24 give her crack. Why didn't you include that in
25 your testimony at trial?

1 A I don't know.

2 Q Did you omit facts in violation of your plea
3 agreement?

4 A No.

5 Q Did you include the --

6 MR. BROWN: Your Honor, let the record
7 reflect, it stands on his own, there is no
8 testimony about any crack at all from this witness
9 during any testimony in trial.

10 Q So, my question again, why did you leave that
11 out if that's the truth, when your agreement was to
12 avoid murder by telling the truth, why did you
13 leave it out?

14 A Because I'm telling you everything, I told
15 everything when I got on the stand.

16 Q I'm sorry?

17 A I told everything when I got on the stand

18 Q But you didn't talk about the crack, did you?

19 A No.

20 Q Why?

21 A Because I told everything when I got on the
22 stand. Why I have to put it in there for?

23 Q I'm confused. You didn't talk about the
24 crack on the stand at trial. Why?

25 A Oh, I ain't mentioned it.

1 Q Why?

2 A I don't know.

3 Q Did your agreement say you agreed to tell the
4 absolute truth and that you understand that if you
5 omit facts that you lose your plea agreement?

6 A Uh-huh.

7 Q And as it stands right now, because you agree
8 you omitted that fact, right, and so this judge,
9 this Court or any other person in this court can
10 refer you back to court for the court there to
11 revoke your plea, to vacate it and give you death
12 for murder, can't they?

13 A Yes.

14 Q They could do that tomorrow, couldn't they?

15 A Yes.

16 Q Because you omitted facts in trial?

17 A Yes.

18 Q Did you tell Solicitor Bailey that Mr. Bowman
19 went back and gave her crack at the car?

20 A No.

21 Q So, he didn't know that, so you lied to him
22 when you said that, you lied when you said that
23 something else happened besides that, didn't you?

24 A Uh-huh.

25 Q I need to hear a yes or no.

1 A Yes.

2 Q So, yes, you lied to the Solicitor?

3 A Yes.

4 Q And we're finding it out for the first time
5 right now?

6 A Yes.

7 Q That you lied back then?

8 A Yes.

9 Q So, you lied in court at that trial?

10 A No.

11 Q I'm a little confused.

12 A I just didn't mention it.

13 Q You lied by omission?

14 A Just because I ain't mentioned it in court,
15 why --

16 MR. WATERS: Your Honor --

17 THE COURT: Wait a minute. He said he didn't
18 know. I think you made your point. He didn't say
19 it.

20 MR. BROWN: I understand. I'm trying to find
21 out if he willfully withheld --

22 THE COURT: I thought he said no one asked
23 him about it.

24 MR. BROWN: They asked him what happened, the
25 question, after that, what happened?

1 THE COURT: Well, that is your interpretation
2 of that but I know, we all know he didn't say
3 anything about the crack.

4 MR. BROWN: And I asked, and he says it is in
5 fact true and he says the plea agreement, he is
6 supposed to tell the truth, not omit facts.

7 THE COURT: Right. He didn't say anything
8 about the crack?

9 THE WITNESS: I didn't mention the crook.

10 MR. BROWN: He lied when he left that out, is
11 my question to him.

12 THE WITNESS: Well, if nobody didn't ask me
13 about it why should I mention it?

14 THE COURT: In his view he didn't lie but yet
15 he didn't mention it. So, what else can we say
16 other than that? Do we want a ruling on whether
17 that is a lie or not?

18 MR. BROWN: Ultimately I do.

19 THE COURT: Maybe we'll look at that in the
20 case, but he said he didn't say anything about it.
21 Now, in a minute if you want to go into it you can
22 but --

23 MR. WATERS: There is kind of a legal point I
24 think that --

25 MR. BROWN: Okay.

1 THE COURT: Hey, I get to say okay. Have you
2 got any other questions?

3 MR. BROWN: Yes, sir.

4 THE COURT: Go ahead, continue on.

5 BY MR. BROWN:

6 Q Now, I want to make sure I understand this.
7 Your gun was stolen out of your sister's 1997 Ford
8 Escort?

9 A Yes.

10 Q Now, do you recall testifying in the
11 deposition about the theft of that gun?

12 A No.

13 Q Is your deposition there in front of you?
14 And to make sure I've got this correct, you were
15 being questioned, you were being questioned, you
16 were questioned today by Mr. Waters about that gun
17 being stolen?

18 A Yes.

19 Q And you told him just a few minute ago it was
20 stolen from your car, from her car?

21 A Yes.

22 Q And you were being questioned by Mr. Waters
23 back in July of this year about that gun being
24 stolen, weren't you?

25 A Yes.

1 Q And you were asked then whether it was stolen
2 out of a car or a house, weren't you?

3 A Yes.

4 Q And you said no, didn't you?

5 A "No, a house or car."

6 Q You said, "No. I had set it down up under a
7 brick"?

8 A No, it was in the car.

9 Q Would you look at page 74, start with line
10 22, And the question says, "Where did it get stolen
11 from?"

12 A Out of Branchville.

13 Q Out of Branchville. The next question, "Was
14 it in a car, a house?" And your answer?

15 A "I didn't never talked to Mr. Waters this
16 year."

17 Q What was your answer appearing at line 25,
18 for the record?

19 A "I sat it up under a brick. I ain't never
20 talked to him this year."

21 Q You said, "No, I sat it down under a brick."
22 And the next question, "You hid it somewhere?" And
23 the answer was?

24 A Somebody found it.

25 THE COURT: What was that, I couldn't hear

1 that?

2 A Somebody found it.

3 THE COURT: Something I just found?

4 Q Somebody found it.

5 THE COURT: Somebody found it?

6 Q That's not stolen from a car, is it? I want
7 to make sure, I'm asking you, we're not omitting
8 this, are you lying now or did you lie in July?

9 A I didn't lie either time.

10 MR. BROWN: Your Honor, at some point I would
11 ask he be investigated for perjury.

12 THE COURT: You can seek that from the
13 Solicitor's office.

14 MR. BROWN: They prosecuted the case.

15 THE COURT: Let's wait until this case is
16 over.

17 MR. BROWN: Thank you.

18 THE COURT: Any other questions?

19 MR. BROWN: I hadn't gotten an answer from
20 him yet, whether he lied then or lied now.

21 THE COURT: He said a minute ago he never
22 lied, he said he didn't lie either time, that is
23 what he just said.

24 BY MR. BROWN:

25 Q How can you explain that was stolen from a

1 brick and also stolen from a car?

2 A When you talked to me in July you was asking
3 me these questions, I didn't ever come out and tell
4 you, I didn't know you were putting all this down,
5 talking about no court. You were starting to be a
6 little too nosey.

7 Q Excuse me?

8 A You were being a little too nosey.

9 Q Didn't I tell you that this was being
10 recorded, at the very beginning, on page 4, "This
11 is being transcribed, good morning, my name is Jim
12 Brown."

13 Skip down --

14 THE COURT: "I guess it's being recorded." He
15 said something else about being nosey.

16 Q So, to make sure I understand it, if I look
17 back, I didn't ask that question?

18 THE COURT: Any other questions?

19 Q I would like him to answer whether --

20 THE COURT: What is your question?

21 MR. BROWN: How could he explain the
22 difference.

23 THE COURT: Can you explain the difference?

24 THE WITNESS: No.

25 BY MR. BROWN:

1 Q Other than it being a lie?

2 A No.

3 Q So, is it a lie?

4 A No.

5 Q How do you explain that it was stolen from a
6 car and also stolen from a brick?

7 A The last time I had it, it was in a car.

8 Q I want to go back. It says, "I hid it under
9 the brick." On page 75, the question, "You came
10 back and it wasn't there?"

11 A It was in the car.

12 Q That's not what you said back in July.

13 THE COURT: What is your answer?

14 THE WITNESS: No.

15 MR. BROWN: I would like the record to
16 reflect that he indicated it was stolen from under
17 the brick in July.

18 THE COURT: By the way, was he sent a copy of
19 that deposition?

20 MR. BROWN: He declined to do so after being
21 informed. It was one witness that did ask to read
22 and sign.

23 THE COURT: Any other questions?

24 MR. BROWN: No other questions.

25 THE COURT: All right. Now, do you want to

1 ask questions about this issue or some other issue?

2 MR. WATERS: Well, very briefly.

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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Do you recall being instructed by the
4 Solicitor and defense counsel based on an agreement
5 with defense counsel that it is memorialized in the
6 record not to mention illegal drugs or pulling
7 licks or any of that other stuff that we have
8 talked about that was not in the trial testimony?

9 A Yes.

10 Q You recall that?

11 A Yes.

12 Q Okay.

13 THE COURT: When was this, Mr. Waters?

14 MR. WATERS: 3671 of the record, at the
15 beginning they are talking with two other witnesses
16 but there was an agreement between trial counsel
17 and Mr. Cummings at Mr. Cummings' request to excise
18 any mention of crack smoking and drug selling and
19 pulling licks and all the rest.

20 THE COURT: This is on the record, this
21 agreement?

22 MR. WATERS: Right here, "Before calling
23 you," in fairness, right now they are talking to
24 Joseph Fogle and Keith Rivers, which is two initial
25 witnesses, but Mr. Bailey puts on the record that,

1 "Before I call you all as witnesses in front of the
2 jury --"

3 THE COURT: Not too fast.

4 MR. WATERS: "We have an agreement among
5 counsel and the Court that we're not getting into
6 anything involved in any illegal drugs, cocaine,
7 anything of that nature, so I would ask that in the
8 course of your testimony that you all not mention
9 anything like that, you know."

10 Now, there is no indication in the record at
11 this point that Mr. Gadson was standing there but
12 my understanding was that was the agreement between
13 the Solicitor and Mr. Cummings.

14 THE COURT: If you want to ask him questions
15 about it.

16 MR. WATERS: I just asked him if he
17 remembered that limitation, he said he did.

18 THE COURT: Now what is your other question.

19 MR. WATERS: That's all I have.

20 MR. BROWN: And I would ask, I had asked just
21 a few seconds ago why he omitted that information.

22 THE COURT: Okay.

23 MR. BROWN: He clearly was not there for
24 that, so I don't know, because he wasn't there,
25 Your Honor, and I have asked him why he left that

1 part out, if that's going to be, and Your Honor,
2 because I'm predicting the argument from the State
3 is going to be somehow or another there was steps
4 in that period of time when he wasn't there with
5 them and I'm predicting that is what they're going
6 to argue because it is crystal clear, about the
7 only unequivocal thing from this witness, he said
8 there was no sex while he was there and the
9 question has come out, the question has come out
10 that, "Was there ever a point in time when they
11 were not with you?" "Yes, when they went back to
12 give them crack." "There was a point in time you
13 were not there?" That was some of the questions.
14 I'm predicting they are going to argue there was
15 sex during that brief period of time, that that
16 makes it an important omission. My question, why
17 he omitted that, if that is in fact true, and he
18 said he didn't know why.

19 THE COURT: That's right, he said that.

20 MR. BROWN: Now it seems to be, "I don't know
21 I was there." Still --

22 THE COURT: That's right.

23 MR. BROWN: So, my question is why did you
24 omit that?

25 THE COURT: Wait a minute, I thought he has

1 already answered that. He answered it, "I don't
2 know," then to him he said he remembered the
3 Solicitor saying that, so --

4 MR. BROWN: We have a fraud on the court,
5 Your Honor, this is classic fraud on the court.

6 MR. WATERS: Your Honor, I think it is clear
7 he probably doesn't remember a lot of this.

8 THE COURT: What if he doesn't remember one
9 way or the other? What we are having is a lot of
10 lying on the court. The witness is here, basically
11 I sense this gentleman seems to be looking at you
12 all, going along with what one or the other of you
13 is saying every once in awhile. I'm not sure what
14 the man remembers or doesn't remember, to tell you
15 the truth.

16 MR. BROWN: I have asked him direct
17 questions.

18 THE COURT: Right, and I'm not sure if he
19 remembers it or not.

20 MR. BROWN: And one question I asked is
21 whether he signed an agreement and, Your Honor, I
22 can't say this is a public policy contract but it
23 says if he doesn't cooperate or violates the
24 agreement he gets death without objection.

25 THE COURT: Exactly.

1 MR. BROWN: I have never seen anything like
2 that.

3 THE COURT: Exactly. What do you want me to
4 do with this witness?

5 MR. BROWN: Go back and determine whether he
6 violated this agreement.

7 THE COURT: That is not up to me. I'm here
8 dealing with the trial of the PCR of Mr. Bowman.

9 MR. BROWN: I understand that.

10 THE COURT: That is up to someone else to
11 handle.

12 MR. BROWN: For this Court it is important to
13 determine whether the prosecution --

14 THE COURT: One second. There is a lady back
15 here that's bothering me. Ma'am, would you just
16 stay still? She does her head this way, that way,
17 all kinds of motion, it is very distracting.
18 Please, ma'am, if you want to stay in the courtroom
19 don't make motions and everything else, stay where
20 you are, listen. You are welcome to do that but I
21 don't need any insinuations one way or the other.
22 I can't tell whether you're against or for Mr.
23 Bowman in your actions but, I mean, it's confusing
24 to me. Sometimes it sounds like you're against me,
25 other times you're for him. I don't want to see

1 anything, I would rather make my decision on the
2 evidence before me.

3 But, I mean, I'm not sure, I can't make the
4 witness answer one way or the other.

5 MR. BROWN: I'm trying to make sure I
6 understand whether -- this is, this really goes to
7 the heart of the integrity of this conviction,
8 whether the prosecutor informed him to omit facts
9 in violation of this very same agreement that they
10 had --

11 THE COURT: I have been reading in the
12 transcript of the trial where they said they
13 agreed, and the question, whether he was there when
14 he said that, they would not go into issues of some
15 crack and other things, drug use.

16 MR. BROWN: Which was all clearly prejudicial
17 to Mr. Bowman, it was an obvious strategic decision
18 on the part of the defense. That is exactly the
19 exact proof that --

20 THE COURT: I'm looking for your remedy.
21 What do you want me to do?

22 MR. BROWN: I'm offering to prove in this
23 hearing that either he omitted facts --

24 THE COURT: You didn't hear my question.
25 What is it you want the Court to do at this time?

1 MR. BROWN: I want him to answer whether Mr.
2 Bailey allowed or encouraged him to omit that
3 critical fact.

4 THE COURT: If you want to ask him that
5 question, ask him the question but you got to stand
6 with whatever he answers.

7 MR. BROWN: Can I do it in a leading way?

8 THE COURT: Do it any way you wish to.
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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q Okay. Did the Solicitor tell you to leave
4 that testimony out?

5 A No.

6 Q So, you omitted it on your own?

7 A Yes.

8 Q And you omitted it in violation of that
9 agreement?

10 A Yes.

11 Q And you entered that agreement before you
12 testified?

13 A Yes.

14 MR. BROWN: Nothing further.

15 THE COURT: All right. Anything else from
16 you?

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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q So, no one told you not to talk about the
4 crack?

5 A No.

6 Q You don't recall that?

7 A No.

8 Q Now, this has been seven years ago, right?

9 A Yes, it's been a while.

10 Q Have you had all these documents here to go
11 through over the past seven years?

12 A No.

13 Q You're just kind of getting all this right
14 now, is that correct?

15 A Yes.

16 Q Okay. You're just trying to answer these
17 questions, right?

18 A Yes.

19 MR. WATERS: Nothing further, Your Honor.

20 THE COURT: All right, sir, you may step
21 down. You're still under subpoena, if we have to
22 get you back we'll get you back some other way.23 Have we worked anything out with the other
24 two people?

25 DEPUTY SHERIFF: Your law clerk has the

1 answer.

2 THE COURT: Have Mr. Gadson go ahead and
3 leave at this time.

4 (Witness excused).

5 All right, let's go ahead and call it a day,
6 I have a few things to do, we'll start back
7 tomorrow at 9:30. Do you need any help with other
8 witnesses to make sure they know to be here?

9 MR. BROWN: The next witnesses we go into,
10 Your Honor, would be Mr. Davis, Mr. Johnson, Hiram
11 Johnson who is out here, Darien Williams, Travis
12 Fedler and then we plan to go into --

13 THE COURT: How about letting SCDC, whoever
14 is in charge of Mr. Davis, let them know to be here
15 by 9:00 o'clock tomorrow morning.

16 MR. BROWN: He is our next witness, yes, sir.

17 THE COURT: I said make sure you coordinate
18 with SCDC to make sure he's here at least a half
19 hour before we start tomorrow morning at 9:30.
20 Okay?

21 MR. BROWN: Yes, sir.

22 THE COURT: Then who is the other person from
23 SCDC, Williams?

24 MR. BROWN: Yes, sir.

25 THE COURT: Let's have him here, too,

1 tomorrow morning. I assume you can get your other
2 witnesses here?

3 MR. BROWN: I apologize, Your Honor, for
4 earlier --

5 THE COURT: All right. We're in adjournment
6 until tomorrow morning.

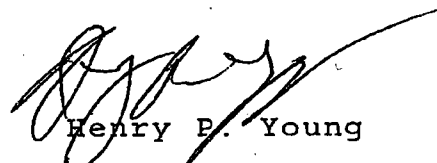
7 MR. BROWN: Thank you, Your Honor.

8 (Recessed at 5:09 p.m.).
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4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Dorchester County,
11 South Carolina, on the 15th day of September, 2008.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 September 21, 2008
15
16

17 
18 Henry P. Young
19 Court Reporter
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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

A P P E A R A N C E S:

JAMES ARTHUR BROWN, JR., Esquire
JOHN SINCLAIRE, III., Esquire
Attorneys for the Plaintiff

SAMUEL C. WATERS, Esquire
ALPHONSO SIMON, JR., Esquire
Attorneys for the Defendant

Henry P. Young
Court Reporter

VOLUME II OF X
September 16, 2008

P-R-O-C-E-E-D-I-N-G-S

(Reconvened 11:00 a.m., September 16, 2008).

THE COURT: Mr. Court Reporter, I called the attorneys back this morning before we got started and -- wait a minute, I'm sorry, the petitioner is not here. Everyone be seated, let them bring the petitioner in.

All right, we're now just about ready to get started. Before we get started, I called the lawyers into my chambers this morning and I wanted to make sure that the prisoner situation, both witnesses and the petitioner that were incarcerated, that we had them back. They have checked, the witnesses are here.

I also mentioned to the parties I did not have any transcripts and I asked for the Clerk to come here this morning, she brought her file, that I thought there would be a transcript in the file but there is no transcript in the file.

I have got the criminal file of the original trial as well as the PCR file over here and so I asked you all if you could provide me a transcript and Mr. Waters says he only has one, and Mr. Brown and Mr. Sinclair said they may have another one and I could use Mr. Sinclair's copy but I want to

1 make sure you all saw it wasn't marked up or
2 anything. What is the status of that?

3 MR. SINCLAIRE: Judge, I put it up there on
4 your bench. To the best of my recollection, Judge,
5 I didn't write anything in any of them while I was
6 reading. I did use my highlighter.

7 THE COURT: All right. I have eleven
8 volumes.

9 MR. SINCLAIRE: Correct.

10 THE COURT: And Mr. Waters says he sent
11 eleven. I guarantee you if you didn't get eleven
12 volumes I would know about it.

13 MR. WATERS: I delivered those way back when,
14 my record reflects that, with the appointment of
15 counsel hearing.

16 THE COURT: Where was that? The Clerk
17 probably wonders why she doesn't have a transcript.

18 MR. WATERS: It was probably Dillon. And
19 then I've got --

20 THE COURT: When was that?

21 MR. WATERS: November of 2006.

22 THE COURT: Yes. The Clerk always wants to
23 say was that before me? Yes, it was.

24 MR. WATERS: And there should be a copy in
25 the file attached to, that came with my return,

1 that would have gone to the Clerk. They would
2 obviously not be in there, or actually in my
3 initial return because obviously they are not in
4 there because that is a little file. We usually
5 send the transcript and appellate brief, appellate
6 opinion attached to the initial return we filed as
7 well.

8 THE COURT: To the Clerk?

9 MR. WATERS: To the Clerk.

10 THE COURT: So, the Clerk's file should have
11 the eleven volumes?

12 MR. WATERS: That is our typical practice.

13 THE COURT: That's why I asked her to come
14 up, I thought they did. Madam Clerk, you don't
15 have them?

16 THE CLERK: No, sir.

17 MR. WATERS: If I could have a moment to look
18 in here.

19 MR. BROWN: Your Honor --

20 MR. WATERS: Your Honor, one thing I noticed,
21 I don't see my initial return in here, in this
22 file. My initial return is not in that file, even
23 the document itself, so I don't know if it maybe
24 got separated, or I can look to see if I have a
25 stamped copy.

1 THE COURT: I'm sure we can find the initial
2 return. We'll do that.

3 MR. WATERS: It is not in the file, so I
4 wonder if maybe it, the whole thing, a big box came
5 in and it got separated, I don't know, I can't
6 verify any of that. I don't know, as long as Your
7 Honor has one you can use right now and after this
8 I can, once we get back to Columbia I can have an
9 expedited copy sent right out to you.

10 THE COURT: Out to the Clerk.

11 MR. WATERS: Obviously I was looking for one
12 for you to use.

13 THE COURT: I think I have your return. We
14 need to have a return filed with the Clerk.

15 MR. WATERS: True. I'm talking about another
16 copy of the transcript. One hasn't gotten to you
17 for you to use.

18 THE COURT: Yes.

19 MR. BROWN: Briefly, Your Honor, obviously we
20 had proceedings in this other matter made part of
21 this record.

22 THE COURT: You did that yesterday.

23 MR. BROWN: I understand that. We want to
24 make sure, I guess, the Court does get that copy of
25 the transcript and also there is a page, there is

1 page 4918 is missing and it involves testimony --

2 THE COURT: What volume would that be in?

3 MR. BROWN: Volume 10. Ten goes from 4500 to
4 5000.

5 MR. WATERS: I'm looking for mine as well.
6 These records were put together by the Office of
7 Appellate Defense as part of the direct appeal, so
8 we do have the original transcript.

9 THE COURT: Right.

10 MR. WATERS: We do have the original
11 transcript. Appellate Defense is the one puts
12 together these records, it should have the original
13 transcript, we should be able to get that page.

14 MR. BROWN: We contacted them late last week
15 and they were going to look in the archives, there
16 was a possibility we do not have that. It does
17 involve some testimony that we're going to question
18 a witness about, we don't know, we don't know that
19 it is going to be a problem, though, because we
20 have deposed this witness related to what he did
21 testify about, so we just point that out, we would
22 like 4918 to make it in the record, at least.

23 THE COURT: All right. Let's try and find
24 4918. Mr. Waters, Mr. Brown, one of you all need
25 to keep me up to date on that this week, I want to

1 find out where that page is. Are you sure it is
2 missing as for as you all read the page and there
3 is something missing and not just misnumbered?

4 MR. BROWN: It's missing. But we did call
5 appellate counsel for Mr. Bowman on Thursday, Mr.
6 Sinclair, he said he would try to find it for us,
7 he agreed they had the original. I say original,
8 but they had the transcript, it was not bound in
9 these volumes, he thought it would be in the
10 archives.

11 MR. WATERS: Your Honor, again going back to
12 the previous issue, my records reflect that we
13 mailed the return along with all the attachments
14 to the Clerk on August 25th, 2006, and that
15 subsequently -- that was prior to your appointment.

16 MR. BROWN: Yes, that was back when it was
17 mailed to appellate counsel and Mr. Bowman.

18 MR. WATERS: Subsequently a letter was sent
19 out to you all that I was giving a return and then
20 the transcript would be delivered at that initial
21 hearing at that time.

22 THE COURT: We'll find out where that is.

23 Now, as for as what we discussed in chambers
24 before we came out, two things. One is get me a
25 copy of the transcript, which you you have done.

1 And I'm trying to think what else. I think
2 just the transcript and then I told you I had the
3 Clerk's assistance here today, and Friday we may
4 have a logistical problem, we'll work that out when
5 we get closer to Friday.

6 Anybody want to add anything to what we may
7 have discussed in chambers?

8 MR. WATERS: No, sir, Your Honor.

9 MR. BROWN: Nothing from the petitioner.

10 THE COURT: All right. Are you ready for
11 your next witness?

12 MR. BROWN: We are, Your Honor.

13 THE COURT: Bring your next witness in.

14 MR. BROWN: Ricky Davis, a Department of
15 Corrections inmate.

16 THE COURT: And, Mr. Bowen, if you would,
17 just so we have no misunderstanding, no one comes
18 in here under the age of twelve unless you talk to
19 me about it, okay?

20 DEPUTY SHERIFF: Yes, sir.

21 MR. BROWN: Your Honor, we have pre-marked
22 some exhibits to try to speed this up.

23 THE COURT: All right, have you shown them to
24 the State?

25 MR. BROWN: They have been and there is no

1 agreement on the introduction in evidence but they
2 have been pre-marked.

3 THE COURT: All right. Good morning, Mr.
4 Davis. If you would, please stand up. The Clerk
5 will swear him in.

6 Stand up for me, Mr. Davis, the best you can,
7 put your left hand on the Bible the best you can
8 and raise your right hand, sir.

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1 RICKY DAVIS,

2 after being first duly sworn, testified as follows:

3 THE COURT: Now, Mr. Davis, can you grab that
4 microphone there to your right and let's go ahead,
5 if you would, and give us your name and make sure
6 everyone can hear you.

7 THE WITNESS: Ricky Davis.

8 THE COURT: Mr. Davis, speak into the
9 microphone.

10 All right, Mr. Brown.

11 MR. BROWN: May it please the Court.

12 DIRECT EXAMINATION

13 QUESTIONS BY MR. BROWN:

14 Q Mr. Davis, were you at some point during 2001
15 housed in the Dorchester County Detention Center?

16 A Yes.

17 Q Okay. And do you know a James Tawain Gadson?

18 A Yes, I do.

19 Q And was he also housed there with you?

20 A Yes.

21 Q And would that have been on A side?

22 A Yes, sir.

23 Q Okay. And at this time I'm going to show you
24 what has been marked Plaintiff's Exhibit 11. Are
25 you familiar with that document?

1 A Yes.

2 Q Yes? Is that your handwriting on that
3 document?

4 A Yep.

5 Q That's a yes?

6 MR. BROWN: At this time, Your Honor, we
7 would move this be introduced into evidence as
8 Plaintiff's Exhibit 11.

9 THE COURT: Could I see the document? You
10 have seen the document, Mr. Waters?

11 MR. WATERS: I have, Your Honor. For
12 purposes of this hearing and assistance to
13 plaintiff's counsel, I have no objection.

14 THE COURT: Now, what is this document, or
15 you haven't gone into that yet?

16 MR. BROWN: I haven't gotten into it.

17 THE COURT: No objection, it's in evidence as
18 Plaintiff's Exhibit 11, no objection.

19 (Ricky Davis August 6 memo marked and
20 received in evidence as Plaintiff's Exhibit
21 Number 11).

22 BY MR. BROWN:

23 Q Was that document written by you back in
24 2001?

25 A Yes.

1 Q Yes. And that would have been August 6th?

2 A I guess.

3 Q Is that the date you wrote on the top of it?

4 A Yes.

5 Q Okay. And were you, do you remember being
6 transported to the Dorchester County Courthouse?

7 A Yes.

8 Q And that was in May of 2002?

9 A I believe so.

10 Q Okay. And that was for the trial of Marion
11 Bowman?

12 A Yes.

13 Q Okay. And you were transported there. Where
14 did you go when you arrived at the courthouse?

15 A To the holding cell.

16 Q And what happened when you were in the
17 holding cell?

18 A They asked me a couple questions and I told
19 them I didn't have nothing to do with that, and
20 that was it.

21 Q Who asked you questions?

22 A I can't remember, that was too long ago.

23 Q Marion Bowman?

24 A No.

25 Q Did you ever speak to Marion Bowman that day?

1 A No.

2 Q Okay. And was it an attorney?

3 A I think Marva Hardee, if I understand.

4 Q Marva Hardee came to speak to you? You said
5 you didn't have anything to do with this. You're
6 talking about what, that you didn't have anything
7 to do with?

8 A Whatever it was, I guess this case or
9 whatever.

10 Q You said, "I didn't have anything to do with
11 the case." Did you talk to her about the writing
12 of this statement?

13 A I think we did in the beginning.

14 Q And did you tell her that you wrote this
15 statement?

16 A Yes.

17 Q So, she knew that this statement was from
18 you?

19 A I'm pretty sure she did.

20 Q From your memory of that conversation did you
21 tell her that?

22 A Yes, if I'm not mistaken, yes.

23 Q Okay. And how do you know Marva
24 Hardee-Thomas?

25 A She represented me on my case.

1 Q Okay. Now, let's talk about that first. Was
2 she a Public Defender?

3 A Yes.

4 Q She worked for the Dorchester County Public
5 Defender office?

6 A Uh-huh.

7 Q You have to answer.

8 A Yes.

9 Q And you were charged with two counts of armed
10 robbery?

11 A Yes.

12 Q I'm going to show you what has been marked
13 Plaintiff's Exhibit 12. Do those look like the
14 warrant numbers to your armed robbery case?

15 A Yes.

16 Q I'm sorry?

17 A Yes.

18 Q Okay. And it says armed robbery times two.
19 These are not two Counts from one incident, are
20 they?

21 A No.

22 Q They are saying you committed armed robbery
23 on two different times?

24 A Yes.

25 Q Okay.

1 MR. BROWN: Your Honor, this is an
2 appointment order from the Clerk's office and we
3 ask that it be moved into evidence as Plaintiff's
4 12.

5 MR. WATERS: No objection, Your Honor.

6 THE COURT: In evidence, Plaintiff's 12.

7 (Attorney appointment sheet marked and
8 received in evidence as Plaintiff's Exhibit
9 Number 12).

10 BY MR. BROWN:

11 Q And she spoke with you about both of these
12 charges?

13 A Yes.

14 Q And you went to trial on one?

15 A Yes, sir.

16 Q And what happened at that trial?

17 A I got twenty years.

18 Q You got convicted and got twenty years?

19 A Yes.

20 Q All right. And what happened to the other
21 charge?

22 A I think it got dismissed, to my knowledge.

23 Q To your knowledge? Do you remember telling
24 us at the deposition about your understanding of
25 that case?

1 A I can't remember.

2 Q And why do you say now that it was dismissed?

3 A I haven't heard anything about it.

4 Q Did you speak with Marva Hardee-Thomas about
5 your cases after your conviction in October of
6 2001?

7 A Which one, the first one or the second one?

8 Q Either one.

9 A Not that I remember.

10 Q You didn't speak to her about either one
11 after you were convicted?

12 A No.

13 Q Did she file notice of appeal for you?

14 A Yes.

15 Q Okay. And did she come back down and see you
16 after that?

17 A I think the last time I seen her was on my
18 PCR, that was it.

19 Q Okay. Did you all have a conversation about
20 the other case?

21 A No.

22 Q Since the date of your conviction in October
23 of 2001 have you talked to her about the other
24 case?

25 A No.

1 Q And, so, she never told you it was dismissed?

2 A No, not to my knowledge, not that I can
3 remember.

4 Q And did you ever receive anything in the mail
5 indicating, from the Clerk's office, that it was
6 dismissed?

7 A No.

8 MR. BROWN: Beg the Court's indulgence.

9 THE COURT: Okay.

10 Q All right. And do you recall being
11 questioned when you were deposed, which was on May
12 19th, 2008?

13 A Yes.

14 Q Okay. And you were questioned about did you
15 have any other charges outstanding when you came
16 back to court. Do you recall being asked that
17 question? Do you recall answering, "I still
18 believe I've got another pending armed robbery"?

19 MR. WATERS: Your Honor, again I think he
20 needs to --

21 THE COURT: Do you remember saying that?

22 THE WITNESS: Yes.

23 THE COURT: He said it.

24 BY MR. BROWN:

25 Q Okay. So, you told us in May of this year

1 you thought it was still pending?

2 A Yes, sir.

3 Q And do you recall being asked who your
4 attorney was on that case?

5 A Yes.

6 Q And what did you say?

7 A Marva Hardee, if I'm not mistaken.

8 Q In May of 2008 you believed Marva
9 Hardee-Thomas was your attorney on a charge that
10 was still pending?

11 A I guess. I'm not sure because I ain't never
12 talked to nobody about it, so --

13 Q Okay.

14 MR. BROWN: Your Honor, for the sake of
15 dealing with some of the issues, we have some
16 information from the Clerk's file and I want to try
17 to present these.

18 Q Now, Mr. Davis, I'm going to hand you a
19 series of documents and see if you recognize any of
20 these documents. The first one would be
21 Plaintiff's 13. Does that look like a letter, do
22 you recognize that?

23 THE COURT: Do you recognize the letter?

24 A Not this one right here.

25 THE COURT: He doesn't recognize it.

1 Q Okay. Does it appear to be a letter
2 concerning your case?

3 THE COURT: Is it out of the Clerk's file?

4 MR. BROWN: It is, all of these are.

5 THE COURT: If it's out of the Clerk's file
6 in Dorchester County I'm sure the State has no
7 objection to it coming in.

8 MR. WATERS: No. My only objection is that
9 if he starts trying to get him to comment on it or
10 read it into the record or anything like that.

11 THE COURT: As for as putting it in evidence,
12 have you got it marked already?

13 MR. BROWN: They are marked.

14 THE COURT: You looked at them, Mr. Waters,
15 and all these are from the Clerk of Court of
16 Dorchester County's file?

17 MR. WATERS: I have no reason to think it's
18 not. I have not reviewed Ricky Davis' Dorchester
19 County file and so I guess --

20 THE COURT: Subject to later on if you find
21 out they are not, then I'll admit them in evidence
22 and let's make sure they're marked.

23 MR. BROWN: They are. That would be
24 Plaintiff's 13, 18, 19, 20, 21, 22, and 23, Your
25 Honor, will be offered in evidence subject to the

1 condition that the Court --

2 THE COURT: Mr. Court Reporter, are you just
3 putting that down by typing it in or do you write
4 them down, too?

5 (Notice of appeal marked and received in
6 evidence as Plaintiff's Exhibit 13).

7 (Warrant G-326981 affidavit marked and
8 received in evidence as Plaintiff's
9 Exhibit Number 18).

10 (Arrest warrant G371372 was marked and
11 received in evidence as Plaintiff's
12 Exhibit Number 19).

13 (Sentence sheet in indictment 2001-GS-18-734
14 was marked and received in evidence as
15 Plaintiff's Exhibit Number 20).

16 (Indictment/arrest warrant G587667 was marked
17 and received in evidence as Plaintiff's
18 Exhibit Number 21).

19 (Docket sheet 2001-GS-18-106 was marked and
20 received in evidence as Plaintiff's Exhibit
21 Number 22).

22 (Docket sheet 2001-GS-18-0606 was marked and
23 received in evidence as Plaintiff's Exhibit
24 Number 23).

25 THE COURT: The ones you had before were 11

1 and what?

2 MR. BROWN: Were 11 and 12.

3 THE COURT: His statement that he signed,
4 what number was that?

5 MR. BROWN: That was 11?

6 THE COURT: Okay, thank you. All right.

7 BY MR. BROWN:

8 Q Now, the only thing I want to ask you about,
9 Mr. Davis, regarding these documents, if you will
10 look at numbers 22 and 23, and those appear to be
11 an armed robbery charge, don't they?

12 A Uh-huh.

13 Q That indicates they are an armed robbery
14 charge, it was dismissed?

15 MR. WATERS: Your Honor, again, he hasn't
16 asked him if he recognizes these documents.

17 THE COURT: They are in evidence now, you can
18 publish them to whoever you want to publish the
19 documents. Do you want to publish them?

20 BY MR. BROWN:

21 Q I have a simple question, whether or not
22 anybody sent you a copy of these documents?

23 A Not this one right here I'm looking at now,
24 either one of them.

25 Q Okay. So, you have never gotten an

1 indication from the Clerk's office that the case
2 has been dismissed?

3 A No.

4 Q When you went to court in May of 2002 for
5 Marion Bowman's trial you were under the impression
6 Marva Hardee-Thomas was still your attorney?

7 A Yep.

8 THE COURT: When is it that you were tried on
9 the other charge you got twenty years for?

10 THE WITNESS: 2001, I think in May.

11 MR. BROWN: October 16th, and it's in the
12 record as well, Your Honor.

13 THE COURT: Okay.

14 MR. BROWN: On Plaintiff's 20 it says October
15 16. Two days later his other charges was dismissed
16 with leave to restore it, as a matter of fact.

17 THE COURT: So, in '01 he had no charges
18 pending against him.

19 MR. BROWN: But he didn't know it.

20 THE COURT: I understand, but he didn't know.

21 BY MR. BROWN:

22 Q Yet you were put in the cell with James
23 Tawain Gadson?

24 A Yes.

25 Q You were?

1 A Yes.

2 Q What did you all talk about?

3 A Bullshit, really.

4 Q You all didn't talk about your testimony in
5 this case?

6 A No.

7 Q Did he ask you about the statement that you
8 wrote, Plaintiff's 11?

9 A No.

10 Q He never mentioned to you anything that would
11 have caused you, quote, to bump heads?

12 A No.

13 MR. BROWN: Beg the Court's indulgence.

14 Q Lastly, did Marva Hardee-Thomas ever talk
15 about any conflict between representing you and
16 representing Mr. Bowman?

17 A Not -- no, not to me.

18 Q Okay. Did she ever ask you to waive any
19 conflict of interest?

20 A No.

21 MR. BROWN: Nothing further on direct.
22 Please answer any questions from the State.

23 THE COURT: Mr. Waters.

24

25

1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Mr. Davis, how you doing today?

4 A All right.

5 Q You remember we had that deposition back in
6 May that Mr. Brown was asking you about, correct,
7 and we talked about that handwritten statement that
8 you gave in the Marion Bowman case, correct? Now,
9 when did you first meet James Gadson?

10 A 2001 sometime.

11 Q Was that in Dorchester County general
12 population?

13 A Yes.

14 Q Okay. Did you know him well?

15 A Somewhat.

16 Q Did Mr. Gadson ever tell you that he was the
17 one who killed Kandee Martin?

18 A I can't remember.

19 Q Did he ever tell you that the police said to
20 just say that Black did it because his family got
21 caught with the gun?

22 A You're asking me questions from 2001, I can't
23 remember, I got my own court cases going on too,
24 now.

25 Q You're under oath in court, I need you to

1 search your memory. Did he every tell you that?

2 A I can't remember.

3 Q Subsequently you got moved to max where you
4 met Marion Bowman, isn't that right?

5 A Yes.

6 Q Okay. And isn't it true that you have
7 testified under oath that Marion Bowman and you
8 were talking through a flap, correct?

9 A Uh-huh.

10 Q And he asked you to write this statement to
11 help out his case, correct?

12 A Yep.

13 Q Is that accurate?

14 A Yes.

15 Q Is that the truth?

16 A Uh-huh.

17 Q That is what you testified to before on the
18 deposition, correct?

19 A Yes.

20 Q Okay. So, to reiterate, Marion Bowman was
21 talking to you about your case and he is the one
22 who told you to write this thing down, correct?

23 A Yes.

24 Q Is that correct?

25 A Yes.

1 Q Okay. So, you don't actually know anything
2 about this case other than what Marion Bowman told
3 you, is that right?

4 A Yep.

5 Q Now, you said earlier that you don't remember
6 what Gadson told you but isn't it true that in the
7 deposition you told us that you never heard Gadson
8 tell you anything about this case?

9 A Yes.

10 Q So, that's the truth?

11 A Yes.

12 Q Okay. So, James Gadson never once told you
13 the stuff that is in this letter, correct?

14 A Not that I can remember.

15 Q Okay. And it was Marion Bowman who told you
16 what was in this letter?

17 A Yep.

18 Q Correct, and he was asking you to do him a
19 favor in his case by writing this, correct?

20 A Yes.

21 Q Okay. And how was he going to help you?

22 A I can't remember, something we talked about,
23 I can't remember what it was now.

24 Q Okay. But you wrote it and gave it to him,
25 correct?

1 A Something like that.

2 Q Okay. You didn't notarize this and sign it
3 and give it to the police, correct?

4 A Right.

5 Q Okay. So, this was totally done at Marion
6 Bowman's instigation, correct?

7 A Yes.

8 Q That is what you testified to before,
9 correct?

10 A Yes.

11 Q Correct?

12 A Uh-huh.

13 Q All right. And you were in Dorchester County
14 lockup when Marva Hardee-Thomas came down in 2002
15 to see you about this case. Is that correct?

16 A About what case this would be?

17 Q About Marion Bowman's case.

18 A We didn't talk nothing about that.

19 Q She didn't come down and ask you about this
20 statement you had given right here?

21 A Not that I can remember.

22 Q Didn't you testify earlier she came down and
23 asked you about it and you told her just what
24 you're saying now, that Marion Bowman was the one
25 who told you to write that and they turned around

1 and sent you back home?

2 A Oh, yes, I wasn't there then, I was at Leiber
3 at that time.

4 Q She came and saw you at Leiber?

5 A They brought me to Dorchester County.

6 Q What happened?

7 A She asked me about it and I told her what I
8 just told you.

9 Q That Marion Bowman was the one who asked you
10 to write this letter, correct?

11 A Yep.

12 Q And so she then turned around and said okay,
13 thanks, and you went right on back to Leiber where
14 you're serving your sentence?

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q All right. When you -- you were asked some
19 questions about whether or not you thought these
20 other charges, the other armed robbery was pending
21 or not but when you got to Leiber you thought you
22 were done, you were going to have to do your twenty
23 years and that was the end of it, correct?

24 A Yes.

25 Q You didn't think you were going back for any

1 more trials, did you?

2 A No.

3 Q And the only thing you thought you might have
4 is a PCR, correct?

5 A Yes.

6 Q Which you did have, correct?

7 A Uh-huh.

8 Q That was on the other charges. You weren't
9 under the belief you would be called back down to
10 Dorchester County to undergo trial for some more
11 armed robbery charges?

12 A No.

13 Q Okay. And you got in 2001, you're serving
14 now twenty years for armed robbery and failure to
15 stop, correct?

16 A Yes.

17 Q And then your only other prior of anything
18 major was possession of drugs, correct?

19 A Yes.

20 Q And that was back in 1997?

21 A I guess so.

22 Q Okay.

23 MR. WATERS: The Court's indulgence one
24 moment.

25 Your Honor, I have nothing further.

1 THE COURT: Any redirect?

2 MR. BROWN: Yes, sir, briefly.

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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q If you look at Plaintiff's 11, which is your statement from August, 2001.

THE COURT: You have to give it to him.

Q Do you see where it has a notation of being notarized. That's year handwriting?

A Which one where you talking about, the bottom?

Q That's correct.

A Yes.

Q This is your handwriting down here?

A No, not the part to the bottom. I thought you were talking about where I signed it at.

Q That notary portion was written by Marva Hardee-Thomas, wasn't it?

A I guess. I don't know who wrote that.

Q She came down and got you to notarize this statement, or asked you to have it notarized?

A It has handwriting on the bottom, ain't nobody signed it at the bottom.

Q Somebody wrote in this notary portion, didn't they?

A Obviously, it is on the bottom of the paper.

1 Q It wasn't you?

2 A No.

3 Q And it was Marva Hardee-Thomas?

4 A I guess. I don't know who wrote that bottom
5 part.

6 Q Now, you don't recall being asked about
7 Tawain Gadson telling you that he shot someone, in
8 the deposition?

9 A Not that I can remember.

10 Q Do you remember being asked that at the
11 deposition?

12 A Not that I can remember.

13 Q You don't remember being asked that?

14 MR. BROWN: Your Honor, at this time I would
15 mark as Plaintiff's Exhibit 24, it is still sealed
16 and signed.

17 THE COURT: Okay.

18 MR. BROWN: May I open it?

19 THE COURT: Yes. Just let me open it.

20 You're offering the original deposition here of
21 Ricky Davis taken on the 19th of May, 2008, 10:30
22 in the morning at Leiber Correctional. What page
23 are you going to?

24 MR. BROWN: Page 21, Your Honor, line 10.

25 THE COURT: All right. Now what's your

1 question you want to ask him?

2 MR. BROWN: Does he recall being questioned
3 in the deposition about what Tawain Gadson told
4 him. The AG has just asked whether Tawain Gadson
5 told him he had shot this girl. He said no today.
6 That is contradicted by the answer then.

7 THE COURT: The Court is looking at the
8 answer then. Does the State contend it was taken
9 down wrong?

10 MR. BROWN: No, I believe --

11 THE COURT: I'm talking about the State.

12 MR. WATERS: No, I don't contend it was taken
13 down wrong but I think his answer isn't in context.

14 THE COURT: I'm going to read it myself.
15 Question on line 10 was, "So, he never told you
16 that he was the one who shot the victim and that
17 the police told him to blame it on Black, or Marion
18 Bowman?" Answer, line 13, "I mean, I can't, like I
19 say, this happened like, what, six years ago, I
20 can't even remember. I had actually went down
21 now."

22 All right. That is what he said back in May.
23 Sir, do you remember saying that?

24 THE WITNESS: Yes, I remember saying it.

25 BY MR. BROWN:

1 Q All right. You just told the Attorney
2 General that Tawain Gadson didn't say that he shot
3 the girl.

4 A That is what it says there, no.

5 Q But in May you say you don't remember?

6 A That is what I'm saying now, I don't
7 remember. That's like six, so many years ago, I
8 don't remember.

9 Q I just want to know the truth, that's all I'm
10 trying to find out is do you not remember whether
11 Tawain Gadson told you to write that or told you he
12 shot the girl?

13 A I'm pretty sure he didn't.

14 Q Huh?

15 A I'm pretty sure he didn't.

16 Q Did?

17 A Did not tell me that.

18 Q Do you remember?

19 A I mean, no, not really.

20 Q You can't remember whether he told you that
21 or not?

22 A No.

23 Q But you wrote down in August of 2001 that he
24 did?

25 A Like I told you, like I told him in the

1 beginning, that is what he wanted me to say.

2 Q You were housed in the A side in Dorchester
3 jail with Tawain Gadson, weren't you?

4 A Yes.

5 Q And that's in that statement as well, isn't
6 it?

7 A I'm pretty sure it is, yes.

8 Q And a statement like that would certainly
9 help Mr. Bowman, wouldn't it?

10 A Yes, I guess so, I don't know.

11 Q If Tawain Gadson actually confessed to the
12 shooting to him that would help him, wouldn't it?

13 A I'm pretty sure it would.

14 Q If you were on trial for a crime, if somebody
15 else said they had done it, you would want that?

16 MR. WATERS: Your Honor, I object.

17 THE COURT: He answered. I understand the
18 answer.

19 MR. BROWN: Nothing further of this witness.

20 THE COURT: Recross again?
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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q You were asked a little bit on Plaintiff's
4 Exhibit 11, which is the statement, about who wrote
5 this notary stuff at the bottom, and you don't
6 remember. Is that what you testified?

7 A Yes.

8 Q Okay. But if Marva Hardee-Thomas told you
9 she had written that there when she came to see you
10 that is when you told her Marion made you write
11 this and you don't about this case, right?

12 A I guess.

13 Q You didn't ultimately have this signature
14 notarized, correct?

15 A Yes.

16 Q Because it's not true?

17 A Yes.

18 Q Now, you were asked about whether or not you
19 remember or don't remember what James Gadson said
20 but one thing you do remember is Marion Bowman is
21 the one who asked you to write this?

22 A Yes.

23 Q And he's the one who told you the information
24 in this statement?

25 A Uh-huh.

1 Q And that was when both of you all were in
2 super max talking to one another through a flap?

3 A Yes.

4 Q At Dorchester County?

5 A Yes.

6 Q All right. Now, you were shown a little bit
7 from the deposition, and just for context, I'm
8 going to show you page 21 of this deposition.

9 THE COURT: Now, is this the deposition we
10 just read from?

11 MR. WATERS: Yes, sir. It's actually the
12 answer immediately preceding the one that Mr. Brown
13 asked for.

14 THE COURT: Let me just show it to you, sir.
15 This is when you were there in May, someone was
16 typing everything you all said and that is what a
17 deposition is, but I'm going to hand it to you,
18 that is page 21. Where the letter A is, that
19 letter says that's your answer. The letter Q is
20 where someone asked you a question.

21 BY MR. WATERS:

22 Q And beginning with line 6, do you recall
23 testifying, when you were asked did Tawain Gadson
24 ever tell you he was the one who shot -- you said,
25 I quote, "Like I said, I mean, I talked to him

1 briefly but it ain't been nothing like, I don't
2 think it been nothing pertaining to the case or
3 anything like that there."

4 Is that correct?

5 A Uh-huh.

6 THE COURT: Hand it back to me.

7 Q That is what you're saying now today, is that
8 correct?

9 A Yes.

10 Q All right. Let's look over on page 12 of
11 that deposition.

12 THE COURT: Do you see those numbers there on
13 the side? He might refer to the line number, just
14 go to that number he refers to.

15 Q I'm going to point you to line 19, and that
16 was your answer there where you said, when you were
17 asked if you remembered speaking to Gadson about
18 this case you stated, "Me and Gadson ain't never
19 really talked about this case, not like that, not
20 until he got here. But once we got here he had
21 been like he had done get his time in.

22 Now, do you remember saying that?

23 A Uh-huh.

24 Q Is that correct?

25 THE COURT: Answer yes or no.

1 A Yes.

2 Q When you said, "We didn't really talk about
3 this until we got here," we were taking that
4 deposition at Leiber, correct?

5 A I believe so, yes.

6 Q All right. So, when you were saying here you
7 were talking about once Gadson came to Leiber, too,
8 that is when you all talked?

9 A Yes.

10 Q And that was long, long after. When this
11 statement right here was given you all were in
12 Dorchester then, correct?

13 A Yes.

14 Q Okay. All right, let's turn over to page 13,
15 the very next page, and look at line 22 where you
16 stated, "But I ain't no, you know what I'm saying,
17 about the who did what part."

18 Do you recall that?

19 A Yes.

20 Q That's correct, isn't it?

21 A Yes.

22 Q You were saying you don't really know who did
23 what in this case, is that right?

24 A Yes.

25 Q Okay.

1 MR. WATERS: Your Honor, I have nothing
2 further on recross.

3 THE COURT: Anything else of this witness
4 that hadn't been asked already?

5 MR. BROWN: Well, I just need to clear up one
6 thing.

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REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q Can you remember whether Tawain Gadson told you that or not?

A No, I can't.

Q I hate to go back and forth like this.

THE COURT: All right, what else?

Q There is an item, did you ever write notes to Rebecca Richardson?

A No.

Q Do you know who that is?

A No.

THE COURT: I don't either, sir. Do you know who that is?

THE WITNESS: No.

MR. WATERS: Your Honor, I believe this is beyond the scope of redirect. I didn't ask anything about that.

THE COURT: What's it about?

MR. BROWN: It's got some notes about Ricky Davis on that, I was wondering if they were his notes.

MR. WATERS: They are clearly not his, the handwriting isn't alike. I didn't ask him anything about that.

1 THE COURT: He says no.

2 MR. BROWN: I will take the concession they
3 were not written by Ricky Davis. Nothing further.

4 THE COURT: Let me ask you, sir --

5 MR. WATERS: Your Honor, I didn't get a
6 recross.

7 THE COURT: On this thing? What's her name?

8 MR. BROWN: Rebecca.

9 MR. WATERS: He asked him again about whether
10 or not he remembered or didn't remember.

11 THE COURT: Then you are going to ask him, he
12 says he doesn't, didn't talk to him or he doesn't
13 remember. The person said, two things he said he
14 didn't do, he didn't talk to Gadson about this and
15 Gadson didn't tell him to write, didn't tell him he
16 killed the person, that Bowman told him to write
17 the note, help him out. He also said he doesn't
18 remember whether Gadson, and then he also says he
19 don't think he did this. So, I mean, you've got
20 several things. We can go back and forth each
21 time.

22 MR. WATERS: The one things he is sure of he
23 was talking to Marion Bowman at super max and
24 Marion Bowman gave him this information and asked
25 him to write this as a favor to him.

1 THE COURT: He said that. He has not said
2 anything to take away from that. Did he say Mr.
3 Bowman --

4 MR. WATERS: That is all I was going to
5 reiterate.

6 THE COURT: Do you have any other questions?

7 MR. BROWN: I was just trying to hear what
8 you said.

9 THE COURT: Mr. Bowman asked him to write the
10 statement.

11 MR. BROWN: Yes, sir, we understand that.

12 THE COURT: The only issue is going back and
13 forth on the issue whether or not he remembers Mr.
14 Gadson told him he did the murder or not, he said
15 one time no, he didn't, "I don't think he did, I
16 can't remember, I'm pretty sure he didn't." He has
17 given all those type answers.

18 MR. BROWN: I agree that is the issue, too.

19 THE COURT: All right. I said that is what
20 he said. Okay, you can step down, sir.

21 MR. BROWN: Thank you.

22 (Witness excused).

23 MR. BROWN: Subject to the Court's
24 instruction about keeping him available.

25 THE COURT: Yes, let's keep him available,

1 Sheriff.

2 MR. BROWN: But he can go back to Leiber?

3 THE COURT: Yes.

4 (Witness excused).

5 MR. BROWN: Your Honor, at this time we call
6 David Collins, he is a Richland County Sheriff's
7 Deputy instructed to be here at 11:00 o'clock. I
8 don't know if he is here. We do have other
9 witnesses.

10 THE COURT: I'm sorry, one question. Could
11 you ask the last witness to come back in, Officer,
12 would you all get Mr. Davis back in.

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1 RICKY DAVIS,
2 having been previously sworn, testified as follows:

3 All right, let's come to order, please. Come
4 to order, Mr. Waters, Mr. Brown.

5 One thing I forgot to ask you, Mr. Davis,
6 when Miss Hardee-Thomas came to see you at Leiber,
7 I think?

8 THE WITNESS: Yes.

9 THE COURT: This is after you had been
10 convicted of a robbery. Now, did you know she was
11 involved in representing Mr. Bowman?

12 THE WITNESS: No, sir.

13 THE COURT: Do you know why she came to see
14 you?

15 THE WITNESS: They took me to Dorchester
16 County to see her.

17 THE COURT: I'm sorry, they took you to
18 Dorchester? She came down to the county jail to
19 see you?

20 THE WITNESS: Yes.

21 THE COURT: Did you know why she came to see
22 you?

23 THE WITNESS: Not until she came in and
24 started explaining to me.

25 THE COURT: That was about the note that you

1 had written?

2 THE WITNESS: Yes.

3 THE COURT: And you told her Mr. Bowman asked
4 you to write it?

5 THE WITNESS: Yes.

6 THE COURT: Did she ask you whether or not it
7 was true or not?

8 THE WITNESS: I can't remember. I don't
9 think she did. Once I told her that, I told her I
10 didn't have nothing to do with it, she let me go
11 from there.

12 THE COURT: What do you mean, what did you
13 mean by the term, "I didn't have anything to do
14 with it"?

15 THE WITNESS: That he told me to write it and
16 that was it.

17 THE COURT: Okay. So, did you tell her
18 whether it was true or not?

19 THE WITNESS: I can't remember. I think I
20 probably told her it wasn't.

21 THE COURT: That it what?

22 THE WITNESS: That it wasn't.

23 THE COURT: That it was not true?

24 THE WITNESS: Uh-huh.

25 THE COURT: Now, when she came to see you,

1 you had been convicted of robbery and you were
2 serving your twenty years?

3 THE WITNESS: Yes.

4 THE COURT: You told them, in response to one
5 of the attorneys, that you had thought the other
6 charges may have been gone, then you weren't sure,
7 then you said maybe they were still pending.

8 When she came down to see you did you ask her
9 anything about the other charges pending?

10 THE WITNESS: No.

11 THE COURT: Did she say anything to you about
12 the other charges pending?

13 THE WITNESS: No. The reason why I thought
14 that, every time I would look, it show it in the
15 computer, it shows I have a pending charge, so I
16 thought it was still pending, to my knowledge.

17 THE COURT: Well, at the time that you saw
18 her at Dorchester after they brought you back from
19 Leiber had you looked at the computer and saw it
20 was still pending?

21 THE WITNESS: I believe so, yes.

22 THE COURT: Well, why didn't you ask her
23 about it?

24 THE WITNESS: It just didn't concern me right
25 then.

1 THE COURT: Why didn't it concern you?

2 THE WITNESS: Because we was talking about
3 this Bowman case at the time.

4 THE COURT: All right. So, neither you nor
5 she mentioned anything about it?

6 THE WITNESS: Which we found it out it wasn't
7 pending, that's right, in actuality it wasn't
8 pending.

9 MR. BROWN: Actually it has been dismissed
10 and later restored.

11 THE COURT: All right, restored. In any
12 event, it had actually been dismissed, neither you
13 nor she knew that, or you didn't know it, anyway?

14 THE WITNESS: Yes.

15 THE COURT: But you all, nobody brought it
16 up?

17 THE WITNESS: No.

18 THE COURT: So, it didn't concern you?

19 THE WITNESS: No, not really, not at the
20 time.

21 THE COURT: All right. Have you got any
22 questions about my questions?

23 MR. WATERS: I do.

24 THE COURT: Mr. Brown, you get to go first.

25 MR. BROWN: Okay.

REDIRECT EXAMINATION

QUESTIONS BY MR. BROWN:

Q The first time you talked to Marva Hardee-Thomas about this case was at Marion Bowman's trial?

A I believe so, yes.

Q So, she didn't take down that statement from you?

A No.

MR. BROWN: I hate to open up a can of worms.

THE COURT: She didn't what, now?

Q She didn't dictate the statement, I know you wrote it, but she didn't go down there and dictate the statement, because I think there was a question about whether or not you gave that, you gave that written statement to Marva Hardee-Thomas?

A I gave it to Bowman.

Q You gave this paper to Bowman?

A Yes.

Q It is not like you gave it to Marva Hardee-Thomas?

A Huh-uh.

Q I'm sorry, you have to answer.

A No, I didn't.

1 Q So, you didn't give the statement to Marva,
2 she came and talked to you about it but it wasn't
3 until May, 2002, was it?

4 A I believe, I believe that's the date, I
5 guess.

6 Q During his trial?

7 THE COURT: Right. That was clear. I'm not
8 sure --

9 MR. BROWN: He had asked whether he had given
10 a statement to Marva Hardee-Thomas.

11 MR. WATERS: I was asking about --

12 THE COURT: The Court understands this. If
13 anyone has some different understanding, the Court
14 understands Mr. Bowman had the statement, the Court
15 assumes Mr. Bowman gave it to Marva Hardee-Thomas
16 and Miss Marva Hardee-Thomas had him brought from
17 Leiber to Dorchester to court for trial or just
18 before the trial and talked to him about it.

19 Is that everybody's understanding?

20 MR. BROWN: No, sir.

21 THE COURT: What is it?

22 MR. BROWN: We don't agree the statement went
23 from Marion Bowman to his lawyers.

24 THE COURT: Okay. Do we agree the testimony
25 is that the witness here says he gave it to Mr.

1 Bowman?

2 MR. BROWN: We heard him say it, we don't
3 agree with that.

4 THE COURT: He said that. All right.

5 MR. BROWN: That is not where we got it from.

6 THE COURT: The testimony is, of Mr. Davis,
7 is he gave it to Mr. Bowman and the testimony of
8 Mr. Davis is that even during the trial of Mr.
9 Bowman or around that time Miss Hardee, Miss
10 Thomas, Hardee-Thomas, came to Dorchester where he
11 had been brought from Leiber, had a copy of the
12 statement and talked with her about it.

13 MR. BROWN: He thought she represented him on
14 the charge still pending.

15 THE COURT: No, no, listen. One statement at
16 a time.

17 MR. BROWN: Yes, I agree with that.

18 THE COURT: Now, I asked him about that, with
19 the charges. He has answered that like he did a
20 couple other things, three or four different ways,
21 but he last answered it three or four different
22 ways.

23 MR. WATERS: That was going to be what my
24 question was, because he told me clearly that when
25 he got twenty years in Leiber he thought he was

1 done.

2 THE COURT: That is all in the record, what
3 he said about that. I was just curious as to if in
4 fact any uncertainty he had with the other
5 questions, why he wouldn't ask his lawyer about a
6 charge that he thought was pending. But that's why
7 I wanted to, really the only purpose I brought him
8 back for was to ask him at the time she came to see
9 him if he thought the charge was pending why would
10 he not ask her about it, and he didn't.

11 All right, anything else from anyone?

12 MR. WATERS: No, sir, Your Honor.

13 MR. BROWN: No, sir.

14 THE COURT: All right. Okay, you may step
15 down.

16 (Witness excused).

17 THE COURT: Now, do you know whether the
18 other witness is here yet?

19 MR. BROWN: I have his cell phone number, a
20 Richmond County Sheriff's deputy.

21 MR. WATERS: I told Mr. Collins the witnesses
22 are sequestered, he may be waiting out in the hall.

23 MR. BROWN: He was to be here at 11:00
24 o'clock, he is a ballistics person. My expert from
25 Pittsburg's plane has already touched down in

1 Charleston, these go on one issue together, we
2 would prefer to put them up together.

3 THE COURT: I'm going to step off a moment.
4 Let me know.

5 MR. BROWN: Thank you, Your Honor. It
6 shouldn't be but a minute.

7 (Recessed at 10:53 a.m.).

8 (Reconvened at 11:30 a.m.).

9 THE COURT: Okay, the next witness, please,
10 Mr. Brown.

11 MR. BROWN: David Collins.

12 THE COURT: Come around, Mr. Collins. I
13 understand they found the box at the Clerk's office
14 with everything in it.

15 MR. WATERS: Yes, sir, the transcript and the
16 stuff that was attached to my initial return has
17 been found and will be here tomorrow.

18 THE COURT: Mr. Collins, come on around, if
19 you would, please, sir. Good morning to you. You
20 can set your material down there somewhere and
21 place your left hand on the Bible, raise your right
22 and face the Clerk.

23 THE CLERK: State your name for the record.

24 THE WITNESS: David Collins.

25

1 DAVID JEFFREY COLLINS,
2 after being first duly sworn, testified as follows:

3 THE COURT: Have a seat, Mr. Collins. There
4 is a mike right there that adjusts here and there,
5 if you want to turn around, up and down.

6 Give us your name.

7 THE WITNESS: David Jeffrey Collins.

8 THE COURT: Jeffrey with a J?

9 THE WITNESS: Yes.

10 THE COURT: J-e-f-f-r-e-y?

11 THE WITNESS: Yes, sir.

12 THE COURT: Your witness.

13 MR. BROWN: I propose first to hand him a
14 copy of his trial testimony, 4307 through 4339, a
15 presentation of his testimony.

16 THE COURT: All right.

17 DIRECT EXAMINATION

18 QUESTIONS BY MR. BROWN:

19 Q And, Mr. Collins, you testified as a SLED
20 firearms expert in the May, 2000, trial of Marion
21 Bowman?

22 A Yes, I did.

23 Q And do you recall a report entitled Firearms
24 Department, SLED lab number and some other items?

25 A Yes, I do.

1 Q I'm going to hand you what has been marked
2 Plaintiff's Exhibit 24. Does that look like your
3 report?

4 A Yes, sir, it does.

5 MR. BROWN: We enter this in evidence at this
6 time as Plaintiff's 24.

7 MR. WATERS: No objection, Your Honor.

8 THE COURT: Mr. Court Reporter, have you
9 marked it already?

10 All right, Exhibit 24-B in evidence.

11 (SLED firearms report marked and received
12 in evidence as Plaintiff's Exhibit 24-B).

13 THE COURT: That is your firearm report?

14 THE COURT: Yes, Your Honor.

15 THE COURT: Okay.

16 BY MR. BROWN:

17 Q I'm going to ask you to take a look at what
18 has been marked Plaintiff's Exhibit 25.

19 A This appears to be a copy of my bench notes
20 concerning the examination of the firearm in the
21 case.

22 MR. BROWN: And we would ask those be moved
23 into evidence as well.

24 MR. WATERS: No objection.

25 THE COURT: Okay, you have those marked

1 already? Do you have them marked, Mr. Brown?

2 MR. BROWN: I do have it marked.

3 THE COURT: What is it?

4 MR. BROWN: It's a set of his bench notes,
5 25.

6 THE COURT: Okay, 25 is in evidence.

7 (Firearm bench notes marked and received
8 in evidence as Plaintiff's Exhibit 25).

9 BY MR. BROWN:

10 Q I'm going to ask you a little bit of
11 information you testified about, I want to get this
12 right, the American Firearms and Tool Marks
13 Examiners Association?

14 A The Association of Firearms and Tool Marks
15 Examiners, yes, sir.

16 Q Yes, sir. And you joined that association?

17 A Yes, I did.

18 Q All right, and I want to kind of get a little
19 bit of information about their standards. Are you
20 familiar with their standards regarding tool mark
21 identification?

22 A Yes, sir, I have copies of that information
23 with me.

24 Q And they have a theory of identification,
25 range of conclusions?

1 A Yes, they do.

2 Q I ask you to take a look at Plaintiff's 26.

3 A This is a copy of the range of conclusions,
4 for a range of conclusions consistent with coming
5 from the AFTE Criteria for Identification
6 Committee.

7 Q I'm just talking about what is contained in
8 the block, not the other text below it.

9 A Yes, sir.

10 Q Okay. And is that the theory to which you
11 subscribe?

12 A Yes, it is.

13 MR. BROWN: I would ask it be moved into
14 evidence as well.

15 MR. WATERS: No objection as long as it is
16 limited to just what is in the box and it doesn't
17 move to a larger admission of everything in this
18 document.

19 MR. BROWN: We agree with that. It's just to
20 show Your Honor there is an insert box, there is
21 text below it, we're not moving the text in, just
22 the information contained in the box?

23 THE COURT: The box meaning the front page or
24 second page?

25 MR. BROWN: Box 3-1 and it spills over to the

1 next page.

2 THE COURT: You are looking at putting that
3 in, box 3-1?

4 MR. BROWN: Yes.

5 THE COURT: Exhibit 26, the box 3-1 is in
6 evidence.

7 (ATFE range of conclusions Box 3-1 was
8 marked and received in evidence as
9 Plaintiff's Exhibit 26).

10 MR. BROWN: Thank you, Your Honor.

11 BY MR. BROWN:

12 Q That talks about a sufficient agreement, a
13 set of markings to constitute a match, I guess? It
14 may not be the right word.

15 A That's correct.

16 Q What is your take on what that sufficient
17 agreement means?

18 A The sufficient agreement refers to, a
19 sufficient agreement refers to examination of
20 individual characteristics that will be placed on a
21 bullet or cartridge case, those markings that are
22 unique to that particular firearm. We're not
23 talking about marks another firearm could have made
24 but those that are purely made by that firearm or
25 that portion of the gun that comes in contact with

1 an item.

2 During the course of the examination an
3 examiner will look at those items side by side and
4 compare those individual characteristics to
5 determine to what extent they agree or disagree.
6 The examiner is looking at the width, the number,
7 the shape, the general form and other factors of
8 all the matching stria or impressed marks that he
9 sees in order to determine at which point in time
10 if it becomes enough to be sufficient for an
11 identification to be made or sometimes say in our
12 bench notes whether they indicate to be fired by
13 that item or not.

14 The actual examination of those items is very
15 objective as for as the documenting it on paper the
16 major of those images in their actual form. The
17 actual determination as to whether it is enough to
18 render an identification is still subjective based
19 on the examiner's training and experience. If the
20 examiner reaches a point to which in his opinion it
21 is enough to determine that that particular item
22 had been fired from that particular firearm he can
23 render a conclusion that that item had been fired
24 by that firearm.

25 Q Now, you mentioned a couple words, objective

1 and subjective.

2 A Yes.

3 Q And objective, the objective part of this
4 examination is whether a marking actually exists on
5 an item you're viewing?

6 A Whether that marking exists and other factors
7 concerning that marking, its dimensions, its shape
8 and all. We're talking about matching markings
9 here, not those that don't match.

10 During the course of my examination I'm also
11 looking for exclusion factors, I'm looking for
12 markings that don't match during that same process
13 because I might be able to exclude that firearm as
14 being a possibility.

15 Q You mentioned that you're not only looking
16 for the marking, but it's relationship to some
17 other marking?

18 A Yes. We're looking at whether or not the
19 markings, in the case of a bullet, for instance,
20 you'll have scratch marks known as stria that will
21 be present along the course of a lands impression on
22 a bullet. These markings, if they are in
23 sufficient agreement with another bullet, say one
24 that has been test fired from a suspect firearm,
25 you will be able to line them up, so to speak, on

1 the actual examination. You are looking at both
2 items side by side under a comparison microscope
3 and looking for areas where these markings agree.

4 Just having two lines that match isn't by
5 itself enough to be considered a factor, they have
6 to be the same general width, the same contours and
7 in the same location relative to the other markings
8 and to other major features on the bullet.

9 Q And how do you measure the width of a stria
10 mark?

11 A The width of a stria mark is done visually.
12 You are looking at the actual visual comparison.
13 If you have two stria marks lined up and they are
14 different width you will be able to determine that
15 microscopically.

16 Q Is there a particular algorithm calculates
17 the width of two stria marks?

18 A No.

19 Q It is actually up to the examiner's opinion
20 about whether there is any match on that?

21 A That is correct. I mean, this is all based
22 on my expert opinion as to whether or not these two
23 items have a common origin, if you will. The only
24 time that algorithm comes into play is in some
25 IBIS digital imaging systems, for instance, that

1 examine the surface of a fired bullet or of a fired
2 cartridge case, then it uses a mathematic algorithm
3 to compare that with other specimens in the
4 database to determine if there are any that are
5 similar. That system, however, is primarily used
6 as a screening tool and does not itself perform an
7 identification, it doesn't tell you if there is a
8 match or not.

9 Q Was that IBIS type system or any type system
10 using a mathematical algorithm used in the analysis
11 in this case?

12 A No.

13 Q The stria marks were determined to have
14 sufficient agreement in the language of the AFTE?
15 Is that right?

16 A Yes.

17 Q That was determined by you?

18 A Yes, that is correct.

19 Q As a human?

20 A That's correct.

21 Q Now, in that process you used a microscope?

22 A I did.

23 Q Okay. And it says you took some photographs?

24 A I have some photographs of the actual
25 evidence items themselves. That is, just for

1 instance, a photograph of the cartridge case or
2 photograph of a bullet. I use that to document
3 that, that I actually have the item in my custody
4 and it's to document its condition. I did take one
5 photomicrograph through the microscope of one of
6 the identifications. Typically at that time and
7 I'm sure possibly still now, although I no longer
8 work for SLED, the policy was that you would, you
9 could take a photograph of a comparison to document
10 that for later use, to remind you for trial as to
11 what it was you were looking at, for instance, but
12 it was not a requirement to photograph it.

13 Q Now, the photograph was a view of an item
14 found at the scene or an item that was test fired?

15 A The photograph that I took, I took one
16 photomicrograph.

17 Q Yes, sir, that is to which I was referring.

18 A If I could refer to my notes for just a
19 moment, please.

20 Q The notes you are referring to, is that the
21 one that is marked, or is this your own file?

22 A This is my own file that was provided to me
23 by the State Law Enforcement Division, a copy that
24 I brought with me today. It was a photomicrograph
25 of a comparison of a test fire from the firearm

1 that was submitted in this case, versus one of the
2 fired cartridge cases to the best of my knowledge
3 would have come from the scene but I do not have
4 any independent knowledge as to where that
5 particular item came from.

6 Q And do you know which test fired casing --
7 back up. There were fifteen test fired casings,
8 correct?

9 A Again if I can refer to my notes?

10 Q And actually I would also refer to your
11 testimony --

12 A I did test fire that firearm fifteen times.

13 Q And then as for as the items that were
14 attributed to collection at the scene of the crime,
15 we're talking about items two, three, four, five,
16 six, seven, eight -- excuse me, three through
17 eight?

18 A We have three through eight and there was
19 also an item thirteen. Again I'm not, I did not
20 collect these items, I did not go to the scene.

21 Q And let me make sure the Court is clear.
22 Item thirteen is actually a bullet, would be more
23 accurate?

24 A Pardon, thirteen?

25 Q Is that actually a projectile?

1 A Thirteen is a fired cartridge case.

2 Q It's not -- excuse me. We have three through
3 thirteen being the items that were collected,
4 excuse me, three was the bullet and four through
5 thirteen are the casings?

6 A That's correct.

7 Q Excluding nine, ten, eleven as well?

8 A That's correct, excluding.

9 Q There were also four other cartridge casings
10 that were submitted?

11 A Yes.

12 Q And those were from a different container,
13 were they not?

14 A Yes. They were submitted later, they were
15 submitted after the initial batch of evidence came
16 to me.

17 Q Do you have an understanding about where
18 these were collected?

19 A Looking at my notes, there was something
20 written on the container that they were contained
21 in but it doesn't necessarily have any meaning to
22 me. I don't know, I have no knowledge as to what
23 that means.

24 Q Okay. Long story short, the casings, you got
25 fifteen test fired casings and then you got ten

1 other casings that you're being asked to examine?

2 A That's correct, ten evidence cartridges
3 casings, yes, sir.

4 Q What you're trying to do when you look -- let
5 me back up. On the microphotograph you have got --

6 A Yes.

7 Q -- which test fired casings and which --

8 A I don't know which test fire casing was used
9 to actually render that comparison.

10 Q And was it one that you were not able to
11 match?

12 A This was an actual identification, it is a
13 photograph of a match, yes.

14 Q And there are no photographs of the ones that
15 did not match?

16 A We don't take photographs of non matches, no,
17 sir.

18 Q And to speed up on this, there was one casing
19 that was attributed to the scene, that in your
20 opinion was not a match to the exclusion of all
21 other firearms?

22 A Yes, it was an inconclusive result on what
23 was listed as item five in my report.

24 Q It was not an unsuitable item under the AFTE
25 standards, was it?

1 A No, it was not.

2 Q So, it was suitable for comparison?

3 A It was, that particular item was perhaps
4 suitable for comparison. The problem that I
5 encountered in this case, if you would like for me
6 to go in that direction?

7 Q Please.

8 A The firearm that was submitted to me had been
9 immersed in water for a period of time before I was
10 able to examine it. During the course of this
11 immersion there were perhaps some corrosion or
12 other issues that were going on with the breach
13 face of the firearm. The actual evidence items
14 could have been fired before it was immersed and
15 therefore were marked by a more intact breach face.
16 This is the reason why I test fired the firearm
17 fifteen times, was in order to try to gain some
18 test standards that were more representative of the
19 firearm's actual breach face markings.

20 The immersion process itself created a
21 situation, in other words, the test fires had
22 poorer quality of markings on them than the
23 evidence did.

24 Q Now, you confused me. I understand what
25 you're telling me, those test fired casings were

1 sufficiently marked for you to state a match to
2 other casings found at the scene?

3 A That's correct.

4 Q Why weren't those markings sufficient for a
5 match on casing number five, or item five?

6 A Each time a cartridge is fired there could be
7 a difference in chamber pressure, difference in the
8 way it impacted the breach face, for instance, that
9 could change the manner of the markings that were
10 left on that particular cartridge casing. In this
11 particular case there simply weren't enough
12 corresponding individual characteristics between
13 that particular cartridge casing and my test fired
14 cartridge casings to be able to render a positive
15 conclusion that it had been fired by that
16 particular firearm. There were no indications
17 there of any factors that would cause me to exclude
18 that cartridge case having been fired from that
19 gun, it was not a negative.

20 Q Let me refer you to your testimony regarding
21 the uniqueness of firearm markings and specifically
22 I'm going to turn to page 4312 of the transcript.

23 A Yes, sir.

24 Q And there are a couple sentences beginning at
25 line 9 where you discuss the uniqueness of

1 markings.

2 A Yes.

3 Q And would you agree that it was your opinion
4 at trial that markings were unique to each firearm?

5 A Some of those markings are going to be unique
6 to each firearm if they are left on the surface of
7 the item. There are some markings may be more
8 unique to a group of firearms or in general to a
9 whole class of firearms. We have what we call
10 class characteristic and sub-class characteristics
11 and individual characteristics. Individual
12 characteristics are the ones we use to make an
13 identification. That is to say that item had been
14 fired by this gun.

15 Q That is what you're talking about in this
16 trial?

17 A When I'm talking about the items unique to
18 each individual firearm I'm discussing individual
19 characteristics.

20 Q That's what you go on and talk about at lines
21 14 through 19, isn't it? In fact it goes on to
22 line 23?

23 A Yes.

24 Q And it says defects left are unique to that
25 firearm such as the markings are as unique as a

1 fingerprint to a person?

2 A That's an analogy I have often used in the
3 past.

4 Q Now I want to make sure I understand. We
5 know that fifteen test fired casings are the same
6 fifteen test fired casings that you're comparing to
7 items three through eight and item thirteen?

8 A Yes.

9 Q So, quality of the test fired casings,
10 although may be affected by the immersion in the
11 water, are the same for every one of these
12 comparisons?

13 A Not necessarily. Test fired cartridge
14 casings would be subject to the same variables that
15 any other cartridge casing would be, in that there
16 could be differences in the way those test
17 cartridge casings impact the breach face as well.
18 Each one might have slight differences in the
19 manner in which it was marked by the firearm.
20 Those slight differences could be enough to
21 determine whether that particular test fired
22 cartridge casing is going to display the right
23 markings I need to make an identification.

24 Q I want to make sure I understand. The
25 fifteen test fired ones that were compared to

1 number three, for instance, were the same fifteen
2 test fired ones compared to number five?

3 A Yes.

4 Q All right. So, the quality of the markings
5 on the fifteen are the same as a group, whether
6 you're comparing them to three or five?

7 A When it comes to their suitability for
8 comparison purposes with each individual specific
9 item of evidence, yes, they were, all the same test
10 fires were compared against all the evidence.

11 Q Okay.

12 A So, the same variables would be in place
13 there, you would have some that would be more
14 suitable for identification than others. Part of
15 our examination process also not only involves the
16 comparison of test cartridge casings with evidence
17 cartridge cases, for instance, it will also involve
18 importantly the comparison of test items with each
19 other, and by doing so you are determining whether
20 or not that particular firearm is going to be
21 leaving markings that are suitable for
22 identification on an item that is fired from it,
23 because that is not a given, some firearms simply
24 do not mark cartridge cases nor bullets very well.
25 But it also enables you to determine that the

1 firearm is in fact leaving reproducible individual
2 markings.

3 Q Okay. That is yes?

4 A Yes.

5 Q That fifteen is the same as compared to
6 three, as compared to five?

7 A That's correct.

8 Q Okay. And the markings, consistent with your
9 theory of uniqueness, the markings, unique marking
10 on three was sufficiently agreeable with the
11 markings on the set of fifteen to make the match on
12 the fifteen test fired casings to item number
13 three?

14 A Lab number, we need to clarify, lab three is
15 the projectile.

16 Q Excuse me, lab four?

17 A Lab four did bear sufficient individual
18 characteristics to determine that it had been fired
19 by the firearm that was submitted.

20 Q Lab five did not have those same unique
21 markings, did it?

22 A Not to the quality that I needed to make an
23 identification.

24 Q It is not because it was an unsuitable
25 marking, was it?

1 A It wasn't unsuitable. There simply were not
2 enough individual characteristics there for me to
3 determine whether based on its comparisons with the
4 test fires it had been fired by that gun.

5 Q That is exactly the point I'm trying to
6 highlight here. That was fired by a gun that did
7 not leave the same unique markings as item four or
8 six or seven or eight or 46 through 49, or 13,
9 excuse me?

10 A The markings present on that cartridge
11 casing, item five in my report, in comparison with
12 test fires from the evidence firearm that was
13 submitted were not of sufficient quantity or
14 quality for me to be able to make a determination
15 as to whether it had been fired by that gun or not.

16 Q But you're not telling the Court that it was,
17 in AFTE standards, unsuitable to compare?

18 A No, I'm not saying it was unsuitable.

19 Q So, you actually did compare it?

20 A Oh, I did compare it, I compared it
21 extensively with the other items.

22 Q Can you demonstrate on, and I believe it is
23 Plaintiff's 25, can you show the Court which
24 markings on five were different in the drawing that
25 I believe you drew that has the stamp?

1 A That is of the head stamp. It is a rough
2 sketch of the head stamp. Those markings are not
3 intended to be the actual representation of the
4 markings that I looked at on the microscope. It is
5 simply to indicate the presence that there were
6 markings there.

7 Q Okay. The head stamp drawing is not
8 accurate?

9 A The head stamp drawing is not something I
10 would, I did not base a conclusion on. That is
11 simply a sketch. Actually what it primarily does,
12 it shows me the brand of the ammunition, the shape,
13 the general shape of the firing pin and the
14 presence or lack thereof of any characteristics,
15 marking characteristics.

16 Q So, what we know, there were markings on it?

17 A There were markings there, yes.

18 Q That tells us that?

19 A Yes.

20 Q And basically nothing else?

21 A From that sketch, it reveals simply that.

22 Q Okay. Where is it, and I'm going to start
23 with item 25, is it item 25 that the stria
24 markings, where are they described, where it
25 appears in your image on the microscope?

1 A We don't document, we didn't document that at
2 SLED, where the exact location of the markings
3 were. It is simply stated in the results what your
4 conclusions were and then you would make some notes
5 as to the general condition of the evidence. We
6 didn't make detailed notes as to the location and
7 nature of the actual markings on the items.

8 Q To make sure I understand, basically the
9 worksheet just has a conclusion?

10 A The worksheet has conclusions, it has notes
11 concerning, for instance, looking at my note sheet
12 for my item five, there is a section there in the
13 center of the note sheet that indicates the shape
14 of the firing pen and the type of breach face
15 markings that were present on this particular item.
16 The results portion of that indicates the results
17 of the microscopic comparisons and if necessary any
18 other pertinent information that would be reported
19 in this particular case.

20 Q Okay. You said it talks about the type of
21 breach face markings?

22 A Where it says breach face, then after that is
23 written the word parallel.

24 Q Yes.

25 A That is the type of breach face markings that

1 were present on that cartridge casing.

2 Q Let's talk about the identity of pattern
3 matching. Are you familiar with that term?

4 A That is a term I have heard, yes.

5 Q Okay. Can you tell the Court a little bit
6 about how pattern matching applies to ballistics
7 imaging?

8 A The general rule of performing firearms
9 identification is there are two theories of what
10 could be used as a criteria for identification of
11 the pattern but the one that is currently largely
12 accepted, that is, you are actually looking at the
13 pattern of the stria markings or depressed markings
14 and the degree to which that pattern, which
15 includes the widths and thicknesses, the direction,
16 all of these things, how well they agree in order
17 to make an identification.

18 The other method is called consecutive
19 matching stria, where they actually count the
20 number of stria that match in a particular area and
21 try to use that as a means to determine whether
22 that item was fired by that particular firearm.
23 CMS, as it is known, hasn't been widely accepted by
24 AFTE at this time and it is still a method that is
25 under development. The method of pattern matching

1 or pattern identification is one that is, has been
2 in use since the beginning of this discipline in
3 the 1920's. All the firearms identifications that
4 have been made since then have been based on what
5 is essentially pattern matching or looking for
6 these areas, patterns of matching stria or other
7 characteristics.

8 Q Now, you employed pattern matching theory in
9 reaching your conclusions?

10 A I did.

11 Q And that is you note there is parallel, you
12 note the parallel, I'm going to get the numbers
13 right this time, lab number four, lab number five,
14 lab number six, lab number seven, lab number eight,
15 lab number thirteen, and I'm assuming on 46 through
16 49?

17 A That P there stands for parallel, yes.

18 Q Okay. Form six through 49 are indicated all
19 on one worksheet?

20 A Yes. They were all received together as one
21 group of items in one container so I listed them
22 all on one sheet.

23 Q Where are the notes regarding the width of
24 the stria or the distance between the stria that
25 you determined with your own viewing and not an

1 algorithm program were sufficiently alike to
2 declare this a match, or sufficient agreement,
3 where are those notes?

4 A Those markings are not, information of that
5 nature is not documented in a firearms examiner's
6 notes. I have never seen it documented by anybody
7 that I have ever worked with. These process of
8 pattern identification, pattern matching is based
9 on identifying the presence of matching
10 characteristics and then microscopically analyzing
11 those to see if there is sufficient agreement based
12 on the, it is like you are putting together a
13 puzzle, and based on that information you don't go
14 forward and try to document the actual widths of
15 each individual stria or its contours related to
16 others, that is all done visually by the examiner.
17 None of this is typically done in a vacuum.
18 Typically these examinations are not only done by
19 myself, but if I render an identification I will
20 also have that verified by another properly
21 qualified certified examiner.

22 Q All right. How can another person come
23 behind, gosh, I have got kids in middle school, how
24 can you check the work on their math problems?
25 Obviously you have a problem, you can have an

1 answer, but using that example, the teacher wants
2 to see the work between the problem and the answer.
3 A The work is all done with the eye, looking at
4 these items under the microscope and you actually
5 have a visual representation of these individual
6 characteristics, and what you're determining
7 visually is whether these items match. There is
8 not a score or anything else that is given to the
9 nature of that match. The determination as to
10 whether or not those particular items have
11 sufficient agreement is subjective. That is all
12 based on my training, my experience as an examiner,
13 and that all includes not only the examination of
14 known matches of different items, but also known
15 non matches. That is part of our training, we look
16 at items from, for instance, multiple manufactured,
17 consecutively manufactured barrels and test them
18 and fire through them. We will look at those and
19 try to determine if there is any carryover from one
20 barrel to the next in the manufacturing process.
21 Those studies have been done. I have actually
22 participated in one of those studies where we
23 looked at numerous bullets fired by different
24 barrels to determine if those particular individual
25 characteristics were unique enough to be able to

1 determine which barrel each bullet came from, and
2 thus far there have been no errors in that study,
3 which is nationwide, there were no errors in my
4 portion of that study, so therefore you are able to
5 make that determination visually as to whether or
6 not there is sufficient agreement. Another
7 firearms examiner coming along behind me that has
8 sufficient training and qualification should come
9 to the same conclusion that I did if there is
10 sufficient matching characteristics there.

11 Q Using the math example, you have a problem of
12 two times two, the answer was four, that would be
13 the correct answer?

14 A That's right.

15 Q But if the person did the equation and
16 actually added two plus two they would still come
17 up with four, won't they?

18 A I'm not sure if I follow what you're trying
19 to say.

20 Q In other words, you don't know how they got
21 the answer. Whether the answer is right or not,
22 you want to see the work on multiplication or the
23 work in addition in that scenerio?

24 A In that scenario that would be true.

25 Q Okay.

1 A Our situation it is all done, again, this is
2 all based on the accepted methodology.

3 Q Does the AFTE give a definition of sufficient
4 agreement that can be quantified?

5 A Again it is all subjective. That portion of
6 the examination where you actually render the
7 conclusion is subjective.

8 Q And isn't one of the hallmarks of science
9 that, not the conclusion, but the actual findings
10 can be verified and reproduced?

11 A And in this particular case I believe that
12 they can be, yes.

13 Q I don't mean to the exclusion of a match, but
14 the findings of a number of stria and the distance,
15 width or relationship between the stria to create
16 that pattern?

17 A If you were to attempt to do that I'm sure
18 that in some way, shape or form it may be able to
19 be verified. However, that is not the manner in
20 which we do our identifications.

21 Q That wasn't done in this case?

22 A In this case, no.

23 Q At least related to your examination?

24 A No, that is simply not documented in our
25 notes.

1 Q Now, tell me about the blind testing that was
2 done at the SLED lab related to this.

3 A The blind testing?

4 Q Yes, sir. Where there were items submitted
5 and there was no idea of whether or not these were
6 related or to be eliminated or not. In other
7 words, there were other guns that were test fired
8 besides the gun you were testing.

9 A We only had one firearm submitted for
10 analysis in this case so all my testing, all my
11 tests were done based on either evidence, evidence
12 comparison of the items in this case, which we also
13 did, multiple fired cartridge casings, you will
14 attempt to identify them with each other, or they
15 were done versus comparison with the test fires
16 produced by this one evidence firearm that was
17 submitted. We don't take evidence items and then
18 compare them with, for instance, test fires from
19 firearms that are not related to the case.

20 Q Using an example like a cattle brand, if
21 somebody has got a cattle brand that has a curved R
22 on it and you saw that and you said, well, that
23 marking had to come from a Curved R cattle brand.
24 If there was a second Curved R cattle brand would
25 it not produce the same marking?

1 A Now we're talking about the individual
2 marking characteristics of firearms and it has been
3 a study that is going on in firearms identification
4 since 1920 as validated by multiple studies that
5 showed that based on the worst case scenario, which
6 is what I spoke before, you would have multiple
7 sequentially manufactured barrels, that would be
8 the most likelihood of having similarities between
9 barrels of that nature. Even in those situations
10 you can differentiate which bullet came from which
11 barrel. So, the individuality of particular
12 barrels has been well established as has the other
13 portions of the firearm, the breach face, the
14 firing pin, et cetera.

15 Q Are you familiar with a ballistics imaging
16 study done by the National Academies of the
17 National Research Council?

18 A I have read most of the executive sub-reading
19 of that study but I have not read the entire
20 document. I am aware of its existence.

21 Q Would you consider that to be an expert
22 study?

23 A I will consider it to be an expert study
24 within the realm of its scope, which would be the
25 study of ballistics imaging systems.

1 Q And underlying that question whether you
2 created an imaging system is a question of the
3 assumption that all firearms create a unique and
4 reproducible mark?

5 A In order for that system to be ultimately
6 useful, yes, that would be, it will be something
7 that will have to be agreed upon.

8 Q And if it was not a unique and reproducible
9 mark then you cannot do firearms matching through
10 an imaging program, can you?

11 A Well, the imaging program itself, this goes
12 back to what I was speaking of previously about the
13 national integrated ballistics information network,
14 IBIS technology that is used to put those items in
15 the system. That system is not intended to
16 actually determine whether those two items match.
17 It simply is a screening tool that indicates there
18 is a higher score, for instance, assigned to this
19 particular comparison that you might want to take
20 and look under a comparison microscope. The actual
21 identification has to be done by an examiner,
22 qualified and trained examiner under a microscope.
23 The system itself is not intended at least at this
24 time to perform that type analysis.

25 Q Underlying assumption, any system, even in

1 the one that is currently in existence, is that a
2 firearm produces a unique marking and that marking
3 is reproducible?

4 A That's correct.

5 Q In fact reproducible every shot?

6 A I don't believe, I don't think I would go as
7 far as saying a firearm is going to produce a
8 reproducible individual mark on every shot because
9 there are variables in play. However, the
10 variables would tend to be the exclusion rather
11 than a false conclusion of a particular item.

12 Q Let me make sure I understand this now. If
13 it produces a unique mark when it is fired that is
14 not reproducible every time it is a firearm
15 producing different sets of unique marks?

16 A It's not producing different sets of unique
17 marks, necessarily, it is sometimes producing
18 different quality and quantity of markings,
19 depending on, for instance, the breach face of a
20 firearm, you may have very bold and distinct
21 markings produced when that cartridge casing goes
22 into contact with the breach face. However, the
23 next cartridge, if there is a change in the chamber
24 pressure it may produce less markings. Some of the
25 markings you have the first test may not be present

1 on the second test. However, the markings that
2 there will be some correspondence of markings
3 between both items.

4 Q All right. Now --

5 A It may not be enough to render a conclusion
6 as to whether they are from the same item or not,
7 in which case you come up with an inconclusive
8 response.

9 Q I will probably move on to something else.
10 I'm just struggling to understand how there is a
11 marking that is unique to a firearm that shoots
12 cartridge A and then on cartridge B it may produce
13 a marking that is not the same but it is still
14 unique.

15 A If I could use an analogy, perhaps, to try to
16 explain this. With the fingerprint, the
17 individuality of a fingerprint, if I were to place
18 my finger on this bench and lift it I probably have
19 left a very good individually marking fingerprint.
20 If I were to just take a portion of my finger and
21 strike it across in a manner such as that or just
22 to leave a partial fingerprint I may leave some of
23 the same individual markings that will be useful in
24 fingerprint identification but I may not have left
25 enough of them to render a conclusion as to whether

1 it was fired by the same gun or not.

2 Q Would you call that fingerprint unsuitable
3 for identification?

4 A I would call that fingerprint, the conclusion
5 would be, I'm not a fingerprint expert so I'm not
6 sure what terminology they would use.

7 Q I'm sorry, you injected it.

8 A I did. But from the firearms standpoint I
9 would consider that to be an inconclusive
10 comparison. There may be sometimes if you simply
11 swipe your finger across a surface you would leave
12 no information at all, which would be insufficient
13 ridge detail, which would be equivalent of an
14 unsuitable. But there may be enough information
15 present but between those particular two items
16 there simply isn't enough agreement. You could
17 have a third item that did have enough agreement to
18 make identification, yes, and that is why you
19 render an inconclusive.

20 Q Let me ask you whether as part of the study
21 of the casings found in this case was there another
22 High Point .380 fired to compare it to?

23 A No, I did not have another High Point .380, I
24 did not test fire or analyze any other High Point
25 .380 caliber firearm in this case.

1 Q So, this was only compared to that High Point
2 .380 that was submitted to the lab?

3 A That is correct.

4 Q All right. And explain to the Court the
5 difference between, I think we did this briefly,
6 but between class characteristics and individual
7 characteristics.

8 A Class characteristic would be those
9 characteristics left by perhaps a whole group of
10 firearms, perhaps of a common manufacture, perhaps
11 not. An example of class characteristics would be
12 a .38 caliber bullet with five rifling grooves and
13 righthand twist may be a class characteristic
14 consistent with Smith & Wesson, Ruger, Taurus, other
15 manufacturers of revolvers. That is basically a
16 sub-set of a whole group of revolvers that you can
17 narrow that down to.

18 You can take actual measurements of the lands
19 impressions and groove impressions on the bullets
20 and perhaps narrow that field down even more. The
21 individual characteristics or the microscopic
22 details in those grooves are individual to that
23 specific firearm that fired them. You can use
24 class characteristics, perhaps, in a screening
25 process but you cannot use class characteristics to

1 determine if a particular item had been fired by a
2 gun.

3 Q What class characteristic, let's make sure we
4 understand, we're talking about lands and grooves,
5 but in essence here the matching that was done,
6 that you testified on the State's behalf, was
7 matching between a cartridge casing and the mark on
8 its breach face and the breach of the gun that was
9 submitted. The question is whether or not that
10 breach face produced that marking?

11 A That's correct. And cartridge casings also
12 can display class characteristics. In this
13 particular case the class characteristics described
14 would be first of all the caliber of the cartridge,
15 .380, the form or shape of the firing pin that left
16 the impression, in this case it was hemispherical,
17 the nature of the breach face markings, which would
18 be parallel in this case. All those together are a
19 display of the class characteristics that are
20 present in this particular, on these particular
21 items.

22 Q Okay. Class means not one gun but a set of
23 guns?

24 A That's correct.

25 Q So, we know the caliber casings would have

1 been the same for all .380's, no matter who
2 manufactured it?

3 A These .380's, if you look at the caliber and
4 nothing else, obviously there is a tremendous
5 number of firearms you would have to include as
6 possible sources.

7 Q We have three things you mentioned, the
8 caliber, the firing pin and whether parallel
9 markings?

10 A That's correct.

11 Q The caliber we know narrows it to a .380 gun
12 no matter who manufactured it?

13 A That's correct.

14 Q The firing pin of this gun was replaced,
15 wasn't it?

16 A Yes, that's true. In this particular case
17 the firing pin was broken on the firearm before it
18 was actually test fired, so I had to use a firing
19 pin from a reference collection of firearms in the
20 laboratory in order to effectively test fire the
21 gun.

22 Q So, the .380 does not, the fact it's a .380
23 casing doesn't match this particular gun?

24 A No.

25 Q The fact it was a firing pin marking

1 comparison also doesn't make it this gun because it
2 was replaced before test fired?

3 A I didn't even use the firing pin impression
4 on my test fires for any sort of microscopic
5 analysis because obviously that was from a
6 different gun. The shape of the original firing
7 pin that broke on the firearm was hemispherical, so
8 I could still indicate, that is still not an
9 excluder in this particular case.

10 Q How many, how many manufacturers utilize a
11 hemispherical firing pin?

12 A Vast numbers of them. It still doesn't break
13 it down much beyond the fact it's simply a .380. A
14 hemispherical shape firing pin is probably one of
15 the most popular shape of firing pin. That itself
16 doesn't narrow the ranges down much beyond caliber.

17 Q Okay. We're stuck with the parallel markings
18 being the indicator that you used to take this from
19 a class match, which can be either all .380's or
20 all .380's with a hemispherical firing pin, down to
21 this one gun to the exclusion of all other firearms
22 in the world?

23 A Individual characteristics found in the
24 parallel breach face markings are what were used to
25 render this conclusion. Parallel, many firearms

1 also have parallel breach face markings. The
2 general rifling characteristic of that, as I
3 stated, is pretty much used as a screening tool.
4 You might have, for instance, the cartridge cases
5 of this nature with a hemispherical firing pin and
6 breach face marks submitted, then they submit to
7 you a firearm which has circular breach face. That
8 would be an automatic exclusion, you could look at
9 that and say immediately that firearm did not fire
10 this cartridge casing.

11 THE COURT: Mr. Collins, is there any way of
12 knowing what caused the firing pin to break?

13 THE WITNESS: I was unable to absolutely
14 determine the cause of that. The fact the firearm
15 had been immersed in water for some period of time
16 may have produced some corrosion that contributed
17 to that. This particular make of firearm uses a
18 firing pin that may not be as strong and suitable
19 to dry firing as perhaps another brand of firearm.
20 The breaking of the firing pin occurred after I had
21 disassembled the firearm. When it first came in it
22 was immersed in water.

23 THE COURT: When it first came to you the
24 firing pin was not broken?

25 THE WITNESS: It was not.

1 THE COURT: You feel that the water erosion,
2 or corrosion, I guess, that made it weak or caused
3 it to snap or break?

4 THE WITNESS: That's correct, that may have
5 been a contributing factor.

6 THE COURT: Did you break it?

7 THE WITNESS: Probably. In order to
8 determine if it would function I wiped the gun to
9 get the water off it and to stop any further
10 corrosion, that is the first thing we do with a gun
11 in the laboratory, then I re-assemble the firearm
12 and rack the slide, if you will, cock it and pull
13 the trigger to see if the mechanism was probably
14 reassembled. When I pulled the trigger, dry fired
15 it for that first shot the firing pin broke and
16 actually spit out of the barrel.

17 THE COURT: It broke as you were dry firing
18 it, there was no bullet in the gun?

19 THE WITNESS: There was no cartridge in the
20 chamber, no.

21 THE COURT: I'm sorry.

22 MR. BROWN: Oh, no, please, Your Honor.

23 BY MR. BROWN:

24 Q So, where we're at right now, I do want to
25 come back, you mentioned a lot of guns produce

1 parallel stria?

2 A The class characteristics on this particular
3 fired cartridge casing were not really enough to
4 narrow it down to a specifically small range of
5 manufacturers of firearms. The individual
6 characteristics are what we have to use to actually
7 determine which firearm it is that fired this
8 particular item.

9 Q And what individual characteristics are noted
10 on the worksheets that have been admitted into
11 evidence as Plaintiff's 25?

12 A We don't make any reference to the number,
13 nature or other scriptors of it. We simply
14 indicate whether there was sufficient agreement or
15 not in the individual characteristics and then put
16 it in our notes and then in some cases, in the case
17 of a cartridge case comparison, typically at that
18 time we photograph perhaps one of them as a
19 representative sample, which is what I did in this
20 case. In the case of bullets you might take more
21 photographs in order to document it because there
22 is more areas perhaps you can look at.

23 Q Let me ask you, because one thing, I want to
24 go through a little litany of things, you just
25 talked about one of them, one is whether the notes

1 contained any comment on the stria, the number of
2 grooves, of consecutive matching stria, or the
3 number of consecutive matching stria?

4 A As we did not then nor do we do now use the
5 consecutive matching stria process to render
6 conclusions, it was not noted because it is
7 something simply we did not do then and I'm not
8 sure that SLED even does it to this day. I know in
9 my laboratory we don't document it. CMS can be a
10 useful tool for documenting the quality and
11 quantity of certain individual characteristics if
12 you choose to do so, but it is definitely not a
13 requirement in the industry.

14 Q CMS is short for consecutive matching stria?

15 A That's correct.

16 Q That is an attempt to quantify a match?

17 A And that is true. One thing we need to keep
18 in mind here is that CMS is only regarded as a
19 methodology when you're dealing with striation to
20 striation comparisons. In this case there is a
21 little bit of a muddy area because you're actually
22 dealing with an impression of a stria mark, so it
23 is questionable as to whether or not consecutive
24 matching stria should be contemplated in those
25 circumstances.

1 Q Otherwise we have no other way to quantify
2 stria agreement?

3 A No. Again, all my quantification was done as
4 I do the examination, as I render my conclusion, it
5 was done at that point. Even the photograph that
6 is taken for the comparison is not intended to be
7 used as a means of verifying a comparison. It is
8 simply to document what the comparison looked like,
9 because some cases it might be two, three years
10 before I go to trial on that case and I will need
11 to remind myself later what it was I was looking
12 at. The photograph itself is simply intended to be
13 a document, some laboratories don't even
14 photograph, they actually do a sketch of what they
15 are looking at under the microscope.

16 Q And do we know what the established error
17 rate through blind testing is for the SLED lab?

18 A Through the SLED lab, the only methodology
19 that you have for determining the error rate is the
20 results of proficiency tests, and proficiency tests
21 are given by an outside agency, each examiner takes
22 at least one proficiency test in each discipline a
23 year, typically one firearms examination
24 proficiency test and one tool mark proficiency
25 test. As a result of those proficiency tests you

1 can determine what each individual examiner's error
2 rate was on that test and you can also perhaps
3 indicate what the SLED lab wide error rate was
4 based on those tests. Looking at the use of
5 proficiency tests nationwide as a means of
6 determining the industry's error rate would be
7 questionable problematic.

8 Q Then I guess my question is does it contain,
9 does it include blind testing with guns that are
10 not the source guns for items?

11 A It can. I mean, they typically send you,
12 they send you test fired or simulated evidence.
13 They send you test fired bullets, bullets and test
14 fires. Some of the bullets that they send you may
15 not be related with the test fires they send you.
16 You are simply determining if you can make a match,
17 whether you can find conclusion or something of
18 that nature.

19 Q And that is kind of like the difference
20 between a show-up ID where they bring a person to
21 the scene and say is that the guy that mugged you,
22 and a line-up where they show you six people and
23 ask you which one? That would be --

24 A Yes.

25 Q That would be a blind test?

1 A Yes. That is more on the lines of what is
2 done, simply providing you with the items and you
3 have to determine whether it matches or not, with
4 no other information.

5 Q What is the error rate for the SLED lab for
6 blind testing?

7 A The best of my knowledge, it is zero.

8 Q So, a hundred percent accuracy?

9 A I'm not aware of anybody having failed the
10 proficiency test at the SLED laboratory. I know I
11 didn't when I was there.

12 Q On blind testing?

13 A Blind testing.

14 Q And the same is true for you?

15 A Yes.

16 Q And is the same true for other examiners?

17 A I couldn't say with absolutely there was zero
18 percent error rate. The only study I'm aware of
19 that has been done deals with these proficiency
20 tests and that study did show there was some error
21 rate involved. The problem with that study was
22 that they, this study was developed using the
23 proficiency test on a nationwide basis and there is
24 no determination as to whether or not everybody
25 took that proficiency test was actually a firearms

1 examiner or not or an unqualified trainee, which
2 does happen in some laboratories. Therefore, that
3 error rate, which was proximately one percent based
4 on firearms and looking at false positives, where
5 false identifications were made would be, I would
6 think that would be an artificially high number for
7 that.

8 Q And I'm going to ask you about your
9 conclusion, your expert opinion in this case
10 regarding the five casings that you said there was
11 a match, and in this case didn't you testify that
12 these matches, these five casings, it was your
13 determination they were fired from the submitted
14 firearm, quote, to the exclusion of all other
15 firearms?

16 A Could you refer me to that in the transcript?

17 Q Sure. Beginning on 4315 is your answer, line
18 25, the question is right above it.

19 A Okay. Yes, I did state that in my testimony.

20 Q And --

21 THE COURT: It states what, again?

22 MR. BROWN: He stated he determined that the
23 five casings he was able to match matched this
24 firearm, quote, to the exclusion of all other
25 firearms.

1 THE COURT: Okay.

2 BY MR. BROWN:

3 Q And then you were subsequently asked would
4 that, and I assume, it says would that even be even
5 another .380 High Point gun manufactured at the
6 same plant at the same time, and you responded,
7 "That would exclude even that gun"?

8 A In my opinion, yes.

9 Q Now --

10 A That is what I testified to at the time.

11 Q But you also indicated today that you didn't
12 compare it with any other High Point .380's, did
13 you?

14 A No, I did not.

15 Q And your answer, I would assume is, says that
16 you had not examined any stria from a High Point
17 .380 serial number P732433?

18 A I never received that firearm in this case,
19 I'm not aware of that being submitted to me in this
20 case.

21 Q You don't know the stria markings, you're not
22 aware of the stria markings produced by that model
23 High Point .380, are you?

24 A No, I'm not.

25 Q So, we don't know whether those markings are

1 sufficiently like these or in such agreement with
2 the stria left on these casings today would also be
3 a match?

4 A I can state based on my professional opinion,
5 my opinion as a firearms and tool marks examiner
6 they would not, because I rendered a conclusion in
7 this case these particular items had been fired by
8 that gun. And what that means is, if I can refer
9 to the --

10 Q Sure.

11 A At the bottom of section B of the theory, my
12 findings would be in agreement with the the theory
13 of identification where it says the statement that
14 sufficient agreement exists between two tool marks,
15 and tool marks are what we're talking about in this
16 type case, means that the agreement is of a
17 quantity and quality that the likelihood that
18 another tool, or in this case a firearm, could have
19 made the mark is so remote as to be considered a
20 practical impossibility.

21 Q Let's talk about that. Practical
22 impossiblity means that it could happen?

23 A There are no absolutes in this particular, in
24 any type of examination of this type, even in DNA
25 comparisons where perhaps they have, based on their

1 science they have the ability and access to
2 statistical information where they can, for
3 instance, say that the likelihood this DNA profile
4 was produced by another individual other than the
5 suspect in that case could be one in 300 billion.
6 They can come up with that sort of statistics.
7 Given the population of the planet earth, there is
8 nowhere near 300 billion, you can exclude other
9 people as being a practical possibility as a match.

10 The same thing goes with firearms. Studies
11 have shown there have been sufficient, there have
12 been sufficient studies done to show that the
13 likelihood that two firearms would produce matching
14 individual characteristics of sufficient equal
15 quantity and quality as to produce the same
16 characteristics that an examiner would call as an
17 identification would be practically impossible.

18 Q Let me come back. Practically impossible
19 means that it is possible?

20 A Theoretically there is the possibility if you
21 had massive, massive numbers beyond the number of
22 firearms that are produced now done, that you might
23 find one in 300 billion down the road that produced
24 the same markings. However, as a firearms examiner
25 I'm stating that it is my opinion that it is

1 practically impossible that these particular items
2 could have been fired by any other firearm other
3 than the one submitted. That to me is an
4 identification. I'm saying it is my opinion that
5 item was fired by that gun and no other gun.

6 Q You made two opinions. One, it was fired by
7 that gun, and one that you could exclude all
8 another guns, was the certainty factors that you
9 put in there.

10 A I can see where the analysis of my statement
11 would lead to an opinion of certainty in some
12 people but that is not the manner in which it was
13 coming from me. I was simply trying to articulate
14 that it would be a practical impossibility for any
15 other firearm ever produced to produce these same
16 characteristics.

17 Q You didn't tell the jury there was a remote,
18 tee tiny possibility it could be another gun?

19 A That's correct, because in my opinion it was
20 not. My opinion, the way I'm often asked to
21 describe my opinion would be on, for instance,
22 using a percentage type basis how sure are you that
23 this particular item was fired by that particular
24 gun, and if I render an opinion such as this where
25 I'm stating that item was fired by that gun I'm 100

1 percent sure in my mind that no other firearm
2 manufactured would produce those same markings. If
3 the opposite is true, that I rendered a negative
4 conclusion saying that bullet was not fired by that
5 gun, for instance, I'm saying it is a zero percent
6 chance. Everything between zero and 100 percent is
7 inconclusive to me.

8 THE COURT: Wait a minute, sir. You said
9 just then you're 100 percent confident that that
10 bullet or the bullet in the case you testified was
11 fired by the gun you tested?

12 THE COURT: The cartridge case I'm 100
13 percent sure was fired by that gun.

14 THE COURT: But yet you say it is a
15 possibility, remote possibility it was fired by
16 another gun or not?

17 THE WITNESS: Scientifically, statistically
18 no examiner, I believe, could ever state that there
19 is zero percent chance that that particular bullet
20 or cartridge case could have, could be marked in a
21 way that no other bullet, no other gun that has
22 ever been produced -- let me back up, I'm starting
23 to get my tongue tied.

24 THE COURT: I see what you're saying. Do me
25 a favor. Read your testimony that you gave at the

1 trial again, the response to the question. What
2 page was this response on, Mr. Brown?

3 MR. BROWN: Yes, sir, I apologize. It begins
4 at 4315, line 22, and the question at line 22,
5 where it says, "With respect to the shell casings
6 what determinations or findings did you make on the
7 test fired?" And he gives an answer, "Of the six
8 fired cartridge casings that were submitted I was
9 able to determine that five of them had been fired
10 by this firearm to the exclusion of all other
11 firearms."

12 THE COURT: You say six of them, you fired
13 six --

14 THE WITNESS: There were six evidence
15 cartridge casings submitted.

16 THE COURT: Actually ten but six in one group?

17 THE WITNESS: Six in this initial group that
18 were submitted, I believe, as I understand it, and
19 I was able to match five of them to the gun. The
20 sixth one is the one that we previously mentioned,
21 item number five, which was inconclusive, I was
22 unable to determine if it had been fired by that
23 gun or not. The identification, the match came on
24 the five other ones.

25 THE COURT: And these are casings that were

1 just test fired?

2 THE WITNESS: Those were actual evidence
3 cartridge casings.

4 THE COURT: These are the six, okay. So, you
5 were given six actual casings fired, that allegedly
6 were fired in this particular case either in the
7 victim, at the victim or somewhere in the area?

8 THE WITNESS: Somewhere at the scene. Again,
9 I didn't go to the scene so I'm not sure what the
10 relationship is.

11 THE COURT: Are you saying of the six you
12 were given -- read your statement again, five of
13 the six?

14 THE WITNESS: Of the six fired cartridge
15 casings that were submitted I was able to determine
16 that five of them had been fired by this firearm to
17 the exclusion of all other firearms.

18 THE COURT: Okay. I just wanted to make sure
19 I had it down. But you are saying remotely it's
20 possible that some other weapon fired them but
21 you're saying that it is impossible to say in any
22 case that, to remove millions of weapons, that
23 some, or that some other weapon couldn't have fired
24 it, no way 100 percent of identifying a bullet or
25 casing from a weapon?

1 THE WITNESS: I believe it is a hundred
2 percent because what you're looking at is, as I
3 stated, at the theory OF identification, the
4 likelihood that another firearm would produce these
5 same markings and same quantity and quality is
6 practically impossible.

7 THE COURT: Is there a way to come up with a
8 statistical figure of that?

9 THE WITNESS: Not at this time.

10 THE COURT: Is it so remote you can't come up
11 with a figure of one in five million or one in ten
12 million?

13 THE WITNESS: Statistical studies have been
14 performed that show the likelihood of encountering
15 matching stria on the surface of a bullet or on the
16 surface of a cartridge casing, what your likelihood
17 of encountering a set number of matching stria
18 would be. I actually have a copy of that study
19 here with me if you would like to see it.

20 THE COURT: My question is if there is a
21 statistical way of mentioning that. For example,
22 in DNA they use statistics, it is a likelihood of,
23 you know, one out of ten million other people could
24 be this person or ten trillion, but in this you
25 don't use a figure saying that only one other in

1 five million weapons could have fired this?

2 THE WITNESS: That's correct, we don't have
3 that statistical information.

4 THE COURT: In the industry, as for as in the
5 science, do you know of anyone within your field
6 who usually gives that type of statistical
7 information when he or she testifies or gives an
8 opinion?

9 THE WITNESS: Nobody that I'm aware of has
10 ever given any kind of statistical information of
11 that nature. They are testifying as to their
12 results.

13 THE COURT: And as for as your opinion, is it
14 still your opinion to 100 percent certainty that
15 five, the five casings, that you testified that
16 those five casings were fired by this particular
17 weapon we're talking about?

18 THE WITNESS: Yes.

19 THE COURT: 100 percent?

20 THE WITNESS: 100 percent. If there was any
21 doubt in my mind I would have rendered an
22 inconclusive result.

23 THE COURT: I just wanted to --

24 MR. BROWN: I understand.

25 BY MR. BROWN:

1 Q Let's talk about statistics. On DNA we're
2 talking about the probability by actually running a
3 mathematical algorithm. Tell me how that is done
4 in this case.

5 A We don't have, again, we don't have a
6 statistical, we don't run a statistical algorithm
7 to determine the likelihood or unlikelihood this
8 particular item could have come from another
9 weapon. It is simply done, again, we're back to
10 subjective analysis of the evidence matter, this
11 whole identification is based on my microscopic
12 analysis of individual characteristics on the
13 surface to determine whether they were of
14 sufficient quantity and quality to be able to
15 determine that it is practically impossible that
16 any other firearm could have produced it. Again,
17 as a safeguard, as part of our quality control
18 process this comparison is again reviewed by
19 another qualified examiner in the SLED laboratory
20 at this time that would have to come to the same
21 conclusion. In this case that examiner did come to
22 the same conclusion.

23 Q And let me make sure I understand. There is
24 no statistical basis for this opinion?

25 A Statistically -- that would be an accurate

1 statement, there is no statistical basis for this.
2 As for as talking about hard math statistics, we
3 don't have any statistical basis for this, although
4 statistical studies have been done to show overall
5 the likelihood in some cases that two firearms
6 could produce, for instance, the same matching
7 stria in a given area. In this particular case
8 those statistics were not applied. That is done
9 merely to, those statistical studies are done to
10 validate the whole process as it is with us showing
11 that the, basically to demonstrate the uniqueness
12 of the markings between two firearms, even those
13 that are manufactured consecutively.

14 Q So, these questions have arisen in the past,
15 this is nothing new for 2008?

16 A No, it's not.

17 Q In fact how long have questions about the
18 uniqueness of markings to statistically eliminate a
19 gun, how long has that been in existence?

20 A It's been a number of years, I'm not sure.

21 Q Would you say a year, five years, a decade?

22 A At least five years to at least a decade.

23 The first statistical study I have seen done on
24 this was done in 1959, certainly it had been done
25 before that. The number of studies that have been

1 performed, again we're back to the usual
2 methodology of determining the likelihood of
3 matching characteristics is going to come in a
4 study of consecutively manufactured items, the same
5 tool is used to produce those marks in the barrels,
6 so your likelihood of encountering similar markings
7 is going to be between two consecutively
8 manufactured barrels. That study has been done
9 numerous times and it has always been shown the
10 barrels' markings are unique. The likelihood of
11 another barrel produced much later is going to
12 produce markings similar to the ones found on a
13 given bullet are going to be even much more remote
14 than those found on consecutively manufactured
15 barrels.

16 Q On that note, the closer a barrel is to being
17 consecutively manufactured, the greater the
18 tendency of the markings would occur?

19 A The greater the tendency you will have
20 similarity between markings but the similarities
21 will not be enough to render an identification.
22 You have to go beyond similarities to determine
23 whether a particular firearm is the source of a
24 bullet. For instance, on a cartridge case, you
25 have to have, similarities can exist between, for

1 instance, bullets fired from firearm A to bullets
2 fired from firearm B. The nature of those
3 similarities will not be sufficient in quantity or
4 quality to be able to get confused as to which one
5 was fired by which gun. There is going to be
6 enough unique characteristics there if the barrel
7 marks them well enough to begin with and they are
8 suitable for identification, you should be able to
9 tell which barrel fired which bullet.

10 Q But I want to make sure I understand. The
11 closer a barrel is to being consecutively
12 manufactured, the more in agreement those markings
13 are, according to your study?

14 A In many cases you will have similarities,
15 yes.

16 Q And did you check or were you asked to check
17 how closely the barrel or breach face in this case
18 for the examined gun P703855, how closely that was
19 manufactured to the breach face of P732433? Did
20 they ask you to look at that?

21 A Given --

22 MR. WATERS: Your Honor, I object to that
23 question because, as Mr. Brown knows, that second
24 gun, nobody has that gun.

25 MR. BROWN: High Point sure has information

1 about when barrels are manufactured.

2 MR. WATERS: If he is asking how close in
3 time they were manufactured with one another, then
4 I don't have an objection.

5 MR. BROWN: I'm asking if he was asked to
6 look at that question.

7 THE WITNESS: I was never even, to my
8 knowledge I was every even aware of the presence of
9 the other firearm. That is even, between those
10 two, approximately a 30,000 difference, 30,000
11 number difference in the serial number sequence.
12 Whether or not that plays, whether or not that
13 indicates how far apart those different breach
14 faces are manufactured, I can't testify to because
15 I don't have that information.

16 Q And let me make sure to clarify for the
17 Court. The numbers of the serial numbers on the
18 gun are not consecutive?

19 A No, they are not at all consecutive.

20 Q A lot of times on a gun they are bin parted?
21 In other words, parts go into a bin during the
22 manufacturing process?

23 A Some are, yes.

24 Q Would you say that is on the less expensive
25 firearms, that they are mass produced in parts and

1 put in a bin?

2 A Yes.

3 Q And would you call a High Point, a High Point
4 .380 to be a less expensive firearm?

5 A Definitely.

6 Q So, is it more likely it was mass produced?

7 A Yes. They are produced in significant
8 quantities.

9 Q And, so, there is the chance that the breach
10 face, or the breach, to be more accurate, the
11 breach in this was consecutively manufactured
12 between these two different guns?

13 A I can't rule out that possibility.

14 Q One other thing. You mentioned that there
15 was a photomicrograph taken of a match?

16 A It was.

17 Q Okay. And we don't know which one?

18 A I have that information.

19 Q Do you know which one?

20 A My item 13 --

21 Q Yes, sir.

22 A -- was compared with the test fired from item
23 52. What I do not know is exactly which of the 15
24 test fired cartridge casings that is photographed
25 against, we don't make a note of that.

1 Q And how about the cross reference or cross
2 matching between items 4 through 8 and 13, and
3 items 46, 47, 48, 49?

4 A Those comparisons would have been done. When
5 at all possible we do an actual photo between the
6 test fire and suspect firearm and the actual
7 evidence. In some cases I may not have, again, we
8 were somewhat hampered in this case due to the
9 immersion of the firearm in water may have led to
10 some of the individual characteristics on the
11 breach face not marking on the test fires to the
12 extent that the original fired cartridge casings
13 before immersion were. In other words, the quality
14 of the markings we had on the evidence was much
15 better than we were getting from the test fires.
16 What that sometimes leads to is you can have
17 situations where you cannot match one particular
18 evidence item directly with the test fires from the
19 suspect firearm but you can match that evidence
20 item directly with another evidence item that has
21 in turn been matched back to the firearm. So, if A
22 equals B and B equals C, then A equals C.

23 That is one of the things we did, because the
24 factor we were having with the reduced quality of
25 the markings on the test fires was giving some

1 difficulty. This is not a very easy comparison.

2 Q Using the associative property, if we find
3 out not Marion Bowman but in fact Tawain Gadson
4 shot the gun that expelled casings 46 through 49,
5 then in your opinion at some point in time Tawain
6 Gadson shot the gun that fired items four through
7 eight and thirteen, by the associative property?

8 MR. WATERS: Your Honor, I would object to
9 that question for a number of reasons. Number one,
10 it misstates the facts in that report with regard
11 to the casings. Number two, I don't think he can
12 testify to that link between Mr. Gadson and the
13 firearm.

14 MR. BROWN: Right now we'll ask him in
15 camera. I mean, it is nonjury.

16 THE COURT: What is your objection again?

17 MR. WATERS: It misstates the facts.

18 THE COURT: Let him just ask the question.
19 What is the question?

20 MR. BROWN: Thank you. By use of the
21 associative property, because we know that his
22 opinion is that items four through eight and
23 thirteen were expelled casings, this is his
24 opinion, from gun 52, item number 52, he also says
25 that items 46 six through 49 were expelled casings,

1 at least two of them were expelled casings from the
2 same firearm, number 52. We will show the Court
3 through the course of this trial that we heard
4 testimony yesterday from Mr. Gadson's mouth that he
5 in fact fired a gun in the location where the other
6 casings were found, were collected.

7 BY MR. BROWN:

8 Q And my question is, if Tawain Gadson fired
9 the gun that he opines fired at least two of those
10 casings, 46 through 49, then by the associative

11 property that he mentions isn't it true at some
12 point Tawain Gadson fired the same gun that also
13 fired four, five, six, seven, eight and thirteen?

14 A My studies showed that those items that you
15 mentioned were all fired by one gun. The fact
16 there are items that matched that gun collected
17 from two different locations, I can't state the
18 significance of that. All I can state is those
19 items came from that gun, I cannot state who fired
20 the gun when they were fired.

21 Q And that is fine. I want to, my question is
22 pretty simple, I know it is long winded, but I'm
23 not going to sit up here and say yes or no only,
24 but by the associative property, if we know, if it
25 is known that Tawain Gadson fired the items, I want

1 to get the exact item, I apologize, you said only
2 two of them matched, if a known were given that
3 item 46 and 49 were fired by the gun found in the
4 river, 52, then that means that at some point in
5 time, according to your opinion, Tawain Gadson had
6 fired --

7 THE COURT: Now, he knows nothing about
8 Tawain Gadson.

9 MR. BROWN: I said if that is a known. If
10 that's a know, assuming that fact.

11 THE COURT: Assuming that Tawain Gadson fired
12 46 and 49.

13 MR. BROWN: Yes, sir, 46 and 49.

14 THE COURT: Assuming Tawain Gadson fired
15 casing 46 and 49, your question is 46 and 49 were
16 fired by that gun?

17 MR. BROWN: That's correct.

18 THE COURT: That is all you can say.

19 BY MR. BROWN:

20 Q Assuming he fired, in your opinion the gun
21 that also fired casings four through eight and
22 thirteen --

23 THE COURT: Wait. Why do we need to assume
24 that? Did Mr. Gadson say he did it, fired the
25 other ones, too?

1 MR. BROWN: Yes, yesterday.

2 THE COURT: All five of them? I mean as for
3 as the numbers associated there, that's the problem
4 I've got.

5 MR. BROWN: No, he says he fired the casings
6 that were collected from the spot, that are marked
7 as 46 and 49, he sat here yesterday and admitted,
8 to our surprise he said under oath and said, "Yes,
9 I did fire that gun," that same gun that he says
10 was used in this killing, he said, "Yes, I fired
11 that gun," that's a paraphrase, but that was weeks
12 before.

13 MR. WATERS: Your Honor, there were two sets
14 of casings submitted. One was the six from the
15 scene of the murder in this case, and there were
16 four others that had been collected from a prior
17 incident and there is certainly no dispute that
18 Tawain Gadson and Marion Bowman ran together.

19 THE COURT: Do we know 46 and 49 are from the
20 prior incident?

21 MR. WATERS: From the prior incident, not
22 from the scene of the murder. Mr. Collins, all he
23 is asking Mr. Collins, which the State concedes, he
24 matched five of the six from the scene and two from
25 the other incident to the weapon that was

1 submitted, the one that Mr. Bowman's family threw
2 into the river, and that is the gun that he matched
3 to those. It's in the record.

4 THE COURT: Your question is, if Mr. Gadson
5 said he fired, all Mr. Gadson said, as I recall, he
6 fired that weapon sometime before.

7 MR. BROWN: Yes, sir.

8 THE COURT: How do we know 46 and 49 are the
9 casings from when he fired it before?

10 MR. BROWN: From information that came from
11 the prosecutor's office file in trial, and Margaret
12 Hawkins is the one said, "I heard gunshots,"
13 whatever it is worth, "I heard gunshots, went out
14 and collected any casings, I put them in my kitchen
15 drawer, they were doing the investigation later
16 on," and I asked, the apartments, the Villas, the
17 projects, said yes, she lives there.

18 THE COURT: My question is, Mr. Gadson said
19 he fired that weapon sometime earlier. Are we
20 agreeing that 46 and 49 are casings from when he
21 fired it?

22 MR. BROWN: Yes.

23 MR. WATERS: That is what Mr. Gadson says.
24 I'm saying those casings came from a prior incident
25 and the police asked, at the Villas, which is where

1 all these people hung out, and the police asked Mr.
2 Collins to compare those casings as well.

3 THE COURT: So I assume the lady who
4 collected those casings, Mr. Gadson, although she
5 didn't see him fire them --

6 MR. BROWN: She didn't, Tiara Coleman did,
7 gave a statement to law enforcement.

8 THE COURT: My question is, he said he fired
9 the weapon. Did he actually say 46 and 49 are the
10 casings from when he fired it? I didn't hear him
11 say that.

12 MR. BROWN: Tiara Coleman says he fired the,
13 "I saw Tawain Gadson fire a gun on February," I
14 want to get the date right, I believe February 2nd,
15 and I have her statement in another file but --

16 THE COURT: You're missing my point.

17 MR. BROWN: Sure. She said she saw Tawain
18 Gadson fire that gun, Margaret Hawkins said, told
19 the police she heard the firing and went out and
20 collected --

21 THE COURT: Mr. Brown. Mr. Brown.

22 MR. BROWN: Yes, sir.

23 THE COURT: I understand a lady said she
24 heard firing and she went out and got casings and
25 kept them and those casings were also sent, two of

1 them were sent to Mr. Collins, you don't need to
2 say that over again.

3 MR. BROWN: Okay.

4 THE COURT: I know that Mr. Gadson said
5 sometime prior to the incident he fired this
6 weapon. I understand that.

7 MR. BROWN: Yes, sir.

8 THE COURT: I understand also this gentleman
9 is going to say that 46 and 49 on the report he has
10 there, that 46 and 49 were fired by the weapon that
11 came out of the river or whatever it was, lake,
12 pond or whatever. Now, can we all agree to that
13 point, you don't have to say it again, Mr. Brown,
14 are you listening, can we agree to all that or do I
15 have to repeat it again?

16 MR. BROWN: We agree to all that.

17 THE COURT: That is all I'm going to ask, I'm
18 going to go further in a second. You agree with
19 that?

20 MR. WATERS: I agree with that.

21 THE COURT: You know, my question is, the
22 only question I have, so tell me when you're ready
23 for me to talk.

24 MR. BROWN: I'm sorry.

25 THE COURT: When you're talking to me don't

1 talk to other people when I'm looking at you.

2 MR. BROWN: Yes, sir.

3 THE COURT: Please, when I'm speaking I want
4 to make sure you listen. The only question I have
5 is 46 and 49 are numbers assigned to casings here
6 for testing purposes, so you can identify them for
7 testing purposes. Since Mr. Gadson did not say, "I
8 fired number 46 and 49," he said, "I fired
9 casings," since the lady who picked them up and put
10 them in her drawer heard firing but didn't see the
11 firing -- is Coleman a man or woman?

12 MR. BROWN: A lady, Tiara.

13 THE COURT: Tiara?

14 MR. BROWN: Tiara.

15 THE COURT: Tiara Coleman says that night she
16 saw Mr. Gadson firing. Now, how do we know the
17 casings that she saw came out of the gun that he
18 fired that night are the same casings that the lady
19 inside the building picked up?

20 MR. BROWN: She went out at the same time of
21 the shooting.

22 THE COURT: All right. And picks all the
23 casings up?

24 MR. BROWN: Yes.

25 THE COURT: And the only casings there were

1 casings that Mr. Gadson fired?

2 MR. BROWN: That's correct.

3 THE COURT: All right. So, therefore all
4 this gentleman is going to say is that the casing
5 numbers 46 and 49 which Mr. Waters agrees are the
6 casings from the lady at the house, that picked
7 them up, that Mr. Gadson says he fired it in the
8 wind sometime earlier, you are going to have Miss
9 Coleman testify at some point in time, or she
10 testified in the trial? Did she?

11 MR. BROWN: She did not testify in the trial.

12 THE COURT: I would assume --

13 MR. BROWN: But Alvin Coker, there is plenty
14 of record of that. Whether we need her or not, she
15 is right down the road.

16 THE COURT: All right. But in any event, you
17 have something says that those casings, she says,
18 "I saw him fire it, I heard him fire it," she
19 picked up the casings, these casings were fired out
20 of this weapon by Mr. Gadson in February of
21 whenever, sometime before this event.

22 MR. BROWN: And in fact he even said it
23 involved an event with Tiara Coleman, the subject
24 pulled, somebody pulled a knife.

25 THE COURT: I'm familiar with that. The only

1 thing this gentlemen has to do, this expert, former
2 SLED agent, now with the Richland County Sheriff's
3 Department, is to say those two casings were fired
4 by this weapon.

5 MR. BROWN: And that is already contained in
6 his report which we have entered in evidence.

7 MR. WATERS: It is undisputed --

8 MR. BROWN: You're correct. All I'm trying
9 to do --

10 THE COURT: I was wondering why we're going
11 through all this.

12 MR. BROWN: I guess for emphasis to the
13 finder of fact. That would mean James Tawain
14 Gadson had fired the gun that SLED, we don't
15 concede this, said killed Kandee Martin.

16 THE COURT: Mr. Gadson said that yesterday,
17 too.

18 MR. WATERS: Said Marion gave him the gun,
19 Marion was standing right there, too.

20 MR. BROWN: I would agree.

21 MR. WATERS: I don't know what that proves.

22 MR. BROWN: The jury never heard that Tawain
23 Gadson had been firing the gun that the State said
24 was the murder weapon.

25 THE COURT: What month of the year?

1 MR. BROWN: The same month.

2 THE COURT: February?

3 MR. BROWN: February 16, the night they
4 attribute to the killing, obviously February of
5 2001. That is --

6 THE COURT: When is it the lady collected the
7 casings?

8 MR. BROWN: She said about two weeks ago, and
9 this was the lady collected it, that is on the
10 22nd, which would make it the 8th of February,
11 2001.

12 THE COURT: About a week or so before --

13 MR. BROWN: Yes, sir.

14 THE COURT: -- before he fired the weapon.

15 MR. BROWN: The jury never heard that Tawain
16 Gadson is out firing the gun that the State says is
17 the murder weapon, the jury never heard that.

18 THE COURT: Does the State contend Mr. Gadson
19 and no one else ever had access to this weapon, in
20 the trial?

21 MR. WATERS: No.

22 MR. BROWN: They contend Mr. Bowman had the
23 gun.

24 THE COURT: I'm talking about ever, did they
25 try to contend this is something that was private

1 property that Mr. Bowman had and no one else ever
2 had?

3 MR. BROWN: Actually --

4 THE COURT: At the trial, I'm talking about
5 at the trial.

6 MR. BROWN: At the trial it came out Mr.
7 Bowman suspected Tawain Gadson of taking his gun
8 that same morning of the 16th.

9 THE COURT: Let me ask the question. During
10 the course of the trial did the State contend that
11 this weapon was never possessed by anybody, anyone
12 other than Mr. Bowman at all times, ever?

13 MR. BROWN: Never.

14 MR. WATERS: No, sir. This is a mountain
15 being made out of a mole hill, all this information
16 was available to defense counsel, they had it.

17 MR. BROWN: We would agree to that.

18 MR. WATERS: Nothing is new.

19 MR. BROWN: We agree with that. We withdraw
20 the question because the conclusion will still be
21 vague, I'm trying to get him to make the conclusion
22 for me.

23 THE COURT: What question?

24 MR. BROWN: The question I asked about
25 associative property.

1 THE COURT: All he can testify to is that 46
2 and 49 were fired by the gun.

3 MR. BROWN: That's correct. I said if James
4 Gadson.

5 THE COURT: Why would he have to answer that
6 if Mr. Gadson said, "I fired the weapon"?

7 MR. BROWN: Your Honor, I will withdraw it.

8 THE COURT: Good.

9 MR. BROWN: Thank you. No other questions,
10 by the way.

11 THE COURT: All right. Cross-examination.

12 MR. WATERS: Thank you, Your Honor.

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Mr. Collins, you have done a great job of
4 covering a lot of what I was going to ask you, so
5 I'm going to try not to get too repetitive. You
6 have explained a lot of this very well. The first
7 thing I want to ask you is about your education and
8 experience in the field of firearms and tool mark
9 examination, if you can recount that for us
10 briefly?

11 A I was hired by SLED in 1990, right when we
12 started the firearms department, where I began
13 working as a trainee in the firearms section.
14 There is no, there was nothing at that time and
15 still isn't today any particular college course or
16 other training curriculum that takes you all the
17 way through the firearms examiner training process.
18 That essentially is done on the job.

19 While at SLED I was trained in that manner.
20 Essentially it is almost like an apprenticeship as
21 a firearms examiner. That training lasts about two
22 and a half to three years. During that training I
23 was reading literature concerning the field, I was
24 also actively participating in case preparation and
25 the analyses and examination of evidence items.

1 During that process I essentially was helping to
2 work cases and also was examining other training
3 materials that were given to me, such as bullets
4 fired by consecutive barrels and bullets fired by
5 different firearms in order to find exclusions.
6 All that is part of the training process.

7 Once I completed that training process I was
8 certified by SLED as a firearms examiner and began
9 working cases on my own. I received continuing
10 education and training in my field to include
11 attending AFTE seminars, training seminars whenever
12 possible. As a result of that I have also had the
13 opportunity to obtain training in the consecutive
14 matching stria method of identification and various
15 other techniques. I also have attended and
16 completed the manufacturers' armor course, it's
17 provided by the Glock and Colt firearms
18 manufacturers, and also attended familiarization in
19 the High Point firearm line, those seminars
20 provided by the president of High Point firearms.

21 I have, in addition to all this, also
22 continued my training through the lab. You do
23 continuous research on new firearms product, new
24 ammunition to stay abreast of what is going on in
25 the field. Essentially my training has been

1 ongoing, firearm examiner training is ongoing.

2 As for as my educational background, I have a
3 Bachelor of Arts Degree in history from The
4 Citadel.

5 Q You said, you mentioned AFTE. What exactly
6 is that?

7 A The Association of Firearms and Toolmarks
8 Examiners.

9 Q Are you a member of that association?

10 A Yes. I have been since I believe 1993.

11 Q You are presently a member in good standing?

12 A Yes, I am.

13 Q Now, you worked at SLED until what year?

14 A 2002, September of 2002.

15 Q And then what employment did you go to after
16 that?

17 A I then moved to the Richland County Sheriff's
18 Department in order to establish their firearms
19 department.

20 Q They hired you to establish their own
21 firearms examination department, is that correct?

22 A That is correct.

23 Q Okay. And have you testified before in the
24 state or federal courts with regard to firearms and
25 tool mark examinations?

1 A Yes. I have testified in the Circuit Courts
2 of South Carolina in excess of 200 times as an
3 expert in firearms identification. I have also
4 testified in the state courts of Georgia and North
5 Carolina in such a role, I have testified in the
6 federal court system and the military courts.

7 MR. WATERS: Your Honor, at this point I
8 would move to qualify Mr. Collins as an expert in
9 firearms markings and identification.

10 THE COURT: Any questions as to his
11 qualifications?

12 MR. BROWN: Please, Your Honor, thank you.

13 BY MR. BROWN:

14 Q Are you familiar with the studies as recent
15 as this ballistics imaging study?

16 A I have read, again, parts of that study, the
17 summary of that. I don't have access to the entire
18 study.

19 Q In forming your opinions you rely upon things
20 included in the executive summary of this?

21 THE COURT: Make sure we don't go too far.
22 I'm going to permit you to cross examine him
23 totally about his opinions. The only question now
24 is whether he's qualified. Do you have a question
25 as to whether he's qualified?

1 MR. BROWN: A question on whether he is up to
2 date on the latest, greatest report.

3 THE COURT: I want to know, as for as the
4 opinion I'm looking for, is an opinion as of the
5 date of trial.

6 MR. BROWN: I didn't know that is the way he
7 qualified him.

8 THE COURT: Wait a minute.

9 MR. BROWN: I'm sorry.

10 THE COURT: If you are going to ask him about
11 his opinion today, then of course we need to know
12 about today. Are you asking about his opinion as
13 of now?

14 MR. WATERS: He has obviously said his
15 opinion has not changed, but I think he is a
16 qualified firearms and tool mark examiner, I want
17 him qualified as an expert.

18 THE COURT: I'm going to permit you, Mr.
19 Brown, to ask him anything about whether he is
20 qualified today.

21 BY MR. BROWN:

22 Q Okay. Part of that includes part of the AFTE
23 membership, keeping current on the most recent
24 studies?

25 A To the extent I can, yes.

1 Q Were you aware in the last few months that
2 the National Academies, National Resource Council
3 has done an in depth study on ballistics imaging?

4 A I'm aware of the presence of the study.
5 Again I have not read the entire study, it has not
6 been made available to me. I have read the
7 executive summary of it or at least portions of it
8 that pertain to what I do.

9 Q Who made that available to you?

10 A I believe that was available, that is
11 available on line through the Scientific Working
12 Group of Firearms.

13 Q And the short for that is SWGGUN?

14 A Called SWGGUN.

15 Q SWGGUN. And they also have other things such
16 as recent developments in the law and what is
17 admissible?

18 MR. WATERS: Your Honor, I would object. How
19 is that relevant to the qualifications of a tool
20 marking expert?

21 THE COURT: Continue.

22 Q Doesn't it include gun --

23 A SWGGUN produces and makes available
24 information that can be used by the firearms
25 examiner when, for instance, going through a

1 situation where the admissibility of evidence may
2 be called into question. The amount of information
3 that is present on the site is very exhaustive, I
4 have not read all of it, there may be some
5 information in there, I know there is some case
6 work pending, some decision pending based on some
7 appeals that have been made regarding the NAS
8 study, however I'm not familiar with the total
9 content of it.

10 Q But you take that information that you are
11 synthesizing to --

12 A I'm not sure that is synthesizing my
13 testimony. I make myself aware of it. If it has
14 an impact on my testimony, it does. I don't have
15 enough information on this point in time regarding
16 that particular study.

17 Q tell us about your basis regarding
18 statistical projects.

19 THE COURT: You know, I assume if you are
20 asking him now you're not going to ask him later.
21 Remember you're asking threshold, 700 series of
22 rules, whether or not he is qualified to give
23 opinion testimony in the area of firearm casings
24 and tool markings identification.

25 MR. BROWN: And what I tried to do is prevent

1 a back door concession to the claim I'm making,
2 which is that his opinion should have been excluded
3 in trial and if I concede he's an expert, then I'm
4 giving in to the same, very same claim --

5 THE COURT: Then don't concede.

6 MR. BROWN: That is why I'm trying to voir
7 dire him.

8 THE COURT: Okay, but as long as you're not
9 going to ask the same questions later on if he is
10 qualified. I just want to make sure you don't go,
11 you ask the questions you are going to ask him on
12 cross-examination of these areas, so as long as you
13 do it one time that's fine.

14 MR. WATERS: Your Honor, I'm on
15 cross-examination. I mean, he has redirect.

16 THE COURT: I know that but redirect,
17 whatever, we can use those terms, here in this case
18 we obviously know he is calling him but he's not
19 really necessarily agreeing with this man's
20 thoughts altogether, that is the nature of PCR's.
21 In any event, I'm going to permit you to ask the
22 question. All I'm doing is trying to prevent us
23 doing the same things over. if you want to ask him
24 a question about that area, fine, proceed on. But
25 once you get to the point that you know whether you

1 want to object to his qualifications or not let me
2 know.

3 BY MR. BROWN:

4 Q This is my question. What is your background
5 in statistical projects?

6 A I don't have any background in statistical
7 projects where it relates to firearms and tool mark
8 identification, other than my application of the
9 AFTE theory of identification.

10 MR. BROWN: That completes my voir dire.

11 THE COURT: Now, objection to his
12 qualifications to give opinion testimony in the
13 area of tool marking, firearm and casings
14 identification?

15 MR. BROWN: Yes. We don't believe it meets
16 the standard because it's not scientific, and we
17 don't believe that he can give an opinion regarding
18 the probability of a match.

19 THE COURT: All right. And the State, what
20 is your position?

21 MR. WATERS: Your Honor, we can go through
22 the Jones factors if we like. He is obviously, has
23 been qualified and testified in this very realm
24 over and over again. He is clearly accepted by the
25 courts and is reliable and that's been done for I

1 think he said since the twenties.

2 THE COURT: Let me ask you, Mr. Collins. You
3 told me earlier about your membership or your
4 dealings with other people who are in the similar
5 field as yours. And I assume are there
6 publications and all in this field, too?

7 THE WITNESS: Yes, there are. First off, we
8 have the AFTE Journal which comes out four times a
9 year, includes professional articles concerning
10 this training and our whole discipline as for as
11 new procedures, new developments that come out. We
12 also are published in the International Association
13 for Identifications Journal, and also in the
14 Journal of Forensic Sciences. All those
15 publications are extensively peer reviewed and all
16 those articles that are produced by, in these
17 publications would be subject to that peer review.

18 THE COURT: You told Mr. Waters you have been
19 qualified by not only the Circuit Court but federal
20 courts as well as military courts?

21 THE WITNESS: Yes.

22 THE COURT: You have been doing this how many
23 years, with SLED since 1990?

24 THE WITNESS: Actually testifying, probably
25 1993, that would be approximately fifteen years.

1 THE COURT: You went in the military after
2 you graduated from the Citadel?

3 THE WITNESS: No, I did not.

4 THE COURT: That is why you testified in
5 military court?

6 THE WITNESS: I testified for military as a
7 result of case work done, I can't remember if it
8 was SLED or Richland County.

9 THE COURT: I find, after reviewing his
10 testimony I will let you cross examine but the
11 issue is whether the Court is satisfied with his
12 qualifications, and I find that this person is
13 qualified to give opinion testimony in this case
14 regarding tool markings, casing and firearms
15 identification.

16 MR. BROWN: Your Honor, if I may respectfully
17 submit these three cases and suggest to Your Honor
18 that --

19 THE COURT: You know, Mr. Brown, I asked you
20 your opinion and you gave your thoughts, you didn't
21 say anything about cases. Then I asked Mr. Waters.
22 Now I asked Mr. Waters, you want to come back. Is
23 there any time I can ask you and get your full
24 answer and let's go with that instead of having to
25 go back and forth? I wish you had brought the

1 cases up before I said to Mr. Waters what is your
2 position? I got your position, you didn't give me
3 cases, now I have cases. In any event you may
4 submit those cases, I will be glad to have them in
5 the record but I'm qualifying him and I will stay
6 with the qualification. Once again, it is a
7 qualification to give opinion testimony. It
8 doesn't mean I accept it.

9 MR. BROWN: And, Your Honor, I want you to
10 understand my ground is that he should not have
11 been so qualified at trial.

12 THE COURT: Okay.

13 MR. BROWN: And the difficulty I have got
14 now, I'm trying to convince the very same Court
15 that he shouldn't have been qualified at trial like
16 the same Court just qualified him.

17 THE COURT: Now, that is your difficulty but
18 that doesn't mean it can't be done.

19 MR. BROWN: Yes, sir, thank you. I
20 appreciate it, that is what I was going to ask you,
21 that it be limited just for purposes of providing
22 this opinion.

23 THE COURT: I'm not sure what you mean by
24 that, Mr. Brown.

25 MR. BROWN: Because I would like the Court to

1 reserve the ability to change the ruling on his
2 ability to be qualified.

3 THE COURT: Since this is a nonjury matter,
4 if for some reason during the course of this trial
5 things come to light that require me to change my
6 opinion regarding anything I will. Of course I'm
7 not going to form an opinion about the final
8 results of the case until I have heard everything,
9 including your argument, and I review everything.
10 But as for as me qualifying him, if I change my
11 mind, just like I would in the course of a trial I
12 could say, ladies and gentlemen of the jury, I have
13 changed my mind about the gentleman, he shouldn't
14 have testified, disregard his testimony in regard
15 to that. So, if that happens I will but at this
16 point in time I have sufficient information that
17 I'm going to qualify him under 702 to give opinion
18 testimony.

19 MR. BROWN: Thank you. I submit this, which
20 ultimately goes to the issue --

21 THE COURT: Make sure we have record of this,
22 he is submitting a United States District Court
23 case out of Massachusetts, U.S. versus Green, 405
24 Fed.2d 104. He is submitting another Massachusetts
25 case, 47 Fed.2d 351, United States versus Montero.

1 And he is submitting a Northern District of
2 California case which I assume is a Federal
3 District Court case?

4 MR. BROWN: Yes, sir, all three.

5 THE COURT: Northern District of California,
6 2007 case that has not yet got a Fed Sup. number
7 but it is 207QL485967, which is U. S. versus Diaz,
8 et al.

9 MR. BROWN: Thank you, Your Honor.

10 MR. WATERS: Your Honor, very briefly. At
11 this time the State would move to prohibit him from
12 amending or raising any claim that Mr. Collins
13 should not have been qualified or that counsel
14 should have taken efforts to prevent him from being
15 qualified. The only two allegations alleged in the
16 application are that counsel should have done more
17 to circumscribe his opinion with regard to the
18 exclusion of other firearms and obviously, you
19 know, this is the kind of thing that they knew
20 about, because he has this case, these cases ready
21 and it seems like they are amending on the fly,
22 full well knowing that would be the way they were
23 going to be going and I think they should be
24 precluded from amending based on that.

25 THE COURT: Go ahead, yes.

1 MR. BROWN: I'm raising ground P, which says
2 trial counsel was ineffective for failure to
3 exclude expert testimony.

4 MR. WATERS: That is not the allegation. The
5 allegation is that trial counsel failed to exclude
6 or limit this evidence given that the uniqueness of
7 firearms tool marks has not been demonstrated and
8 did not have statistical basis. The ground right
9 before that is in relation to the exclusion of all
10 other firearms. I don't think this claim is that
11 no one can make a match as to firearms. His claim
12 is that it cannot be a certainty is simply not in
13 here, that when you read the allegation as to his
14 testimony about exclusion of all firearms, I think
15 this is a different permutation that calls it into
16 a whole, a whole new range of issues.

17 MR. BROWN: I will agree with Mr. Waters that
18 the limitations that we were seeking deal with the
19 statement that was to the exclusion of all other
20 firearms. Through the testimony that has been
21 presented today, which is what a trial is for,
22 petitioner has now gleaned information that it
23 appears to be --

24 THE COURT: Let me ask you this. In the
25 course of the trial --

1 MR. BROWN: Yes, sir.

2 THE COURT: -- did defense counsel agree to
3 his qualifications?

4 MR. BROWN: Without question.

5 THE COURT: And the judge qualified him. As
6 we go on with this, I'll let you know about that.

7 MR. WATERS: Just to complete the record,
8 Your Honor, here they are attacking the entire
9 science, they have these three cases printed off, I
10 think it is clear they knew exactly where they were
11 going and again I think the target is being
12 shifted.

13 THE COURT: This is a nonjury matter, I will
14 keep the record open as long as you wish to get
15 this thing done.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: Proceed on with your questions,
18 Mr. Waters, I will permit him to give opinion
19 testimony.

20 MR. WATERS: Thank you, Your Honor.

21 BY MR. WATERS:

22 Q Now, with regard to your qualifications, you
23 said you were proficiency tested. That is once a
24 year, correct?

25 A That's correct.

1 Q It is done by an outside independent agency?

2 A Yes. We contract with Collaborative Testing
3 Service out of Virginia, they produce the
4 proficiency tests which are then distributed to the
5 folks that are subscribers. That is where we get
6 the test from.

7 Q Those tests include casings that are matches
8 and that are not matches and it's left up to you to
9 determine which is which, correct?

10 A That's correct.

11 Q You have never failed one in all these years?

12 A No.

13 Q So, you have got a perfect record with regard
14 to that?

15 MR. BROWN: Your Honor, we subpoenaed the
16 proficiency tests, they are not here. It is a
17 little unfair, I'm now handcuffed from examining
18 him.

19 THE COURT: Why were they not given?

20 THE WITNESS: Your Honor, if I may, that was
21 an oversight on my part when I left the lab today.
22 I can have them here very briefly, they can be
23 mailed here.

24 THE COURT: He will get them to you. If we
25 need to call him back, we will.

1 MR. BROWN: Thank you.

2 BY MR. WATERS:

3 Q Again, you have never failed one?

4 A That's correct.

5 Q That is including the time you have been at
6 Richland County as well?

7 A Yes, that's correct.

8 Q I just want to very quickly get to the heart
9 of what Judge Lockemy was asking about and that is
10 kind of the distinction between the hundred percent
11 match and then the infinitesimal probability. I
12 want to hit that right off the top. Essentially
13 there is two issues that we're talking about. The
14 first one is your expert match of the two weapons
15 and the conclusion of those two casings matching.
16 Is that correct, that is the first issue?

17 A That's correct.

18 Q That, you're 100 percent sure about, correct?

19 A Just to go back again in the AFTE theory of
20 identification we use, it is, reading from
21 Plaintiff's Exhibit 26, is that the statement is
22 sufficient agreement exists between two tool marks
23 means that the agreement is of a quantity and
24 quality that the likelihood that another tool could
25 make the mark is so remote as to be considered a

1 practical impossibility.

2 Q The first issue is your opinion as an expert
3 examiner and looking at those two under the
4 microscope back to back and side by side and
5 determining there is a match, and then the second
6 issue, then, is the theory of the science itself?

7 A Correct.

8 Q That the possibility that there could
9 possibly be another firearm out in the world that
10 would duplicate those precise individual markings,
11 correct, that is the second issue?

12 A Correct.

13 Q Okay. So, when you say that you're 100
14 percent sure of your match are you saying that in
15 your expert opinion, looking at those two casings
16 you are a hundred percent sure they came from the
17 same firearm?

18 A That's what I'm saying, yes.

19 Q And then the second question is, is the
20 theory behind the science itself, and what you were
21 saying with regard to that is that, you know, as in
22 anything there could some infinitesimal possibility
23 out there that some other firearm at some other
24 point in time could be manufactured that could
25 create those precise same markings but it is so

1 infinitesimal as to not be worthy of consideration.

2 Is that a fair way to say it?

3 A That is essentially what we're saying here.

4 One thing that comes into my mind that sometimes I
5 think about as a means of trying to express this is
6 that there is an old saying that an infinite number
7 of monkeys typing on an infinite number of
8 typewriters will produce a Shakesphearean poem.

9 The chance of that is so infinitesimally small as
10 to be irrelevant.

11 THE COURT: Plus there is not enough
12 typewriters?

13 THE WITNESS: That's right.

14 MR. BROWN: We move to exclude that.

15 THE COURT: Come on.

16 MR. WATERS: It's an analogy.

17 THE COURT: I know it's an analogy.

18 BY MR. WATERS:

19 Q To use another analogy, the universe is
20 infinite, there is at least --

21 MR. BROWN: Again, Your Honor, the same
22 objection. He is not a physicist.

23 MR. WATERS: I didn't finish my question.

24 THE COURT: Overruled, I will permit you to
25 cross-examine him.

1 BY MR. WATERS:

2 Q So, is it kind of the same thing you could
3 say if the universe is infinite there is some
4 possibility that, you know, somewhere a kazillion
5 miles away there is another earth that developed
6 the same as ours and there is some trial going on
7 with a Judge Lockey, Clay Waters and Jim Brown and
8 Mr. Collins --

9 THE COURT: Now we're getting wild.

10 MR. BROWN: Statistically he is asking him to
11 compare the statistical probability exists to some
12 other --

13 MR. WATERS: I will withdraw the question.

14 THE COURT: I'm not a monkey but I can say to
15 be or not to be and I am to be, so let's proceed
16 on.

17 MR. WATERS: Yes, sir, thank you, Your Honor.

18 BY MR. WATERS:

19 Q The bottom line is the theory of the science
20 upon which you rely is that if you can make a
21 conclusive match in your determination as an
22 experienced and trained examiner that the
23 possibility that another firearm out there
24 somewhere in the world could have made those
25 markings is essentially so minimal as to be an

1 impractical possibility?

2 A That is a very good way of stating it, yes,
3 sir.

4 Q All right, thank you. Let's go back a little
5 bit as to the science. I think you said this
6 science is accepted in the field, is that correct?

7 A It is the only methodology that I use, it is
8 the common methodology that is used throughout the
9 industry.

10 MR. BROWN: Your Honor, my objection to this,
11 this is the opinion that the Court makes. He is
12 asking the witness to make the opinion about
13 whether something is accepted in the field or not.

14 THE COURT: Overruled. Proceed

15 Q Okay. So, notwithstanding that maybe the
16 existence of some dissent somewhere, this is a
17 generally accepted science that is practiced
18 throughout the nation and indeed the world,
19 correct?

20 A Correct.

21 Q And it has been subject to peer review
22 judgement and studies and all the rest of that, is
23 that correct?

24 A Correct.

25 Q Okay. And it's the kind of thing that, as we

- 1 just said, these methods have been previously
2 applied to other types of evidence and you in fact
3 have done that in 200 cases at least, is that
4 correct?
- 5 A Yes.
- 6 Q Okay. And obviously you have quality control
7 procedures in place inasmuch as you have
8 proficiency testing?
- 9 A Yes.
- 10 Q In every case you have a match they are then
11 reviewed by another qualified examiner who verifies
12 your conclusions or calls them into question, is
13 that correct?
- 14 A At the time of SLED that was definitely the
15 case.
- 16 Q And when you did these examinations in this
17 case you used the theory of identification and the
18 definition of sufficient agreement that is set
19 forth and generally recognized by the AFTE
20 standard. Is that correct?
- 21 A That's correct.
- 22 Q You were using the pattern matching, not CMS,
23 correct?
- 24 A That's correct. We don't use CMS.
- 25 Q If you know, just very quickly, we have three

1 things, we have class characteristic, sub-class
2 characteristics and individual characteristics?

3 A Correct.

4 Q Class are like the same bullets, same brand,
5 excuse me, same caliber, same brand, things like
6 that. Correct?

7 A It goes further into the same number of
8 rifling grooves, same direction of twist, perhaps
9 even the same dimensions to those rifling grooves
10 but it doesn't go beyond necessarily that into the
11 microscopic detail.

12 Q So, that is the first wave where you kind of
13 limit what you're talking about and looking at for
14 a match or exclusion, correct?

15 A That's correct, that is where we start.
16 Actually we are looking for an exclusion. If we
17 get past that point we can go forward into
18 microscopic analysis to determine if there is a
19 match from class characteristics. Typically we
20 look to see if at that point it excludes that
21 firearm as a possible source.

22 Q You narrow it down that way, then go to
23 sub-class? Explain what sub-class characteristics
24 are.

25 A Basically a sub-set of possible source group

1 of firearms, typically it will be from a group of
2 firearms that were manufactured in close sequence
3 of one another. You might have, for instance, a
4 rifle tool that develops a defect, that leaves a
5 mark in the barrel that may be present on multiple
6 firearms barrels that are manufactured in short
7 succession. The length, the size of that groove
8 you cannot determine but you may have some markings
9 that are left on a bullet or a cartridge case,
10 depending on the manufacturing process, that would
11 carry over from one gun to the next. Those are
12 called sub-class characteristics and are not used
13 for identification purposes. It is up to us, we
14 have to, based on your training you are able to
15 look at those markings and determine whether they
16 are sub-class.

17 Q That is another way you can narrow it down or
18 exclude a particular casing or firearm, is that
19 correct?

20 A We don't use sub-classes necessarily for
21 exclusion. It is something we have to be aware of
22 but we don't use those markings to try to render an
23 identification or match.

24 Q You separate those from the individual
25 markings?

1 A That is correct.

2 Q Individual markings are essentially fine
3 striation markings on a casing, if we're talking
4 about casings, those are the ones being look for
5 that are distinctive from other firearms, correct?

6 A Stria or impressed individual
7 characteristics, those are the ones we do use for
8 link and match.

9 Q Okay. Now, the idea, though, is that if you
10 have a sufficient number of individual markings
11 that it essentially kind of creates a face much
12 like I have a different face from Mr. Simon here or
13 Mr. Brown, and that if you look at them side by
14 side there is enough of them you will see that face
15 and that is a distinctive identification. Is that
16 a simplistic way of explaining it?

17 A It's a simplistic way of explaining it but I
18 have heard that explanation used before, it can be
19 very appropriate. Just like in the case of your
20 mother, if your mother was in a crowd of a few
21 thousand people and you were looking at the faces
22 you may, as you go through them you will be able to
23 pick your mother out of the crowd.

24 Q Okay. That sort of thing isn't really
25 uncommon to science, is it?

1 A Not at all.

2 Q It's the same thing as you were saying with
3 fingerprint examinations, there is enough
4 similarities that eventually the whole picture
5 takes shape, correct?

6 A That's true.

7 Q All right. Explain to me, when you say
8 inconclusive, explain to me what that means,
9 inconclusive. It means, correct me if I'm wrong,
10 it means that it's consistent but there is not
11 enough individual markings to make a positive ID,
12 is that correct?

13 A What it simply means to me is that there are
14 simply not enough microscopic information there to
15 be able to say that bullet or that cartridge case
16 originated from that particular firearm, or to take
17 it further, inconclusive could be a cut padlock
18 versus a pair of bolt cutters, there is simply not
19 enough microscopic detail there for me to be able
20 to conclude they came from that source. However,
21 there is also markings there that if I had exactly
22 the right test fire that formed up exactly the
23 right way of the breach face of the firearm I could
24 make a match. Not there is no information there,
25 it simply isn't enough to make an identification of

1 in that particular instance. There is also enough
2 information there for me to be able to indicate
3 that I can't exclude that fireare. The general
4 rifling characteristics, for instance, might be
5 similar but not enough information there to make a
6 match.

7 Q That would be my point. When you find
8 something inconclusive it not only means you didn't
9 have enough information to make a positive ID to
10 your satisfaction as an experienced and trained
11 examiner, it also means you didn't see anything
12 that was inconsistent with your test fires that
13 would cause you to exclude that particular casing?

14 A Exactly.

15 Q Okay. So, inconclusive is kind of the
16 difference between a match and not enough to say
17 there is a match?

18 A Inconclusive is to say it is not enough to
19 say there is a match but enough to say it is not
20 negative.

21 Q The reasons for that often just have to do
22 with the quality of the impressions that were
23 imprinted upon whatever you're examining in the
24 course of that particular time the weapon was
25 discharged, correct?

1 A That's correct.

2 Q Okay. Now, explain to me a little bit, when
3 you're talking about bullets, we often hear the
4 expression lans and grooves and I know we had
5 casings in this case, but explain to me a little
6 bit about how the lans and grooves work in the
7 context of projectiles.

8 A In a rifle barrel there are spiraling grooves
9 that are cut to impart spin or twist on the bullet
10 that is fired. The raised portions in the barrel
11 are called the lans and the depressed portions are
12 called the grooves. When a bullet is fired through
13 that barrel you essentially get a negative
14 transfer. In other words, the raised portion of
15 the barrel are going to create depressed areas on
16 the bullet surface. So, the manufacturing process
17 that does that is the beginning where you start to
18 get your individual characteristics. Those
19 characteristics are caused or created by flaws that
20 are left in those lans and grooves that are
21 transferred in the form of scratches or stria on
22 the surface of the bullet as it passes through the
23 barrel.

24 Q All right, thank you. And then in the case
25 of casings, what happens is the pressure created

1 when the bullet is discharged and the gases that
2 are expelled when the bullet discharges presses the
3 casing back into the breach face which puts an
4 imprint on that casing which you can then examine.
5 Is that correct?

6 A Yes. Microscopic information, the defects
7 that are on the breach face of the firearm or you
8 may be able to use the firing pin tip for a
9 sufficient source of information.

10 Q You didn't have that, as we discussed, in
11 this particular case?

12 A That's correct.

13 Q You are looking at, I have heard it referred
14 to as peaks and ridges and furrows, is that terms
15 you all usually use?

16 A That is a term that is used. I believe it is
17 also used in the AFTE theory of identification, it
18 describes the nature, sort of a general description
19 of what you're looking at when you look at stria or
20 markings, or in some cases impressions. You have
21 the peaks which would be the raised portion, the
22 raised profile of a striation, and then the valleys
23 would be the areas of the, the furrows would be the
24 areas between, depressed. When you apply side
25 lighting to that it manifests itself and becomes

1 visible in the form of very small illuminated
2 lines, dark lines which are the shadows of those
3 furrows and peaks and valleys.

4 Q All right. Let's talk a little bit about the
5 testing on the theory itself. You said yourself
6 you had been involved in some testing. Was that a
7 consecutive manufacturing test?

8 A Yes. We had had submitted to us a set of
9 bullets that had been fired through ten
10 consecutively rifled barrels produced by the Ruger
11 Manufacturing Company.

12 MR. BROWN: Your Honor, I only raise a
13 general objection because we're going to talk about
14 studies that were done when I present my expert
15 witness, and obviously some of what he is going
16 to testify to includes hearsay information, like the
17 fact that those were consecutively manufactured
18 guns. He doesn't know that, somebody told him
19 that. Now, I understand he relied upon that to
20 form the opinion that he's going to give, that he
21 gave as part of his, as part of a study. Now, I
22 guess what is good for the goose is good for the
23 gander. If it is going to be okay for him to go
24 into how another study that he participated in is
25 part and parcel of his opinion here today, I will

1 ask, then I withdraw my objection because I'm going
2 to do the same thing with my expert regarding the
3 studies he participated in, which is encapsulated
4 in this book that I'm going to attempt to enter
5 into evidence.

6 MR. WATERS: Your Honor, I think we're
7 talking about two different things. He is going to
8 have his expert come in and read some other studies
9 that are referred to in this 300 page book that I
10 got a week before trial. I'm not going to agree to
11 that. All I'm asking about is a study that he
12 himself participated in.

13 THE COURT: Are you talking about a study
14 that you participated in or were you looking at
15 someone else's study?

16 THE WITNESS: I participated in the study
17 personally. I have additional information about
18 other people's results in this, which of course
19 plays in to me its validity because it shows it's
20 repetitive, but I can also go back, I can happily
21 just talk about my personal participation in this
22 study.

23 THE COURT: Let's do that, then see if you
24 want to ask further questions.

25 MR. WATERS: Okay.

1 BY MR. WATERS:

2 Q You participated in one of these studies.
3 Describe wht this study was.

4 A We received a set of fifteen, fifteen fired
5 bullets that had been fired through ten
6 consecutively rifled barrels.

7 THE COURT: You know what, I thought it was
8 11:30, I apologize to everyone. Mr. Witness, if
9 you would, please, during the course of lunch I
10 don't wish for you to discuss your testimony with
11 anyone, don't talk with Mr. Brown or with Mr.
12 Waters, and I will call you back up to the stand
13 when we reconvene at 7:00 o'clock tonight -- no,
14 kidding. We will reconvene in an hour, 2:30, so
15 please understand, now, you will be back on the
16 stand just as if you had had not taken a break.
17 All right?

18 THE WITNESS: Yes, sir.

19 THE COURT: We'll break until 2:30.

20 MR. BROWN: Your Honor, my expert has to
21 leave to catch a plane at 5:00 o'clock.

22 THE COURT: Well, I'm sure if you talk to Mr.
23 Waters, if he is not through or if you are not
24 through, then I'm sure there would be no problem
25 letting your witness sort of come in and do his

1 testimony but remember whatever you do as for as
2 direct he's going to have cross-examination rights.

3 MR. BROWN: And there is no problem, I had
4 asked my expert whether he wished to spend the
5 night and he indicated that he teaches classes on
6 Mondays and Wednesday mornings, and Monday night he
7 didn't wish to come down, it was his daughter's
8 birthday.

9 THE COURT: I will let you know I will
10 accomodate you, if need be you can put someone up
11 and bring them back, the Court has no problem.
12 However, I want to make sure, from my experience so
13 far you're not one to ask one or two, however, when
14 you ask direct there is also cross, I can't stop
15 his cross.

16 Okay, 2:30.

17 (Recessed at 1:31 p.m.).

18 (Reconvened at 2:50 p.m.).

19 THE COURT: What is the agreement here? Are
20 we going to continue with Mr. Collins?

21 MR. BROWN: We're going to put up, with Your
22 Honor's permission I would like to put up Dr.
23 DeGraef. We have explained to Dr. DeGraef it may
24 be that he has to come back, there is no problem
25 with that.

1 THE COURT: The question is, is he going to
2 step down? You all have agreed for Dr. DeGraef--

3 MR. WATERS: I hate to do that to Mr.
4 Collins, given it is his birthday today, but
5 understanding the issues of flying him back to
6 Pittsburg, and if that is what the Court desires
7 I'm not going to stand in the way of it.

8 THE COURT: All right, Mr. Collins, if you
9 would, and happy birthday, step down, please.

10 MR. BROWN: Subject to sequestration, we have
11 talked about it. Again I apologize, it is his
12 birthday.

13 THE WITNESS: The hall is nice, Your Honor.

14 THE COURT: Don't be singing out there.

15 MR. BROWN: And there is a nice young lady
16 that came down with him.

17 THE COURT: Okay, we're going to interrupt
18 that witness and obviously he has not completed his
19 testimony yet, we'll bring him back.

20 Bring your next witness up.

21 MR. BROWN: Dr. Marc DeGraef.
22
23
24
25

1 DR. MARC DeGRAEF,
2 after being first duly sworn, testified as follows:
3 THE CLERK: State your full name for the
4 record.

5 THE WITNESS: Marc DeGraef.

6 THE COURT: Doctor, if you would, adjust that
7 microphone there in front of you and speak into it.

8 What is your full name, sir?

9 THE WITNESS: Marc DeGraef.

10 THE COURT: How do you spell your last name?

11 THE WITNESS: D-e-G-r-a-e-f.

12 THE COURT: Is that a capital G?

13 THE WITNESS: Yes, sir.

14 THE COURT: Your witness.

15 MR. BROWN: May it please the Court.

16 DIRECT EXAMINATION

17 QUESTIONS BY MR. BROWN:

18 Q Dr. DeGraef, I'm going to hand you what has
19 already been marked as Plaintiff's Exhibit 27 and
20 ask you if you recognize that?

21 A Yes, I do.

22 Q And is that a copy of your c.v.?

23 A Yes.

24 MR. BROWN: I'm going to introduce that into
25 evidence to try to expedite this hearing.

1 MR. WATERS: No objection.

2 THE COURT: Without objection, introduced in
3 evidence. What number is it, please?

4 MR. BROWN: 27.

5 (Dr. Marc DeGraef c.v. marked and received in
6 evidence as Plaintiff's Exhibit Number 27).

7 BY MR. BROWN:

8 Q And this is a substantial c.v., so what I'm
9 going to ask you to do is kind of hit the
10 highlights, after your university studies and your
11 current position.

12 A Okay, I grew up in the Netherlands, was born
13 in the city of Antwerp, Belgium. In college I
14 studied physics for four years, which I then follow
15 with by five years research, also in physics.

16 And in August of 1989 I go to U. S., Santa
17 Barbara, California, where I spent three and a half
18 years working as, excuse me, as post-doctoral
19 researcher, and in '93, March of '93 I came to
20 Pittsburg to take up a position as First Assistant
21 Professor in the Department of Materials Science
22 and Engineering, and now I'm full professor.

23 THE COURT: At the University of Pittsburg?

24 THE WITNESS: No, Carnegie Mellon University,
25 right across the street.

1 THE COURT: I just got back from Scotland,
2 visited the home of Andrew Carnegie, where he was
3 born.

4 Proceed.

5 BY MR. BROWN:

6 Q You mentioned you are currently a professor
7 of material science and engineering?

8 A That's correct.

9 Q Let me ask you about these studies you have
10 in college, Doctor.

11 A As all scientists, I have studied basic
12 courses in statistics and probability theory. Over
13 the years as I advanced I have studied additional
14 courses as needed for my research.

15 Q And is that something you utilize as a
16 professor of science?

17 A Yes.

18 Q And do you also have a subspeciality
19 regarding materials characterization or comparing
20 images in a quantitative manner?

21 A That is correct. I worked mostly with my
22 cross certificate, optical light microscopes or
23 electroscope, and what we observe in these
24 microscopes are images of the surface of metals or
25 different materials, and part of what is called

1 materials characterization is quantification of
2 those materials, mathematical methods to describe
3 what we see, and use that to understand how the
4 material functions.

5 Q And as part of that you described to the
6 Court, are you using microscopes?

7 A Well, we use, I use four different kind of
8 microscopes, optical light microscope, a standard
9 instrument you probably remember from school, where
10 we look at the surface of a metal.

11 May I put this down?

12 Q Please. Put it on that stack right there.

13 A Okay.

14 A You use a light source to reflect on the
15 metal, look at the structure of the surface of the
16 metal, striations or whatever it might be. We also
17 use electron microscopes, which is a similar
18 concept except that instead of light we use
19 electrons, and the advantage of doing that, we can
20 go to much higher magnification, significantly
21 smaller details on the surface of the material.

22 Those are the two principal techniques I use.

23 Q Now, were you involved in a study regarding
24 ballistics imaging?

25 A Yes, I was.

1 MR. BROWN: I would like to mark at this time
2 as Plaintiff's 28 a book that is entitled
3 Ballistics Imaging.

4 (Book "Ballistics Imaging" marked as
5 Plaintiff's Exhibit Number 28).

6 BY MR. BROWN:

7 Q I'm going to hand you what has been marked
8 Plaintiff's 28.

9 A Thank you.

10 Q Can you explain to the Court what that book
11 is, or represents?

12 A The book reflects the reports of a committee
13 which was formed by the National Research Council
14 upon request of the Department of Justice. This is
15 basically a study where we look at the feasibility
16 of the creation and use of a computer based
17 database systems for ballistics imaging. So, the
18 idea was if we were to take all the new guns like
19 come into the United States every year or the ones
20 that are fabricated here or imported and would test
21 fire them, take a bullet and the cartridge case and
22 image them through microscope system, enter them
23 into a database and do this for every single one,
24 would this be feasible to later on go back and
25 retrieve information from that database, knowing

1 there will be every year about two million new guns
2 in the United States, so would it be feasible to
3 create such a large database and then use this for
4 legal purposes.

5 Q And were you a member of that committee?

6 A Yes, I was.

7 Q And tell me how the report was compiled.

8 A The report was combined by taking things
9 written by many members of the committees. There
10 were 22 members from various backgrounds.

11 Initially each of us had a responsibility for a
12 particular subsection of the report, and after the
13 subsections were combined, then we went through
14 where everybody had a chance to comment on the
15 report, come to a consensus among the 22 members
16 of the committee.

17 Q So, you were part and parcel author of the
18 entire book?

19 A Yes. There are four people mentioned as
20 editors because they did the final editing of the
21 manuscript. All 22 members of the committee
22 contributed to the report.

23 Q And do you know why you were selected or for
24 what expertise they selected you?

25 A I think my expertise in imaging, the study of

1 images obtained by microscope.

2 MR. BROWN: Your Honor, at this time we would
3 offer him as an expert in ballistic imaging.

4 MR. WATERS: Your Honor --

5 MR. BROWN: Ballistic imaging, which is the
6 actual title of this report, Your Honor.

7 THE COURT: I know that but have you got any
8 background he has in ballistic imaging? Ask him a
9 few more questions about that.

10 MR. BROWN: Sure.

11 BY MR. BROWN:

12 Q Would you explain your knowledge and
13 background in the study of ballistics imaging?

14 A Okay. As part of the committee activities we
15 were asked to visit the most recent, the most
16 nearby location of the IBIS system. IBIS is
17 integrated ballistics identification system. It is
18 essentially a microscope, optical microscope, a
19 computer system. There are about twenty or so of
20 those scattered around the country, they are
21 operated by ATF, and we were asked to actually go
22 there and in my case it was the Allegheny County
23 Coroner's office. We did a demonstration of the
24 standard comparison microscopes.

25 THE COURT: Are you saying someone was giving

1 you a demonstration or you were putting on a
2 demonstration?

3 THE WITNESS: Somebody gave us a
4 demonstration of the normal approach.

5 THE COURT: Up to that point had you done any
6 research, got an education, any training on
7 ballistics?

8 THE WITNESS: Ballistics, no.

9 THE COURT: That was your first exposure to
10 ballistics?

11 THE WITNESS: Yes.

12 THE COURT: What year was this?

13 THE WITNESS: This was 2003. I was asked to
14 join the committee in 2002 and this was 2003.

15 THE COURT: 2003 you went to a demonstration
16 put on in Pennsylvania, Allegheny, Allegheny County
17 Coroner's office?

18 THE WITNESS: Not only demonstration, we had
19 several meetings, two and three day meetings where
20 members of the committee, where we had
21 presentations from firearms experts, experts in
22 ballistics, with the purpose of getting all of us
23 up to speed on ballistics.

24 THE COURT: How long was that?

25 THE WITNESS: We had a total of six meetings

1 of three days each over a period of about three
2 years. The initial two meetings --

3 THE COURT: Six days a year?

4 THE WITNESS: Roughly, yes, and the first two
5 meetings were geared toward getting everybody up to
6 speed on the principles of ballistics and
7 ballistics imaging.

8 THE COURT: Okay, go ahead.

9 BY MR. BROWN:

10 Q And the point of getting you up to speed, did
11 that also include studying you did apart from that
12 training that you did as a group? Did they also
13 give you materials like other portions of the book
14 that include information about ballistics tool
15 markings and things of that nature?

16 A Yes, we had presentations from firearms
17 experts, we had presentations from FBI researchers
18 on all the aspects of ballistics imaging and tool
19 marking.

20 Q Let me make sure we go back. Who asked this
21 committee be formed?

22 A I believe it was the Department of Justice.
23 If I can refer to my notes?

24 Q This is the United States Department of
25 Justice?

1 A Yes. This is a combination of the Committee
2 on Law and Justice and the Committee on National
3 Statistics at the National Research Council, they
4 are the ones who organized the committee.

5 Q Who is the National Research Council?

6 A The National Research Council is a portion of
7 National Academies, it's a group that is
8 responsible for all the engineering sciences and
9 physics and chemistry.

10 Q When you talk about the National Academies,
11 you mean such as the National Academies of Science?

12 A That's correct.

13 Q That is just one of them?

14 A It's just one of them.

15 Q And the culmination of your studies with your
16 educational background in materials sciences and
17 engineering and your education in tool mark
18 identification, is that what helped you as a member
19 of this committee form this, and it looks like a
20 book, is it a report?

21 A A report, yes.

22 Q And were you part and parcel co-author of
23 this report?

24 A Yes.

25 Q That would be co-author of the entire report?

1 A Yes.

2 THE COURT: My concern is what his
3 qualifications were before the report was written.

4 MR. BROWN: He spent five years --

5 Q I will follow up. When was this report
6 issued in final form?

7 A The final form, on Wednesday, March 5th,
8 2008.

9 Q And did this --

10 A We as committee members then received advance
11 copy of the report.

12 Q And maybe you will recall a conversation we
13 had. When did this actually become available to
14 the public?

15 A The public, a few weeks ago, three weeks ago,
16 two weeks ago.

17 Q We're talking about from 2002, when you were
18 asked, until 2008 --

19 THE COURT: I know that but you are asking me
20 to qualify him as an expert in ballistics imagery.

21 MR. BROWN: Imaging.

22 THE COURT: Imaging. Is ballistics imaging
23 itself a recognized science or sub-field in
24 science?

25 THE WITNESS: Imaging definitely is a

1 sub-field in science. Whether ballistics imaging
2 is a sub-field in science, I wouldn't know.

3 THE COURT: Tell me what your definition of
4 imaging is.

5 THE WITNESS: Imaging is to obtain, to use
6 light or electrons to illuminate an object and to
7 study the reflective information from the object.

8 THE COURT: You said your expertise was, at
9 Carnegie Mellon was imaging, you have an expertise
10 in imaging? I didn't write the word down but
11 after image you said, "My expertise is in
12 imaging --"?

13 THE WITNESS: Image analysis.

14 THE COURT: Image analysis?

15 THE WITNESS: Yes.

16 MR. BROWN: Maybe I can ask him a few more
17 questions.

18 THE COURT: Yes.

19 BY MR. BROWN:

20 Q As a matter of fact, not opinion, when an
21 image of a tool mark is viewed how does that
22 happen?

23 A It happens with reflective light and optical
24 microscope.

25 THE COURT: What is a tool mark?

1 THE WITNESS: A tool mark is any engraving on
2 a surface, that is made by a foreign object.

3 THE COURT: So, when you say tool mark you're
4 not necessarily referring to a projectile?

5 THE WITNESS: Not necessarily. There are
6 many different types of tool marks. Knives can
7 make tool marks as well.

8 MR. BROWN: I think the Attorney General
9 mentioned through his questioning of Mr. Collins,
10 there was some talk about bolt cutters on a lock.

11 THE COURT: Do you have any questions about
12 his qualification?

13 MR. WATERS: I absolutely do, Your Honor.

14 BY MR. WATERS:

15 Q Dr. DeGraef, is that how it's pronounced?

16 A That's correct.

17 Q So, are you saying your experience primarily
18 is image analysis, correct?

19 A Yes.

20 Q Okay. So, your expertise really is using an
21 electronic microscope or other source of microscope
22 and looking at particles and things like that,
23 doing various sorts of scientific experiments with
24 those, correct?

25 A Correct.

1 Q I was looking through your c.v. and one item
2 is fluxgate ring-core emagnetization field. I can
3 hardly read my own writing. Just very quickly what
4 does that have to do with it?

5 A That is actually, I do theoretical work, that
6 is a different branch of my research interest.
7 That one actually does not have anything to do with
8 microscope or with imaging, that's a theoretical
9 study of magnetic components of electronic
10 circuitry.

11 Q And looking through your c.v., I see a number
12 of studies in here, have any of these ever involved
13 analysis of ballistics or casings or projectiles?

14 A No.

15 Q Not a single one has?

16 A Not other than the ballistic imaging.

17 Q Let me ask this. Are you a firearms or tool
18 mark examiner?

19 A No, I'm not.

20 Q Have you ever done one?

21 A Not personally.

22 Q So, as part of your research, as part of
23 being on that committee, you said you had a
24 demonstration of one, is that correct?

25 A Yes. We went to the coroner's office in

1 Pittsburg and we had a demonstration of two
2 systems. One was comparison microscope, so we had
3 a chance to look through it ourselves and get an
4 idea of how these microscopes work. We also had a
5 demonstration of the IBIS system, which is the
6 automated system, so that we could understand how
7 the actions of a tool mark examiner on the manual
8 microscope are transferred into the automated
9 system.

10 Q Really you were selected for this study based
11 on your expertise in the use of microscopes, not
12 anything having to do with ballistics. Is that
13 correct?

14 A That's correct, yes, analysis of images,
15 comparison of images.

16 Q All right. And have you ever independently
17 researched or studied the uniqueness of tool marks
18 made on projectiles or casings, the uniqueness of
19 tool marks made on casings?

20 A No, sir, I have not.

21 Q You have never done that?

22 A No.

23 Q Have you read any validation studies on the
24 science behind tool mark, firearms identification
25 in the traditional sense?

1 A Yes, many of them as part of my
2 responsibility on the committee. Most of them,
3 most of the ones I have read are listed as
4 references in the report.

5 Q But you never independently have done one of
6 those yourself?

7 A No.

8 Q On uniqueness?

9 A No.

10 Q And the judge was asking about ballistics
11 imaging as a field. I guess it's maybe more of a
12 subject that is, that maybe you have a part in
13 through your field which is, which is imaging,
14 essentially?

15 A Right.

16 MR. WATERS: All right. Your Honor, I have
17 no problem if he is qualified just in imaging and
18 the things he does but anything related to
19 ballistics, I think it is clear that would be
20 beyond that. I think this is a subject that is
21 multidisciplinary and maybe his part of that but if
22 he wants to testify to anything specifically
23 relating to ballistics or firearms or tool marks in
24 specific I think that is beyond the scope of his
25 expertise. He has essentially admitted his role

1 here was just simply because of his expertise in
2 using the electron microscopes and analyzing those
3 images.

4 MR. BROWN: If I may work on this?

5 BY MR. BROWN:

6 Q You were asked about whether or not you had
7 studied ballistics studies?

8 A Uh-huh.

9 Q And --

10 MR. BROWN: I only have one copy.

11 Q In fact, can you tell the Court --

12 A Use of --

13 Q Consecutive manufactured barrels?

14 A Yes.

15 Q Is that an example, if you can just read the
16 name, the title of the study into the record?

17 A This is article in the AFTE Journal.

18 THE COURT: An article by you?

19 THE WITNESS: No, it is not by me.

20 THE COURT: This is something you read and
21 studied?

22 THE WITNESS: It is one of the articles I
23 read.

24 BY MR. BROWN:

25 Q About how many of these type articles were

1 referenced in your expert opinion that you compiled
2 in this book?

3 A I haven't counted them. It must be around a
4 hundred or so.

5 Q So, over the course --

6 THE COURT: It seems to me, I think you can
7 get to the questions you want, Mr. Brown, but it
8 seems to me he's an expert in image analysis and
9 doing the image analysis of whether it be a piece
10 of metal from a microphone, an image analysis of a
11 piece of wood, an image analysis of a piece of
12 metal associated with a weapon, that is image
13 analysis. He just happened to carry on a study at
14 this time of his image analysis of projectiles,
15 ballistics.

16 MR. BROWN: And casings.

17 THE COURT: Image analysis of items and
18 objects. I think his area of expertise and opinion
19 testimony is from image analysis, what he can tell
20 us about things he studied and did images with with
21 the microscope.

22 MR. BROWN: One of the factors, Your Honor,
23 he actually did, imaging analysis is a
24 subspeciality, he is actually a professor of
25 material sciences, in other words, metals and other

1 materials and engineering, and so it is actually
2 greater than just the image analysis. That is a
3 subspecialty within it.

4 THE WITNESS: I use the image analysis as a
5 tool in my profession.

6 THE COURT: What were you going to say, Mr.
7 Waters?

8 MR. WATERS: I don't think that the facts as
9 he has admitted, he has never actually performed
10 any studies involving ballistics or tool mark on
11 firearms specifically --

12 THE WITNESS: May I make one comment?

13 MR. WATERS: Sure.

14 THE WITNESS: Neither have the other 21
15 committee members.

16 MR. WATERS: Thank you, I appreciate you
17 bringing that out. So, I don't think, again he has
18 never, the fact he has read a number of studies,
19 that doesn't mean he can come in and testify as to
20 the contents of this study.

21 MR. BROWN: That is not what the law says.

22 MR. WATERS: That is precisely what the law
23 says, Your Honor.

24 MR. BROWN: It does --

25 THE COURT: Wait. If I'm going to permit him

1 to testify, I want him to give his opinion, not
2 what other people's opinions are, but his. I'm
3 going to permit him to testify in the area of image
4 analysis and the results of studies he has done
5 regarding using his expertise in studying objects,
6 and were those objects to be shell casings or
7 whatever else in image analysis, but you have never
8 actually taken a casing and studied it yourself?

9 THE WITNESS: Right, myself, no.

10 THE COURT: And did this casing come from
11 this weapon or that weapon?

12 THE WITNESS: No.

13 MR. BROWN: We're asking questions about his
14 opinion of these items, Your Honor.

15 THE COURT: Now, is this witness' purpose to
16 be contradicting the testimony of Mr. Collins?

17 MR. BROWN: His purpose is to highlight the
18 shortcomings of the testimony of Collins, compared
19 to what, according to the science.

20 THE COURT: Science that existed in 2001.

21 MR. BROWN: Mr. Collins -- I know I'm not
22 supposed to talk about what another witness talked
23 about.

24 MR. WATERS: Then don't do it.

25 THE COURT: Go ahead.

1 MR. BROWN: There is some question back in
2 the 1950's --

3 THE COURT: Yes.

4 MR. BROWN: I asked him that question.

5 THE COURT: Anyway, I'm going to permit him
6 to give me his opinion or whatever you wish to give
7 it, regarding image analysis and his opinion
8 regarding his studying of images, and we're going
9 to restrict it to metal images.

10 MR. BROWN: Thank you.

11 MR. WATERS: Your Honor, for the record I do
12 plan to and will object inasmuch as he attempts to
13 read or bring into the record the results of any
14 studies in which he did not personally participate.
15 I think if you look at this book again I received
16 about a week before trial, in this chapter that Mr.
17 Brown is planning on probably examining him about,
18 it is essentially, as they admit in front, it is
19 just a summary.

20 THE COURT: I'm not permitting anything about
21 this book, I'm permitting only image analysis.

22 MR. BROWN: Let me suggest this. I
23 understand what he is saying, within this book is
24 reference to studies and their findings. Now, I
25 will point out that besides the one study I know

1 that Mr. Collins worked on, that Mr. Collins also
2 referenced other studies without objection.

3 THE COURT: Well, whether he did or did not,
4 let's proceed on with this witness. He can give
5 his opinion testimony as to image analysis.
6 Whatever he says about that book, nobody has made
7 reference, obviously the book has only been out six
8 months.

9 MR. BROWN: Three weeks.

10 THE COURT: I'm sorry, you said March of '08?

11 THE WITNESS: That is when we received
12 pre-publication copies.

13 THE COURT: It hasn't become a learned
14 treatise people rely upon, it has only been out
15 three weeks, it is not a treatise, so let's proceed
16 on.

17 BY MR. BROWN:

18 Q Let me ask you about review of the testimony
19 regarding tool mark identification that was
20 presented back in 2002 by David Collins. Did you
21 ever have have an opportunity to review that?

22 A Yes, I have.

23 Q And before we get there, let's talk about the
24 comparison of --

25 MR. BROWN: This came up, Your Honor, on the

1 direct, between tool mark imaging and fingerprint
2 analysis and Collins compared the two.

3 THE COURT: Are you familiar with imaging of
4 fingerprint analysis, fingerprint imaging?

5 THE WITNESS: I have read several articles,
6 not done it myself.

7 THE COURT: Are you an expert in that area,
8 consider yourself an expert?

9 THE WITNESS: No.

10 MR. BROWN: Neither is --

11 THE COURT: I'm asking him.

12 THE WITNESS: I'm not an expert.

13 THE COURT: I think we stopped Mr. Collins on
14 that.

15 MR. BROWN: Actually --

16 THE COURT: I tell you what, I don't consider
17 Mr. Collins' thoughts about fingerprint analysis as
18 being expert opinion. He did a thing about wiping
19 a finger, whether you can get enough to read it,
20 but he never said anything about the actual reading
21 of the fingerprint, he said you might not get
22 enough.

23 MR. BROWN: If I may go one step farther, he
24 talked about DNA producing a probability where the
25 probability exceeded the human population, and

1 we're talking about David Collins' thinking about
2 statistical basis --

3 THE COURT: The only thing I accepted Mr.
4 Collins' opinion about is in the area of tool
5 markings analysis and ballistics. The other
6 information, he may have talked about it but to me
7 he was not qualified to give opinion testimony.

8 MR. BROWN: That is not going to be relied
9 upon by the State in their argument?

10 THE COURT: As for as what?

11 MR. BROWN: I don't want to later on in the
12 briefings find out that there is argument or upon
13 appeal there is argument about how DNA is just like
14 ballistics because it produces a probability that
15 is so remotely impractical.

16 THE COURT: My concern, my thoughts about the
17 DNA thing, he was just talking about probability.
18 You can have figures, those are things, I don't
19 consider him an expert in DNA, Mr. Collins.

20 MR. BROWN: I understand that.

21 THE COURT: You're not presenting him as an
22 expert --

23 MR. WATERS: He was just doing an analogy
24 that those of us involved in forensics, judges or
25 whatever, it is common knowledge, I think you even

1 asked him, you said it is kind of like DNA.

2 THE COURT: You see, you don't have to have
3 knowledge of DNA to know how they project
4 themselves with certainty, they use a figure this
5 and this, but --

6 MR. BROWN: That is not what I want to ask
7 this witness.

8 THE COURT: You are not going to ask him
9 anything about fingerprint analysis?

10 MR. BROWN: I will ask him about both, how
11 they render an opinion if there is a matching DNA
12 or matching fingerprint and give some type of
13 quantitative response to what they mean.

14 THE COURT: I'm going to take this in camera,
15 let's assume we're in camera. What is your answer
16 to what he just asked you?

17 THE WITNESS: I would say that you would have
18 to look at the scientific method that was used to
19 obtain the probability, and the way this is
20 normally done is that one looks at the variability,
21 what is the range of possible outcomes of an
22 experiment, be DNA experiment, for instance, where
23 one looks at the location of the little lines,
24 someone looks at the lines, where they are spaced,
25 where they are placed on the photograph, and by

1 knowing the number of lines on a photograph one can
2 use statistical procedures --

3 THE COURT: How does this affect your opinion
4 in image analysis?

5 MR. BROWN: Oh --

6 THE COURT: I'm asking him.

7 THE WITNESS: It is image analysis, it is an
8 aspect of image analysis.

9 THE COURT: All right, continue on, then.

10 THE WITNESS: Once you know, suppose there
11 are ten lines there, you can use statistical data
12 to determine the probability that somebody else in
13 the population would give rise to the same number
14 of lines in the same positions.

15 BY MR. BROWN:

16 Q And is this similar to like the statistical
17 probability that six sets of numbers will come up
18 with the number that you scratched off on your
19 lotto ticket?

20 A It is very similar, yes.

21 Q Okay.

22 A And what we are, I think the technical name
23 for it is called the random match probability, so
24 what you are looking for in an experiment is what
25 is the probability that the outcome of one

1 experiment will re-occur somewhere else in the
2 population. That has been done for DNA, which
3 essentially has put DNA forward as a scientifically
4 valid technique, that kind of study, random match
5 probability.

6 THE COURT: I assume as an experienced
7 statistician you can tell what the chances are of
8 numbers coming up in the lottery?

9 THE WITNESS: Yes.

10 THE COURT: It doesn't have to be DNA, the
11 lottery, DNA is not a scientific field, it's
12 statistics?

13 THE WITNESS: Statistics is a branch of
14 sciences.

15 THE COURT: You don't have to be a scientist
16 in terms to know that, that's something --

17 THE WITNESS: Correct.

18 THE COURT: You can do lotteries, you can do
19 what is the chances of one lawyer in South Carolina
20 having an expertise in something in one area only
21 and the chances of that person in one area only in
22 the United States?

23 THE WITNESS: Correct. But the reason why
24 you can do that is because you know the range of,
25 possible range of outcome. That range has not been

1 established for individual characteristics in
2 ballistics.

3 MR. WATERS: I object, I move to strike that
4 testimony. I think that is beyond the scope of his
5 expertise, it is based solely on the review of
6 other literature.

7 THE COURT: This is in camera right now.

8 MR. WATERS: I understand. I just want to
9 make sure my position is clear on the record.

10 THE COURT: Okay.

11 BY MR. BROWN:

12 Q You just mentioned that quantitative analysis
13 and the ability to project out possible random, the
14 random nature of it, or statistical basis of it
15 re-occurring. Explain why you say that has not been
16 done in ballistics.

17 A I think it has not been done in ballistics
18 because of the extremely wide range of possible
19 tool marks.

20 Q And, so --

21 A So, there is no understanding --

22 Q Let's make sure we understand. Tool marks
23 are sometimes referred to as stria?

24 A Yes, sir.

25 Q More than just stria, we're talking about

1 patterns or relationship between stria?

2 A Yes.

3 THE COURT: Now you are really leading a lot.
4 I assume since we're in-camera Mr. Waters is
5 hesitant to object but let's let him testify.

6 MR. BROWN: Yes, sir, sure.

7 Q I will approach it differently. In a
8 theoretically perfect world how could one, because
9 this is just the heart of this study, how could one
10 quantify markings on a bullet casing to produce a
11 mathematical algorithm, producing a statistical
12 probability of a match, how would it be done?

13 A That is one of the questions we raise in the
14 report, the fact it has not been done and that
15 further study into that area is necessary. If I
16 may read two lines from the report, I have to
17 apologize, the version I have has different page
18 numbers than the book.

19 Q Maybe I can place in the record where that
20 would appear.

21 A It would be in section 3-E.

22 Q Yes, sir.

23 A I believe it is around page 80 in your copy.
24 There is a National Academy of Science finding
25 saying the validity of the fundamental assumptions

1 of uniqueness and reproducibility of firearms
2 related tool marks has not yet been fully
3 demonstrated.

4 Q Let me reference you on that.

5 MR. WATERS: Your Honor, just a minute. I
6 want to make sure we're still in camera, I don't
7 want to waive any objections.

8 THE COURT: You're not waiving anything. I
9 realize he just read something from a book that he
10 may or may not have information about or knowledge
11 about, he just read it.

12 Q That is what I want to ask. I want to go
13 back and make sure the record is clear. On page 81
14 of what has been marked on this book, I'm going to
15 hand it to the Court, Plaintiff's 28, and it says
16 accordingly we, doesn't it, and that is not
17 referencing someone else's quotation, is it?

18 A No, that is a statement by the committee.

19 Q And by the committee means by you and the
20 other people?

21 A Yes, this is our common opinion, our joint
22 opinion.

23 Q Let's talk about this book and these
24 statements. Has this book or the studies within it
25 been peer reviewed?

1 A Yes, it has.

2 Q Explain the peer review on this study.

3 A The peer review system is actually quite
4 complex with the National Academies, but if I can
5 summarize it, the report is sent out to anywhere
6 from fifteen to twenty or thirty independent
7 reviewers who then, then their comments are
8 collected, reviewed by two supervising reviewers
9 who then filter all the information back to the
10 committee. We incorporate the comments or
11 responses to the comments, then that goes back to
12 the two people who are in charge of the final
13 review.

14 Q And what scientific methods, laws or
15 procedures did you rely upon to compile that
16 opinion that is found in this book, specifically
17 the one in section 3-E on page 81? What scientific
18 laws or principles underpinned that?

19 A In this case it is the absence of any
20 statistical approach to firearms, to tool mark
21 analysis.

22 Q And did you rely upon studies to come up with
23 that assumption, that statement that there is an
24 assumption about --

25 A There are several studies and they are all

1 cited in the text, in the report, where people have
2 analyzed or researchers have analyzed the
3 repeatability of the uniqueness of tool marks but
4 it has always been done on a very limited set of
5 consecutively manufactured barrels or limited sets
6 of guns of the same type and make with perhaps only
7 one type of ammunition, and that is not sufficient
8 to come up with what I mentioned earlier, with the
9 random match probability which has to be valid for
10 the entire cross-connection.

11 Q For your tool mark studies what error rate
12 did you discover exists?

13 A We discovered there is no, there has not been
14 a quantification of the error rate.

15 Q Is that consistent with scientific
16 principles?

17 A No, scientific principles, whenever you
18 perform an observation you measure something, you
19 are always required to also state what the error
20 bars are, what the probability is that your
21 measurement is irrelevant or inaccurate.

22 Q And you base that upon what training as a
23 scientist?

24 A This is basic scientific methodology.

25 Q And how long have you employed that as a

1 member of the academic world?

2 A As a member? That's the standard when I was
3 an undergraduate.

4 Q That was how many years ago?

5 A That was, I entered the undergraduate studies
6 in '79, 1979.

7 Q So, we're talking about for nearly thirty
8 years --

9 A Thirty years.

10 Q -- you have been trained in what is
11 consistent with what is scientific method and what
12 is not?

13 A Yes, sir.

14 Q And what you have produced in this study is
15 an opinion that absent an error rate --

16 THE COURT: Are you asking a question or
17 stating --

18 MR. BROWN: Yes, sir, I'm going to ask him a
19 question.

20 THE COURT: You are not going to give him the
21 answer and ask him to agree with you or not, are
22 you?

23 MR. BROWN: I will ask it in a more off way.

24 THE COURT: Ask him to give his opinion
25 instead of you stating an opinion.

1 BY MR. BROWN:

2 Q What is your opinion about the validity of
3 tool mark identification as a science, given the
4 error rate that you all discovered through your
5 study?

6 A Well, I think that members on the committee
7 would agree with the statement that it is plausible
8 that tool marks are unique to a specific firearm.
9 The plausibility is not a scientific quantity, so
10 it is not associated with numerical value of an
11 error rate or probability of an error.

12 Q Now, if we can turn to -- I'm going to keep
13 going with the in-camera,.

14 THE COURT: What I'm going to do, when you
15 finish all of it I'm going to let you know what I'm
16 going to accept.

17 MR. WATERS: The problem with that is, I
18 would be, you know, a little bit quicker up. As
19 Your Honor said, you know, I don't want at the end
20 for you to say all that was admissible, unless --

21 THE COURT: I'm going to let you examine on
22 everything he has examined on. I will tell you
23 what area I'm going to permit him, right now I'm
24 accepting opinions that, I'm accepting in evidence
25 in the case opinions he has that I'm determining

1 are in the area of image or image analysis. I
2 realize what he is in essence saying is tool mark
3 identification and identifying casings of weapons,
4 since there is no statistical way of showing what
5 the error rate is, is really not a science, is what
6 you're saying?

7 THE WITNESS: That's what I'm saying.

8 THE COURT: That is what he's saying at this
9 point in time.

10 MR. BROWN: That is -- I'm sorry.

11 THE COURT: That is his opinion.

12 MR. BROWN: His opinion based on a six year
13 study culminating in this book and based on his
14 thirty years as a scientist.

15 THE COURT: Six year study at three days a
16 year, three days?

17 THE WITNESS: Three days a year and actually
18 meeting with them.

19 MR. BROWN: Four to three days a year.

20 THE WITNESS: There is days that's all work
21 we do.

22 THE COURT: But you had nothing to do in that
23 six years but to do this?

24 THE WITNESS: No, I had my full job.

25 MR. WATERS: Your Honor, I think that opinion

1 came from just simply reading the research. He
2 said, "I have read some research." I don't think
3 it has been scientifically validated.

4 THE COURT: Right now he is giving a
5 scientific opinion. tool marking is a science
6 because his view as to science you've got to have a
7 statistical way of looking at error rates.

8 MR. WATERS: All he has done is review --

9 THE COURT: Well, that's your opinion as for
10 as what he has done. I'm going to -- overruled,
11 proceed.

12 MR. BROWN: Thank you.

13 BY MR. BROWN:

14 Q If you will turn to the testimony of David
15 Collins, I'm just going to go through this, Your
16 Honor, try to keep, obviously the Court has this
17 all in camera, if you will turn to page 4312.

18 THE COURT: I tell you what I'm going to do.
19 I'm hereby going out of camera and I'm ready to
20 hear it.

21 MR. BROWN: Okay.

22 BY MR. BROWN:

23 Q And there is a statement in there that the
24 markings are unique to each firearm, and do you
25 have an opinion regarding that?

1 A Yes, I do, the statement --

2 MR. WATERS: Your Honor, I object.

3 THE COURT: I don't understand how he can
4 testify to that. I sustain.

5 MR. BROWN: I would like to proffer.

6 THE COURT: Go ahead.

7 BY MR. BROWN:

8 Q Do you have an opinion as to that statement,
9 the validity, scientific validity of that
10 statement?

11 A The statement you are referring to that the
12 defects left by the machining process are as unique
13 to that firearm as a fingerprint is?

14 Q It starts on, it runs all the way down to 23,
15 on page 4312, and the rest of it is in the record,
16 you don't actually have to read it.

17 A Correct.

18 Q Thank you. If you have an opinion based on
19 your expertise in this study and your scientific
20 training over the last 29 years, what is that
21 opinion?

22 A The opinion is that this is not a valid
23 statement because the error rates have never been
24 determined for ballistic, for machining tools.

25 THE COURT: We have already established that.

1 MR. BROWN: I understand, yes, sir. I did
2 elicit it in general, now I'm eliciting it in
3 relationship to this.

4 Q If you would, turn to page 4315 and it starts
5 out with testimony, with a question, line 22, and
6 runs through 4316, line 7.

7 A Yes, sir.

8 Q And based upon your study and which
9 culminated in this ballistics imaging report and
10 your 29 years in science, material science and
11 engineering --

12 THE COURT: I hate to hold you up, sir, but
13 29 years, in your years of college you didn't study
14 history or sociology or anything else, you have
15 never studied anything but science?

16 THE WITNESS: The academic system in Belgium
17 are different.

18 THE COURT: You were not able to study the
19 battle of Waterloo which occurred in your own
20 country?

21 THE WITNESS: No. I did that all high
22 school.

23 THE COURT: You were not able to study
24 psychology?

25 THE WITNESS: No.

1 THE COURT: And you were unable to study
2 chemistry?

3 THE WITNESS: Chemistry, yes, mathematics,
4 physics.

5 THE COURT: Political science?

6 THE WITNESS: No, Your Honor. We did not get
7 any electives until our senior year and then the
8 only electives we were allowed to take were all
9 physics.

10 THE COURT: You don't have a well rounded
11 education, just focused in one area and that is it?

12 THE WITNESS: I wouldn't say that because our
13 well roundedness comes from high school education,
14 that is where we get history and language.

15 THE COURT: We get all that, too, here but of
16 course then you have more concentrated areas when
17 you go off to the university or college, which you
18 stop in that area and go in whatever field you're
19 going in right away. You didn't have western
20 civilization 101?

21 THE WITNESS: No, Your Honor.

22 THE COURT: All right. You didn't study the
23 poetry of the various late poets in England?

24 THE WITNESS: We did in high school.

25 THE COURT: But not to the extent you would

1 study the whole semester in college?

2 THE WITNESS: That's correct.

3 THE COURT: Socrates, Plato or Aristotle?

4 BY MR. BROWN:

5 Q So, referring you to page 4315, line 22,
6 through 4316, line 7, based upon your expertise,
7 your study of ballistics imaging for the last six
8 years culminating in that report what is your
9 opinion regarding that statement?

10 MR. WATERS: Your Honor, again I would object
11 for the reasons previously stated. Just to protect
12 the record, I also want to renew, so I'm not deemed
13 to have waived it, my objection to anything that is
14 an assault on underlying premises of firearms and
15 tool marks identification if that that is not --

16 THE COURT: I have already sustained the
17 objection regarding him testifying about that. He
18 is proving, in this proffer, though, I don't know
19 how to rule to make sure it is clear, I'm
20 permitting this person to testify that in his
21 opinion tool marking as it relates to identifying
22 what casings came from what weapons is not a
23 science because it has not been subject to a
24 statistical error rate analysis because they have
25 no error rate analysis and therefore it is not a

1 science, and everything you ask him I assume is
2 relating directly to that?

3 MR. BROWN: It has do with the statement to
4 the exclusion of all other firearms, which is a
5 hundred percent certainty and I wanted to start out
6 broad and narrow in. My first question, what is
7 your opinion, I can't be more open.

8 THE COURT: I know. I assume that he's going
9 to continue to testify regarding the error rate
10 analysis thing, so I will permit him to do it as a
11 proffer.

12 MR. BROWN: Yes, sir.

13 THE COURT: But any opinion he has about
14 particulars of tool markings and all that, I
15 sustain. So, proceed on.

16 BY MR. BROWN:

17 Q Let me back up. Have you looked at any of
18 the tool mark evidence in this case?

19 A This case, no, I have not.

20 Q Okay. You didn't examine this case?

21 A No.

22 Q You didn't examine these casings or any
23 casings relating to this case?

24 A No.

25 Q Or any projectiles?

1 A I have not. With this statement I would
2 take exception with, you mentioned exclusion, to
3 the exclusion of all other firearms, because for
4 the reason it is scientifically not acceptable to
5 state absolute undeniable, undeniable certainty
6 because --

7 Q Let's talk about that, the subjective nature
8 of the observation.

9 A If I may refer you to box 3.1 of chapter
10 three.

11 Q Yes, sir.

12 A Again I do not know what page.

13 Q That is page 59.

14 MR. BROWN: That has already been entered
15 into evidence, Your Honor, without objection.

16 A So, box 3.1 has two components. The first
17 component, the theory of identification as it
18 relates to tool marks, and this is the theory as it
19 is stated by the Association of Firearm and Tool
20 marks Analysts. Item C, it explicitly says
21 currently the interpretation of individualization
22 or identification is subjective in nature.

23 Q And --

24 MR. WATERS: Your Honor --

25 MR. BROWN: That is all I have on that.

1 MR. WATERS: That is not the whole sentence.

2 THE COURT: I'm reading it here, I have it in
3 front of me.

4 BY MR. BROWN:

5 Q I want to make sure I understand. Science
6 does not deal with subjectivity, does it?

7 A That's correct.

8 Q Will you explain a little bit of just basic
9 scientific principles and methods related to
10 objective, the objective nature of findings versus
11 subjective findings?

12 A Yes. The basic scientific method, you would
13 make an assumption or hypothesis about a certain
14 phenomena, then you would try to verify or confirm
15 your hypothesis by doing experiment. And all the
16 while when you do this you have to keep an open
17 mind and not form any opinions about what it is or
18 no expectation about what the outcome of your
19 experiment is going to be. That is an objective
20 scientific approach, where your own personal
21 opinion does not count.

22 Q What is a blind test?

23 A A blind test would be a test where you would
24 have in the case of firearms, for instance, you
25 would, you would have the suspected crime gun plus

1 a number of other guns, half a dozen or ten or so,
2 and the examiner would not know which of those guns
3 is the crime weapon, they would be asked to match a
4 bullet or a cartridge casing to one of those
5 weapons without prior knowledge.

6 Q And when one would undertake scientific
7 analysis of something you have to take into
8 consideration the manner in which they viewed the
9 phenomenon, or phenomena?

10 A Absolutely. The conditions under which an
11 experiment, an experiment or an observation are
12 made are an inherent part of the observation.

13 Q That could be whether it was viewed under
14 certain type of microscope or certain lighting?

15 A That is all part of the observation.

16 Q And what type of notes would you expect in a
17 general scientific study?

18 A The general scientific study, we teach our
19 students that they have to do complete note taking
20 of anything that happens in the process of doing
21 the experiment, goes from starting, setting up the
22 experiment and the various mechanical components,
23 what not, measuring device, all the way through to
24 concluding, to concluding the experiment, writing
25 down the conclusions, anything abnormal that

1 happened or anything unexpected that happened.

2 Q If you would, take a look at item 25 which is
3 in evidence, Plaintiff's 25. If you will, flip to
4 the second, starting on the second page. It says
5 item number four, five, I haven't asked him a
6 question yet, six, seven, eight, thirteen and then
7 the next page which is labeled 46 through 49.

8 THE COURT: Item 25 is?

9 MR. BROWN: It's the worksheet notes of David
10 Collins.

11 THE COURT: Have you reviewed those before?

12 THE WITNESS: I have not seen these.

13 BY MR. BROWN:

14 Q My question for you would be, I have already
15 asked this question of David Collins, would it be
16 consistent with the scientific method to only put
17 conclusion on your work notes?

18 MR. WATERS: Your Honor, I object to that
19 question. Again --

20 THE COURT: Overruled. Answer the question
21 as for as you're concerned.

22 MR. WATERS: Your Honor, could I put my, very
23 quickly, not to argue with the Court, put my
24 position on the record? Very quickly, he has
25 already admitted he has no basis or training or

1 experience in actually examining firearms and tool
2 marks, therefore is not qualified to testify on the
3 manners and methods used.

4 THE COURT: Thank you, Mr. Waters. The
5 question was in a general scientific framework, not
6 tool markings, anything else, but science, he is
7 asking in the area of scientific research,
8 scientific opinions of a study, would it be proper.
9 I guess you --

10 MR. BROWN: Proper scientific --

11 THE COURT: Proper scientific methods in
12 general.

13 THE WITNESS: It would not be proper.

14 THE COURT: That's in science in general?

15 THE WITNESS: Science in general, yes.

16 BY MR. BROWN:

17 Q Now we turn to the ATFE tool mark standard,
18 and you have got a copy of it. In fact it is
19 entered right here.

20 A Okay, yes.

21 Q And again it's on page 59 of the book. When
22 they talk about sufficient agreement --

23 A Uh-huh, yes.

24 Q -- what, and I want to make sure I use the
25 scientific word --

1 THE COURT: What are you referring to?

2 Q 31, box 3.1, part B.

3 THE COURT: I got you, I got it.

4 Q Sufficient agreement between a number of
5 items. What type of phenomena would you expect as
6 a scientist to find noted in somebody's bench
7 notes?

8 MR. WATERS: Your Honor, again how is he
9 qualified to determine what phenomena should be
10 noted in a tool mark or firearms examiner's notes?

11 THE COURT: He is not testifying to that, he
12 said in a general sense, it has nothing to do with
13 tool markings but in a general sense.

14 Right, sir?

15 A Yes.

16 Q Given that box that tells you what they are
17 looking for, what would you expect to find in a
18 scientist's notes?

19 A I would expect to find anything that they can
20 observe, details without omissions.

21 Q Is there a name for some of the phenomena,
22 like, just for edification, stria?

23 A Stria --

24 MR. BROWN: I'm trying not to lead him.

25 Q What does this box state you're looking for?

1 THE COURT: Why don't you tell me what you're
2 looking for, sir? I assume you know without
3 reading the box, don't you?

4 A Yes. We would be looking for certain
5 patterns, repeating patterns in surface striation.

6 Q Patterns of what?

7 A Of surface scratches with individual
8 characteristics.

9 Q You are looking for scratches and you're not
10 just looking for a scratch but are the scratches in
11 the same place or --

12 A Are they the same shape.

13 MR. WATERS: Your Honor, I object.

14 THE COURT: We're now getting into tool
15 markings. I thought we were talking about general
16 scientific methods.

17 Q You would expect notes about that observation
18 in the bench notes?

19 THE COURT: Any person in a science?

20 A Yes, in any experiment I would expect to see
21 in the description of the experiment, the notes of
22 the experiment, I would expect to see all the
23 observations without any omission.

24 THE COURT: Okay.

25 Q And, so, you wouldn't want to just see

1 something that said fired by or inconclusive?

2 MR. WATERS: Your Honor, I object to leading.

3 THE COURT: Overruled.

4 A If it is inconclusive, then I would at least
5 expect to see the reason why it's inconclusive.

6 Q And when you say a reason, you mean something
7 quantifiable?

8 MR. WATERS: Your Honor, I object to leading.

9 THE COURT: Overruled.

10 A An explanation, and it may very well be a
11 subjective explanation.

12 Q And --

13 A It may be that something went wrong and you
14 wrote down, "I think this may have gone wrong,"
15 which might explain why the experiment didn't work.

16 Q And if there was something that was, that
17 went right, so to speak, would you expect an
18 explanation of that?

19 A Absolutely.

20 Q And it would be more than a conclusionary
21 statement, wouldn't it?

22 MR. WATERS: Your Honor, I object to the
23 leading.

24 THE COURT: Overruled.

25 Q What type statement would you expect in the

1 bench notes?

2 A I would expect it to be an objective
3 observation, statement of what was observed and at
4 the end you can draw conclusions from your
5 observations but it is important to not make actual
6 observations with the conclusions you draw, they
7 are completely separated or should be separated.

8 Q As a scientist, if there are, I don't know, I
9 want to make sure I get the numbers right here,
10 there are six items examined and only seven of them
11 match --

12 THE COURT: Six and only seven match?

13 Q Excuse me, ten items examined and only seven
14 of them match. Is there a way to explain that
15 finding consistent with the statement of a hundred
16 percent certainty?

17 MR. WATERS: Your Honor, I object.

18 THE COURT: Sustained.

19 Q When you, when one asserts an error rate of
20 zero can there be an abnormality?

21 A An error rate of zero is a quantitative
22 statement because you attach a number to it.
23 Therefore it is an objective statement and it is
24 hard to mesh an objective statement with a
25 subjective observation.

1 Q When somebody says there is zero error rate
2 is there a way that there is an unexplained
3 outcome?

4 A No, because that is the definition of zero.

5 Q And if there is an unexplained outcome, then
6 it is less than a zero?

7 A It cannot be zero.

8 Q It can't be 100 percent certainty?

9 A That's correct, that's right.

10 MR. BROWN: I have no other questions, Your
11 Honor.

12 THE COURT: Okay. Cross-examination.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q All right, Dr. De Graef, again you have never
4 ever conducted a firearms or tool mark examination
5 yourself, correct?

6 A That's correct, yes, sir.

7 Q All right. And you pointed to a statement in
8 this book right here in which the committee stated
9 that the uniqueness, essentially, of firearms marks
10 has not been demonstrated, fully demonstrated?

11 A That's correct, yes, sir.

12 Q Okay. Now, did you specifically -- was that
13 you who wrote that statement?

14 A That was the outcome of a long discussion.

15 Q Okay. And you all went on, though, in that
16 book to specifically state that that was beyond the
17 scope of this report right here, correct?18 A No. What was beyond the scope of the report
19 was to look at the admissibility of firearms
20 evidence in a court. That was explicitly precluded
21 from our task.22 Q So, are you saying that the book doesn't go
23 on to say that, "We take no position for or against
24 the admissibility of this evidence in court,"
25 correct?

1 A That's correct, we were not supposed to cover
2 that one way or the other.

3 Q So, whether or not the markings upon
4 individual casings or projectiles discharged from a
5 firearm are sufficiently unique or were matching
6 was beyond the charge of this report and was not
7 something that you all independently studied and
8 came to a conclusion on, is that correct?

9 A What we did, we studied in particular, the
10 charge was that we should evaluate uniqueness of
11 ballistics marks, ballistics tool marks as it
12 pertains to the study, to ultimate ballistics
13 imaging so the computer programs that would look at
14 the images, extract the information and attempt to
15 come to matches.

16 Q Okay. Well, immediately after, I'm looking
17 at the executive summary, immediately after that
18 statement is made does it not just have the
19 statement that, "Notwithstanding this finding, we
20 accept minimal baseline standard regarding
21 ballistics evidence"?

22 THE COURT: Be easy on the court reporter.

23 MR. BROWN: I will ask, is he referencing the
24 study?

25 MR. WATERS: The same thing he has.

1 THE COURT: What page?

2 MR. BROWN: That's what I'm asking, or
3 section, even, in the book.

4 MR. WATERS: I'm reading what the plaintiff
5 gave me.

6 MR. BROWN: I gave it to them as soon as I
7 got it.

8 THE COURT: He is saying the line number, you
9 don't have the book, you have a manuscript of some
10 sort.

11 MR. WATERS: He initially sent the executive
12 summary which is a summary of this book and I got
13 the book last week.

14 MR. BROWN: He got the book, I got the book
15 and mailed it to him the next day.

16 MR. WATERS: I did my research, my work on
17 this.

18 THE COURT: Go ahead and ask your question, I
19 will let you do it.

20 MR. BROWN: Does it have a section, though?

21 THE COURT: I see what you are referring to,
22 the text immediately after finding,
23 "Notwithstanding this finding, we accept the
24 minimal baseline standard regarding ballistics
25 evidence."

1 Is that what you are referring to?

2 MR. WATERS: Exactly, yes.

3 MR. BROWN: Is that roughly appearing at 3-E?

4 THE WITNESS: This is in the executive
5 summary. In my note it would be on page three of
6 the executive summary.

7 MR. BROWN: We haven't entered the executive
8 summary.

9 THE COURT: Continue on, Mr. Waters.

10 MR. WATERS: Thank you very much.

11 BY MR. WATERS:

12 Q I think I have found the page number, just
13 give me one second. Let's go to page 81 in the
14 book, in the book itself.

15 A 81? I don't have the book here, but 81?

16 THE COURT: I have it right here.

17 A Box 3.1.

18 MR. BROWN: 3-E?

19 A 3-E.

20 THE COURT: Have you got it?

21 A Yes, I do have it.

22 Q All right. At the beginning of 3-E it says,
23 "It is not the function of this committee to assess
24 the general validity of firearms identification and
25 tool mark examination nor their admissibility in

1 court proceedings." Correct?

2 A That's correct.

3 Q That is a definitive statement it is not the
4 scope of this to do so, correct?

5 A That's correct, yes.

6 Q And then if we read down after the finding it
7 goes on to state that, "There is one baseline level
8 of credibility. However, that must be demonstrated
9 lest any discussion of ballistic imaging be
10 rendered moot. Namely, that there is at least some
11 signal that may be detected. In other words, the
12 creation of tool marks must not be so random and
13 volatile that there is no reason to believe that
14 any similar and matchable marks exist on two
15 exhibits fired from the same gun."

16 I'm reading right here. But in any event,
17 the sentence I'm trying to get to is, there is a
18 conclusion in here that, "The existing research and
19 the field's general acceptance in legal proceedings
20 for several decades is more than adequate testimony
21 to that baseline level."

22 correct?

23 A Yes.

24 Q So, that was a conclusion of the committee as
25 well?

1 A That's the conclusion of the committee. The
2 baseline level there refers to plausibility.

3 Q I couldn't understand that. Going on to the
4 next page, it just goes on to state that additional
5 general research might be advisable as to the
6 uniqueness and reproducibility of firearms related
7 tool marks, correct?

8 A That's correct.

9 Q So, the net result of all that is that not
10 only was the validity of the underlying assumptions
11 of the discipline not beyond the scope of this
12 particular report, but your only conclusion in here
13 was it would perhaps be advisable to do additional
14 research?

15 A That's correct, yes.

16 Q Okay, thank you. And again going back to, I
17 think I asked this question on voir dire but just
18 to reiterate, you have never actually yourself
19 performed a study and done experiments in the
20 laboratory as to the validity of the uniqueness of
21 markings on firearm projectiles or casings?

22 A That's correct, I have not.

23 Q All right. You made a statement that
24 subjectivity plays no role in science. Isn't it
25 true though that, say, someone looking at a

1 spectrograph has to essentially apply their
2 expertise and their experience in using that
3 particular machine to determine what the different
4 colors on the band indicate about what substance
5 that is?

6 MR. BROWN: Your Honor, I would only note
7 that there arguably is an objection because I don't
8 know that he is an expert in spectrograms but I say
9 that because in the interest of having all the
10 testimony out I certainly will let him testify to
11 it but I think now we may be opening the door to
12 testimony about his --

13 THE COURT: Whether we are or not, I will
14 rule. Answer it.

15 A I do work with spectroscopy methods,
16 techniques, so I am familiar with spectrograms and
17 spectra, we call them. The position of the spectra
18 as a scientific technique is not subjective. If
19 you think there is a beam there you better prove
20 that there is a beam there.

21 Q All right. But people can look at the same
22 thing and if someone made an error they could
23 potentially look at the same spectrograph and
24 interpret it incorrectly?

25 A If they -- that is correct, you could have

1 two interpretations for one single set of data.

2 Q Okay.

3 A But which is the correct one then depends on
4 the theoretical models you have and other
5 verification.

6 Q Which --

7 A Which would all have to be according to
8 scientific methods.

9 Q Exactly. Whether or not there is actually a
10 match on that spectrograph of what is known as the
11 result for that particular subject being analyzed,
12 you look at the data here and you look at the data
13 of what you know that substance is and compare the
14 two and determine that therefore this substance
15 must be that because we know that it has been
16 established over here?

17 A Right, you don't make the conclusion simply
18 by looking at them. You do a quantitative
19 comparison, do a PI square, you do a statistical
20 test to show the two spectra are the same. You
21 don't rely on your eyes looking at the spectra.

22 Q What if you're looking at the particular
23 particle under an electron microscope? You look at
24 a particular particle and know it is a particular
25 particle because of your observations of whatever

1 it is and what you know that particular particle is
2 supposed to look like. Correct?

3 A No. What it is supposed to look like. We
4 bombard, we send a beam of electron light through
5 the particle and the way the waves are reflected by
6 the particle.

7 Q It creates an image?

8 A Creates an image or refraction.

9 Q When you say you bombard the electrons on
10 there, the nature of the electron microscope, that
11 is the way you can get pictures, what bounces off?

12 A Correct.

13 Q It is essentially a picture and you look at
14 that picture, what it is and make a judgment based
15 on what you see, is that a particular particle
16 based on what you know the particle is supposed to
17 look like?

18 A You don't make a judgment based on what you
19 see because the imaging formation process is a
20 complex quantum mechanical process, so the images
21 that you see have to be backed up with simulation,
22 so you make a model about your particle and you
23 plug it into the accepted scientific equations for
24 how your microscope works and how electrons
25 interact with materials and based on that you

1 predict what the image will look like. You compare
2 this predicted image with the observed image, using
3 again statistical methods, and only then if you get
4 good agreement as defined by statistical tests,
5 then you can say these two are indeed the same or
6 you can say, "I know what I'm looking at, I know
7 what this image means."

8 Q Okay. So, you essentially don't rely on, it
9 doesn't take any expertise in actually looking at
10 the image itself, that essentially bears no basis
11 or no bearing on your conclusion. Is that what
12 you're saying?

13 A No, not at all. Because in order to obtain
14 image of a particle, as you say, you have to
15 understand the entire image formation process. You
16 have to understand if I, if I turn the particle the
17 imaging might change or other things might happen
18 inside, strong refraction effects or whatever they
19 might be. You do have to understand the nature of
20 the image formation process in order to understand
21 what it is you are looking at.

22 Q But the visual observations and your
23 experience in using this machinery and your
24 experience as a scientist have no bearing on that
25 is what you're saying?

1 A They do, as a first test.

2 Q All right.

3 A They do as a first test.

4 Q All right, thank you. Now, going back to
5 your discussion with this idea of the random match
6 idea and, which the committee came to the
7 conclusion that statistical or the uniqueness had
8 not been fully demonstrated, that was not an
9 independent study, it was a review of the available
10 and previously done research, correct?

11 A Yes, conclusion we came to in reading all the
12 literature.

13 Q So, it is something from reading what other
14 people have done, it is not an actual independent
15 conclusion with this study?

16 A There is some experimental work was done for
17 the committee by researchers at the National
18 Institute of Standards and Technology so we
19 designed experiments for them and they came back to
20 us with their results.

21 Q Specifically on the uniqueness of firearms?

22 A On the uniqueness but in the context of
23 surface striations and measuring the three
24 dimensional profile of striations.

25 Q For purposes of imaging?

1 A You could call it imaging. It is a profile
2 of the surface.

3 Q But the book right here says that that was
4 not the function of this committee, correct?

5 A That was not the primary purpose, no. We
6 found that it was an important enough finding to
7 state it in the text.

8 Q So -- all right. That again was a review of
9 the available research, not an independent
10 examination.

11 Now describe for me the examination you were
12 just talking about. What was that particular
13 examination?

14 A We asked, I believe -- let me see which
15 chapter it is. This is in Chapter 7. So, in
16 Chapter 7, the Department of Justice have made a
17 budget available to the committee for the execution
18 of whatever experiments we deemed necessary and we
19 asked the group at the National Institute of
20 Technology to carry out ballistics experiments but
21 using methods still in the experimental stage.

22 Q What I'm asking, they were not trying to
23 determine whether it was possible or would actually
24 quantify the statistical necessity that you are
25 finding fault with in the traditional manner of

1 matching done by the American Association of Tool
2 mark and Firearms Examiners?

3 A Well, what they did, they compared results
4 from traditional AFTE standards applied methods and
5 observations on a series of cartridges and bullets
6 and compared those results with the results of more
7 advanced methods.

8 Q Right.

9 A They get dimensional profiling.

10 Q That doesn't --

11 A It didn't go to the question of uniqueness.

12 Q It did not go to the question of uniqueness?

13 A No.

14 Q The only experiment you all performed in this
15 study didn't go to this question of uniqueness?

16 A No, it did not.

17 Q Thank you. And again just to reiterate, you
18 fully did not do any examination of the evidence in
19 this case?

20 A That's correct.

21 Q And you don't know whether or not, assuming
22 uniqueness, you don't know whether or not David
23 Collins was correct or incorrect in finding a match
24 under the commonly accepted standards?

25 A I do not know that.

1 Q Okay. How many times have you testified on
2 this issue since this report?

3 A This is the first time.

4 Q This is the first time? Have any other
5 committee members been called to testify, to your
6 knowledge?

7 A The only thing I know about is an affidavit
8 by John Rolph who was the chair of the committee,
9 but I don't know of any others.

10 Q Have you since reviewed a study in the May,
11 2007, Journal of Forensic Science done by Ronald
12 Nichols?

13 A I have not, no.

14 Q So, you don't know what the findings with
15 regard to that were as to uniqueness or error rates
16 in firearms examiners?

17 A No, I do not. I haven't read that article.

18 MR. WATERS: The Court indulgence just one
19 minute, Your Honor?

20 BY MR. WATERS:

21 Q Which parts in this books did you write?

22 A Initially I wrote a large section of Chapter
23 10.

24 Q Okay.

25 A Microstamping, and also Chapter 11, but after

1 the text, excuse me, after the text started to
2 circulate through the various subcommittees on the
3 larger committies then it becomes very difficult
4 to point that I wrote this paragraph or that
5 paragraph because people rewrite it, in
6 subcommittees we also discuss the wording and so on
7 and so forth.

8 Q So, again, both of those just really dealt
9 with nothing to do with uniqueness of firearms or
10 anything like that that was in your main expertise,
11 which is the application of imaging systems and how
12 they might be used in this?

13 A Right, in particular in Chapter 10. In
14 Chapter 11 it was application of scientific methods
15 to firearms.

16 Q And you didn't write any of Chapter 3, which
17 is all Mr. Brown has been asking you about,
18 correct?

19 A I did not write any of the original text of
20 Chapter 3, no.

21 MR. WATERS: Thank you very much. No further
22 questions at this time, Your Honor.

23 MR. BROWN: Your Honor, at this time we
24 qualify him as an expert in the application of
25 scientific methods to ballistic imaging, which he

1 wrote the chapter in the book on it.

2 THE COURT: I will qualify him, as I said, in
3 the area of imaging, scientific imaging analysis.
4 As to the other things regarding the report of
5 statistics and all that, as a scientist he has a
6 right to make general comment in that regard and I
7 would accept his opinions as made as evidence,
8 which means you can introduce it at trial.

9 MR. BROWN: Thank you, Your Honor.

10 THE COURT: Any other questions?

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q You were questioned about the commentary
4 found at 3-E, Chapter 3. Let me also ask you about
5 the authorship of Chapter 7.

6 THE COURT: Let me --

7 MR. BROWN: This is certainly restricted to
8 what --9 A The authorship of Chapter 7, it was a
10 subcommittee, a group of members of a larger
11 committee who interfaced directly with the group at
12 the National Institute of Standards and Technology,
13 they wrote the first draft of Chapter 7.

14 Q Okay.

15 A Later on that was --

16 Q Circulated?

17 A -- circulated, yes, sir. You wanted to ask
18 me about this?19 Q You were asked about it is not the function
20 of the committee. You were asked about some stuff
21 that fell below the finding?

22 A Right.

23 Q Just to make the record clear, since you have
24 been asked about the paragraph above and the
25 paragraph below, what was the finding of the

1 committee that is indicated in 3-E?

2 A The finding was that the validity of the
3 fundamental assumptions of uniqueness have not been
4 fully proven.

5 Q Not only uniqueness, but uniqueness and
6 reproducibility?

7 A Yes.

8 Q Those very hallmarks of science?

9 A Yes, they are.

10 MR. BROWN: Your Honor, I would just again
11 note for the record that this is on --

12 THE COURT: I just read it.

13 MR. BROWN: -- on page 81, just so the record
14 is clear, too.

15 BY MR. BROWN:

16 Q And that is a finding that you all made, it
17 says we?

18 A That's correct, yes.

19 MR. BROWN: Your Honor, I have no other
20 questions but now that he has been questioned about
21 various portions of the book, pursuant to the
22 doctrine of completeness and for the other reasons
23 that I have cited earlier I would ask this now be
24 moved into evidence.

25 MR. WATERS: I would object to that, Your

1 Honor.

2 THE COURT: I think the portion you all have
3 read in evidence will be in evidence.

4 Any other questions?

5 MR. WATERS: Very quickly, Your Honor.
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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Going back to 3-E, right below that finding,
4 we already talked about the sentence, "The existing
5 research and the field's general acceptance in
6 legal proceedings for several decades is more than
7 adequate testimony to that baseline level."

8 And the sentence right after that is, "Beyond
9 that level we neither endorse nor oppose the
10 fundamental assumptions."

11 The official position is neither to endorse
12 nor oppose the fundamental assumptions of firearms
13 and tool mark examinations?

14 A Yes, but to draw attention to the lack of.

15 Q You go on to say perhaps some more research
16 needs to be done?

17 A Yes.

18 Q Perhaps with an additional grant?

19 A Perhaps. It is going to take more than one
20 grant, I think, to be honest.

21 MR. WATERS: Thank you.
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1 FURTHER REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q And let me ask you this. In this same
4 chapter you all find that the uniqueness of
5 firearms and the statement regarding the exclusion
6 of all other firearms is not valid?

7 MR. WATERS: Your Honor --

8 THE COURT: Where is that?

9 MR. WATERS: It is beyond the scope of
10 recross.

11 MR. BROWN: He tries to come back and say
12 they do not say anything about uniqueness, but the
13 finding actually --

14 THE COURT: All he did was do what you did,
15 cite what is in the book.

16 MR. BROWN: I understand, but the book has
17 not, I have asked the book as a matter of
18 completeness be entered in the record.

19 THE COURT: I know, but you can give portions
20 of it, then he will give portions of it. Some of
21 this book, this doctor has, this doctor of image
22 analysis and materials, some of which in this book
23 he has no opinion one way or the other on. For
24 example, if I started asking him about the court
25 cases the book cites, do you have much knowledge of

1 that?

2 THE WITNESS: No.

3 THE COURT: No, so why should I put this book
4 in on opinions on court cases, he has no knowledge
5 of the opinions of court cases listed on page 83.
6 I see now where you got your research done on the
7 cases --

8 MR. BROWN: I will be honest, that is not --
9 it is where I got two of the cases.

10 THE COURT: -- that you handed to me. But
11 all three of them are there.

12 MR. BROWN: As is referenced to an earlier
13 case from the State of Florida, 1983 murder
14 conviction, 2001 ruling, Ramirez versus State of
15 Florida, that predates the trial of this case, in
16 which tool mark evidence was excluded, it was a
17 knife.

18 THE COURT: I know that. This man has a
19 plane to catch. I'm not sure he's interested in
20 that.

21 MR. BROWN: Yes, sir.

22 BY MR. BROWN:

23 Q Let me ask this, though. The conclusion
24 about the firearm matches to the exclusion of all
25 other firearms, what is the committee's opinion

1 regarding that?

2 A The committee's opinion is such comments, I'm
3 reading from the, from section 3-E, "Such comments
4 cloak an inherently subjective assessment of a
5 match with an extreme probability statement that
6 has no firm grounding and unrealistically implies
7 an error rate of zero."

8 MR. BROWN: That is found at page 82 of the
9 Ballistic Imaging book, Your Honor, just for the
10 record, right above the indented paragraph, and
11 that is, I think, Plaintiff's 28.

12 THE COURT: It's right before, right after,
13 quote, such comments cloak an inherently subjective
14 statement that has no firm grounding and
15 unrealistically implies an error rate of zero,
16 close quote.

17 MR. BROWN: Just to make sure, that is in
18 Plaintiff's 28, page 82.

19 No further questions.

20 THE COURT: Thank you. Anything else?

21 MR. BROWN: No, sir.

22 MR. WATERS: No, Your Honor.

23 THE COURT: Would you consider the people
24 who, we'll say this committee did it, we're talking
25 about the committee, National Materials Advisory

1 Board, the Committee on Natinal Statistics, the
2 Committee to Assess Feasibility and Accuracy of
3 Technical Capability of National Ballistics
4 Database, and the Committee of Law and Justice, all
5 those committees together did this book, right?

6 THE WITNESS: The main work was done by the
7 committee on the first page, the Committee to
8 Assess the Feasibility, Accuracy and Technical
9 Capability of a National Ballistics Database.

10 THE COURT: Does it say that somewhere in the
11 book?

12 THE WITNESS: Well, I believe it does.

13 THE COURT: Well, I notice that the editors,
14 the four people who were editors were all on that
15 committee.

16 THE WITNESS: That's correct. If you look at
17 the third paragraph of the objective summary --

18 THE COURT: Which page is that on?

19 MR. BROWN: He doesn't have an executive
20 summary.

21 THE WITNESS: There is no executive summary
22 in the book.

23 MR. BROWN: I'm going to hand you my copy.

24 THE COURT: It may be in the preface.

25 MR. BROWN: I apologize. Your Honor said

1 the --

2 THE WITNESS: Page 1, the bottom paragraph,
3 it says, "In 2004 the National Institute of Justice
4 of the Department of Justice requested that the
5 National Academies appoint a committee of experts
6 to address the issues raised by the computerized
7 ballistic imaging technology."

8 THE COURT: I see that.

9 THE WITNESS: That is the committee that
10 wrote the report and we have drawn from the
11 expertise of members of the other committees that
12 are listed.

13 THE COURT: The National Materials Advisory
14 Board and the Division of Engineering and Physical
15 Sciences and Committee on Law and Justice and the
16 Committee on National Statistics?

17 THE WITNESS: Yes, that's correct.

18 THE COURT: What I'm going to do, I'm going
19 to make this book a court exhibit. So, it will be
20 a court exhibit so that for purposes of anything
21 after this level, anything you all cited, someone
22 could find it in the book, all right?

23 MR. BROWN: And we would like to offer it
24 subject to our offer earlier to put it in evidence,
25 Your Honor, as well. Thank you.

1 THE COURT: I have already ruled the book is
2 not coming in evidence other than the portions you
3 all published and I'm going to make it a court
4 exhibit. What's the purpose of your additional --

5 MR. BROWN: Just to make sure, because there
6 is some --

7 THE COURT: Tell me what you want me to do
8 that I didn't rule on.

9 MR. BROWN: I want to make sure the record is
10 clear I'm actually proving what I offered to
11 introduce. It is obviously clear it's the same
12 book, I would like to make sure that the appellate
13 court that might review this would know that,
14 following all the rules of preserving issues that I
15 did proffer --

16 THE COURT: You asked me to put this book in
17 evidence.

18 MR. BROWN: Yes, sir.

19 THE COURT: He objected and I sustained the
20 objection.

21 MR. BROWN: Yes, sir.

22 THE COURT: So, I would assume that's met
23 your burden, but I'm going to publish and put in
24 evidence all matters you all published to the
25 Court.

1 MR. BROWN: Yes, sir.

2 THE COURT: And I'm going to make this a
3 court exhibit.

4 MR. BROWN: Yes, sir.

5 THE COURT: And if later on through the
6 course of this trial there is something in this
7 book that you all now wish me to read and consider,
8 but I do not feel it appropriate to put in an
9 entire book that is the subject of you would think
10 dozens of people working, writing, that deals with
11 a lot of other subjects. It deals with ballistics
12 imaging but it deals with a lot of different areas,
13 including legal areas and everything else, legal
14 opinion. I'm not going to put that in evidence but
15 what you all published I will put in evidence.

16 MR. BROWN: Thank you.

17 THE COURT: I will put this as a court
18 exhibit.

19 MR. BROWN: Yes, sir.

20 THE COURT: Make that as a court exhibit.

21 MR. BROWN: It will be a court exhibit as
22 well as marked as Plaintiff's exhibit not in
23 evidence, but --

24 THE COURT: That's fine with me.

25 MR. BROWN: Court Exhibit 1?

1 THE COURT: Yes.

2 MR. BROWN: Okay.

3 (Ballistic Imaging booked marked as
4 Court Exhibit Number 1).

5 THE COURT: Any other questions of Dr. De
6 Graef?

7 MR. BROWN: Nothing from the plaintiff.

8 MR. WATERS: No, sir.

9 THE COURT: This gentleman is released of his
10 subpoena?

11 MR. BROWN: He was never subpoenaed.

12 THE COURT: Good.

13 THE WITNESS: Thank you.

14 (Witness excused).

15 THE COURT: Let's bring Mr. Collins back in
16 and have him ready to get back on the stand.

17 (Recessed at 4:15 p.m.).

18 (Reconvened at 4:40 p.m.)
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1 DAVID COLLINS,
2 having been previously sworn, testified as follows:

3 THE COURT: Hello again, Mr. Collins.

4 THE WITNESS: Hello, Your Honor.

5 THE COURT: We're right now ready to proceed.
6 We were, I think, still in the direct examination,
7 weren't we, or you had him on cross?

8 MR. WATERS: We're in cross, Your Honor.

9 THE COURT: All right.

10 FURTHER CROSS EXAMINATION

11 QUESTIONS BY MR. WATERS:

12 Q Mr. Collins, how you doing?

13 A Fine, sir.

14 Q Just for the record, in the break when we had
15 testimony of Dr. De Graef you and I had no
16 substantive conversations about this case?

17 A No, we did not.

18 Q Okay. I think we left off, we were talking
19 about a study that you participated in of
20 consecutively manufactured weapons. I wanted you
21 to describe that study and your part in it and
22 findings.

23 A I was provided a series of a total of fifteen
24 test bullets that were submitted to me. Each had
25 been fired from one, from a total of ten

1 consecutive rifle barrels manufactured. I was also
2 provided separately the known standard from each of
3 the barrels. Part of my study was to determine
4 which of those bullets came from, the questioned
5 bullet came from which of the barrels, and I was
6 able to do this. They sent me a question sheet, an
7 answer sheet which I completed and returned to the
8 provider of the test and was later given the result
9 of that examination, which was I was indeed able to
10 identify exactly which, in each of the fifteen
11 instances which bullet came from which barrel.

12 Q Okay. So, those barrels came off the line,
13 we know those barrels came off the line one after
14 the other?

15 A Yes. The producer of the test went to the
16 factory and obtained the barrels after they came
17 off the rifling process.

18 Q Have you reviewed other consecutive
19 manufacturing studies?

20 A Personally reviewed them?

21 Q Right.

22 A Nothing personally. I have just reviewed the
23 text of other people's studies.

24 Q All right. And those conclusions have been
25 similar in those studies you have reviewed as well?

1 MR. BROWN: We would object, similar to the
2 objection with Dr. De Graef, on studies he didn't
3 participate.

4 MR. WATERS: That committee's conclusion was
5 they didn't think it has been fully demonstrated,
6 which is based on their review of a whole bunch of
7 studies.

8 THE COURT: I'm not going to permit this
9 person to give hearsay testimony but if he's giving
10 an opinion based on his studies --

11 MR. WATERS: For the record, that's the
12 point, if you are limiting his testimony, that was
13 my objection to Dr. Le Graef, all they did was
14 review a bunch of studies, they didn't actually
15 conduct any studies as to tool marks.

16 THE COURT: And you noted that and --

17 MR. WATERS: He testified to that as well, I
18 understand. Okay.

19 THE COURT: If he uses certain studies to
20 form his own opinion --

21 MR. WATERS: Okay.

22 THE COURT: -- then, you know, he forms his
23 opinion and what is the basis of his opinion.

24 MR. WATERS: I think these studies go to the
25 validity of the underlying assumption.

1 THE COURT: I will permit him to testify as
2 to his opinion and also to give underlying basis of
3 his opinion.

4 MR. WATERS: Okay.

5 BY MR. WATERS:

6 Q Your opinion in this case, there was
7 conclusive match, is that correct?

8 A That's correct.

9 Q That was based on your observation of the
10 test fired casings and the casings submitted to you
11 in evidence, correct?

12 A Microscopic comparison between the two.

13 MR. BROWN: Just to clarify, this is not the
14 study with the rifle bullets, or consecutive rifled
15 barrel?

16 A That's the same way I performed that study as
17 well, through microscopic analysis just as I did
18 with this. What I believe is being asked here is
19 about the particular criminal case in question,
20 which is also what I was referring to.

21 Q And that is with your technical expertise
22 that comes from your experience and training in
23 that regard, is it not, to make those
24 identifications from?

25 A That's correct.

1 Q From using the equipment that you use and
2 making the observations and ultimately drawing
3 conclusions?

4 A That is correct.

5 Q Okay. And your conclusion comes from the
6 base that we have already discussed of the
7 practical impossibility, that once you have
8 identified sufficient pattern of individual
9 markings that it's a practical impossibility that
10 another firearm could have made those, correct?

11 A That is correct. When you look at the
12 entirety of that portion of the theory of
13 identification it goes into all the involvement.
14 We're looking, in addition to the number, we are
15 matching striations or impressions, if you will,
16 but also if there were special relationships, size,
17 et cetera, all those in play, that is what I based
18 my identification on, is that foundation based on
19 that.

20 Q And you, in coming to that opinion and
21 relying on that conclusion you have reviewed other
22 consecutive manufactured studies that have
23 confirmed that theory of identification, correct?

24 A I have read the peer review articles on such
25 studies.

1 Q Thank you. That is what I was trying to get
2 to. All right, now let's go back to, let's talk a
3 little bit about the possibility that due to wear
4 or corrosion or whatever, that the pattern can
5 change over time. Is that something that you have
6 to deal with in the course of your examination?

7 A At times I do. It depends on the length of
8 time that has transpired from the time the incident
9 occurs to the time perhaps the firearm itself was
10 recovered, some change may take place as a result
11 of deliberate alteration or corrosion or misuse or
12 something. In this particular case there was some
13 change that appeared to be evident as a result of
14 being immersed in water.

15 Q But the worst case scenario from such a
16 change from additional wear or corrosion or what
17 have you, from the time of discharge of your casing
18 to the firing of your test casing, the worst case
19 scenerio would be you would not be able to come up
20 with a match, not come up with a false positive.
21 Is that correct?

22 A That's correct.

23 Q Does the fact that a weapon is a less
24 expensive manufactured weapon, does that have any
25 effect on the ability to make an identification or

1 sufficiency of the marks that are given, that you
2 are looking at?

3 A In an indirect way it may, in that such
4 manufacturers often do not put the degree of
5 finishing work into the inside of their barrels or
6 other parts of their gun that would tend to remove
7 some of the defects that would leave individual
8 characteristics for us. So, as a result they
9 sometimes will leave more individual
10 characteristics in the barrels and on the breach
11 faces of firing pins than you might find in a more
12 expensive, more precisely manufactured firearm.

13 Q Okay. Just to reiterate, High Point is
14 generally an inexpensive weapon?

15 A Generally inexpensive, fairly reliable but
16 generally inexpensive.

17 Q All right. Now, there was some concern or
18 some question about the subjective component of
19 your determination, which is ultimately your
20 conclusion from viewing both the subject casing and
21 the test casing. Correct?

22 A That's correct.

23 Q All right. And it's true, though, that if
24 that subjective component in the analysis was a
25 problem it would be reflected in the error reports.

1 Isn't that true?

2 A I believe so.

3 Q Your proficiency reports show you never
4 failed one, correct?

5 A That's correct.

6 Q That we have discussed, and I believe you
7 testified earlier that the error rate from the
8 studies is less than one percent. Is that correct?

9 A Around one percent to less. If you look at
10 the studies that have been done based on the CTS
11 proficiency tests the error rate was around one
12 percent overall but again we couldn't determine if
13 those, how many nonfirearms examiners were involved
14 in that data gathering.

15 THE COURT: Data gathering, did you all have
16 all sorts of weapons fired and then see if so many
17 people could identify the casing or projectile
18 fired? I assume you use projectiles as well as
19 casings?

20 THE WITNESS: At various times we do. The
21 Collaborative Testing Services produces these tests
22 using combination of materials that should match.
23 They will send us test standards from a gun and
24 they will send, for instance, fired cartridge
25 casings that are submitted to be placed in

1 evidence, questioned items, some of those may
2 match --

3 THE COURT: My question is when you say you
4 had a one percent or less error, are you saying --
5 what did, what is the practical nature of how you
6 determine that? Do you have actually people in one
7 group and you do the firing and see if they can
8 identify them or are you saying one percent got it
9 wrong? What do you mean by that?

10 THE WITNESS: Nationally all the CTS test
11 result we send back to the vendor and they score
12 our results, they know what the answers are, they
13 issue a report.

14 THE COURT: This is some sort of standardized
15 test that the vendors of the various weapons have?

16 THE WITNESS: This is a separate company that
17 produces efficiency tests for forensic
18 laboratories.

19 THE COURT: They send it to the various
20 laboratories and you do the test, I guess under
21 some supervision? Do they also have, send the
22 projectiles or the casings with them?

23 THE WITNESS: They send you the actual items
24 for you to examine, then you fill out, essentially
25 you issue a report that you will return.

1 THE COURT: Do they also send the weapons?

2 THE WITNESS: No, sir, they don't send the
3 weapons.

4 THE COURT: You don't actually fire weapons?

5 THE WITNESS: No, sir. They send you
6 standards that they have produced from the weapons
7 and they send you questioned items, some of which
8 will match, potentially match with the known
9 standard?

10 THE COURT: But you're not going to be asked
11 to say did this casing come out of a certain
12 weapon, because you haven't seen the weapon?

13 THE WITNESS: You're asked to determine if
14 this casing matched the three casings they sent
15 you. Those three casings are going to be sent to
16 you with the understanding all of those are from a
17 common source.

18 THE COURT: So, they know where some casings
19 came from and you are saying this casing matches
20 that casing?

21 THE WITNESS: Yes, sir, or bullets.

22 THE COURT: In your profession it's
23 projectile?

24 THE WITNESS: Yes, Your Honor.

25 BY MR. BROWN:

1 Q Just to follow up on what Judge Lockemy said,
2 it is kind of the same thing as the test casing you
3 fired in this case?

4 A Yes.

5 Q It is the same thing as the known casings the
6 test gives you?

7 A That's correct.

8 Q They give you a bunch of subject casings
9 which their identity is up in question and you are
10 to determine which ones match and which ones don't?

11 A That's correct.

12 Q Okay. So, you also not only have to include
13 them, you exclude them?

14 A Yes, sir, that's right.

15 Q What they did was add up the totals of
16 everybody across the country, the results of that,
17 and it came back to less than one percent and that
18 is nationally, is that correct?

19 A Nationally. Everyone who participated in
20 that particular proficiency test, they issued a
21 report and that report reflects the total number of
22 people that got it right and people that
23 essentially got it wrong with inconclusive results.
24 If people issued an inconclusiive it is not
25 necessarily considered to be a wrong answer, but

1 what is considered to be a wrong answer would be a
2 false negative or a false positive.

3 Q Okay. And to your knowledge no one at SLED
4 has ever failed one of those tests?

5 A To my knowledge, no, sir.

6 Q So, if you were to add up all the SLED it
7 would be zero at least as to the subjective
8 component of this analysis?

9 A That is correct.

10 THE COURT: To his knowledge.

11 Q To your knowledge, based upon your technical
12 expertise and your training and experience and
13 applying this method?

14 A That is correct.

15 MR. WATERS: Court's indulgence just one
16 moment, please?

17 Nothing further at this time, Your Honor.

18 THE COURT: Redirect?

19 MR. BROWN: Very briefly, Your Honor.
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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q Now, when you say there is a hundred percent
4 pass rate on the proficiency, and I'm just going to
5 try to use an analogy, school work, passing is one
6 thing. Does that mean it is also a hundred percent
7 scoring rate for everyone?

8 A It's on a pass/fail type of basis, so you can
9 either get correct answers or acceptable answers or
10 not on the test. It would be, if there was an
11 issue with that, then there would be, for instance,
12 if you had incorrect response to the proficiency
13 test there is a remedial process you would have to
14 go through.

15 Q There is more than one question asked?

16 A Typically there is about three questions
17 asked on each test you have to answer and they will
18 provide at least three different standards, three
19 different questions that you will have to determine
20 whether, for instance, out of three cartridge
21 casings submitted did number one match the standard
22 they sent you, did number two match the standard,
23 did number three match the standard, yes or no on
24 each of those questions.

25 Q Well, I guess there is a chance you could

1 pass and make like an 80?

2 A No. You would have to get all of them right,
3 or if you got one of them wrong it would be
4 considered failing a proficiency test.

5 Q So, it does not represent pass rate, but are
6 you saying this is a 100 percent accuracy
7 determination test?

8 A Yes.

9 Q Is that raw data contained in this booklet,
10 firearm report, 9704?

11 A No. That is what the quality manager, the
12 quality, I guess quality manager of SLED keeps as a
13 record of the passing or failing standard on
14 proficiencies.

15 Q Who is it that did the test?

16 A Collaborative Testing Services, CTS, provides
17 the tests. The examiner takes the tests and then
18 the results would be forwarded back to the
19 laboratory once they have been scored by CTS, and
20 then the quality, usually it depends on the agency,
21 I believe at SLED at the time it was the policy
22 that the section technical leader or supervisor
23 would determine who passed or failed based on the
24 response to make sure what you said was in line
25 with what was in the report. Some agencies have a

1 quality manager do that.

2 Q Now, as I understand, these are paper tests?

3 A Those are not the tests themselves. The
4 tests themselves are -- those are the results of
5 the proficiency test.

6 Q You mentioned the tests, answers are provided
7 on the test, I think you said true, false or
8 something?

9 A Yes/no typically. Or yes/no, in some cases
10 they might put, you have an inconclusive option you
11 can take as well.

12 Q Do you have some physical object?

13 A Yes. You are actually looking at the actual
14 items themselves. When they give the proficiency
15 test they send the items, you do a microscopic
16 examination.

17 Q Using the items?

18 A Using the items they provide and the
19 instrumentation at the laboratory.

20 Q Now, you mentioned an error rate of one
21 percent or less?

22 A Approximately one percent for firearms
23 identifications based on the CTS nationwide
24 statistics. Again, given the qualifier that that
25 may, SLED only included trained firearm examiners.

1 Outside the SLED laboratory it has been known some
2 agencies have trainees take these tests and get
3 results as well.

4 Q The trainee, that is somebody still working
5 in the lab but hasn't apprenticed long enough?

6 A That's true, that would be the best way to
7 put it.

8 Q Okay. And I just ask that, do we know
9 whether trainees were taking it and included in
10 that error rate?

11 A It can't be absolutely ascertained but
12 because of that risk there is some question of
13 whether that one percent rate is accurate or not.

14 Q We don't know if the, bear with me, I'm not a
15 statistician, but we don't know if when you exclude
16 the trainees that the error rate would go up or go
17 down, do we?

18 A I believe if you exclude anybody it is going
19 to go down because you are going to have less
20 people in the pool.

21 Q If all the trainees had a zero percent error
22 rate and it was overall --

23 A I see what you're saying.

24 Q If you took the trainees out the error rate
25 would go up?

1 A Yes, that would be, that would be possible if
2 that were to be the case.

3 Q An assumption being the trainees had scored
4 lower than the people who had finished their
5 training?

6 A Yes.

7 Q We still stick with what we do know, they are
8 producing a one percent error rate, one percent or
9 less?

10 A Based on the, based on false positive result
11 errors, that is approximately one percent.

12 Q Okay.

13 A The other method that you can use to try to
14 get a handle on what an error rate might be one to
15 look at the blind studies that's been done from
16 these validation studies, consecutive rifle barrel
17 studies, to see what those people are reporting as
18 the results of those tests, when they have sent
19 these out to all these different laboratories and
20 gotten the results back from the blind study, to
21 see what their error rate is.

22 Q Are you aware of any consecutively
23 manufactured studies that have less than 100
24 percent accuracy rate?

25 A No, I'm not.

1 Q All of them are 100 percent?

2 A Everything I have seen has had a zero error
3 rate.

4 Q Are you aware of any ballistics study that
5 has provided an error rate of less than 100
6 percent?

7 A Not to the best of my knowledge. I can't say
8 that one doesn't exist but in this particular case,
9 the ones I have reviewed that are, like I said,
10 these consecutive rifle barrel studies, they had a
11 100 percent accuracy rate.

12 Q And the ones you are talking about are
13 projectiles?

14 A There are some that have cartridge cases as
15 well. One was done by the FBI that actually had
16 cartridge casings and projectiles as part of the
17 items.

18 Q And the one that you participated in was not
19 casings, but projectiles?

20 A That's correct.

21 Q Okay. And here what we're dealing with a
22 match was made on were casings, not projectiles?

23 A That's correct.

24 Q All right. And the error rate of one
25 percent, that's akin to the odds of picking the

1 poisoned Coca Cola out of a drink machine if there
2 is one out of a hundred in there, or something of
3 that nature?

4 A Yes. That is on the national level, yes.

5 Q I won't ask whether you purchased a drink out
6 of that machine.

7 A I hope I did not.

8 Q Okay.

9 THE COURT: Are you feeling okay?

10 THE WITNESS: I feel fine, Your Honor.

11 BY MR. BROWN:

12 Q You mentioned, you mentioned that there is a
13 remote, although it may be small, possibility that
14 this could be a different firearm, and I may have
15 misstated it, I think you said a practical
16 impossibility?

17 A That is the definition, that is what I go by,
18 practical impossibility it could be another
19 firearm, because of the way you reach a practical,
20 that conclusion is based on, you can reach a
21 practical conclusion based on certain criteria.

22 Q And that's not what you told the jury in this
23 case?

24 A I told the jury that that bullet was fired by
25 that gun, excuse me, that cartridge case, those

1 cartridge casings had been fired with that firearm
2 to the exclusion of all other firearms, and that
3 was, that is what I told the jury.

4 Q And you never said that it was a practical
5 impossibility it was another gun?

6 A No, that is not the way I worded it that
7 particular day, no, sir.

8 Q And you discussed the statement to the
9 exclusion of all other firearms. It is not, that
10 is not, that is not a phraseology that is currently
11 being used at AFTE, ever in their ATFE tool
12 markings? I say this because the one has been
13 entered in evidence is excerpted from a 2003 ATFE
14 document. Did it change in the time between 2002
15 and 2003?

16 A No. The only, there was some addition to a
17 couple words to part B of the theory of
18 identification that happened sometime after 1994
19 but it did not address to the exclusion of versus
20 the practical impossibility manner of expressing
21 that information to a jury.

22 Q And the last thing, on your bench notes is
23 there anywhere that you note for our review the
24 actual phenomenon you observed, such as stria left
25 side, left side or three stria marks, so that we

1 can try to figure out which markings, for instance,
2 on the inconclusive ones were similar but not
3 sufficiently similar?

4 A You will note in many of my notes that I
5 refer back to item four.

6 Q Yes, sir.

7 A If I could read my item four results?

8 Q Please. There is a record, actually --

9 A Item four was fired by item 52 based on
10 matching individual identifying characteristics
11 found in breach face impressions.

12 THE COURT: You're reading too fast, the
13 court reporter is trying to take it down.

14 A I'm sorry. "Tests did not mark as well as
15 evidence possibly due to immersion." That is the
16 meat of my identification.

17 Q On number six you said see notes for number
18 four?

19 A Yes. It was the same criteria applied.

20 Q Which was a conclusionary statement?

21 A For me, yes.

22 Q So, there is not, the items regarding what is
23 the sufficient agreement, in box 3.1.B, where it
24 talks about two or more sets of surface contour
25 patterns or individual peaks, ridges and furrows or

1 one set of surface contour pattern, we don't know
2 whether those were present or not?

3 A Well, I can infer from my notes that they are
4 present by the fact that I recall the
5 identification was a positive match.

6 Q Otherwise it is not indicated on raw data?

7 A No, it's not.

8 Q Raw data entry?

9 A Not in the way you are asking about those.

10 MR. BROWN: No further questions.

11 THE COURT: Okay.

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1 RECROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q Just real quick, I just want to make sure we
4 all understand about the proficiency testing. You
5 get actual casings, similar knows from the
6 firearms?

7 A Yes.

8 Q You get some unknown, you are getting real
9 casings examined under the microscope?10 A I might treat it like I was working a case, I
11 work the whole thing as if I was working a case.12 Q That is what I was about to say. Those
13 proficiency tests are exactly, what you did in this
14 case where you had your fifteen test fired knowns
15 and you had your submitted evidentiary casings and
16 you examined the actual physical casings, that's
17 the same thing you do on a proficiency test, is
18 that right?

19 A That's true.

20 Q You are either going to come up with a
21 positive, eliminate or inconclusive. Correct?

22 A Correct.

23 Q Based on your proficiency testing your error
24 rate, at least with regard to that subjective
25 identification your error rate is zero, is that

1 correct?

2 A That's correct.

3 Q All right. Now, you were asked about your
4 bench notes and what we can infer from looking at
5 your bench notes but is it true that any qualified
6 examiner, if the firearm was, say, delivered to
7 them and casings were delivered to them in Atlanta,
8 any qualified examiner could then review that and
9 verify the accuracy of your conclusion?

10 A Absolutely.

11 Q So, as long as you've got the gun and the
12 casings any qualified examiner can look at them and
13 come up with an opinion as to whether you
14 accurately made the call or inaccurately made the
15 call?

16 A Yes. I would take that actually a step
17 farther and state no examiner should look at my
18 notes and try to render a conclusion based on that.
19 It should always be done based on personal
20 examination of the items in question.

21 Q That is my point. The way you do these
22 things, your bench notes are not meant to be
23 something to go behind you, for people to look at
24 the veracity of your conclusion, it is just a
25 worksheet essentially, is that correct?

1 A Yes, that is correct. It would be a
2 worksheet that I typically use, it is designed
3 primarily for me to document what I saw and any
4 actual measurements that were taken. For instance,
5 weight, diameter, things of that nature and to
6 document my conclusions specifically so that I can
7 remind myself or have something for trial later
8 that I can refer to when asked.

9 Q If somebody wanted to test the veracity, the
10 way to do that is to get their own examiner and
11 have him look at the real deal and make a call,
12 correct?

13 A That's what we recommend, yes.

14 MR. WATERS: All right. Nothing further at
15 this time.

16 THE COURT: Anything?

17 MR. BROWN: The only thing I say to Your
18 Honor, we would like to see if we can get a copy of
19 firearms examination report number, I guess it is
20 9701 to 9704, which is referenced in October, 1997,
21 a letter to SLED from Irwin Williams.

22 THE COURT: What does the document contain,
23 test results?

24 MR. BROWN: Yes, sir, which I did see a while
25 ago.

1 THE COURT: Are you talking about they are
2 his test results?

3 MR. BROWN: And the lab's. He gave me this
4 letter. You remember I had asked for them.

5 THE COURT: I just want to make sure that I
6 don't do anything to reveal some personnel issues
7 with another individual. That is the only concern.

8 MR. BROWN: They are welcome to black out the
9 individual's name.

10 THE COURT: He may not have the ability to
11 get that. He is no longer with them.

12 MR. BROWN: I will tell you this. At the
13 time we issued the subpoena we put SLED down. We
14 learned later, I was told by my investigator who
15 was here earlier there wouldn't be a problem, we
16 could get this information. I take his answer at
17 face value but out of an abundance of precaution I
18 want to look at it myself.

19 THE COURT: I want to assist you all I can to
20 help you look at that information if that is
21 something he has. Is that something you have?

22 THE WITNESS: I don't have. I took the
23 subpoena provided to SLED, that is what they
24 provided me to give this court today.

25 THE COURT: I think basically he told SLED

1 and they gave that to him, so you can deal with
2 SLED and get what you can and if you can't, let me
3 know and I will help you out.

4 MR. BROWN: Otherwise I have no other
5 questions for this witness, subject to looking at
6 that stuff.

7 THE COURT: I know you are no longer with
8 SLED. The last question is what is your opinion of
9 the fact SLED is run by a former Circuit judge?

10 THE WITNESS: I have no problem with that
11 whatsoever, Your Honor.

12 THE COURT: That was an inconclusive
13 statement, I think. You may step down.

14 (Witness excused).

15 THE COURT: Do you want to call another
16 witness, Mr. Brown?

17 MR. BROWN: We would if -- we actually might
18 have a short one except, Your Honor, when I saw him
19 in the restroom after lunch or about lunch, I can
20 say before lunch he was grumbling and I haven't
21 seen him since lunch. There is no one out in the
22 hall. They were not released and they were
23 witnesses against my client, no way are they some
24 kind of special my witness.

25 THE COURT: My concern is not only today but

1 tomorrow. Do they live locally?

2 MR. BROWN: I say this, not trying to speak
3 for their veracity, they showed up for the
4 deposition and they showed up both morning?

5 MR. WATERS: Who are you talking about?

6 MR. BROWN: Hiram Johnson and Travis Felder.

7 THE COURT: Why are they not here now? I
8 told you all to make sure they're not released from
9 subpoenas.

10 MR. WATERS: They are not my witnesses. I'm
11 just saying I have seen them out there when I went
12 out for different reasons.

13 MR. SINCLAIRE: I saw Mr. Travis Felder
14 around 12:00 o'clock this morning when I went out
15 to my car for something. He said, "When are you
16 getting to me?" I said, "We're working as hard as
17 we can."

18 THE COURT: They may be at work. I hate to
19 keep these people out of work but just to make sure
20 we have no misunderstanding -- I assume you have a
21 phone?

22 MR. BROWN: Yes, we do.

23 THE COURT: While I look at a couple things
24 here why don't you make a phone call right quick
25 and make sure they will be here tomorrow morning.

1 MR. BROWN: Yes, sir, and then --

2 THE COURT: They may be outside in the car
3 somewhere.

4 MR. BROWN: We actually sent Darien Williams
5 back, knowing these fellows were still here and we
6 were going to get to them, and let them take him
7 back to the Department of Corrections.

8 (Brief recess).

9 MR. BROWN: We reached one witness, Your
10 Honor, Mr. Sinclair did, he is at work, and I will
11 pass and let him --

12 MR. SINCLAIRE: I spoke to Travis Felder,
13 Your Honor, I asked where he was, he said he was at
14 work. I know he works at Coburg Dairy in
15 Charleston. I said, "Why did you leave without
16 permission?" He told me because I wasn't speaking
17 to him outside. I said, "Well, if the judge asked
18 me why you left without permission what do you want
19 me to tell the judge?" And he said because he had
20 to go to work and couldn't get in touch with his
21 supervisor.

22 THE COURT: Is he going to be here tomorrow?

23 MR. SINCLAIRE: I specifically asked him if
24 he would be here tomorrow morning at 9:00 and he
25 said he would be.

1 THE COURT: What about the other witness?

2 MR. BROWN: I called his cell phone number
3 obtained by my investigator. The first ring-back,
4 I guess that is what it was, was Jeff Foxworthy,
5 which is a little unusual. The second one was rap
6 music and it never rang. Mr. Sinclair also saw
7 that.

8 THE COURT: You called one person and got two
9 different, you got a Jeff Foxworthy and a rap
10 music?

11 MR. BROWN: Yes.

12 THE COURT: In the same ring?

13 MR. BROWN: No, two different calls. First I
14 thought maybe I dialed the wrong number.

15 THE COURT: Well, you may have.

16 MR. BROWN: Well, my phone indicates I dialed
17 the same number both times. I thought that was
18 unusual as well. He has been here every day, he
19 showed up at our deposition on August 26.

20 MR. WATERS: I saw him come back from lunch,
21 waiting out there when I got back.

22 MR. BROWN: I didn't even see that, because
23 he followed me into the bathroom wanting to know
24 why he was, "Mr. Brown, why am I still sitting
25 here?" I told him we would call him as soon as we

1 could.

2 THE COURT: Well --

3 MR. BROWN: But we do have Darien Williams
4 and we have several other witnesses, Hiram Johnson.
5 By the way, his participation was very short, I
6 wouldn't expect his testimony to be any different
7 than his deposition. I say that hoping it will be
8 consistent with his deposition testimony, and again
9 very short, less than an hour to it direct and
10 cross. We have Darien Williams, we have Travis
11 Felder and we have several law enforcement officers
12 that are available. They need three hours notice,
13 they live right here in this area, that is three
14 different ones.

15 THE COURT: Are you saying you have no
16 witnesses left today?

17 MR. BROWN: Because of their absence we
18 don't, not by choice.

19 THE COURT: How about tomorrow let's keep an
20 eye on witnesses during the day and let's make sure
21 they stay. We need to stay late getting things
22 done. We're now, we're two days and we have only
23 gone through like four witnesses. Five.

24 MR. BROWN: There are at least three items
25 that I think we can enter into evidence, two are

1 statements that we reached an agreement to admit.
2 One is a statement of Tiara Coleman and one is a
3 statement of Margaret Hawkins.

4 THE COURT: These are statements taken at the
5 time of the incident?

6 MR. BROWN: They were taken --

7 MR. WATERS: Your Honor, these were the two
8 statements taken with regard to the, prior to the
9 murder, in which the weapon, the weapon that
10 ultimately fired the bullets that killed the
11 victim, those other four casings were generated,
12 that we talked about with Tawain Gadson, and these
13 were the two statements, one person that saw the
14 incident, one person who collected the casings.

15 THE COURT: This is the lady who saw it and
16 the lady in the home who got the casings?

17 MR. BROWN: Yes, sir.

18 MR. WATERS: To speed things up I'm going to
19 agree to admit these two.

20 THE COURT: Are they marked?

21 MR. BROWN: Not yet. So, offered in evidence
22 without objection is Margaret Hawkins' statement
23 given to Special Agent Helms, Plaintiff's Exhibit
24 29, and statement of Tiara Coleman marked as
25 Plaintiff's Exhibit 30, also without objection.

1 (Margaret Hawkins' statement marked and
2 received in evidence as Plaintiff's Exhibit
3 Number 29).

4 (Tiara Coleman's statement marked and
5 received in evidence as Plaintiff's Exhibit
6 Number 30).

7 MR. BROWN: There is one other item, Your
8 Honor, mental health evaluation report of James
9 Tawain Gadson. We have spoken with opposing
10 counsel about the report compiled by the Department
11 of Mental Health, and the doctor examining, the
12 examining doctor was Dr. Frierson, and this would
13 end up being 31.

14 THE COURT: Now, wait a minute. Is that a
15 report done at the time of trial?

16 MR. BROWN: It was done, yes, sir, for James
17 Tawain Gadson.

18 THE COURT: So, it's a competency and
19 McNaughton evaluation?

20 MR. BROWN: Competency and McNaughton.

21 THE COURT: It was done on Gadson?

22 MR. BROWN: Yes.

23 THE COURT: You want that in for what
24 purpose?

25 MR. BROWN: We asked him some questions about

1 hearing a voice and smoking Blunts. He denied
2 involvement. We weren't going to introduce it,
3 that is why we didn't subpoena the doctor.

4 THE COURT: Do you object to having this in?

5 MR. WATERS: To avoid Dr. Frierson having to
6 come down here I'll say that is accurate.

7 THE COURT: All right, marked as 31, then.

8 (Dr. Frierson's report marked and received
9 in evidence as Plaintiff's Exhibit 31).

10 MR. BROWN: I believe that concludes the
11 business we can do today without other witnesses.

12 THE COURT: Okay. It's the end of the day
13 without these witnesses, I don't know what to say
14 other than if they are not here tomorrow they will
15 have justice to pay. See you all later on.

16 MR. BROWN: Thank you, Your Honor.

17 MR. WATERS: What time?

18 THE COURT: 9:30?

19 MR. WATERS: Yes, sir, Your Honor.

20 THE COURT: We'll start at 9:30.

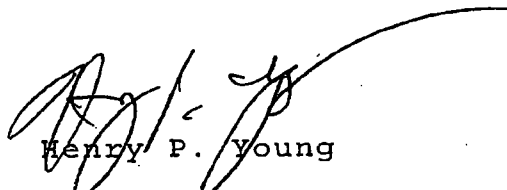
21 MR. BROWN: Yes, sir.

22 (Recessed at 5:10 p.m.).
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4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Dorchester County,
11 South Carolina, on the 16th day of September, 2008.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 September 22, 2008
15
16

17 
18 Henry P. Young
19 Court Reporter
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

A P P E A R A N C E S:

JAMES ARTHUR BROWN, JR., Esquire
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Henry P. Young
Court Reporter

VOLUME III OF X
September 17, 2008

P-R-O-C-E-E-D-I-N-G-S

(Reconvened at 10:10 a.m., September 17,
2008).

THE COURT: You have your witnesses here?

MR. BROWN: We do.

THE COURT: The two people we were concerned
about made it back?

MR. BROWN: They came back.

THE COURT: Ready to proceed?

MR. BROWN: We are. As a matter of
housekeeping we have gone through all the
plaintiff's exhibits that have been offered and
just to keep the record very clear on it, with the
exception of Plaintiff's Exhibit 7 and Plaintiff's
Exhibit 28, the other ones have been admitted with
consent or without objection.

THE COURT: What's the highest number? I
have it down to 26.

MR. BROWN: It actually goes to 31.

THE COURT: Have you all referred to 31 yet?
26 is the highest I have got.

MR. BROWN: 31 is the Department of Mental
Health report.

THE COURT: Okay.

MR. BROWN: Your Honor, Number 14 through --

1 THE COURT: Report on Mr. Gadson?

2 MR. BROWN: Yes. Number 14, I believe 14
3 through 18 have not been offered yet.

4 THE COURT: But Mr. Waters doesn't object to
5 them.

6 MR. BROWN: 14 through 18 have not been
7 offered at all, they are going to be offered
8 through the next witnesses.

9 THE COURT: Has Mr. Waters seen them? Do you
10 object to 14 through 18, Mr. Waters?

11 MR. WATERS: We did not discuss those. I
12 would need to see those again, Your Honor.

13 MR. BROWN: I guess to clarify the matter --

14 THE COURT: Are you saying, then, in your
15 information that 1 through 6 have been introduced
16 in evidence?

17 MR. BROWN: That's correct.

18 THE COURT: And your information, 8 through
19 13 have been introduced in evidence?

20 MR. BROWN: That's correct.

21 THE COURT: Your information, 19 through 26
22 have been introduced in evidence?

23 MR. BROWN: Through 27.

24 MR. WATERS: Correct.

25 THE COURT: 27 is what?

1 MR. BROWN: This is 28.

2 THE COURT: 19 through 27, and then 29, 30,
3 and 31?

4 MR. BROWN: That's correct, Your Honor.

5 THE COURT: Is that your record also, Mr.
6 Waters?

7 MR. WATERS: Yes, sir.

8 THE COURT: 28 is the book that has come in
9 as a court exhibit?

10 MR. BROWN: And been proffered.

11 THE COURT: Been proffered but it's a court
12 exhibit?

13 MR. BROWN: Correct.

14 THE COURT: Number 7 has not been offered
15 yet.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: You can can tell law clerks are
18 short-timers when they don't offer you their pen.
19 The first two weeks he was offering pens all over
20 the place, he went and bought me one.

21 Mr. Court Reporter, what we just said, is
22 that also in your records, 1 through 7, is that
23 right?

24 MR. BROWN: 1 through 6.

25 THE COURT: 1 through 6, and 8 through 13,

1 and 19 through 27?

2 MR. BROWN: Yes, sir.

3 THE COURT: And 29 through 31, are in
4 evidence. And 28, this is Court Exhibit 1, it has
5 been proffered.

6 Okay. By the way, we will be in this room
7 tomorrow, so no misunderstanding, we can have this
8 room, we're discussing Friday.

9 Okay, anything before we get started?

10 MR. BROWN: No.

11 THE COURT: Call your next witness.

12 MR. SINCLAIRE: Hiram Johnson.

13 THE COURT: Mr. Johnson, come around, please.
14 You will see a Bible over there, sir. She's got it
15 in her hand. Place your left hand on it, raise
16 your right.

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1 HIRAM JOHNSON,
2 after being first duly sworn, testified as follows:

3 THE COURT: All right, Mr. Johnson, if you
4 would, pull that microphone, you see it to your
5 right, pull it around just so we can make sure we
6 can hear you.

7 Give me your full name, sir.

8 THE WITNESS: Hiram Johnson.

9 THE COURT: H-i-r-a-m?

10 THE WITNESS: Yes, sir.

11 THE COURT: Your witness, Mr. Sinclair.

12 DIRECT EXAMINATION

13 QUESTIONS BY MR. SINCLAIRE:

14 Q Mr. Johnson, how old are you?

15 A 27.

16 Q And are you related to Tawain Gadson?

17 A Yes.

18 Q How are you related to him?

19 A Cousin.

20 Q His daddy is your uncle?

21 A Yes.

22 Q You're related to Marion Bowman as well?

23 A Yes.

24 Q And how are you related to him?

25 A His mom is my aunt.

1 Q What about Darien Williams, are you related
2 to him?

3 A His mother is my aunt.

4 Q Do you remember back on February the 22nd,
5 2001, being transported by Chief Boone Walters to
6 the Branchville Police Department?

7 A I don't remember.

8 Q Do you remember meeting with Detective Coker
9 on February 22nd at 4:27 in the afternoon?

10 A I remember meeting a detective at a carwash.

11 THE COURT: What are we talking about?

12 MR. SINCLAIRE: The carwash would have been
13 April 5th, Your Honor.

14 THE COURT: What year?

15 MR. SINCLAIRE: 2001.

16 BY MR. SINCLAIRE:

17 Q Do you remember meeting with Detective Coker
18 at the Branchville Police Department after being
19 transported there by Boone Walters February 22nd,
20 six days after this incident?

21 A No. I remember meeting him at Simpson.

22 Q All right. So, let me ask you some specific
23 questions, then. Do you remember telling, on
24 February 22nd, Detective Coker that you saw Marion
25 on February the 16th wearing black jeans and a

1 light colored shirt? Do you remember telling
2 Detective Coker that?

3 A I remember writing a statement, I believe I
4 wrote a statement when we was at Simpson carwash.

5 Q Okay.

6 A But I think, when I wrote it I think I was at
7 Simpson carwash. I remember meeting, Boone taking
8 me to the police station.

9 Q We're going to get to the April 5th statement
10 in a minute. Just so the record is clear, I would
11 ask you this specific question, if that's okay. Do
12 you remember telling Detective Coker Marion was
13 wearing black jeans and a light colored shirt on
14 February 16, 2001?

15 A Was that the day of the incident?

16 Q Yes.

17 A Yes.

18 Q Do you remember telling Detective Coker you
19 drove to the Allen Murray's Club with Marion,
20 Tawain and Darien? This is an oral statement you
21 gave on February 22nd.

22 A An oral statement?

23 Q Correct.

24 A Where were we?

25 Q At the Branchville Police Departmnet.

1 Actually you were sitting in one of the courtrooms
2 there.

3 A Okay. Well, I don't remember that.

4 Q So, is it safe to say you don't remember
5 telling them you rode with Marion, Tawain and
6 Darien, you also don't remember telling them what
7 car you rode to the club in?

8 A It's in my statement but I don't remember him
9 transporting me. What I'm telling you, I don't
10 remember him transporting me to the police station.
11 I wrote a statement but I'm thinking I wrote a
12 statement at the Simpson carwash when we met in
13 April.

14 Q You're correct about that. We're going from
15 the notes Detective Coker took when he met with you
16 on February 22nd, 2001, a couple months before your
17 written statement.

18 A I don't remember.

19 Q And, so, you didn't tell Detective Coker what
20 car you and Marion and Tawain and Darien rode to
21 the club in?

22 A What I'm telling you is I remember talking to
23 Mr. Coker, Koger, whatever his name is, in April.
24 As for as my memory can go back, I do have a
25 statement that I'm pretty sure you have read it but

1 being transported, I don't remember it, so --

2 Q Well, let me ask you a couple more questions
3 about your February 22nd conversation you had with
4 Detective Coker. February 22nd, 2001, where you
5 told Detective -- do you remember telling Detective
6 Coker you saw Marion with a gun in his lap?

7 A It's in my statement?

8 Q I'm talking about the conversation you had on
9 February 22nd, two months before your written
10 statement. Do you remember telling tell Detective
11 Coker, "I saw Marion with a gun in his lap"?

12 A I don't remember.

13 Q You don't remember telling him what kind of
14 gun it was either, do you?

15 A I don't remember. I remember writing a
16 statement in April.

17 Q All right. Shortly after your meeting with
18 Detective Coker do you remember them giving you a
19 ride back to your house in search of some gloves?

20 A I don't remember.

21 Q You do not remember 5:35 p.m. on February
22 22nd giving Detective Miller the gloves you and he
23 and Detective Coker had talked about --

24 A I don't remember.

25 Q -- back at your house? Do you have any

1 recollection of that?

2 A Huh-uh (negative).

3 Q Were you ever arrested for your involvement
4 in this case?

5 A No, sir.

6 Q Did you ever get a lawyer as a result of your
7 involvement in this case?

8 A No, sir.

9 Q Does the name John O'Leary ring a bell with
10 you?

11 A Yes, sir.

12 Q Who is he?

13 A A lawyer I had in an incident where I got
14 shot by a cop and I had, he was representing me in
15 that case and this came up prior to when he was
16 already representing me but as for as hiring him
17 for this right here, no, he was already hired.

18 Q Okay. So, it's safe to say when you and I
19 met in your deposition and I asked you if you had a
20 lawyer during the time in question and you said
21 your lawyer was John O'Leary?

22 A Yes, he was my lawyer prior to this incident
23 happened and he came to the trial whenever it was
24 just to sit in and hear the case but he wasn't
25 hired for me to be represented in this right here.

1 That is what I'm telling you, he was hired maybe
2 six months before, prior to this.

3 Q Okay. And do you know, did you pay John
4 O'Leary for his assisting you and his sitting with
5 you during your testimony in the trial of Marion
6 Bowman?

7 A No.

8 Q Was he paid by the Public Defender
9 Corporation?

10 A I wouldn't know. That is something you have
11 to ask him or the Public Defender, they do things
12 behind closed doors.

13 Q All right. You mentioned just briefly, I
14 think a second ago, that John O'Leary represented
15 you in a lawsuit as a result of the injuries you
16 sustained?

17 A Yes.

18 Q Okay. And what agency, what law enforcement
19 agency was it that Mr. O'Leary was suing on your
20 behalf for injuries you sustained?

21 A Orangeburg.

22 Q Orangeburg County Sheriff's Department?

23 A Yes.

24 Q Okay. That is where Chief Larry Williams
25 works?

1 A Does he? He's the sheriff.

2 Q All right.

3 Q Do you remember when your case was settled
4 against Orangeburg County Sheriff's Department?

5 A No.

6 Q Did Orangeburg County Sheriff's Department
7 through the insurance defense fund pay you money
8 during the pendency of Marion Bowman's trial?

9 A No.

10 Q Was it before he was put on trial or after he
11 was put on trial?

12 A After. About what?

13 Q When did you get your money?

14 A We all know lawsuits take time. I got shot
15 in 2000, I'm pretty sure. You have some paperwork
16 where I got shot, November 2nd, 2000, and we all
17 know lawsuits take maybe five, maybe more years, so
18 I'm pretty sure it was after, you know.

19 Q You have no recollection today of whether you
20 were paid before your testimony in the Marion
21 Bowman case. Is that correct?

22 MR. WATERS: Your Honor, I object at this
23 point.

24 A I don't believe this is --

25 THE COURT: Wait a minute, sir.

1 MR. WATERS: I don't believe it is relevant
2 to any issue in the case.

3 THE COURT: Are you planning to connect this
4 at all?

5 MR. SINCLAIRE: Judge, I just found it
6 interesting he is going to be a witness,
7 effectively for the Orangeburg County Sheriff's
8 Department and he's about to, he's suing them for
9 money and they are giving him money, so there is
10 some money changing hands for whatever reason.

11 THE COURT: Among us chickens we do know
12 insurance companies were involved.

13 MR. SINCLAIRE: Correct.

14 THE COURT: Are you saying he got money from
15 the fund or the county or the state or city or
16 whatever, there wasn't an insurance company
17 involved?

18 MR. SINCLAIRE: At least in his mind he would
19 get money from the agency that injured him. I
20 think it's relevant to whether he thought --

21 THE COURT: He doesn't remember when he got
22 the money. Do you want me for whatever reason to
23 note that lawsuit and he did recover?

24 Did you recover a money amount?

25 THE WITNESS: Yes, sir.

1 THE COURT: He recovered money.

2 MR. SINCLAIRE: Can we ask how much money he
3 recovered?

4 THE WITNESS: You don't need to know that.
5 He told me not to discuss it.

6 THE COURT: If the judge told him not to
7 discuss it --

8 THE WITNESS: It was court order.

9 MR. SINCLAIRE: Your Honor, it's the timing,
10 not the dollar amount.

11 THE WITNESS: Last year.

12 MR. SINCLAIRE: So, you did --

13 THE COURT: Wait, listen, you all probably
14 need to talk before he starts questioning. It is
15 kind of, I'm not sure the court reporter can take
16 down what you're saying or --

17 MR. BROWN: I'm sorry.

18 MR. WATERS: Your Honor, my objection is one
19 of relevance and I would also object to any attempt
20 to amend on the fly to assert a new ground that
21 counsel should have cross-examined Hiram Johnson on
22 his pending suit against Orangeburg County. I
23 think it would be inappropriate. Since it hasn't
24 been pled, this line of questioning is irrelevant,
25 I move to strike it.

1 THE COURT: I will let you ask a couple
2 things about it.

3 MR. SINCLAIRE: Judge, we took his deposition
4 back on August 26, 2008, and just to quote, where I
5 had it written, I asked him if he had a lawyer
6 during the pendency of this action. At the time it
7 was my understanding John O'Leary was representing
8 him in the Marion Bowman case. This is the first I
9 heard he had a financial interest in it. He had a
10 potential bias for testifying for the State if the
11 State is going to be paying him money.

12 MR. WATERS: If anything, he wasn't suing the
13 State, they weren't adversaries at the time.

14 THE COURT: In any event, are we saying at
15 the time he testified in the trial he had a lawsuit
16 pending against the Sheriff's Department of
17 Dorchester County.

18 MR. SINCLAIRE: That is my understanding,
19 Orangeburg.

20 THE COURT: Orangeburg? You made that point.

21 MR. SINCLAIRE: Right.

22 THE COURT: What else do you need to ask him?
23 He had a lawsuit against Orangeburg County
24 Sheriff's Department.

25 MR. SINCLAIRE: Orangeburg County Sheriff's

1 office, chief of which is Larry Williams, one of
2 the major players in the Marion Bowman case.

3 THE COURT: All right. So, what else do you
4 need to ask him?

5 THE WITNESS: I'm wrong, sir, it was Papa
6 Johnson at the time.

7 THE COURT: Papa Johnson, he said was Chief
8 of Police.

9 MR. SINCLAIRE: Thank you, Judge.

10 BY MR. SINCLAIRE:

11 Q Was your lawsuit filed in federal court?

12 A Huh?

13 THE COURT: I don't think he knows. Do you
14 know if it was state court or federal court?

15 THE WITNESS: I don't know.

16 THE COURT: He doesn't know.

17 THE WITNESS: I think it was both. It didn't
18 make it to trial.

19 MR. BROWN: Your Honor, I think --

20 THE COURT: Mr. Sinclair has this witness.

21 MR. SINCLAIRE: Judge, the significance of
22 that is --

23 THE COURT: Do you have a question? This is
24 not argument, this is a witness.

25 BY MR. SINCLAIRE:

1 Q Let me ask you something. Did John O'Leary
2 change the named principal from Chief Larry
3 Willaims to whatever that guy's name was, Papa
4 somebody?

5 MR. WATERS: I object on relevance.

6 A Really this doesn't have nothing to do with
7 anybody but I got shot November 2nd, 2000, Larry
8 Williams didn't come in as sheriff until January,
9 2001.

10 Q Okay. So, you were suing Larry Williams in
11 federal court?

12 THE COURT: Why don't you get John O'Leary up
13 here to say all this?

14 THE WITNESS: Yes.

15 MR. SINCLAIRE: Thank you, Judge.

16 THE COURT: Any other questions?

17 BY MR. SINCLAIRE:

18 Q Mr. Johnson, did you have pending charges in
19 Dorchester or Orangeburg County at the time of this
20 arrest?

21 A Yes.

22 Q What were those charges?

23 MR. WATERS: Your Honor, again I object to
24 the relevance.

25 A I don't remember.

1 THE COURT: He doesn't remember. Are you
2 talking about at the time of the incident involved
3 here?

4 MR. SINCLAIRE: Yes.

5 THE COURT: He doesn't remember. He said he
6 had charges, he doesn't remember what they were or
7 what.

8 THE WITNESS: No.

9 BY MR. SINCLAIRE:

10 Q Were they burglary charges or receiving
11 stolen goods charges?

12 A I don't know what it was.

13 Q But you had charges pending in Dorchester
14 County?

15 A No, never had charges.

16 Q Charges pending in Orangeburg County at the
17 time of Marion Bowman's trial?

18 A Yes, I had a lawsuit. I got shot November
19 2nd of 2000.

20 Q I'm not talking about your civil lawsuit, I'm
21 talking about criminal charges pending where you
22 had been arrested for something.

23 A Never been arrested since I got shot in
24 November, I'm telling you, November 22nd. After I
25 got shot, never been arrested a day in my life in

1 Orangeburg. I had charges but I don't remember
2 them, they never arrested me because of the
3 condition I was in.

4 Q All right. Did you have charges, did you
5 have criminal charges pending, whether they arose
6 before or after you were shot, did you have
7 criminal charges pending?

8 A Yes. I don't remember --

9 Q Yes, you had them but you don't know what
10 they were?

11 A Uh-huh.

12 Q Okay. And that was in Orangeburg County,
13 wasn't it?

14 A Yes.

15 MR. SINCLAIRE: Beg the Court's indulgence,
16 Your Honor.

17 Q Okay. Do you remember on April 5th giving a
18 written statement at 2:15 in the afternoon to
19 Detective Alvin Coker?

20 A Yes.

21 Q Prior to giving that statement do you
22 remember Detective Coker reading you your Miranda
23 rights?

24 A I'm not sure.

25 Q All right. Let me show you what has been

1 marked Plaintiff's Exhibit Number 32 and ask you if
2 you recognize your signature and initials on that
3 form?

4 A Yes.

5 Q So, those are your initials by each of your
6 Miranda warnings and that is your signature under
7 the waiver of rights. Is that correct?

8 A Yes.

9 MR. SINCLAIRE: Plaintiff's 32 into evidence,
10 Your Honor?

11 THE COURT: Can I see that again?

12 MR. SINCLAIRE: Absolutely.

13 THE COURT: And this is from Officer Coker of
14 Dorchester County Sheriff's Department, okay. All
15 right, any objection to 32?

16 MR. WATERS: No objection, Your Honor.

17 THE COURT: 32 in evidence.

18 (Hiram Johnson Miranda rights waiver marked
19 and received in evidence as Plaintiff's
20 Exhibit Number 32).

21 BY MR. SINCLAIRE:

22 Q And after Sergeant Coker of the Dorchester
23 County Sheriff's office read you your Miranda
24 rights did you give him a written statement?

25 A Yes.

1 Q I hand you now what has been marked
2 Plaintiff's Exhibit Number 33. Do you recognize
3 this statement that bears your signature at the
4 bottom?

5 A Yes.

6 MR. SINCLAIRE: Your Honor, I move
7 Plaintiff's Exhibit 33 into evidence at this time.

8 MR. WATERS: No objection, Your Honor.

9 THE COURT: All right, 33 in evidence. After
10 he does that hand it back to me so I can read it.

11 (Hiram Johnson statement marked and received
12 in evidence as Plaintiff's Exhibit 33).

13 BY MR. SINCLAIRE:

14 Q I will let you hold a copy of it in case
15 there is any question you might have about it.

16 In that statement, Mr. Johnson, do you
17 remember telling Sergeant Coker that you went to
18 E-Z Horizon in Yolanda's blue car?

19 A Yes.

20 Q Do you remember telling him you took Kandee's
21 car to the Allen Murray Club?

22 A No. I remember telling him I rode in
23 Kandee's car to Allen Murray, I don't remember
24 telling him I took Kandee's car to the club.

25 Q Okay. And who else was with you in the car

1 that you rode to the Allen Murray Club in?

2 A Darien, Marion and Tawain.

3 Q Darien Williams, Marion Bowman and Tawain
4 Gadson?

5 A Yes, sir.

6 Q And I think in your statement you say that on
7 April the 5th at least you told the police that
8 Marion had told you he stole the car, is that
9 correct?

10 A I don't remember telling him that Marion
11 stole the car.

12 Q All right. If you will go down one, two,
13 three, four, five, six, seven lines, the line
14 starts with got. At the end of that line it says,
15 "We all wore brown gloves because J.R. said he had
16 stole the car." Do you remember telling Detective
17 Coker that?

18 A Yes. He said that but you asked me, you told
19 me Marion stole the car.

20 Q And who is J.R.?

21 A Marion.

22 Q Marion Bowman, okay. At least on April 5th
23 when you were talking to Sergeant Coker you told
24 him that Marion had told you he stole the car?

25 A That's what he said but I didn't know for

1 sure.

2 Q He told you he stole the car, right?

3 A Yes.

4 Q He told you to wear these brown cotton gloves
5 while you all were riding in the car, correct?

6 A Yes.

7 Q Did you not understand at the time that
8 riding in the car when a guy told you he stole it
9 and you are wearing gloves, that that makes you
10 guilty of at least possession of a stolen motor
11 vehicle?

12 MR. WATERS: Your Honor, I object to that
13 question.

14 THE COURT: What's the relevance of that?

15 MR. SINCLAIRE: Judge, if he thinks -- two
16 things, I think, Judge. First off, if he thought
17 that there was a possibility he could be arrested,
18 this is a five year offense, he certainly would
19 have an incentive to testify in court to whatever
20 the Solicitor asked him to.

21 Second, that he was never actually impeached
22 with the possibility he had an additional five year
23 sentence hanging over his head.

24 MR. WATERS: Judge, first of all --

25 THE COURT: He was never charged, was he?

1 MR. SINCLAIRE: There is no statute of
2 limitations on criminal offenses in South Carolina.

3 THE COURT: I'm talking about your thought is
4 that had some effect on his testimony?

5 MR. SINCLAIRE: I think it is something the
6 jury certainly should have been entitled to know,
7 that he had.

8 THE COURT: The jury should have been
9 entitled to know that he possibly could be charged,
10 he said the judge instructed the jury, which is not
11 a PCR matter.

12 MR. SINCLAIRE: I think the fact he was not
13 impeached on the fact he had possible criminal
14 charges pending, my much more learned co-counsel
15 tells me it's ground M in the application, that
16 that is something he should have been examined
17 about at trial.

18 MR. WATERS: Your Honor, that is my
19 objection. Again, there is nothing in ground M
20 about impeaching Hiram Johnson on the fact he had
21 pending charges. Again I would object to any
22 attempt to amend on the fly and I would, Mr.
23 Johnson is his witness and I would object to any
24 attempt to amend on the fly and because of that
25 this line of questioning is not relevant to any

1 matter of issue in this.

2 MR. BROWN: Your Honor --

3 MR. WATERS: Your Honor, Mr. Brown is not his
4 witness.

5 MR. BROWN: I'm explaining the objection to
6 the amendment.

7 THE COURT: Anyway, you can ask him
8 questions. To me, the fact he's in a car he knows
9 is stolen, he's a passenger in the car he knows is
10 stolen, it's a stretch to say that no doubt he can
11 be charged with a crime, no doubt that he now has
12 something to be concerned with because that is such
13 a discretionary thing. It is not like he had
14 possession of the car. He is actually in a car
15 that he said someone said he stole it. Now, I
16 guess theoretically there could be some accessory
17 to possession of a stolen weapon, stolen vehicle,
18 something of that nature because he had no, there
19 is no statement here he had possession of the
20 vehicle, so I assume that is what you're going at,
21 is some possibility, although I have never seen
22 accessory to stolen vehicle in my nineteen years on
23 the bench, but that is what you're saying he could
24 have been charged with?

25 MR. SINCLAIRE: What I'm saying, I'm basing

1 this on my seventeen years in the Solicitor's
2 office when these files come across my desk, where
3 four people were caught in a car, one of them was
4 driving and all four of them were charged with
5 possession of a stolen motor vehicle.

6 THE COURT: All right. Under what theory
7 does he have constructive possession, from reading
8 his statement?

9 MR. WATERS: Your Honor --

10 THE COURT: You need to ask the questions.

11 MR. WATERS: The witness seems to be shaking.
12 His family says he might be having a seizure.

13 THE COURT: Are you okay?

14 THE WITNESS: I'm all right.

15 THE COURT: Let us know if anything is wrong.

16 THE WITNESS: It's cold. All these fans
17 blowing, I'm cold.

18 MR. SINCLAIRE: In my opinion, Judge, not
19 that I liked it when these files came across my
20 desk, I will tell you that all four parties --

21 THE COURT: I know that but how did you prove
22 it with the statement here?

23 MR. SINCLAIRE: I used the fact he was in a
24 car, in a common place.

25 THE COURT: Possession of a stolen vehicle

1 doesn't have a requirement of possession?

2 MR. SINCLAIRE: He has constructive
3 possession.

4 THE COURT: By being inside?

5 MR. SINCLAIRE: Yes.

6 THE COURT: As a passenger?

7 MR. SINCLAIRE: He's a passenger.

8 THE COURT: We can talk about the practical
9 nature of charging people but it's a long stretch
10 of convicting someone as a passenger without
11 evidence he had control, constructive or otherwise,
12 of the vehicle.

13 MR. SINCLAIRE: Judge, in my day it required
14 actual knowledge the car was stolen. He was told
15 it was stolen. There is no question, I agree with
16 the Court it would be a long stretch getting a
17 conviction for it. That wasn't the reason we bring
18 it up. I think the relevance was he admitted he
19 was riding in a car that was stolen, had brown
20 gloves on so he wouldn't leave his fingerprints in
21 the car.

22 THE COURT: All right. The record shows or
23 reflects, I'm sure, that no one asked him that in
24 front of the jury, so that is what you want me to
25 be aware of, you all made it clear the record does

1 not show that that interesting point was not made.
2 That practical use by Solicitors and police
3 officers as opposed to being legal consideration,
4 it wasn't made. But, Mr. Waters, do you still say
5 that isn't a ground for PCR?

6 MR. WATERS: Yes, absolutely. I want to make
7 sure the record reflects you overruled my
8 objection. You have to have a preservation.

9 THE COURT: Your objection was what? I
10 didn't give you a chance to talk.

11 MR. WATERS: They were questioning him on his
12 pending charges and there is nothing in ground M
13 about trial counsel should have impeached Hiram
14 Johnson on anything. I would object, number one,
15 none of this is relevant. It is not relevant to
16 the issues pled and I would object to any attempt
17 now to start asking questions, clearly ones they
18 could have known and then attempt to amend on the
19 fly to have the pleadings conform to the proof.
20 That is getting around the PCR statute, and the
21 rule clearly requires --

22 THE COURT: In M -- which number is Mr.
23 Johnson involved in? I don't see his name
24 anywhere.

25 MR. BROWN: Your Honor, M is the ground. The

1 supporting facts.

2 THE COURT: Where is there -- is Mr. Johnson
3 named anywhere in M?

4 MR. WATERS: No, sir, Your Honor.

5 MR. BROWN: We would assert under Simpson v.
6 Moore, when the evidence comes out at trial we're
7 allowed, in fact that case, it is his case --

8 THE COURT: All right, in M are you referring
9 to Hiram Johnson not being impeached --

10 MR. BROWN: I'm not --

11 THE COURT: M is not the ground?

12 MR. BROWN: M is the ground, Your Honor, if I
13 can make it clear?

14 THE COURT: Well, reading M, which you say
15 excludes your discussions of Mr. Johnson's pending
16 charges --

17 MR. BROWN: Your Honor, just to make clear,
18 the application is set up, if you will notice the
19 way it is pled according to the rule, which
20 requires this form, it used to be nine and ten, and
21 the way I have done it, it is still under nine and
22 ten. Nine is the ground for relief. Nine M is
23 that the trial counsel was ineffective for not
24 presenting impeachment evidence.

25 THE COURT: How could Mr. Waters know to

1 prepare in regard to Mr. Johnson?

2 MR. BROWN: We didn't know this information
3 until now.

4 THE COURT: All right. So, you didn't call
5 Mr. Johnson to discuss that with him? Why did you
6 call Mr. Johnson, about the civil case or what?

7 MR. BROWN: We called him to talk about his
8 discrepancy in his statement and his trial
9 testimony and we learned new information, which is
10 what a trial is for, to get evidence.

11 THE COURT: You know, you really have a tough
12 time asking questions without making speeches.
13 What I need to ask is this. What pending charges
14 did Mr. Johnson have at the time?

15 MR. BROWN: We don't know. This is the first
16 we found out about it. We even asked him --

17 THE COURT: Did you have pending charges,
18 excuse me, did you have pending charges in
19 Dorchester County in 2001?

20 THE WITNESS: Dorchester?

21 THE COURT: Yes.

22 THE WITNESS: No, sir, only Orangeburg, I
23 never had charges pending in Dorchester County.

24 THE COURT: Did you have charges pending in
25 Orangeburg County?

1 THE WITNESS: I don't know. They got threw
2 out, they didn't stay long.

3 THE COURT: Do you remember when they were
4 thrown out?

5 THE WITNESS: I don't remember.

6 THE COURT: Do you know why?

7 THE WITNESS: My lawyer called me -- no, I
8 don't.

9 THE COURT: Who was your lawyer?

10 THE WITNESS: John O'Leary out of Columbia.

11 THE COURT: Was this involving the shooting
12 that occurred in 2000?

13 THE WITNESS: Yes.

14 THE COURT: So, there were charges about that
15 and after that you had sued them for it?

16 THE WITNESS: Uh-huh.

17 THE COURT: Those charges in Orangeburg
18 County were thrown out?

19 THE WITNESS: Yes, sir.

20 THE COURT: All right. So, that's the
21 information.

22 MR. BROWN: The same Solicitor's office.

23 THE COURT: Okay.

24 MR. BROWN: There is a motion filed by --

25 THE COURT: What is your question now?

1 Overruled, ask the question. What is your
2 question?

3 MR. BROWN: Now it is a different issue.

4 THE COURT: What is your question? He said
5 he does not know about why they were thrown out or
6 anything else. What's your question?

7 BY MR. SINCLAIRE:

8 Q Do you remember being charged with burglary
9 and grand larceny prior to the trial of Marion
10 Bowman, in Orangeburg County?

11 A I don't remember.

12 MR. WATERS: Your Honor, they knew there were
13 charges and motions filed, they clearly knew this
14 information.

15 THE COURT: Your next question?

16 Q Do you know whether as a result of your
17 cooperation in the trial of Marion Bowman that
18 those charges were thrown out?

19 A No. They were thrown out long, my case
20 didn't get over until last year, they was thrown
21 out way after Marion. Probably, if not the
22 beginning of last year, the end of 2006.

23 Q And did Mr. O'Leary ever tell you why your
24 charges were dismissed?

25 A No. He didn't tell me anything, really.

1 THE COURT: Mr. Sinclair, this is something
2 your client hadn't told you? He keeps giving you
3 information that he knew about all this. Is this
4 something you didn't discuss with him? I'm asking
5 you, Mr. Sinclair.

6 MR. SINCLAIRE: I have no idea.

7 THE COURT: You and Mr. Bowman never
8 discussed this at all, this is something he knew,
9 he just didn't reveal it to you until today, you
10 keep talking with him and he tells you about the
11 charges and all that?

12 MR. SINCLAIRE: Judge, so the record --

13 MR. BROWN: I would assert attorney/client
14 privilege on that. As lead counsel we're not going
15 into discussions between our client and counsel.

16 THE COURT: Therefore were you all surprised
17 about it today?

18 MR. BROWN: I'm not going to answer what we
19 talked about.

20 THE COURT: You said a minute ago you were
21 surprised. Were you surprised?

22 MR. BROWN: We were surprised.

23 THE COURT: So, you heard nothing about this
24 until today?

25 MR. BROWN: I'm not going to reveal any

1 conversations with my client.

2 THE COURT: When you say surprised, does that
3 mean you heard about it before today or you didn't
4 hear about it before today?

5 MR. BROWN: I have not heard about it from
6 any State's witnesses, State's file, State's
7 documents before today.

8 THE COURT: All right. So, therefore if I am
9 going to determine that you all had no idea to put
10 the State on notice, you had no information to put
11 the State on notice about it?

12 MR. BROWN: That is not my answer. We put
13 the State on notice we're alleging ineffective
14 impeachment.

15 THE COURT: Let me ask you a question.
16 Regarding the fact Mr. Johnson may have had pending
17 charges and may should have been impeached on
18 pending charges, were you aware of that before
19 today?

20 MR. BROWN: No.

21 THE COURT: Okay. That is all I need to
22 know. Therefore no one told you about it before
23 today, therefore you didn't tell the State about
24 it. That was my question, if you are telling me no
25 one told you, so that is why I was just curious

1 about the fact no one told you but I must be
2 observant in the courtroom and noticed Mr. Bowman
3 keeps telling Mr. Sinclair these things, keeps
4 asking questions.

5 Now, I don't want to get involved in your
6 attorney/client privilege but I find it amazing
7 that you say no one told you this at all before
8 today but yet your client seems to keep giving
9 information about it during the course of the
10 questioning of this witness. That just seems very
11 interesting.

12 MR. BROWN: And let me make sure you
13 understand. My client has been incarcerated with
14 no access to any court records since his arrest on
15 February 17th, 2001.

16 THE COURT: That means today he knows to tell
17 you. How does that affect his ability to tell you
18 about it today?

19 MR. BROWN: The question was whether he had
20 pending charges during his testimony at trial.

21 THE COURT: Right.

22 MR. BROWN: He didn't know that because there
23 is no record in the trial counsel's file.

24 THE COURT: Those are my observations of Mr.
25 Bowman and what Mr. Sinclair said is probably

1 incorrect. Mr. Sinclair says his client keeps
2 telling him this about pending charges and all
3 that. But let's proceed on this.

4 MR. BROWN: Just to make sure we're clear,
5 without waiving any attorney/client privileges and
6 without waiving my right to have other counsel come
7 in and represent me on that issue, then we would
8 like to put on the record --

9 THE COURT: I'm not asking you to reveal any
10 attorney/client privilege.

11 MR. BROWN: I don't know how to respond to
12 the question otherwise.

13 THE COURT: Well, when you say you wish to
14 make sure when new evidence comes up, you responded
15 clearly, you said that this thing is something you
16 had no idea about until Mr. Johnson testified to it
17 today. And therefore, you see, let me finish, and
18 therefore since you had no knowledge of it, no one
19 told you about it because obviously as an officer
20 of the court if your client had told you about it
21 you wouldn't tell me you had no knowledge of it
22 because then you would not be being clear to the
23 Court. And therefore I'm assuming and I know you
24 are a reputable attorney and you would tell me if
25 you knew about it. So, I'm accepting the fact you

1 had no knowledge of Mr. Johnson having pending
2 charges at the time of his testimony in the trial.

3 MR. BROWN: At the time of his testimony we
4 did not know he had pending charges, with the
5 caveat my client was arrested on February 17th, not
6 for this murder but for receiving stolen goods
7 which we have belief was related to his charge,
8 which we have yet to know whether or not it is
9 pending at the time of trial in May of 2002. We
10 don't have access to his SLED records, I cannot run
11 his rap sheet, we do not have access --

12 MR. WATERS: Your Honor -- I'm sorry, go
13 ahead.

14 THE COURT: I'm only trying to address this
15 issue of you wanting this to be part of the PCR
16 because you had no knowledge of it.

17 MR. BROWN: Yes, sir.

18 THE COURT: Then when I say if you had no
19 knowledge of it why is Mr. Bowman over here in
20 front of me telling Mr. Sinclair the questions to
21 ask and therefore if he's telling the questions to
22 ask it seems to me Mr. Bowman must have been aware
23 of it, so Mr. Bowman is aware of it, I find it
24 surprising you all didn't discuss it with him.
25 When I asked that it made you all assume I'm trying

1 to get you to reveal attorney/client privilege,
2 which I'm not trying to do. It seems none, put it
3 that way, I guess I have to consider all matters,
4 even unusual matters when I decide on your request
5 to make amendment, to make another amendment to
6 your petition because evidence came out today that
7 you were not aware of.

8 MR. BROWN: And let me make sure we're clear
9 on that. We don't believe that is an amendment to
10 our claims. Our claim is ineffective impeachment.

11 THE COURT: I know that but, Mr. Brown, I
12 agree with you your claim is ineffective
13 impeachment but you then can't say ineffective
14 impeachment for not telling who you're talking
15 about and bring all these people in that you don't
16 have opportunity to prepare, that you are saying
17 were the ones who you think should have been
18 impeached and were not.

19 MR. BROWN: Let me go ahead and make clear
20 for notice right now that there may well be a claim
21 of Brady violation and a discovery violation
22 against the State based on the fact that they
23 didn't turn over the deal, whether it is implicit
24 or not, cut with Hiram Johnson to go easy on him
25 for these charges which he said were dismissed.

1 THE COURT: What evidence do you have of
2 that?

3 MR. BROWN: This much. He was called as a
4 State's witness, he testified favorably for the
5 State, they dismissed his charges. That's
6 circumstantial evidence there was a deal cut.

7 THE COURT: When did they dismiss his
8 charges?

9 MR. BROWN: After the trial, he said.

10 THE COURT: He said sometime in the last
11 year.

12 THE WITNESS: Which I never was charged.

13 THE COURT: Now he says he never was charged.

14 MR. BROWN: He has a memory problem, too,
15 Your Honor, that came out at trial as well.

16 THE COURT: He may or may not be remembering
17 the charges.

18 MR. BROWN: I don't know he's competent as a
19 witness. If you want to admit allegations and have
20 a competency evaluation, he may not have been
21 competent in 2002.

22 THE COURT: Mr. Waters?

23 MR. WATERS: I think he is talking about he
24 wasn't charged in this case when he asked, there is
25 nothing in this application for me to look at, his

1 deal, pending lawsuit with Orangeburg, or charged
2 in some other things, I had no reason to look at
3 any of that because none of that is in the
4 application. I don't know the circumstances of
5 that deal, I don't know whether he was charged with
6 burglary. That is not something that was in this
7 application or related specifically to this trial,
8 so that is not something I looked at and that is
9 the apparent prejudice, just to make sure, I think
10 we can answer that question, he was talking about
11 he was never charged in the Marion Bowman case.
12 That is it. Whether or not his charges got
13 dismissed in the course of dealing with John
14 O'Leary and a lawsuit about him getting shot in the
15 back of the head, I don't know. The first thing
16 about that, there is certainly nothing I have ever
17 seen that indicates there was any sort of quid pro
18 quo with Hiram Johnson based on that lawsuit, and
19 to throw that in at this time I think is extremely
20 prejudicial.

21 THE COURT: I assume they must have evidence
22 other than this testimony.

23 MR. BROWN: I have to be quite honest with
24 you, Brady says any evidence that is either
25 exculpatory or impeaching has to be turned over.

1 THE COURT: All right, let's proceed on with
2 the questions. Thank you very much. What other
3 questions do you have of Mr. Johnson?

4 BY MR. SINCLAIRE:

5 Q In your statement you gave, do you still have
6 a copy of it there, Mr. Johnson, right beside you?
7 This is a statement you gave Sergeant Coker on
8 April 5th, 2001. You told him that J.R. talked to
9 Travis at the club. Isn't that correct?

10 A Yes.

11 Q All right. And you told him, Sergeant Coker,
12 that Black, and when you say Black who were you
13 referring to?

14 A Marion.

15 Q Black was a nickname for Marion?

16 A Yes.

17 Q You told Sergeant Coker on April 5th, 2001,
18 Black had a pistol in his lap. Isn't that correct?

19 A Yes.

20 Q You didn't tell him he had a .380 in his lap,
21 did you? It just says pistol, doesn't it?

22 A Yes.

23 Q Did you know Tawain Gadson carried a .380 as
24 well?

25 A I wouldn't, I never seen him with one.

1 Q Do you know Black carried a .32 instead of a
2 .38, with a broken handle, have you ever seen Black
3 with a .32 with a broken handle?

4 MR. WATERS: Your Honor, again I object to
5 the relevance of this.

6 THE COURT: Overruled, let's proceed.

7 MR. WATERS: I understand, Your Honor, I will
8 sit down after this but I want to let you know I'm
9 not trying to harass you, but he keeps mentioning
10 the Simpson v. Moore case, that is precisely what
11 I'm trying to stop from happening to me again,
12 that's why I'm making sure that anything that is
13 not related to anything pled, that I'm not standing
14 up and complaining about. I'm not trying to harass
15 you.

16 THE COURT: Okay.

17 BY MR. SINCLAIRE:

18 Q In anywhere in your statement on April the
19 5th, 2001, did you tell Sergeant Coker, "I killed
20 Kandee, ha, ha, ha?" Is that anywhere in your
21 statement?

22 THE COURT: Are you talking about Exhibit 33?

23 THE WITNESS: Who killed Kandee?

24 MR. WATERS: Your Honor, same objection.

25 THE COURT: The statement is right here.

1 MR. SINCLAIRE: He testified, thank you, Your
2 Honor, he testified at trial for the first time
3 that he heard Mr. Bowman tell him, "I killed
4 Kandee, ha, ha, ha."

5 THE COURT: Okay.

6 BY MR. SINCLAIRE:

7 Q My question to you is did you ever tell the
8 police that prior to getting on the witness stand?

9 A I don't remember.

10 Q So, you don't remember -- let me put it this
11 way. You didn't tell them that on February 22nd,
12 2001, did you?

13 A I don't remember that.

14 Q You didn't tell them that on April 5th, did
15 you?

16 A No, I don't remember saying that.

17 Q You didn't tell them that when they read you
18 your Miranda rights at 4:27 p.m., did you?

19 A I don't remember them reading me any rights.
20 That's about seven years ago.

21 MR. WATERS: Your Honor, again, the objection
22 is to new ground on apparently failure to impeach
23 Hiram Johnson on whether or not he said, "I killed
24 Kandee, ha, ha, ha." Again that is not pled, which
25 I assume you're overruling the objection at this

1 point.

2 THE COURT: Yes.

3 BY MR. SINCLAIRE:

4 Q So, you didn't tell him when you rode back in
5 the car to your house to find the gloves that you
6 heard him say, "I killed Kandee"?

7 A I didn't ride back with him to my house.

8 Q Do you remember us taking your deposition?

9 A August 26.

10 Q Thank you. August 26, 2008, and during that
11 deposition do you remember telling us that you
12 thought Marion Bowman was kidding when he said, "I
13 killed Kandee, ha ha ha"?

14 A Yes.

15 Q But you never told the jury in the case that
16 you thought he was kidding, did you?

17 A I don't remember that.

18 Q Did you meet with the Solicitor prior to your
19 testimony?

20 A No.

21 Q You never met with Solicitor Walter Bailey
22 prior to him calling you as a witness in the
23 capital murder trial of Marion Bowman?

24 A I don't remember.

25 Q Would it be safe to say that you did not tell

1 Solicitor Bailey that you heard Marion say, "I
2 killed Kandee, ha, ha, ha"?

3 A No.

4 Q Do you remember telling Solicitor Bailey that
5 prior to getting on the witness stand?

6 A No, I don't remember telling him that..

7 MR. SINCLAIRE: The Court's indulgence, Your
8 Honor?

9 THE COURT: Is there another question, Mr.
10 Sinclair? I know you're having a discussion there
11 with Mr. Bowman.

12 MR. SINCLAIRE: Thank you, Your Honor.

13 BY MR. SINCLAIRE:

14 Q Do you remember a fight on February 16th,
15 2001?

16 MR. WATERS: Your Honor, I object to
17 relevance of a fight.

18 THE COURT: I will see if you can connect it.

19 Q Do you remember an argument between Tawain
20 Gadson and Marion Bowman on February 16th about a
21 gun?

22 A Yes.

23 Q Okay. And that was because Marion -- do you
24 remember what that fight was about?

25 A Yes.

1 Q What was it about?

2 A Marion couldn't find his gun.

3 Q Isn't it the truth he couldn't find it
4 because you had possession of it and you had moved
5 it?

6 A Yes.

7 Q Did you tell Dorothy Bowman the gun was in
8 the couch?

9 A No.

10 MR. WATERS: Your Honor, again I object to
11 that last statement inasmuch as it may be used to
12 try to amend with yet another new issue with regard
13 to the discovery of a weapon. I don't know how
14 they are going to try to phrase it.

15 THE COURT: I'm letting him ask the question,
16 I'm not deciding it in any way by letting him ask
17 the question to see if he can connect the
18 relevance.

19 Is that all, Mr. Sinclair?

20 MR. SINCLAIRE: That's all I have.

21 THE COURT: Cross-examination.

22 MR. WATERS: Thank you, Your Honor. Your
23 Honor, just for the record, I just want to be clear
24 that, given Your Honor's rulings, that if I examine
25 on some of these issues that have been raised, that

1 I'm not waiving my objection to these even being
2 considered and ask that I can have a continuing
3 objection in that regard and not be deemed to waive
4 anything if I inquire.

5 MR. BROWN: We would object under the same
6 line of thinking that the Court says if you draw
7 out the first sting of impeachment by your own
8 criminal charges you waive the objection to the
9 State properly impeaching if it is later --

10 THE COURT: Thank you. I note your
11 statement, you're not waiving your objection. You
12 may proceed.

13 MR. WATERS: Your Honor, again if I don't
14 have that I can't ask any questions and I, I don't
15 know they can have their cake and eat it too.

16 MR. BROWN: That's the way it works.

17 THE COURT: Your motion is noted and your
18 request is noted, we will go forward. When we
19 finish this matter we'll note and put all our
20 issues on the record as for as what the petitioner
21 is claiming, we'll address those.

22 MR. WATERS: All right.
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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q You know Darien Williams, correct?

4 A Yes.

5 Q You know his reputation in the community for
6 truthfulness or untruthfulness, whether he tells
7 the truth or tells lies?

8 A Yes.

9 Q What is that reputation?

10 A Shaky. He's liable to say anything.

11 Q He's liable to say anything?

12 A Yes.

13 Q Okay. And didn't he claim that you shot
14 Patrick Strange?

15 A Yes.

16 Q When in fact the proof showed that Patrick
17 Strange killed himself playing Russian Roulette?

18 A Yes.

19 Q That is an example of a lie he tells, is that
20 correct?

21 A Yes.

22 Q All right. You were asked about saying in
23 the deposition that you thought Marion Bowman was
24 kidding when he said, "I killed Kandee, ha, ha,
25 ha," right?

1 A Yes.

2 Q But did you know at the time that Kandee was
3 dead?

4 A No.

5 Q Okay. So, you had no knowledge that she was
6 dead then?

7 A No, sir.

8 Q So, you just thought he was kidding when he
9 said that because you didn't know she had been, she
10 was laying in the woods somewhere, right?

11 A Yes, sir.

12 Q Okay. You were asked about a party at Hank
13 Coker's house on the day of the incident in which
14 Kandee was killed, correct?

15 A Yes.

16 Q And you were asked about moving Marion
17 Bowman's gun?

18 A Yes.

19 Q Why did you move his gun?

20 A Because he had pulled it out, it was in a
21 brown paper bag and we wasn't at no party, it
22 wasn't a party, it was early in that day, that
23 morning about 10:00 or 11:00, it was before 12:00.

24 Q There were people gathered there?

25 A Yes, people was gathered there, sitting

1 around. And I had set the gun in a barrel and when
2 I came back from the store Hank told me that he
3 felt uncomfortable with the gun just sitting in the
4 barrel, so what I did, I moved the gun and took it
5 to my cousin Katrina's house and put it in a
6 cabinet but at the time he didn't know, so when I
7 came back from the store him and Tawain was arguing
8 about a gun, so I pulled him to the side and I told
9 him that I moved it and I put it to Katrina's
10 house.

11 Q Because Marion was accusing Tawain Gadson of
12 taking the gun, right?

13 A Yes.

14 Q And you told him, "Hey, man, I'm the one who
15 did it"?

16 A Yes.

17 Q And that is because Marion was waving it
18 around and playing with it and Hank Coker didn't
19 like that, is that right?

20 A Well, I mean, I didn't never see him waving
21 it or pulling it out, but he told me Black had put
22 it in the barrel. When I come up to the barrel it
23 was in a brown paper bag so I moved it and I took
24 it across the street to Katrina's house.

25 Q All right. You remember we had that

1 deposition, I guess a couple months ago?

2 A Uh-huh.

3 Q And I think you were asked about Marion

4 Bowman, you said there is no telling what Marion

5 Bowman would do, is that correct?

6 A Uh-huh.

7 Q You said you meant by that he had a pretty

8 rough reputation and nobody wanted to cross him, is

9 that correct?

10 A Yes.

11 Q So, if you were friends of Marion Bowman you

12 didn't want to get on his bad side, is that

13 correct?

14 A I mean, he was all right, I mean, he was good

15 hearted but, you know, coming up, all of us had

16 pretty bad background coming up, you know.

17 MR. WATERS: Your Honor, I have nothing

18 further at this time.

19 THE COURT: Mr. Sinclair?

20 MR. SINCLAIRE: Your Honor, just briefly.

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REDIRECT EXAMINATION

QUESTIONS BY MR. SINCLAIRE:

Q Back on when Marion told you kidding that he killed Kandee, do you remember in your deposition telling us whether you believed him or not? Do you remember what you said?

A I didn't believe him. The way he said it, it was a shock, I mean, he always jokes around.

Q Your response was, "Man, stop playing"?

A Yes.

Q You were asked about Marion's reputation in the community. Do you know Marion's reputation for drinking alcohol?

A No.

MR. WATERS: Your Honor, I would object to this being beyond the scope of redirect.

THE COURT: Overruled.

Q I will ask you specific questions. Did you ever see Marion with English 800 in his hand, 42 ounce beer?

A No.

Q You don't know whether he drinks or not every day?

A No.

Q All right. You said that Marion, you said

1 Tawain told you the gun had been put in the barrel,
2 is that correct?

3 A Tawain?

4 Q You were testifying earlier about the gun was
5 in a bag and in a barrel. Tawain knew the gun was
6 in a bag and in the barrel?

7 A I said Hank.

8 Q Hank Coker did?

9 A Yes.

10 Q But no question in your mind, based on the
11 argument that you overheard, that Marion thought
12 Tawain had his gun?

13 A Yes.

14 Q Do you know of your own personal knowledge
15 whether Tawain had possession of Marion's gun prior
16 to that?

17 A Like I said, when Hank told me the gun was in
18 the barrel I moved the gun and put it in Katrina's
19 house.

20 Q You just said earlier, too, that Marion was a
21 good hearted person. Can you expand on that for me
22 a little bit?

23 A We first cousins, we all got along pretty
24 good, I mean, but you coming up as a child you run
25 into incidents or whatever, that is part of growing

1 up.

2 MR. SINCLAIRE: Thank you. Nothing further.

3 THE COURT: Anything?

4 MR. WATERS: Yes, Your Honor very briefly.

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