

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

AUG 19 2016

SC Court of Appeals

RESPONDENT,

THE STATE,

V.

KENDALL JEROME TYUS, JR.,

APPELLANT

APPELLATE CASE NO. 2015-001739

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE'S EXHIBIT # 1 (VIDEO SURVEILLANCE); STATE'S EXHIBIT # 8
(PHOTOGRAPH); STATE'S EXHIBIT # 9 (PHOTOGRAPH); STATE'S EXHIBIT # 11
(PHOTOGRAPH); STATE'S EXHIBIT # 12 (PHOTOGRAPH); STATE'S EXHIBIT # 14
(PHOTOGRAPH); STATE'S EXHIBIT # 15 (LATENT FINGERPRINT CARD);
STATE'S EXHIBIT # 16 (TEN-PRINT CARD); STATE'S EXHIBIT # 17 (PALM PRINT
CARD); STATE'S EXHIBIT # 18 (PALM PRINT CARD)

1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS
 2 COUNTY OF CHARLESTON) CASE NO. 2013-01496
 3) 2013-01497
 4 STATE OF SOUTH)
 5 CAROLINA,)
 6 Plaintiff,) Transcript of Record
 7 vs.)
 8 KENDALL JEROME TYUS,) Date: July 13, 2015-
 9 JUNIOR, a/k/a KENDALL) July 15, 2015
 10 JEROME TYUS, II,)
 11 Defendant.

12 * * * * *

13

14 B E F O R E:

15 The Honorable DEADRA JEFFERSON

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20 Denise J. Lauder, RPR

21 Ninth Judicial Circuit

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A P P E A R A N C E S

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1 approximately a three-hour interview.

2 THE COURT: You're not seeking to
3 introduce a three-hour interview?

4 MR. LIETZOW: No, ma'am.

5 THE COURT: What portions of it are you
6 seeking to introduce and are those portions reduced
7 to writing.

8 MR. LIETZOW: I have personally reduced
9 them to writing. They have not been done so
10 professionally, but, if anything, we would just be
11 putting in no more than ten minutes of the
12 statement.

13 THE COURT: Ms. Proctor, you made two
14 motions to suppress. I assume they both are
15 duplicative. They all amount to the same thing,
16 don't they?

17 MS. VAN PALA: Your Honor, actually,
18 there is a motion to suppress the statement and
19 respectfully requesting a Denno hearing, also a
20 motion to suppress the fingerprint evidence and the
21 --

22 THE COURT: I haven't gotten to that
23 yet. I'm taking them in the order that I'm taking
24 them. There are two motions that are entitled,
25 Motion to Suppress Statement. And what I asked,

1 were they not duplicates of one another, because
2 they're asking for the same thing?

3 MS. VAN PALA: I apologize, Your Honor,
4 you're correct.

5 THE COURT: Does the defense have any
6 request for voir dire?

7 MS. VAN PALA: At this time, Your
8 Honor, we would ask the Court's standard voir dire.
9 Thank you.

10 THE COURT: Now, there's a motion to
11 suppress fingerprint evidence and search warrant,
12 correct?

13 MS. VAN PALA: Yes, Your Honor. And I
14 did, I apologize, transmit a copy of that motion to
15 the Court and to counsel for the State this morning
16 and I have a copy.

17 THE COURT: I have it.

18 MS. VAN PALA: And I handed one to the
19 Court.

20 THE COURT: I have a copy. I will hear
21 that before the witness testifies in camera.
22 How were his fingerprints discovered?

23 MR. LIETZOW: Would Your Honor like me
24 to address that?

25 THE COURT: Yes.

1 MR. LIETZOW: There was a cash register
2 tray taken during the armed robbery. It was found
3 outside of the business in what we would contend
4 would be close proximity. The fingerprint examiner
5 took a series of five latent lifts from that cash
6 register tray and all five of those returned
7 matches to Kendall Tyus.

8 THE COURT: How did you get his
9 original print to compare them to?

10 MR. LIETZOW: Mr. Tyus has been
11 arrested before.

12 THE COURT: So they were in the system.

13 MR. LIETZOW: So they were in SLED
14 through that arrest. And, Your Honor, I believe
15 Ms. Proctor and myself have discussed that process
16 in authenticating the ten-print card. At this
17 point, if it's okay with Your Honor, my fingerprint
18 expert was going to refer to SCAFIS or AFIS as the
19 database.

20 And, you know, I believe case law
21 supports the State from kind of developing
22 information of where those fingerprints were taken
23 from, i.e., somebody being arrested. We're trying
24 to keep the record as clean as possible. Ms.
25 Proctor has consented to not pushing that issue too

1 hard, so I'm going to try to dance around that
2 issue as much as possible, Your Honor, and still
3 have a properly authenticated ten print card to
4 enter into evidence.

5 MS. VAN PALA: The State is correct,
6 Your Honor. If I may, the Solicitor, Ms. Proctor,
7 and I have worked together diligently regarding
8 these issues. And the defense stipulates to
9 referring to South Carolina AFIS as the database
10 and thereby avoiding getting into the issue of any
11 prior bad act. He have no -- or arrests, and we
12 have no concerns whatsoever that the State will get
13 into that. So that matter is taken care of as far
14 as we are concerned.

15 As to stipulating to the admissibility
16 of the ten print cards, there is case law that is
17 clear, and the Solicitor and I have discussed this,
18 that I'm not going to be -- we're not going to be
19 objecting necessarily, as long as the Solicitor is
20 still able to lay the proper foundation and
21 authenticate the cards, other than the issues that
22 are covered under the motion in limine.

23 THE COURT: Ms. Proctor, does your
24 client wish to have a formal arraignment?

25 MS. PROCTOR: Just one moment. No,

1 Your Honor.

2 THE COURT: Thank you.

3 MR. BAILIFF: Your Honor, are you ready
4 for the jury to come in?

5 THE COURT: Yes, ma'am.

6 (Jury panel in, 12:05 p.m.)

7 THE COURT: Thank you. Good morning,
8 ladies and gentlemen.

9 JURY PANEL: Morning.

10 THE COURT: I am Deadra Jefferson. I'm
11 one of your resident circuit judges for the Ninth
12 Circuit which is made of up Berkeley and Charleston
13 Counties. We appreciate your patience; we know
14 that Monday is a particularly long day for you.
15 This is a system that we are well used to, we do it
16 every Monday. We know this system is unfamiliar to
17 you and, hopefully, by the end of it it will prove
18 educational for you and you will learn and have a
19 true experience as to what the court process and
20 processes really are about versus what you watch on
21 television.

22 We're going to select a jury for the
23 case of the State of South Carolina v. Kendall
24 Jerome Tyus, Junior, and they are for Indictments
25 2013-1496 and 1497 for armed robbery and possession

1 THE COURT: Okey-doke.

2 (Juror number 382 in, 1:16 p.m.)

3 THE COURT: Ma'am, how are you?

4 A JUROR: Fine.

5 THE COURT: I got your note regarding
6 you being a diabetic. That does not exclude you
7 from jury service. As a matter of fact, probably
8 80 percent of our jury pool is now diabetic, so
9 that's something that we're used to dealing with
10 that. If you need assistance, if your blood sugar
11 drops or you need something to eat, or juice, let
12 the bailiff know and we'll make sure that we
13 accommodate you.

14 Judge Nicholson was in charge of
15 qualifying the jury, and it's my understanding that
16 you brought these items to his attention as well
17 and he did not excuse you from service. As well, I
18 cannot since he has already ruled upon that.

19 A JUROR: Thank you.

20 THE COURT: Okay. Thank you, ma'am. I
21 just wanted you to know that I got your note and I
22 wasn't ignoring it.

23 A JUROR: Thank you.

24 THE COURT: Is the defense going to
25 have any witnesses on its motion regarding the

1 suppression of the fingerprints?

2 MS. VAN PALA: If Your Honor feels
3 like --

4 THE COURT: It's your burden of proof.

5 MS. VAN PALA: Yes, Your Honor,
6 Kubicsko, CST Kubicsko.

7 THE COURT: Now, I've read your motion.
8 Some of it goes to her expertise, not to
9 suppression. So you're going to have parcel out
10 what applies to what, because some of that really
11 doesn't fall within the nature of the motion you
12 filed.

13 MS. VAN PALA: Yes, Your Honor. And I
14 made my motion on a number of alternative bases,
15 depending on your ruling, also including the expert
16 standard in requesting --

17 THE COURT: The expert standard would
18 have to be dealt with at the time the State seeks
19 to use her as an expert. That would be the
20 appropriate time to deal with that. I would not
21 rule on that in advance.

22 MS. VAN PALA: Yes, Your Honor and that
23 was a prophylactic measure.

24 THE COURT: What is your offer of proof
25 that -- and I think we know that the fingerprint

1 evidence is reliable. Wouldn't you say that's
2 really a moot issue? I think the US Supreme Court
3 has addressed that many times.

4 MS. VAN PALA: Yes, Your Honor. It is
5 generally accepted so it passes the Frye Standard,
6 F-R-Y-E, but also since the Daubert Standard,
7 D-A-U-B-E-R-T, it's now the five point standard as
8 the Court --

9 THE COURT: I think fingerprint
10 evidence is more than reliable. I think it's more
11 than accepted generally in our courts. I think --
12 that's one of your prophylactic measures?

13 MS. VAN PALA: Yes, Your Honor. And
14 I --

15 THE COURT: I like to use the Court's
16 time on stuff that really is --

17 MS. VAN PALA: I can get to the meat
18 and the essential issue.

19 THE COURT: Under the Franks standard,
20 you are required preliminarily to show that there
21 was a false statement, that it was recklessly made
22 and that it was intentional for you to be entitled
23 to a hearing.

24 MS. VAN PALA: Yes, Your Honor. And
25 the false statements are two. Detective Evans

1 misstates in his narrative that the Defendant said
2 that he doesn't remember going into the business,
3 but remembers exiting the business with the
4 register and taking the money. Our argument is
5 that, that essentially works as a true confession
6 to the offence of armed robbery.

7 If you listen to the three-hour
8 interrogation tape, Mr. Tyus in his conversation to
9 Detective Evans says, I don't remember coming in, I
10 don't remember coming out or nothing. So that
11 is --

12 THE COURT: Is that the totality of his
13 statement or does he later make a different
14 statement that contravenes that?

15 MS. VAN PALA: He never actually places
16 himself in the restaurant at the time of the
17 robbery, so that essential element of the armed
18 robbery is not met. And that is our argument that,
19 that is just a false statement and --

20 THE COURT: What was the real basis of
21 them -- I don't have a copy of the -- I would
22 assume they ran his prints through AFIS before --

23 MS. VAN PALA: Yes, Your Honor, that is
24 correct, and they found --

25 THE COURT: The prints, in and of

1 themselves, would be sufficient for the issuance of
2 a warrant, would it not?

3 MR. LIETZOW: Yes; that's the State's contention,
4 Your Honor.

5 MS. VAN PALA: And my argument is that
6 considering the entire investigation in this case
7 and the investigation into CST Kubicsko's findings
8 in other cases and ongoing investigations from the
9 North Charleston Police Department, even opening
10 some of -- we have reason to believe that some of
11 her cases and investigations have been reopened
12 based on her shoddy investigations or perhaps that
13 her prints and her evaluation and her matches were
14 called into question.

15 Our argument is that the search warrant
16 -- probable cause for the search warrant for both
17 of them, in fact, was based on her one list of one
18 print, the right index finger that she ran through
19 AFIS. Without that print, our argument is that
20 they wouldn't have had probable cause. So based on
21 her -- the accuracy and reliability of her finding
22 of her comparison to the print lifted off the cash
23 register tray and the known standard found in AFIS,
24 that's the central issue.
25 The other issue that Detective Evans could have

1 perhaps based his probable cause determination on
2 an utterly false statement is another reason for my
3 motion under Delaware V Franks. Additionally, the
4 search warrant for the search of Mr. Tyus's home
5 wasn't time stamped.

6 So putting together all of the
7 documents in the discovery, all of the reports, all
8 of the booking reports, the narratives from the
9 officers, and as well as watching the interview, we
10 really have no way, based on the record, to
11 determine what exactly the time was on the 23rd of
12 October, the date after the incident, that the
13 search warrant was executed.

14 So our argument is that it is totally
15 possible that Detective Evans based his probable
16 cause determination on that false statement. He
17 was the affiant to the search warrant. We believe
18 he's a necessary witness for that reason.

19 Additional grounds that I raised in my
20 motion is that the search warrant return was not
21 made until 21 days after execution, and that's
22 administerial error, it depends on prejudice.
23 Again, my prejudice argument is that this is an
24 identity case and it comes down to the identity of
25 our client, one fingerprint on a cash register tray

1 that was found outside of the building, thus,
2 doesn't place him in the building, in the
3 restaurant for the armed robbery.

4 An additional ground is that -- excuse
5 me, Court's indulgence. Under the warrant statute,
6 I think it's ending in 151, 17-13-141 is the
7 statute, it says that the warrant -- the person who
8 issues the warrant, issuing magistrate, has to time
9 stamp it. So that is a violation under that
10 statute.

11 THE COURT: Administerial, isn't it?

12 MS. VAN PALA: Yes, Your Honor. And I
13 would argue that the prejudice standard also
14 applies, and I have articulated my prejudice
15 argument to the court.

16 THE COURT: My question still remains,
17 do you plan to call any witnesses?

18 MS. VAN PALA: Yes.

19 THE COURT: I don't know that you can
20 meet the standard frankly to demand a hearing, but
21 I'm going to think about it over lunch.

22 MS. VAN PALA: Thank you.

23 THE COURT: Who would you call if you
24 were calling witness?

25 MS. VAN PALA: CST Kubicsko and Mark

1 Evans.

2 MR. LIETZOW: Your Honor, may I respond
3 for clarification purposes?

4 THE COURT: Yeah. Give me a moment.
5 What does the video surveillance show?

6 MR. LIETZOW: The video surveillance
7 shows a male -- approximate male entering the Under
8 the Sea Restaurant in North Charleston with his
9 face covered by what appears to be a white T-shirt.
10 Important to the State's case is the male is seen
11 wearing a blue jacket with two distinct stripes
12 running down both sides of the arm, carrying a
13 handgun and wearing a pair of white sneakers,
14 pointing the gun at the cash register, the cashier
15 fleeing, the suspect then reaching over and
16 grabbing the cash registry tray, tucking it under
17 his arm and running out of the restaurant, Your
18 Honor.

19 There are eight different camera angles
20 I believe. We're intending to show --

21 THE COURT: Any of them show the
22 Defendant?

23 MR. LIETZOW: None of them show a
24 direct shot of the face, Your Honor, but pending
25 the results of the search warrant, that's how we

1 are tying Mr. Tyus to the individual that was
2 inside that restaurant committing the armed
3 robbery.

4 I know it's for the jury to decide, but
5 my intention is going to be that that male was an
6 African American male of the approximate height and
7 build of Mr. Tyus, and several pieces of evidence
8 seen on the video are then subsequently located in
9 his house a short time later after the armed
10 robbery was committed.

11 MS. VAN PALA: And the search warrant
12 execution.

13 MR. LIETZOW: Yes. I know Your Honor
14 said you would allow me to respond at the
15 appropriate time --

16 THE COURT: This is not the appropriate
17 time.

18 MR. LIETZOW: Yes, ma'am.

19 THE COURT: Thank you. Why were the
20 police executing a warrant for his arrest or
21 placing him into custody before they got a search
22 warrant? What led them to that?

23 MR. LIETZOW: Your Honor, they had the
24 print for -- the latent print off the register.
25 They then matched that to the defendant through

1 subsequent investigation. They were able to
2 determine the defendant's address being at [REDACTED]
3 [REDACTED]. When they responded to that
4 location, at that point they were taking Mr. Tyus
5 into custody.

6 And, subsequently, there was another --

7 THE COURT: So they got a warrant for
8 the other stuff they saw in plain view?

9 MR. LIETZOW: They did execute a
10 protective sweep due to another female at that
11 residence, and through that protective sweep they
12 did see the shoes that are seen in the video in the
13 defendant's room. They also saw the jacket that
14 was seen on the video in the defendant's room and
15 --

16 THE COURT: And then they got the
17 warrant to get those things?

18 MR. LIETZOW: They backed out, they got
19 a search warrant, they came back and served thee
20 search warrant.

21 THE COURT: Mr. Lietzow, for
22 clarification purposes only you may respond.

23 MR. LIETZOW: Thank you, Your Honor.
24 First, Detective Evans did not get a search warrant
25 based on probable cause due to Mr. Tyus's

1 statement. That was merely a sentence that he
2 wrote in his supplement. The supplement is not
3 evidence. If you read the search warrant, no where
4 in the search warrant does he state that based on
5 the defendant's statement he -- a search warrant is
6 executed.

7 As a time line, Detective Aiken is
8 questioning --

9 THE COURT: I'm going to hear --

10 MR. LIETZOW: Excuse me?

11 THE COURT: I'm going to hear full
12 argument on this motion. I was just asking for
13 clarity so I could think during lunch. I'm not
14 looking for a full argument right now. Is that
15 what you meant by clarity?

16 MR. LIETZOW: Yes, ma'am.

17 THE COURT: We're going to break for
18 lunch and then I'll hear anything on the motion at
19 that time. If you plan to have any witnesses for
20 the motion, I suggest you all have them here when
21 we resume. The jury is coming back at 2:30. We'll
22 resume with any argument on these motions,
23 depending on how many numbers we have -- long story
24 short, be back at 2:30 and we'll go from there.

25 MR. LIETZOW: Your Honor, are you

1 inclined to start with opening statements then --

2 THE COURT: No. I'm going to let -- as
3 a matter of fact, I'm going to let the jury go
4 until tomorrow because of the way this day has
5 developed.

6 MR. LIETZOW: Thank you.

7 THE COURT: You're welcome.

8 (Jury Panel in, 1:32 p.m.)

9 THE COURT: You may be seated.

10 Ladies and gentlemen, we appreciate your patience.
11 I've determined we were -- long story short, we're
12 trying to pick another jury and I'm going to have
13 to do that this afternoon as well as deal with some
14 matters of law that are related to this case that
15 would take us way too late into the afternoon to
16 begin this case.

17 So I'm going to excuse you for the
18 remainder of the afternoon and ask that you return
19 in the morning at 9:30. You will return directly
20 to your jury room.

21 During this break, please do not
22 discuss this case amongst yourselves. Please don't
23 speculate about what you think it may or could be
24 about. Please don't do any independent research on
25 the Internet regarding any newspaper articles or

1 otherwise that may be out there. Please do not
2 watch, read, or listen to any media accounts that
3 may be out there.

4 Also, please do not make any comments
5 regarding your status on any social networking
6 sites. That includes Instagram, Vine, Snapchat,
7 Facebook -- I've lost track there are so many. But
8 you would be amazed at how many people, who are not
9 on jury duty, that look at those sites all day long
10 and call us and are very happy to let us know what
11 you said. So I would ask that you refrain from
12 making any comments, because even an innocent
13 comment could very easily be misinterpreted.

14 When you return to the courthouse,
15 please don't -- have contact only with those that
16 you recognize to be a fellow juror. Even an
17 innocent conversation could be misinterpreted. I
18 don't know if you've noticed these little bubbles
19 in the ceiling; they are high-definition cameras.
20 They record everything that we do. So I really
21 don't want to have to watch any of those tapes to
22 try to determine what conversations have been
23 about.

24 Also, with the advent of technologies,
25 people are not hesitant to record you on their

1 tablets and their cell phones. The best way to
2 avoid, again, even an innocent conversation being
3 misinterpreted is to only have contact with your
4 fellow jurors.

5 You've been incredibly patient with us
6 today. We truly appreciate it. I hope you have a
7 wonderful afternoon and we'll see you in the
8 morning at 9:30. The bailiffs will show you how to
9 come directly back to your jury room in the
10 morning.

11 (Jury Panel out, 1:35 p.m.)

12 (A luncheon recess transpired.)

13 THE COURT: Did you all decide what
14 you're going to do with this video, use it versus
15 not use it? Regarding Jackson v. Denno.

16 MR. LIETZOW: Your Honor, I know you
17 don't want to hear this --

18 THE COURT: It doesn't matter to me one
19 way or the other.

20 MS. PROCTOR: Can we get our client
21 first?

22 THE COURT: Yes. I just need you to
23 make a decision. I don't care what your decision
24 is. I don't have a vested interest in it one way
25 or the other. I just don't like you folks

1 flip-flopping it; I'm very organized. Whatever
2 you're going to do, do it and be deliberate about
3 it.

4 What's the status of the video
5 regarding Jackson v. Denno?

6 MR. LIETZOW: Your Honor, at this point
7 we are not intending to enter the video into
8 evidence. Your Honor, I briefly mentioned earlier
9 that if it becomes necessary for the State to enter
10 that --

11 THE COURT: I'll have to take it up at
12 that time, but if you're not going to use it, then
13 there's no point in having a Jackson v. Denno for
14 evidence if the State doesn't seek to introduce
15 it. I would assume that the defense agrees with
16 me?

17 MS. VAN PALA: Yes, Your Honor. Thank
18 you.

19 THE COURT: The only thing I want to
20 take up at this time because, basically, I have
21 read the motion to suppress fingerprint evidence
22 and the search warrant, and it's really mixing
23 apples and oranges and it's a bunch of different
24 concept that have been morphed into one document
25 which are all severable and separate.

1 The issue regarding the warrant is one
2 issue, and I'm going to deal with that. Any issues
3 regarding the reliability or any methods employed
4 by the fingerprint person I will take up in camera
5 at the time the State seeks to qualify her as an
6 expert or to introduce that testimony.

7 Are we ready to proceed? And I assume
8 that the defense will be proceeding since it's your
9 burden under the Frank's case.

10 MS. VAN PALA: Thank you, Your Honor.
11 Our argument -- I understand that the Court --

12 THE COURT: If you're going to call
13 witnesses, that's what I would like to deal with
14 and I'll hear argument at that conclusion of that.

15 MS. VAN PALA: On the Delaware v Franks
16 hearing?

17 THE COURT: Yes.

18 MS. VAN PALA: The defense calls Lisa
19 Kubicsko.

20 THE COURT: Is she present?

21 MS. VAN PALA: Yes, Your Honor.

22 LISA KUBICKSKO,
23 being first duly sworn, testified as follows:

24 THE CLERK: Once seated, please state
25 your first and last name and spell your last name

1 loudly and clearly into the microphone.

2 THE WITNESS: Lisa Kubicko,

3 K-U-B-I-C-S-K-O.

4 THE COURT: You may proceed.

5 MS. VAN PALA: Thank you, Your Honor.

6 May it please the Court.

7 THE COURT: Yes, ma'am.

8 DIRECT EXAMINATION

9 BY MS. VAN PALA:

10 Q. Good afternoon. My name is Tamara Van
11 Pala; I represent the Defendant. Thank you for
12 being with us. I want to make sure I address you
13 properly. What is your rank and your title?

14 A. I'm a civilian crime scene technician.

15 Q. Crime scene technician. Thank you. So
16 October 22, 2012, you responded to the Under the
17 Sea Restaurant in Charleston, correct?

18 A. Yes.

19 Q. The scene of an alleged armed robbery,
20 correct?

21 A. Yes.

22 Q. And when you arrived to the scene, what
23 time was it?

24 A. It was evening, approximately 19:35.

25 THE COURT: I hate to interrupt you,

1 Ms. Van Pala, but for what purpose did you call
2 this witness regarding the sufficiency of the
3 warrant?

4 MS. VAN PALA: Our argument is that the
5 warrant's probable cause determination rests
6 entirely on --

7 THE COURT: But she didn't make the
8 probable cause determination, did she?

9 MS. VAN PALA: Her findings on the
10 fingerprint evidence were what the affiant used in
11 its determination of probable cause.

12 THE COURT: And how do we know that?

13 MS. VAN PALA: Based on the reading in
14 the search warrant and Detective Mark Evan's
15 report, which we believe speaks for itself.

16 THE COURT: I will give you some
17 latitude. You may proceed.

18 MS. VAN PALA: Thank you, Your Honor.

19 BY MS. VAN PALA:

20 Q. When you responded to the scene, you
21 photographed the scene?

22 A. Yes.

23 Q. You swabbed for DNA?

24 A. Yes.

25 Q. You lifted prints?

1 A. Yes.

2 Q. You ultimately chose one print to bring
3 back to the station to verify, correct?

4 A. I brought all of the prints back to the
5 station.

6 Q. I apologize. Thank you.
7 You ultimately chose one print to
8 insert into AFIS and run for any known standards to
9 compare?

10 A. Yes.

11 Q. And that print was L1.1?

12 A. Yes.

13 Q. And you generated only nine standards
14 from AFIS?

15 A. Meaning the number of responses that
16 come back from the database?

17 Q. Yes.

18 A. I believe that was set to ten.

19 Q. Including the -- including the print
20 that you put in AFIS?

21 A. That's not how it works, ma'am. I
22 might be misunderstanding what you're asking,
23 but...

24 Q. So you put -- you took the print that
25 you lifted from the scene L1.1?

1 A. Yes.

2 Q. And you enter that into AFIS?

3 A. Yes.

4 Q. And AFIS automatically generated nine
5 samples?

6 A. Ten search responses, yes.

7 Q. Ten samples that are standard for
8 comparison? The ten results that come from AFIS
9 are standards for comparison?

10 A. Yes. They are known that -- that are
11 in the database, yes.

12 Q. And you compared visually L1.1 with
13 those ten standards?

14 A. I compared -- those ten responses that
15 come back are ranked 1 through 10, 1 being the best
16 possible match based on a score that the system
17 gives us. So I start with my comparison's 1.1 to
18 the search -- the first search response. If I
19 determine that that is an identification, I do not
20 look at any of the other responses because I'm
21 100 percent that that is an identification to that
22 known in the system.

23 Q. So in this case, you looked at only the
24 first response?

25 A. Yes.

1 Q. And you made the determination that was
2 the print -- that matched the print L1.1 --

3 A. Yes.

4 Q. -- taken from the scene?

5 A. Yes.

6 Q. And you always choose ten prints to
7 come out of AFIS to be generated from --

8 A. Yes.

9 Q. Not 20?

10 A. No.

11 Q. Not 50?

12 A. No.

13 Q. And you always stop after the first
14 examination of the first print?

15 A. Not always.

16 Q. And MPO Agent Coker reviewed your print
17 findings that day, correct?

18 A. Yes.

19 Q. And he memorialized his finding in a
20 report dated that date, October 22nd, 2012?

21 A. Yes.

22 Q. Your report as well?

23 A. Yes.

24 Q. And it states, number three right
25 middle finger positive ID to Defendant?

1 A. Yes.

2 Q. And it says, code C -- code A, excuse
3 me, positive AFIS result?

4 A. What you're referring to, that is our
5 AFIS worksheet. That is basically what I fill out
6 as I'm entering that print into the database. So
7 that demonstrates 1.1, the finger number that I ran
8 it through as, and how many specific minutiae
9 characteristics I marked in that print.

10 Code C, that means that no
11 identification was made through the database, and A
12 means that, yes, there was an identification.

13 Q. So Code C means that no identification
14 was made to finger nine?

15 A. Correct. I first set the database to
16 search all of the known fingers in the database --
17 number nine fingers in the database, because after
18 looking at the latent print, I felt it was possibly
19 the left ring finger because of the simultaneous
20 impression that was left. I felt that it could
21 have been the left ring finger, number nine. So my
22 first search was in the database against all number
23 nine fingers. That resulted in no identification.

24 I then ran it again searching it as
25 either finger three or finger nine. And that made

1 the identification to the finger number three of
2 the Defendant.

3 Q. But on the form it states that finger
4 number nine is both a match and not a match,
5 according to the codes?

6 MR. LIETZOW: Objection.

7 THE WITNESS: It's more --

8 THE COURT: What's the basis?

9 MR. LIETZOW: I fail to see how it's
10 relevant to a Delaware v. Franks hearing.

11 THE COURT: I'm going give her a little
12 latitude because what she's arguing is that the
13 police relied in whole, basically, on her
14 identification of the Defendant in the database to
15 obtain the search warrant.

16 So I haven't heard anything regarding
17 science or otherwise that would go beyond my
18 instructions. Overruled.

19 Ma'am, do you need the question
20 repeated?

21 THE WITNESS: Yes, please.

22 BY MS. VAN PALA:

23 Q. So both the fingerprint number nine is
24 both code C and code A on this form which
25 correlates to -- I apologize. It's both C and A.

1 A. I see what you're saying. The way we
2 look at this is that 1.1, that is the latent
3 number. And then on this checklist, per se, we
4 then are able to mark how we see the pattern type
5 if we can. If we add any limitations to the search
6 responses we want, if we knew that our suspect was
7 a white male, a black male, we could limit the
8 search to those specifications, but in this case we
9 didn't.

10 I limited the first search to the
11 finger number nine and I limited the second search
12 to finger number three or finger number nine, and
13 those are the amounts of minutiae. Now, that is
14 separate from the results portion of this which
15 state Code A, meaning identification was made to
16 the first number that I reference at the bottom, to
17 the finger number three.

18 Q. Although the blanks still state nine is
19 both C and A?

20 A. No. The inquiry section of this chart
21 shows that I ran it to search all the number three
22 and number nine fingerprints in the system. The
23 results section of this chart show that an
24 identification was made to the number three finger.

25 Q. And that same day you also described

1 that the full latent examination hadn't yet been
2 completed?

3 A. Yes. I wrote that on the verification
4 sheet so that NPO Coker would understand that this
5 was just a report of one fingerprint versus an
6 entire report for this case, so that he was doing a
7 verification on just that one fingerprint.

8 Q. Although -- although you labeled print
9 number three, right middle finger, you did not note
10 its location at the crime scene in this report?

11 A. No. That would be written on the
12 latent part itself.

13 Q. And you did not include a picture or a
14 description of the print card that it appeared on?

15 MR. LIETZOW: Objection, Your Honor.
16 She's asking the witness to testify about hearsay
17 document and that's just mainly for her knowledge
18 later when she testifies in court.

19 THE COURT: Well, if she created the
20 document, it's not hearsay. Overruled.

21 You may answer the question.

22 THE WITNESS: I have K1 ink fingerprint
23 of Kendall Tyus and his information. K1 is also
24 written on the top of the ten-print card which is
25 how we make a reference between the report and the

1 known ten print standard.

2 BY MS. VAN PALA:

3 Q. So this cover sheet corresponds with
4 the incident report that you drafted on the same
5 night?

6 A. The verification sheet, that
7 corresponds to, yes, the latent report.

8 Q. The latent report that states that K1
9 is the inked fingerprint of Kendall Tyus.

10 A. The inked fingerprint, yes, which is
11 the ten-print card and the palm print.

12 Q. And to the latent report, also dated
13 October 22, 2012, there is no description of where
14 L1.1, which is listed on this report, was located?

15 A. L1 is one white backer card bearing
16 latent lift. L1.1 is that specific fingerprint.
17 Now, the latent card that has -- contains 1.1 is
18 labeled L1, and on the reverse said of that latent
19 card is where we write where the print was taken
20 from.

21 Q. So the latent card is labeled L1?

22 A. Yes.

23 Q. And it includes no other information
24 about the print card in your latent report?

25 A. If you're asking if the latent report

1 states L1 lifted from the location, it does not.
2 This is how we correspond as a -- in this regards
3 when I'm working on this, I'm working as a latent
4 examiner. I'm not working as a crime scene
5 technician at this point in time while I'm working
6 on the latent examinations. So this is how we
7 reference between L1, K1 on our reports. The
8 location of the lift on the crime scene would be on
9 the back of the latent card.

10 Q. And you testified that when you -- that
11 you are a CST, a crime scene tech?

12 A. Yes.

13 Q. And when you arrived you went about
14 your duties as a crime scene tech --

15 A. Yes.

16 Q. -- at the scene? In your report in
17 your narrative dated October 30th, which is the --
18 this is the next work that you performed on this
19 case, correct?

20 A. My crime scene report? Yes, I wrote
21 that on October 30th.

22 Q. But that's different from a separate
23 report that you drafted on October 22nd. You
24 drafted -- excuse me, withdrawn.

25 You drafted a total of three reports on

1 October 22nd?

2 A. The only report I drafted on
3 October 22nd is that latent report from 1.1.

4 Q. Then you drafted at least three
5 documents memorializing your investigation on
6 October 22nd?

7 A. I then did my crime scene report on
8 October 30th and the complete latent report on
9 July 6th. I'm sorry, on January 11th.

10 Q. And the documents labeled October 22nd,
11 2012, bear your name and title at the bottom?

12 A. Yes.

13 Q. What are those called, those documents?

14 A. One would be my crime scene report and
15 the other two would be a latent report.

16 Q. And on the latent report, the latent
17 report dated January 11th, 2013 -- excuse me, I
18 apologize. Your narrative that was dated
19 October 30th, what did you call that?

20 A. That is my crime scene report.

21 Q. And in your crime scene report you said
22 that you lifted seven total prints?

23 A. Eight latent prints.

24 Q. But you also said that you lifted 1
25 through 4.

1 A. I'm not sure what you're asking me.
2 There is -- I collected eight latent backer cards
3 from the scene.

4 Q. And your report dated October 30, 2012,
5 states a total of four latent lifts were made, 1
6 through 4?

7 A. That is from -- it says I processed the
8 interior front door for latent prints. From the
9 interior front door, I made a total of four latent
10 lifts, number 1 through number 4.

11 Q. Then you state a total of seven latent
12 lifts were made from the cash drawer?

13 A. Yes.

14 Q. But you only made eight lifts in total?

15 A. I made eight -- I collected eight
16 latent backer cards from the scene. From the
17 register -- on the backer card we put several
18 lifts, several lifts of tape on one card. So I
19 made seven individual lifts from the register tray;
20 however, multiple ones could be on a card, so I
21 walked away with eight total latent backer cards.

22 Q. And you did not reconcile which cards
23 correspond with which lifts?

24 A. I did.

25 Q. However lifts -- a total of seven

1 latent lifts were made from the cash drawer, but it
2 does not state what backer cards they appear on?

3 A. That's because the location is written
4 on the back of the cards themselves.

5 Q. But in your report you say only a total
6 of seven latent lifts were made from the cash
7 drawer and you do not state what print card they
8 appear on?

9 A. Because as a latent examiner, I am
10 labeling those latent cards at that time what I
11 want versus at the crime scene. So I take in
12 latent cards from not only scenes that I process,
13 but from patrol and all the other members of the
14 crime scene unit.

15 So another crime scene unit could go
16 through a crime scene and collect four latent cards
17 and they may call that 1 through 4; however, when I
18 do my latent examination, I might call their number
19 1 my number 4. They're not related. I don't
20 follow what they may label their latent cards.

21 And that would be -- their report may
22 show what they called their latent cards, and then
23 my latent report will show what I labeled it and
24 red ink on the latent card will show what I labeled
25 that card, whether it's L1, L2.

1 Q. But in this case you took both -- you
2 took all the lifts in this case?

3 A. Yes.

4 Q. And you noted where they were located
5 on the back of every single card?

6 A. Yes.

7 Q. And you noted in your report which
8 print card they came from?

9 A. Yes.

10 Q. However it does not state that in your
11 report. It states a total of seven latent lifts
12 were taken from the cash drawer, but it does not
13 state which backer cards they came from.

14 A. No, it does not; however, that is
15 written on the back of the latent cards.

16 Q. Likewise, one latent lift number 5 was
17 made from the bottom of the drawer you state in the
18 report; however, you do not state which backer card
19 it came from.

20 A. At that point I wouldn't know. I don't
21 have them numbered. The numbers of those do not
22 correspond to the numbers of the latent report;
23 therefore, when I'm lifting prints from the scene,
24 I don't know what number card that's going to be
25 called.

1 Q. And you, likewise, don't know where
2 that location is going to be because you have not
3 labeled --

4 A. I do. I do, because when I take the
5 lift, I write on the back of the latent card where
6 I took that lift from.

7 Q. And in your reports you reference the
8 lift, but you do not also correlate it with its
9 print card which contains all the other identifying
10 information?

11 A. Because I do not know that at that
12 time. I mean, in this case I did because I --
13 June 30th -- at this point, I didn't know that
14 because I didn't do the rest of the comparisons
15 until January, and this report was done in October.
16 So I wouldn't know the number that these cards are
17 going to be given at that point in time to put in
18 my report.

19 Q. Even though you took them at the --
20 after the incident at the scene and you were the
21 only technician?

22 A. I do not give them a number at the
23 scene. So -- let me back track. When I went to
24 the scene and I began processing, I began
25 processing with the interior door and I made four

1 latent lifts from the interior side of that door.
2 To be able to demonstrate in photographs where
3 those latent print cards were lifted from, I
4 photographed those latent cards still on the door
5 and labeled them number 1 through number 4.
6 Photographed them and collected them, wrote on the
7 back of those cards, interior front door.

8 Then I processed the cash drawer that
9 was still in the business, the actual drawer
10 itself, and had made one latent lift, wrote number
11 5 on it, took a photograph and collected it, wrote
12 on the back, register drawer. Then, later, I
13 processed the tray that was found outside and
14 collected seven lifts from that tray and did not
15 photograph those lifts themselves. So then I take
16 those latent cards and go back to the office.

17 Now, when I go to enter prints into
18 AFIS or do my latent report, do any comparisons,
19 I'm usually working with the best quality prints
20 first. So in this instance, the card -- one of the
21 cards -- the latent cards lifted from the tray was
22 given the L1 number, and written on the corner of
23 that latent card. And then L2, L3 -- so L2 may be
24 what is photographed in my photos as the number
25 four from the interior door. They're not

1 corresponding numbers.

2 Q. And it just so happens that the prints
3 that were L1, that came from the cash register
4 draw, correct?

5 A. The tray, the money tray, yes.

6 Q. The money tray, thank you. Those were
7 the only positive hits to the Defendant?

8 A. Yes.

9 Q. And you did not photograph where you
10 took those?

11 A. No.

12 Q. And you did not photograph the latent
13 backer cards that correspond to the prints?

14 A. No.

15 Q. And you did not document what number
16 the print card is that corresponds with those
17 prints?

18 A. I never wrote a number on that latent
19 card. That was kind of after the fact. I went to
20 the scene, I started processing that, I finished
21 taking all my photographs. So the money tray
22 processing, that kind of came in later. At first I
23 wasn't going to process that on the scene, but then
24 I decided it would be best if I was able to get
25 that back to the business so they could continue,

1 you know, operating. So at that point, I processed
2 it on-scene and did all of that.

3 Q. Even though you testified and your
4 photographs show that you did label print cards 1
5 through 5 --

6 A. Yes.

7 Q. -- at the scene?

8 A. Yes.

9 Q. And photographed them?

10 A. Yes.

11 Q. However, you did not do that to the
12 cash tray?

13 A. No.

14 Q. In your report dated January 11, 2013,
15 you state that L1.2 --

16 MR. LIETZOW: Objection.

17 THE COURT: Basis?

18 MR. LIETZOW: This happened after the
19 probable cause for the search warrant, and it is --

20 THE COURT: Why is it relevant?

21 MS. VAN PALA: It goes to the overall
22 accuracy of her finding --

23 THE COURT: I've given you a lot of
24 latitude. You have to prove that there was some
25 deliberate falsehood or reckless disregard for the

1 truth in the statements included in the search
2 warrant. She did not prepare the search warrant.

3 MS. VAN PALA: Right.

4 THE COURT: And I've given you some
5 latitude and I haven't heard anything at this point
6 that has risen to the level of a deliberate
7 falsehood on her part, or reckless disregard, and
8 I've given you a whole lot of latitude. She didn't
9 evaluate the search -- the print. Electronically,
10 those things are identified, and so I'm trying to
11 figure out what it is that you're exactly trying to
12 elicit.

13 If I gave you some latitude -- which
14 really you're supposed to give me an offer of proof
15 and I really didn't hear anything that amounted to
16 an offer of proof before we started this hearing..
17 But out of an abundance of caution, I gave you a
18 little room. I really haven't heard anything up to
19 this point. The only thing I've heard up to this
20 point amounts to the level of reliability or
21 credibility that a jury would give as to how she
22 did her investigation, which is their burden of
23 proof issue. Not an affidavit issue, not a
24 probable cause issue, and certainly not a
25 suppression issue.

1 MS. VAN PALA: And our argument is
2 that --

3 THE COURT: You know, you need to
4 elicit testimony from the witness. I'll hear
5 arguments at the end, but you need to cut to the
6 chase.

7 MS. VAN PALA: Yes, Your Honor.

8 THE COURT: I need to hear something
9 that rises to the level of Delaware versus
10 Franks -- that rises to the level of a Franks
11 violation, and I haven't heard anything thus far.
12 And you didn't make an appropriate offer of proof
13 before we got started, but I gave you some
14 latitude.

15 And I was very clear when we began,
16 issues of burden of proof, issues of deficiency of
17 their investigation, all of that goes to the
18 State's burden of proof; they're not a suppression
19 issue, which a jury might buy it. They may believe
20 that they didn't do their investigation like
21 they're supposed to. I don't know; I'm not the
22 finder of fact.

23 BY MS. VAN PALA:

24 Q. Ultimately, for print L1.1, the only
25 print that was used to positively identify the

1 Defendant, correct?

2 A. Initially, yes.

3 Q. Before October 23rd, 2012?

4 A. Yes.

5 Q. And when you processed the scene, you
6 took 15 pictures total, correct?

7 A. I'm not sure exactly how many on-scene,
8 but a total of 107 throughout the whole entire
9 case.

10 Q. However, you didn't take a picture of
11 where print L1.1 was lifted from?

12 A. No.

13 Q. And you found a bandana at the scene,
14 correct?

15 A. Yes.

16 Q. And you did not test that for DNA?

17 MR. LIETZOW: Objection, Your Honor.
18 Same basis as before.

19 THE COURT: He didn't use DNA as a
20 basis for his search warrant, did he?

21 MS. VAN PALA: I think he might have.

22 THE COURT: I just read it three times.
23 I don't see anything about DNA in here. I see --

24 MR. LIETZOW: To clarify, this is the
25 search warrant of the house, not the buccal swab.

1 THE COURT: The only motion I have is
2 the house. I don't have any motion about a buccal
3 swab.

4 MS. VAN PALA: There were two search
5 warrants, Your Honor.

6 THE COURT: My motion only deals with
7 one of them, unless you filed a motion I'm not
8 aware of.

9 MS. VAN PALA: It encompasses both
10 search warrants because they're essentially the
11 same. The language in the affidavit is essentially
12 the same. And that there is probable cause to
13 believe Kendall committed the armed robbery and
14 left biological evidence of his involvement. So
15 it's both the fingerprints and the DNA.

16 THE COURT: There was blood left at the
17 scene?

18 MR. LIETZOW: No, ma'am. I'm not
19 offering any DNA evidence in the case, so --

20 THE COURT: So it's moot then?

21 MR. LIETZOW: Yes, ma'am, from my
22 perspective.

23 MS. VAN PALA: I was planning on making
24 an argument.

25 THE COURT: Based on?

1 MS. VAN PALA: The fact that that is
2 another falsehood included in the affidavit.

3 THE COURT: If they don't plan to use
4 it against him, then --

5 MS. VAN PALA: There wasn't even any
6 blood found.

7 THE COURT: But that's not the point.
8 The point is, did they plan to use it against him?

9 MS. VAN PALA: But that goes towards
10 the invalidation of the search warrant under
11 Delaware v Franks.

12 THE COURT: A search warrant is to
13 search for something that you later obtain that you
14 would have used as evidence. They have a search
15 warrant for DNA that they didn't use; no harm, no
16 foul. They're not using it to convict him.
17 They're not using it to arrest him. They found it
18 after they arrested him, correct?

19 MS. VAN PALA: Correct.

20 THE COURT: Then it's a moot issue.
21 They're not seeking to use it. If they were
22 seeking to use it, then you have a basis for
23 suppression, maybe. Maybe. But they're not
24 seeking to use it, so it becomes a moot issue.

25 MS. VAN PALA: But they are seeking to

1 use the fingerprint.

2 THE COURT: Yeah, keep on track with
3 the fingerprint. They're not using any DNA; it's a
4 moot issue. They're not seeking to introduce any
5 DNA evidence against him. So even if they screwed
6 up monumentally, they're not seeking to use it. It
7 hasn't prejudiced him in any way because they're
8 not seeking to use it to convict him. They didn't
9 use it to pick him up, they did it after. Unless I
10 misread something in here. They got his DNA after
11 they arrested him, correct?

12 MS. VAN PALA: That's correct.

13 THE COURT: So it becomes a moot issue.
14 They're not seeking to introduce it to try to
15 convict him. In the search warrant I see nothing
16 about -- the only thing I see is that they
17 responded to the business, they got the cash
18 register draw, which was located outside of the
19 business, and the basis of the warrant is video
20 surveillance with description of the suspect, that
21 CST was able to verify the prints from the cash
22 register drawer through the AFIS system, prints
23 lifted -- the prints lifted were verified to be
24 that of Kendall Jerome Tyus, date of birth

25 

1 The victims indicate they did not know
2 the Defendant. They then responded to his home at
3 [REDACTED] where he was taken into
4 custody, and then they did a protective sweep and
5 asked for this warrant so they could go back and
6 look for the currency, the clothing, and any other
7 evidence that would be integral to this crime.
8 What you need to prove to me is that there was a
9 deliberate falsehood or reckless disregard for the
10 truth regarding the statement in that affidavit
11 that the fingerprints were his.

12 Now, how she did her job may be an
13 issue of proof for the State, but it certainly does
14 not amount to a lack of probable cause. It would
15 be different if she had to evaluate these prints,
16 if she had to read them, if she had to make the
17 subjective analysis regarding whether it was his
18 print or not, but AFIS is automated. AFIS doesn't
19 reward or punish anybody. So you would have to
20 prove to me that she made up a print that she
21 lifted off the cash register drawer in able to meet
22 your burden.

23 And based on what I've heard so far,
24 she may have been sloppy in doing her job, but that
25 doesn't amount to the fact that there wasn't a

1 print. She only needs one; she doesn't have to
2 take ten. We have robberies all the time and
3 there's one print on the door sill, one print on
4 the window frame. That's more than enough to run
5 through AFIS and identify a print. So I need to
6 know -- and, really, I should have required this
7 from the beginning to even determine if we had a
8 hearing, but I wanted to give you some latitude as
9 I didn't see any harm or foul in it.

10 But you're going to have to prove to me
11 or give me some proffer that somehow through what
12 she did, that she deliberately created a falsehood
13 or she had a reckless disregard for the truth as to
14 the information that she provided to the police
15 that they put in this affidavit as the basis for
16 locating him and then executing an arrest warrant.
17 And then once they saw what they saw at the house,
18 it was all really most of it in plain view, but out
19 of an abundance of caution, it appears they got a
20 warrant which most of them don't do so I have to
21 applaud them for that. They then, according to the
22 Solicitor, backed out of the house and got the
23 search warrant.

24 So I need to know what evidence you
25 have that the information she provided to them is

1 that she ran through AFIS was a deliberate
2 falsehood or a reckless disregard for the truth.
3 Now, the issues of whether the science was reliable
4 and whether it meets the scientific standard, I
5 think those are all forgone issues. The United
6 States Supreme Court's already addressed all of
7 those issues routinely around the United States.
8 Whether she can be qualified as an expert or
9 whether she did her job thoroughly or not, all of
10 that is fair game, but that's not the basis for
11 whether there was a lack of probable cause in the
12 warrant.

13 MS. VAN PALA: And I don't want to
14 disobey the Court's instructions not to get into
15 argument --

16 THE COURT: I'm not going to use this
17 hearing for you to conduct discovery either. So I
18 need to know whether you have some evidentiary
19 basis to elicit from her that she engaged in
20 deliberate falsehood to get these fingerprints or
21 that she had a reckless disregard for the truth in
22 getting these fingerprints.

23 MS. VAN PALA: And my argument --

24 THE COURT: You need to elicit the
25 testimony if you can, because it's your burden,

1 it's your standard, and I have given you the
2 instructions of what you need to elicit from the
3 witness.

4 Apples and oranges, two different
5 issues.

6 MS. VAN PALA: Beg the Court's
7 indulgence?

8 THE COURT: Uh-huh.

9 MS. VAN PALA: No further questions for
10 this witness. Thank you, Your Honor.

11 THE COURT: You're welcome.
12 Any questions for the witness?

13 MR. LIETZOW: Briefly, Your Honor.

14 THE COURT: You may proceed.

15 CROSS-EXAMINATION

16 BY MR. LIETZOW:

17 Q. Crime Scene Detective Kubicko, is that
18 how I should address you?

19 A. Yes, that's fine.

20 Q. This incident occurred on October 22,
21 2012?

22 A. Yes.

23 Q. And when you got to the Under the Sea
24 Restaurant, did you have any idea who Kendall Tyus
25 was?

1 A. No.

2 Q. When you acquired those latent lifts
3 from the scene, did you have any idea who Kendall
4 Tyus was?

5 A. No.

6 Q. When you got back to city hall and you
7 ran the prints you lifted from the scene through
8 AFIS, did you have any idea who Kendall Tyus was?

9 A. No.

10 Q. And you swore to tell the truth during
11 your testimony; is that correct?

12 A. Yes.

13 Q. Did you make any deliberate or reckless
14 false statements in regards to the fingerprints
15 used to acquire this probable cause for the search
16 warrant?

17 A. No.

18 Q. And did you show a reckless disregard
19 for the truth in any way when you were conducting
20 your examination on the fingerprint to get a
21 probable cause for a search warrant?

22 A. No.

23 MR. LIETZOW: No further questions,
24 Your Honor.

25 THE COURT: Any redirect of the

1 witness?

2 MS. VAN PALA: No. Thank you, Your
3 Honor.

4 THE COURT: Ma'am, you may step down
5 subject to being recalled.

6 Do you have any further witnesses?

7 MS. VAN PALA: No, Your Honor. Thank
8 you.

9 THE COURT: You're welcome. I will
10 hear any argument on the issue. I need to hear
11 from you first and then the State can rebut the --

12 MR. LIETZOW: Your Honor, may I -- I
13 apologize and --

14 THE COURT: Oh, no, I never thought
15 that you might want to call witnesses.

16 MR. LIETZOW: No, that's not what I'm
17 addressing, Your Honor. I would like to know
18 whether I should produce anymore witnesses today so
19 I can have Investigator Faulkner -- let them know
20 so it's not making Your Honor wait --

21 THE COURT: Well, it depends on whether
22 she needs -- or they need any further witnesses.

23 MS. VAN PALA: No.

24 MR. LIETZOW: So I can release my
25 witnesses for the day?

1 THE COURT: I would keep Ms. Kubicsko
2 around for a few moments, but everybody else you
3 can. They have -- the burden of proof is on them
4 on their motion.

5 MR. LIETZOW: Thank you.

6 THE COURT: You may proceed.

7 MS. VAN PALA: Thank you. Our argument
8 is that the deliberate falsehood or misinformation
9 that was made with reckless disregard for the truth
10 of that incorrect information is not what the crime
11 scene tech did herself, but what the affiant says
12 as the basis of forming his probable cause
13 determination to the magistrate.

14 In this case, in the affidavit
15 regarding the fingerprint evidence, Mark Evans --
16 Detective Mark Evans, who is the affiant, who
17 memorialized in his report that it was after
18 retrieving the latent print that he went to the
19 magistrate and that his determination of probable
20 cause was based on the latent print --

21 THE COURT: You didn't call him as a
22 witness, so how do I know what he said was false or
23 not?

24 MS. VAN PALA: Well, we feel as though
25 the report speaks for itself because that's the

1 only indication that the record has --

2 THE COURT: He relied on something she
3 told him. She said she had a match. Why would he
4 question that? She's the crime scene tech.

5 MS. VAN PALA: I mean, that is a good
6 faith exception.

7 THE COURT: So on its face, how is it
8 false? And it has to be deliberately false. The
9 purpose of the Franks hearing is when an officer
10 goes to a magistrate basically and lies, and uses
11 the basis of that lie to surreptitiously get an
12 affidavit that he would not -- I mean, get a
13 warrant that he would not be entitled to. That's
14 the whole purpose of it.

15 And then even if I look at the
16 affidavit, if I can extract everything that was
17 false from that affidavit and there's still
18 probable cause, then the affidavit is still good.
19 So what I'm trying to find out from you -- you said
20 on its face what he said was false. How on its
21 face is it false?

22 MS. VAN PALA: Our argument without
23 using the term, lie --

24 THE COURT: Well, that's basically what
25 he has to do. He has to have -- a deliberate

1 falsehood is a lie, isn't it?

2 MS. VAN PALA: Or a reckless disregard
3 for --

4 THE COURT: Either way it's a lie. I
5 don't care how you color it up. Lipstick on a pig
6 is still a pig.

7 MS. VAN PALA: And there was only one
8 basis, according to his very own report, and the
9 affidavit itself which is the print.

10 THE COURT: Well, it was more than
11 that. He said he had the video surveillance that
12 identified the clothing.

13 MS. VAN PALA: That's correct, but the
14 clothing wasn't found until after the search
15 warrant --

16 THE COURT: I agree, but still you need
17 to show me as an offer of proof, especially since
18 you didn't call him as a witness and it's your
19 burden of proof, how he lied. How he provided some
20 deliberate falsehood or reckless disregard for the
21 truth. She can't tell me what was in his mind when
22 he did that.

23 She provided him with a small piece of
24 information that he used as a basis for his
25 affidavit; which is, as a crime scene tech, I

1 collected all of these prints, I ran them through
2 AFIS, it identified and flagged this particular
3 person. And then based on that he went to the
4 magistrate and said, the CST told me that the
5 latent print comes back to this guy.

6 I assume he then went to -- I don't
7 have to assume because I have his testimony, that
8 he went to the highway department records and ran
9 his name and found out where his -- or either
10 looked in the database. If you're using the
11 database that means he's been arrested, so he
12 probably didn't have to go far to find out what his
13 address was, and then you go to the address to
14 search.

15 So I need to know -- because,
16 basically, if I understand you correctly, you're
17 saying because -- and I don't mean this in any
18 pejorative sense, but you're saying, basically, she
19 was slack, she didn't take all the pictures, she
20 didn't identify everything and, therefore, anything
21 she provided to him was inaccurate. How would he
22 have known that? It has to be a deliberate
23 falsehood on his part.

24 What I heard her testify to was, I took
25 prints at the scene. One of them was off the cash

1 register drawer. Yeah, I may have mislabeled them,
2 I may not have even labeled them until later as
3 part of my process. If I wouldn't have labeled
4 them at the front end, I would have labeled them at
5 the back end. No, I didn't take pictures of
6 everything. I gave them the cash register drawer
7 back because I didn't want to incapacitate their
8 ability to run their business, I wanted them to
9 have it back. What I did take is the print that I
10 labeled such and such, which may be different from
11 how I label other things, and I ran it through the
12 system and it came up with Mr. Tyus.

13 What you would need to prove to me is
14 that either she fabricated this print, she took it
15 from somebody else's crime scene, or otherwise, to
16 meet your burden of proof that she had a reckless
17 disregard for the truth or it was completely false
18 when she entered it into AFIS.

19 It's not a situation where she lifted a
20 print and she went through a bunch of cards and
21 said, I compared the ridge details and patterns
22 and, blah, blah, blah, and I think it's him. She
23 ran it through AFIS, a totally objective process
24 that flags those whose prints are in the system and
25 whose DNA is in the system. That's the whole

1 purpose of why we have that database, to aid law
2 enforcement.

3 So I'm still at a loss when you say it
4 was false information that he was provided. What
5 false information was he provided with that was the
6 basis of this affidavit in procuring the search
7 warrant?

8 MS. VAN PALA: Well, our argument is
9 that -- that the crime scene technician's testimony
10 about her investigation meets the required level of
11 reckless disregard of Detective Evan's reckless
12 disregard for the truth or falsity by relying on
13 that, but --

14 THE COURT: Why wouldn't he rely on
15 somebody who's employed and it's their job to take
16 evidence from the scene and process it? He doesn't
17 do it, does he? I mean, Isn't that why
18 investigators rely on crime scene techs, that's
19 within the ambit of their job description? So who
20 else would he be relying on?

21 Is he supposed to go behind her and
22 make sure that she did her job right? He's not her
23 supervisor. I don't even know how he would be able
24 to do that. Does he have the expertise to question
25 what she's done?

1 MS. VAN PALA: The other false
2 information -- the rest of the false information
3 that was included in the warrant, is that the
4 warrant states that Mr. Tyus is six-foot in height
5 and weighs approximately 160 pounds.

6 THE COURT: Where is that? That's not
7 the affidavit that I have for property. Are you
8 talking about the DNA?

9 MS. VAN PALA: Yes, Your Honor.

10 THE COURT: Well, that's a moot issue
11 we've determined, correct?

12 MS. VAN PALA: Oh, and our argument --
13 I understand that you have ruled. Our argument is
14 that the -- both of the search warrants when
15 invalidated excludes all fruits. So not just --

16 THE COURT: They only exclude what
17 they've searched for and what the return was for
18 each warrant. There were two separate warrants
19 that were executed with two separate returns, so --

20 MS. VAN PALA: Correct.

21 THE COURT: -- the one that you're
22 referring to was to gather DNA evidence, correct?

23 MS. VAN PALA: I was referring to both
24 of them. Our argument is --

25 THE COURT: I have one dated

1 October 23rd at --

2 MS. VAN PALA: It should have been
3 both.

4 THE COURT: I'm a little confused
5 actually, because which one did they actually use
6 to search the residence and which one does the
7 return correlate to?

8 MS. VAN PALA: The search warrant for
9 the residence is the second warrant. It is dated
10 October 23rd. It is not time stamped.

11 THE COURT: That's the one I'm looking
12 at. I have nothing referring to his height or
13 weight.

14 MS. VAN PALA: Correct. That was on
15 the DNA affidavit that also has the same language
16 except for it also includes biological information
17 about Mr. Tyus --

18 THE COURT: Yeah, but if you're seeking
19 biological information, the only thing that they
20 can obtain from this warrant is DNA.

21 MS. VAN PALA: Correct.

22 THE COURT: And they got his DNA.

23 MS. VAN PALA: Correct.

24 THE COURT: But they're not using it,
25 so it can't prejudice him. There's not any

1 jeopardy from that. Even if they did everything
2 wrong on that and they got his biologicals, the
3 only time that would be a problem is if they were
4 trying to use them. They're not using them.

5 MS. VAN PALA: Yes, Your Honor. And
6 our true problem is with the search warrant for the
7 property because only after the execution of the
8 search warrant for the property did law enforcement
9 discover a jacket that might have matched --

10 THE COURT: Yeah, but then you're
11 mixing apples and oranges. Don't tell me a
12 description that's in an affidavit that's moot, if
13 it doesn't relate to the affidavit that is
14 relevant. The affidavit that you have all of this
15 other information in is moot, because the only
16 thing they sought from that affidavit is biological
17 evidence, DNA profile of other evidence collected
18 in this case, period. That's the only thing they
19 could have gotten from this affidavit.

20 They did, in fact, procure his DNA, but
21 they're not using it. If, in fact, there was a
22 problem with this and they were seeking to use his
23 DNA, then we could talk about it, but it's moot.
24 They're not seeking to use his DNA. If they, in
25 fact, after this point intended to try to use his

1 DNA, then we'll have to renew that conversation,
2 but the only time somebody is in jeopardy -- if the
3 police violate my rights and they take something
4 from me and they don't intend to use it against me,
5 then there is no issue. If they were seeking to
6 use his DNA, then it would be an issue because
7 there could arguably be some depravation of his due
8 process rights or some other constitutional
9 violation.

10 But what we're were dealing with now is
11 a search of his property where they found the
12 jacket, the money, and presumably the currency.
13 And you say the problem with that is the print that
14 was run through AFIS. And I need to know how that
15 is a deliberate falsehood or a reckless disregard
16 for the truth when you haven't even called the
17 person that prepared the affidavit.

18 So I don't even know if he supplemented
19 what he told the magistrate. I don't know if he
20 was sworn in and he told him something different
21 when he got there.

22 MS. VAN PALA: And we find that the
23 evidence in the record is sufficient based on
24 Detective's Evan's investigation, excuse me, of the
25 incident.

1 My last argument is that this warrant -- the
2 property warrant was not time stamped.

3 THE COURT: That's administerial, isn't
4 it?

5 MS. VAN PALA: Yes, Your Honor. And
6 likewise administerial is that the return wasn't
7 made until 21 days later when the statutory
8 requirement is ten. And the statute also requires
9 prejudice to the Defendant and our argument is that
10 because it's an identity case, it boiled down to
11 the one print essentially, and without the print,
12 the State would have no evidence -- none of the
13 other evidence --

14 THE COURT: The print isn't subject to
15 the search warrant. They didn't search for his
16 print. They found his print at the scene. His
17 print is not a part of the return. His print
18 wouldn't be a part of the return.

19 MS. VAN PALA: And our argument is that
20 the print is the entire basis for the probable
21 cause determination and that it is so material and
22 so relevant because it eventually led to the
23 discovery of all the other items that were found in
24 the residence that links the defendant to the
25 unknown assailant on the video. And without

1 linking the Defendant to the unknown assailant on
2 the video, you can't place the Defendant inside the
3 restaurant, you don't have the offence of armed
4 robbery. That's our prejudice argument.

5 THE COURT: Anything further?

6 MS. VAN PALA: Not at this time.

7 THE COURT: Would the State like to
8 respond?

9 MR. LIETZOW: Briefly, Your Honor. As
10 Your Honor is aware, the standard is deliberate
11 falsehood or reckless disregard for the truth.
12 Your Honor, the defense has elicited no testimony
13 and presented no evidence that would suggest anyone
14 from the North Charleston Police Department or
15 anyone involved in this investigation at all made a
16 deliberate falsehood or reckless statement -- let
17 me back up. Nobody had made a deliberate falsehood
18 or had a reckless disregard for the truth when
19 securing the probable cause for the search warrant.

20 Furthermore, the defense has alleged no
21 prejudice as far as administrative goes in the
22 search warrant. And for this reason the State
23 believes that the defense has not met their burden
24 under Delaware v. Franks, and we respectfully
25 request Your Honor rule that the search warrant

1 should not be suppressed. Thank you.

2 THE COURT: You're welcome.

3 Anything further?

4 MS. VAN PALA: No, Your Honor. Thank
5 you.

6 THE COURT: You're welcome. Do you
7 have any indication as to why the return was not
8 filed for 21 days or why it wasn't time date
9 stamped? I'm just curious.

10 MR. LIETZOW: Yes, ma'am. If Your
11 Honor would like to know I could let you know what
12 Detective Evans had to say and supplement as far as
13 why that did not occur?

14 THE COURT: I would like you to give me
15 a summary.

16 MS. VAN PALA: Your Honor, I have it
17 right here. So basically what happened, Detective
18 Evans put all of this in his narrative. The judge
19 was in trial one week, then Detective Evans went on
20 vacation the week after, and then the week after
21 that he tried for two days to try to get in touch
22 with the judge unsuccessfully. The third day
23 happened to be 21 days later.

24 THE COURT: Okay. Based on what was
25 presented to the Court, I find there is no -- that

1 the Defendant in this case has failed to meet his
2 burden of proof regarding his challenge to the
3 admissibility or the sufficient -- not
4 admissibility, the sufficiency of the search
5 warrant that was provided to the magistrate that
6 was the foundation of the probable cause for the
7 warrant to search the Defendant's residence.
8 The standard in Delaware versus Franks is very
9 clear. The -- and our courts have articulated that
10 the Defendant has a very onerous burden, my words
11 not the court's, but a very high burden in order to
12 mandate an evidentiary hearing for challenging the
13 veracity of the search warrant affidavit.

14 There must be allegations of deliberate
15 falsehood or a reckless disregard for the truth as
16 to the statements included in the warrant affidavit
17 and those allegations must be accompanied by an
18 offer of proof, and the accused has the burden of
19 proving the allegations of perjury or reckless
20 disregard for the truth by a preponderance of the
21 evidence, which we know is more likely than not.

22 If a deliberate falsehood or reckless
23 disregard for the truth has been established, the
24 Court must exclude the false material in the search
25 warrant affidavit and consider the remainder of the

1 affidavit to determine if it is sufficient to
2 establish probable cause. If the Court determines
3 that no probable cause exists after the falsehood
4 material is omitted from the analysis, the search
5 warrant must be voided and the fruits of the search
6 excluded to the same extent that the probable cause
7 was lacking on the face of the affidavit.

8 And there are many examples of
9 deficiencies in warrants, anything from missing
10 dates and times to information that our courts have
11 found has been deliberately excluded from an
12 affidavit that has been presented to a magistrate
13 for the purpose of procuring a search warrant. A
14 magistrate is supposed to be provided with
15 information that rises to the level of probable
16 cause in order to establish that the issuance of a
17 warrant is appropriate. And under Franks, it is
18 not appropriate simply that a false statement be
19 made or that key facts were omitted in order to
20 suppress the warrant.

21 And I have already articulated the
22 two-prong standard for the analysis. I've not
23 heard any evidence -- the defense -- it is their
24 burden by a preponderance of evidence. They've
25 called the crime scene technician as a witness.

1 They did not call the officer who actually prepared
2 the affidavit, so I have no way to individually --
3 or to independently review his reliability or his
4 veracity in preparing the affidavit for purposes of
5 procuring the search warrant; however, in looking
6 at the search warrant on its face, it appears to be
7 sufficient. It appears to establish probable cause
8 by preponderance of the evidence, and the Defendant
9 has failed to establish through the testimony of
10 the CST that there was a false -- and, again --
11 just backing up a little.

12 There really wasn't a proffer made
13 sufficient to really justify having a Franks
14 hearing, but out of an abundance of caution, I held
15 one. I couldn't see any harm or foul in doing it.
16 I did not see how it prejudiced the State in any
17 way and certainly inured the benefit of the
18 Defendant.

19 In looking at the affidavit that was
20 provided, the basis of the affidavit, and I'm
21 referring to that dated October 23rd, this does not
22 deal with procurement of DNA or biological
23 evidence. In a nutshell it says, they would like
24 to get a warrant because they responded to the
25 scene of a crime, that based on the surveillance

1 video as well as fingerprints that was obtained and
2 a print verified from the cash register through
3 AFIS, that those prints came back to Kendall
4 Tyus -- and I'm just eliminating all of his name, I
5 apologize -- date of birth [REDACTED] That
6 the victims indicated he was not known to them as
7 of the date of this offence, that the North
8 Charleston police responded to [REDACTED]
9 where the Defendant was taken into custody.

10 So the warrant basically has two parts.
11 First they're asking for a warrant because of the
12 AFIS hit and because they have surveillance video.
13 And then they indicate that once they then went to
14 the house to serve this arrest warrant, that there
15 were certain items in plain view, the US currency
16 that was observed under the living room couch,
17 there was a blue jacket with a white stripe which
18 ties back to the video in plain view in the
19 Defendant's closet, that the Defendant was
20 developed as a suspect in a subsequent
21 investigation and has a listed address of the
22 residence to be searched that is also documented in
23 the South Carolina Department of Motor Vehicles.
24 And based on those facts, the officer's experience
25 believed that by executing this warrant further

1 evidence of the crime would be obtained.

2 I've not heard anything that indicates
3 that the CST did not obtain the print that was run
4 through AFIS, that she didn't obtain it at the
5 scene from the cash register. There's nothing that
6 requires her to run every print that she finds at
7 the scene through AFIS. If she has one good print
8 that she feels is more legible, or better, than
9 another print, she can run the standards through --
10 there are many ways they can run those standards
11 through that computer system.

12 She articulated how she ran or how she
13 chose to run those known standards, and that once
14 she ran that known standard, that being finger
15 number 3, when she narrowed the search, that it
16 identified the Defendant.

17 I have not heard anything that would
18 rise to the level of a deliberate falsehood or a
19 reckless disregard for the truth as the State --
20 were included in the warrant affidavit, as I would
21 see no reason why an officer would not rely on the
22 representations made to him by a crime scene
23 technician.

24 I have never in all my years on the
25 bench had a detective actually run prints or take

1 prints except when they were arresting somebody. I
2 don't even think they do that. I think an intake
3 officer probably does that. So I would see no
4 reason why he would not rely on her representations
5 that she collected the prints, and that she had a
6 hit on those prints and then conveyed that to the
7 officer, and that he acted in anything other than
8 good faith in preparing this affidavit.

9 So I find that the Defendant has failed
10 to meet his burden of proof by a preponderance of
11 the evidence and the motion is denied.

12 Now, I will say once again for the
13 record, that whether the investigation was done
14 thoroughly, whether the CST documented as she
15 should have or didn't, those are all matters of
16 proof as to whether the State can establish their
17 burden by beyond a reasonable doubt, but I'm not
18 the fact-finder. It's not for me to sort those
19 things out. The only think I determine is whether
20 -- and I haven't heard anything that rises to the
21 level of any kind of omission or deliberate
22 falsehood or reckless disregard for the truth
23 regarding the collecting of the fingerprint or
24 running it through AFIS; therefore, the motion is
25 denied.

1 Is there anything else we need to take
2 up before we break for the evening, from the State?

3 MR. LIETZOW: Your Honor, the State is
4 going to make a motion in limine to limit the
5 defense's questioning of Crime Scene Tech Kubicsko
6 to the case at hand, pursuant --

7 THE COURT: What else would they be
8 asking her about?

9 MR. LIETZOW: Past investigations
10 conducted on prior cases. Pursuant to Rule 403 of
11 the South Carolina Rules of Evidence, we would ask
12 Your Honor to limit the defense's questioning of
13 Crime Scene Tech Kubicsko to this particular case.

14 THE COURT: Like what? What else would
15 they ask?

16 MR. LIETZOW: They're going to allege
17 that Crime Scene Tech Kubicsko had a snafu, for
18 lack of a better word, on a case that I personally
19 handled in the Solicitor's Office about two months
20 ago.

21 THE COURT: And what was the result of
22 that?

23 MR. LIETZOW: The result was that an
24 offer was made to the defendant and the defendant
25 pled guilty.

1 THE COURT: No, I mean, what exactly --
2 you-all are going in circles. I need to know what
3 exactly what --

4 MR. LIETZOW: There was an issue
5 between North Charleston and my office. My office
6 had access to a draft folder from North Charleston
7 Police Department. I had access to that draft
8 order and then I disclosed the draft of a
9 fingerprint report to the defense. I then
10 subsequently disclosed what would be considered a
11 final report done by another investigator to the
12 defense and there were glaring discrepancies
13 between the two reports.

14 THE COURT: Uh-huh.

15 MR. LIETZOW: And our office in north
16 Charleston has since rectified that by putting up a
17 fire wall, but we want to make sure that they do
18 not confuse the jury --

19 THE COURT: Well, I'm confused still.
20 What exactly would they be asking her that would --

21 MR. LIETZOW: Just out of an abundance
22 of caution, Your Honor, I would like to bring that
23 to your attention. If they would like to then
24 further inform you of what they would intend to do,
25 I just want to make sure that --

1 THE COURT: The question is, what do
2 you plan to ask her about?

3 MS. VAN PALA: I plan to ask her about
4 ongoing investigations now --

5 THE COURT: What is it exactly that you
6 will be asking her?

7 MS. VAN PALA: Investigations into her
8 work and whether her work is being reviewed by
9 others for inaccuracies.

10 THE COURT: I think that's fair game.
11 Goes to the thoroughness of her investigation.

12 MR. LIETZOW: I just --

13 THE COURT: But I will say, I rarely
14 ever rule on a motion in limine. It is never asked
15 the way you all tell me. It all comes out
16 differently. You will have to make a
17 contemporaneous objection. I would suggest that we
18 handle it in camera before you ask it in the
19 presence of the jury so that we can create a
20 proffer in the event that I exclude the evidence.

21 MR. LIETZOW: Thank you. That's what I
22 was --

23 THE COURT: Then that's no harm, no
24 foul to anybody and you have a complete record
25 regarding the line of questioning. So once you get

1 greater vote or voice than you do.

2 In order to preserve everyone's rights,
3 I will give the parties an opportunity to take
4 exception to anything that the Court has said by
5 way of opening instructions:

6 THE COURT: Are there any exceptions
7 from the State?

8 MR. LIETZOW: No, ma'am.

9 THE COURT: From the defense?

10 MS. PROCTOR: No, Your Honor.

11 THE COURT: Ladies and gentlemen, I
12 would ask that you give the attorneys your
13 undivided attention in opening statements.
14 You may proceed, Mr. Lietzow. Or Mr. Lewis, I'm
15 sorry. The State may proceed.

16 MR. LEWIS: May it please the Court.

17 THE COURT: And please make sure there
18 is no movement during the Court's opening
19 instructions or any arguments by the attorneys.
20 It's very distracting.

21 Thank you. You may proceed.

22 MR. LEWIS: Thank you, Your Honor.

23 THE COURT: You're welcome, sir.

24 MR. LEWIS: The actions of a person can
25 affect the lives of so many others. Today you will

1 see how the actions of Kendall Tyus affected the
2 Lee family in a matter of seconds. His actions
3 also affected his life, Mr. Tyus', as well.
4 On October 22nd, 2012, Kendall Tyus entered Under
5 the Sea, a restaurant at 5060 Dorchester Road,
6 Suite 280, in North Charleston. Some of the
7 clothes that he was wearing that evening was a
8 striped jacket, white shoes, jeans. Now most
9 people would enter that type of restaurant and
10 order food, but that was not the case for Mr. Tyus.

11 He ran into that store with a small
12 black semiautomatic handgun and scared off
13 Mrs. Hannah Lee, one of the co-owners of the
14 restaurant who was at the register. Tyus then over
15 the counter, grabs the money tray from the register
16 and goes out the store and immediately goes home.
17 911 is called.

18 North Charleston police officers soon
19 arrive. They speak with Hannah and Sunny Lee, her
20 husband, the owners of the restaurant. The
21 description is given after officers look at the
22 video surveillance of the restaurant that shows the
23 incident.

24 Crime scene techs come to the
25 restaurant, look for fingerprints, they get prints,

1 one comes back identifying Mr. Tyus. North
2 Charleston Police Department gets his address and
3 goes to his home where he's arrested. During that,
4 they do a protective sweep. The officers find the
5 jacket and shoes worn by Mr. Tyus just hours before
6 when he was at Under the Sea. The officers get a
7 search warrant and they find a small black
8 semiautomatic handgun and some money found under
9 the couch.

10 Now, due to the actions of Kendall
11 Tyus, he is before you charged with two offences,
12 armed robbery and possession of a weapon during the
13 commission of a violent crime. Now, the Judge is
14 -- later on, as she mentioned to you, will instruct
15 you on the law.

16 I would like to take a brief moment to
17 explain the offences for you. Armed robbery is a
18 robbery while armed with a deadly weapon, like a
19 pistol or handgun. A robbery is defined as the
20 unlawful taking of money from the person of another
21 or in his presence by violence or by putting such
22 person in fear. Armed robbery is considered a
23 violent offence or a violent crime under South
24 Carolina law. It is also a separate offence to be
25 in possession of a firearm during the commission of

1 a violent crime.

2 Now, North Charleston Police Department
3 was able to investigate this case at a moment --
4 very quickly, so an arrest could be made and we're
5 at this point that we're at. You will hear from
6 Sunny Lee, one of the owners of the restaurant, and
7 he will explain to you what he saw, how he was in
8 fear for him and his wife when they ran out of the
9 store.

10 Lisa Kubicsko from the crime scene
11 unit, she's going to sit right there later on
12 during the trial and she is going to tell you how
13 she was able to get fingerprints and how she was
14 able to get a match to Tyus Kendall off of the
15 prints. You will see what was recovered from
16 Mr. Tyus' home later on. You will see the jacket,
17 you will see the clothes, you will see the handgun.
18 Also, members of the jury, you will see the
19 surveillance video that was used. Watch that
20 video.

21 There are a few things that we want to
22 bring to your attention in particular. Look at the
23 hand that Tyus used to collect the money tray.
24 Look at the black semiautomatic handgun that was
25 held by Mr. Tyus, look at the jacket and the

1 clothes he was wearing. Members of the jury, we
2 ask that you use your common sense.

3 At the end of this trial, we are not
4 going to ask you to make any unreasonable
5 assumptions or make any giant leaps of faith. We
6 are going to ask that you use your common sense,
7 look at the evidence, and you will come back with a
8 guilty verdict for armed robbery and possession of
9 a weapon during the commission of a violent crime.

10 THE COURT: You may proceed.

11 MS. PROCTOR: Thank you, Your Honor.

12 May it please the Court.

13 THE COURT: Yes, ma'am.

14 MS. PROCTOR: Good morning. I'm
15 Lorelle Proctor and myself and Tamara Van Pala
16 represent Mr. Tyus. Under the Sea Restaurant was
17 robbed approximately three years ago. It was near
18 closing, it was around 7:15; Sunny Lee, the owner,
19 was in the back and in the front. He was cleaning,
20 sweeping, getting ready for the store to close.

21 His wife, Hannah, was sitting at the
22 front. She was sitting in a chair at the counter.
23 All of a sudden, she sees somebody run into the
24 restaurant. When she saw somebody run in, they had
25 a gun to their side, she saw that, she runs out the

1 back door. She grabs Sunny and out they run.
2 The person that ran in -- and this would be on the
3 surveillance video you will see -- ran in, leaned
4 up on the counter with their body, grabbed the
5 counter, reached over, pulled open a drawer, got
6 the cashbox, and ran back out.

7 The description of that person was a
8 black male with a dark knit hat on, a blue jacket,
9 a white cloth over their face, and white tennis
10 shoes. And, as I said, at that point, Hannah and
11 her husband, Sunny, were running out their back
12 door. And this is in a strip mall.

13 So as they were running around the
14 back, they were going to come around to the back to
15 the front, to go back into their front door. And
16 as they were running around the back, coming right
17 around the corner, they almost ran into the robber.
18 They can't now and they couldn't then identify who
19 the robber was.

20 Now, police watched the surveillance
21 video and they described from the video a person
22 with the same clothes, dark jacket, white towel,
23 white tennis shoes, knit cap. They sent a tracking
24 dog -- K9 came and they sent a tracking dog out to
25 follow the path. The police never found -- after

1 the dog came, I will say, the police then, as the
2 Solicitor said, got a search warrant for
3 Mr. Kendall Tyus's house, which isn't very far from
4 the restaurant.

5 There was no white towel ever found in
6 his house, there was never any black knit cap found
7 in his house. And also the height and weight from
8 the video do not match Mr. Tyus.

9 Now, the State has the burden of proof
10 in this case, and that means they can't say to you,
11 well, he could have robbed it, he might have robbed
12 it. There were some things found, maybe he did.
13 That doesn't work. They must prove to all 12 of
14 you beyond any reasonable doubt that Kendall Tyus
15 is the robber. And they must prove that to all 12
16 of you and, as I said, everything must fit before
17 you can find him guilty. Kendall Tyus has nothing
18 to prove to you.

19 THE COURT: State may proceed.

20 MR. LIETZOW: Thank you.

21 THE COURT: You're welcome.

22 MR. LIETZOW: The State calls Sunny
23 Lee.

24 SUNNY LEE,

25 being first duly sworn, testified as follows:

1 THE CLERK: Please be seated. Once
2 seated, please state your first and last name and
3 spell your last name.

4 THE WITNESS: My name is Sunny Lee.
5 Lee is L-E-E.

6 THE COURT: You may proceed.

7 MR. LIETZOW: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MR. LIETZOW:

10 Q. Morning.

11 A. Morning.

12 Q. Please tell the jury how old you are.

13 A. I'm 51 now.

14 Q. Okay. Are you married?

15 A. Yes, I am.

16 Q. And how many kids do you have?

17 A. I got one son.

18 Q. How old is he?

19 A. He's 21 now.

20 Q. Tell the jury where you're from.

21 A. Originally I come from Korea.

22 Q. Is that where you were born?

23 A. Yeah.

24 Q. And when did you move to the United
25 States?

1 A. 1990.

2 Q. Okay. And when you originally moved to
3 the United States, where did you move to?

4 A. California.

5 Q. Okay. And how long have you been in
6 Charleston?

7 A. In Charleston, about 16 years now.

8 Q. 16 years?

9 A. Yes.

10 Q. What brought you to Charleston from
11 California?

12 A. For business.

13 Q. And what do you do for a living?

14 A. Right now I'm working for somebody that
15 -- I got two jobs. My full-time job is at Dunes
16 West, the golf club, and the second job is at
17 Denny's Restaurant right now.

18 Q. And as part of being here today, did
19 you have to take off of work?

20 A. Yes.

21 Q. And tell the jury how you feel about
22 that.

23 A. Well, actually, I'm not really
24 comfortable taking off to come here today, but I
25 have to.

1 Q. Is going to work a matter of honor for
2 you?

3 A. Luckily, I have vacation days, so when
4 I don't work today I can have it paid. Yeah.

5 Q. Okay. Let's talk about the night in
6 question. Do you remember that night? It was
7 October 22, 2012.

8 A. Yes, I do.

9 Q. And tell the jury what you were doing
10 that night.

11 A. I was working at the back side of the
12 restaurant, the kitchen area. It was almost
13 closing time, between 7:00 to 8:00. We used to
14 close the business about 8:00, so I was cleaning
15 all the stuff back there and prepare the things for
16 the next day.

17 And then about -- I don't know the
18 exact time; but my wife was at the front, the
19 register area, the cash register area, and she just
20 jump on me and she just shouting something, but I'm
21 not really clear understanding what she's saying
22 about it. And she said something that -- a rat or
23 something, but one word in there she keep saying,
24 gun, gun, gun --

25 MS. PROCTOR: Objection; hearsay.

1 THE COURT: Sustained, hearsay.

2 BY MR. LIETZOW:

3 Q. Mr. Lee, let's not say what someone
4 else said. Let's just focus on what you knew and
5 what you saw that night.

6 A. Yeah.

7 Q. All right. I want to back up just a
8 little bit. We'll have an opportunity to discuss
9 when the incident occurred, but I want to lay a
10 little bit more foundation for the jury.

11 A. Okay.

12 Q. Who owned that restaurant that you were
13 working at that night?

14 A. Me and my wife.

15 Q. Okay. And you mentioned she was there?

16 A. Yes.

17 Q. Where specifically was your restaurant
18 located?

19 A. Where what?

20 Q. Where was you're the restaurant
21 located?

22 A. You mean address?

23 Q. Yes, sir.

24 A. 5060 Dorchester Road, North Charleston.

25 Q. Is that Charleston County?

1 A. Yes.

2 Q. And that's in the State of South
3 Carolina?

4 A. Yes.

5 Q. Was it common for your wife to be at
6 the restaurant with you, working with you?

7 A. Actually, she not working in the
8 restaurant all the time. Every Monday is off day
9 for her job. So every Monday she come to
10 restaurant to help me.

11 Q. Okay. And where is your wife from?

12 A. Korea.

13 Q. And does she speak English very well?

14 A. Not really.

15 Q. What is your wife doing right now?

16 A. She is doing hair, hairdresser.

17 Q. She's at work?

18 A. Yes.

19 Q. All right. Let's focus in on that
20 night. Do you remember approximately what time it
21 happened? I know you said it was around closing
22 time. Do you have a general idea of the time?

23 A. About 7:30.

24 Q. And what time did your restaurant
25 close?

1 A. 8:00.

2 Q. And specifically, when you heard your
3 wife cry out, where were you located?

4 A. I was back in kitchen.

5 Q. And when you heard your wife cry out,
6 what happened next?

7 A. I take -- I take her and then we open
8 the back door of the kitchen and then we ran away
9 from there, yeah.

10 Q. Did you ever see the individual enter
11 the restaurant? The individual that was the
12 robber, did you ever see that person enter the
13 restaurant?

14 A. No, I didn't see him.

15 Q. Tell the jury what happened when you
16 ran out back. Who did you encounter?

17 A. Me and my wife run out the back door
18 and then we just -- actually, I don't have that.

19 MR. LIETZOW: May I approach the
20 witness, Your Honor?

21 THE COURT: You may.

22 By MR. LIETZOW:

23 Q. I'm showing the witness what's been
24 marked as State's Exhibit 21, just for his purposes
25 of orienting himself with the scene. I believe

1 this is the restaurant. Don't mark --

2 MS. PROCTOR: Your Honor, may I see
3 which picture that is?

4 MR. LIETZOW: Yes, ma'am.

5 BY MR. LIETZOW:

6 Q. Sunny, take a look at that and see if
7 this will help you remember which direction you ran
8 in.

9 A. Okay. This is my restaurant here, and
10 then we have a back door here. (Indicating) And
11 me and my wife ran out this way and around the
12 building, and then at the moment that that
13 gentleman came out front door, we're facing each
14 other outside. And then my wife tell me, oh,
15 that's the man, that's the man. And then I was
16 surprised and scared, just because I knew that he
17 had gun.

18 Q. Okay.

19 A. So I just was shouting, somebody help
20 and call 911.

21 Q. Right. Did you notice that individual
22 carrying anything?

23 A. Well, I didn't see the gun at that
24 moment, but I see that he carry the register at the
25 side of his arm like this. (Indicating)

1 Q. Okay. What was he wearing at that
2 point?

3 A. He wear jacket and then jeans and white
4 sneakers, and then the jacket is like striped, like
5 this, and it looks like Adidas.

6 Q. Can you give a general description of
7 that individual? Black, white, male, female?

8 A. Black male.

9 Q. Did he say anything to you?

10 A. No.

11 Q. And did you say anything to him?

12 A. I didn't say to him. I just, you know,
13 shouting myself.

14 Q. Were you able to get a good look at his
15 face?

16 A. Not really clearly, just because
17 outside is dark.

18 Q. Do you know whether his face was
19 covered up in any way?

20 A. Well, he didn't cover his face.

21 Q. Did he have a white T-shirt over his
22 face at any point when you saw him outside?

23 A. I cannot say exactly that it was white.
24 It was a bright color T-shirt and then he wear
25 jacket with the stripe on it.

1 Q. What I mean is, did he have anything
2 over his face?

3 A. No.

4 Q. Okay. But you did not get a good look
5 as far as being able to describe exactly who it was
6 at that point?

7 A. Yes, correct.

8 Q. Did you see that individual get into a
9 vehicle?

10 A. No.

11 Q. Were there any vehicles in the area?

12 A. No.

13 Q. So was he -- he was running on foot?

14 A. Yes.

15 Q. What happened after that encounter?

16 A. After he run away, and then me and my
17 wife come back to the restaurant, and call 911
18 right away.

19 Q. And when they got there, what happened?

20 A. The police?

21 Q. Yes, sir.

22 A. They just checked the fingerprints on
23 the door and the cash register and then on the
24 countertop where he touch everywhere, yeah.

25 Q. Was your restaurant under video

1 surveillance?

2 A. Yes.

3 Q. Tell the jury why your restaurant was
4 under surveillance.

5 A. Well, first reason is to protect me,
6 and the second reason is to protect the customer.

7 Q. Elaborate. Explain.

8 A. What?

9 Q. Can you -- what do you mean, protect
10 you, protect the customer? Why does that mean?

11 A. Like if that happened, we have a
12 robbery. So if we have the surveillance system,
13 then the people think they get away but they cannot
14 do it. The second reason, it protects the
15 customer. Sometimes they have fallen, sometimes
16 it's slippery somewhere and -- you know.

17 Q. Okay. The system that you had, did you
18 have multiple cameras set up in the restaurant?

19 A. Yes. I had eight camera at the time
20 and everywhere.

21 Q. So there were eight different cameras
22 from all -- a variety of different angles inside
23 the restaurant?

24 A. Seven of them is inside the restaurant,
25 one was at the back door outside.

1 Q. Okay. Did they record digitally?

2 A. Yes.

3 Q. Did you install those cameras yourself?

4 A. Yes.

5 Q. And did -- were those cameras always
6 recording?

7 A. Yes.

8 Q. Were they recording when the restaurant
9 was closed?

10 A. Yes, 24 hours.

11 Q. Explain how they would store onto the
12 system, please.

13 A. I bought that kind of system from
14 Coastal --

15 THE COURT REPORTER: Say again.

16 THE WITNESS: I bought that kind of
17 system from the Costco, and then I installed that.
18 And that system is especially -- then recorded
19 automatically, the seven -- seven days, 24 hours..
20 And then if I don't delete it, that recording is
21 deleted automatically after two months, and
22 re-recording.

23 BY MR. LIETZOW:

24 Q. Were you the person in the business
25 that knew how to work the system and make sure it

1 was running properly?

2 A. Yes.

3 Q. Were you able to get a copy of the
4 surveillance video of the night that this incident
5 happened and show that to the police?

6 A. Yes.

7 MR. LIETZOW: May I approach, Your
8 Honor?

9 THE COURT: You may.

10 BY MR. LIETZOW:

11 Q. Mr. Lee, I'm showing you what's been
12 marked as State's Exhibit 1. Do you recognize
13 that?

14 A. Yes, I do.

15 Q. How are you able to recognize that?

16 A. Well, that is actually the records from
17 that video surveillance system. I saw that and
18 that was what happened at that time.

19 Q. Did you and I watch that together?

20 A. Yes.

21 Q. And did you then put your initials on
22 this disk, indicating that it was as it occurred
23 the night of the incident?

24 A. Yes, I did.

25 MR. LIETZOW: Okay. Your Honor, at

1 this time I would move to have State's --

2 THE COURT: It's already been marked
3 and admitted by agreement.

4 MR. LIETZOW: Yes, ma'am. May I
5 publish it to the jury?

6 THE COURT: Proceed.

7 BY MR. LIETZOW:

8 Q. Sunny, bear with us. We're just going
9 to show a few of the different angles that were
10 inside that night.

11 A. Okay.

12 (Video playing.)

13 Q. Is that the front of your restaurant,
14 Mr. Lee?

15 A. Yes.

16 Q. And that was the camera focused on the
17 door?

18 A. Yes.

19 Q. So behind that -- your wife was at the
20 register behind that and that's when she screamed
21 out to you and you-all ran out the back door?

22 A. Yes.

23 Q. What is this showing, Sunny?

24 A. That is right side with the cash
25 register; that go to the public restroom beyond

1 that door.

2 Q. Is that the door that leads out to the
3 exit of the business?

4 A. That white door is the -- we have
5 another door back there that is access to the --
6 out of the building.

7 Q. Okay. Okay. We're going to have it
8 run and then explain what's going on after you see
9 it, when he pauses it.

10 A. Okay.

11 (Video playing.)

12 Q. You can't really see much on that one.
13 What's going on right there? Can you recall from
14 that video? Would you have ran back in this
15 direction?

16 A. Actually, not this direction. At this
17 moment, we cannot see the -- behind the wall,
18 actually the kitchen cabinet that is behind the
19 wall.

20 Q. (Video playing.) What are we looking
21 at there, Sunny?

22 A. This is inside the restaurant.

23 (Video playing.)

24 Q. So these are just all of the different
25 camera angles that you had set up?

1 A. Yes.

2 Q. Okay. Are these all in color or black
3 and white? That kind of looks like it's in color.

4 A. It's color, yes.

5 (Video playing.)

6 Q. What are we looking at here, Sunny?
7 Not the customer, but generally in the area that
8 we're looking at.

9 A. My wife is helping customer.

10 (Video playing.)

11 Q. All right. Mr. Lee, can you see down
12 there? Is that your wife running away right there?

13 A. Yeah.

14 MR. LIETZOW: May I approach?

15 THE COURT: You may.

16 BY MR. LIETZOW:

17 Q. Sunny, I'm going to show you what's
18 been marked and entered into evidence as State's
19 Exhibit 2, State's Exhibit 3, State's Exhibit 4,
20 and State's Exhibit 5. Take a look at those. Do
21 you recognize those photos?

22 A. Yes, I do.

23 Q. Are those simply still images of the
24 surveillance video frozen at a specific point in
25 time?

1 A. Uh-huh.

2 Q. Do they accurately depict the video
3 that we're seeing there?

4 A. Uh-huh, yes.

5 MR. LIETZOW: Your Honor, at this point
6 --

7 THE COURT: They've been marked and
8 admitted.

9 MR. LIETZOW: May I publish?

10 MS. PROCTOR: Your Honor, may I see
11 what he's showing?

12 THE COURT: Uh-huh.

13 By MR. LIETZOW:

14 Q. What is that a photo of, Sunny?

15 A. It looks like where he tried to grab
16 the cash register under the table.

17 Q. Is that the same jacket that you saw
18 from the individual that was outside of the
19 restaurant?

20 A. Yes.

21 Q. Is that him reaching under and grabbing
22 the cash register tray from out of the cash
23 register?

24 A. Actually, he took the whole drawer. He
25 didn't grab the cash, he took the drawer.

1 Q. And that shows him grabbing that?

2 A. Yes.

3 Q. Can you see his hands in that photo,
4 Sunny?

5 A. Yes, I do.

6 Q. And in that one, is that a firearm that
7 he's carrying? Holding? Pointing?

8 A. Yes.

9 Q. Mr. Lee, do you know who Kendall Tyus
10 is?

11 A. I don't.

12 Q. Did you ever have somebody employed at
13 your business by the name of Kendall Tyus?

14 A. No.

15 Q. Who was employed at your business?

16 A. At that time I have two employees, one
17 is Japanese, one is Filipino.

18 Q. Did you ever have a black male
19 employee?

20 A. No.

21 Q. Was there any reason Kendall Tyus's
22 fingerprints should have been on the cash register
23 from your business?

24 A. No.

25 Q. Were you at the business when the

1 police arrived? Were you at the business when the
2 police arrived?

3 A. Yes.

4 Q. Did the police bring the cash register
5 tray that they located back to the business?

6 A. When they arrived, they didn't find it
7 at that moment. And then later, they find it and
8 they bring it back to me.

9 Q. And were you able to verify that the
10 cash register tray that they brought back was the
11 same one that was taken from inside of your
12 restaurant?

13 A. Yes.

14 MR. LIETZOW: Mr. Lee, I don't have any
15 further questions for you. Please answer any
16 questions that the defense may have for you.

17 THE WITNESS: All right.

18 THE COURT: You may proceed.

19 CROSS-EXAMINATION

20 BY MS. PROCTOR:

21 Q. Hello, Mr. Lee. I'm Ms. Proctor. Now,
22 the night of the robbery, you gave a written
23 statement to the police, correct?

24 A. Yes, ma'am.

25 Q. And you told them you were in the back

1 of the business when the robbery occurred?

2 A. Yes.

3 Q. And you never saw the robbery take
4 place, correct?

5 A. Correct.

6 Q. And you testified that when it
7 happened, your wife came running by you and both of
8 you then at that time ran out the back door?

9 A. Uh-huh.

10 Q. Now, when you were running out your
11 back door -- this is in a strip mall, correct?

12 A. Yes.

13 Q. And when you ran out the back door, you
14 were running toward Scarsdale Street? You were
15 running -- when you ran out the back door, you ran
16 left out the back door around to where -- you ran
17 around to come back around into the front door?

18 A. Yes.

19 Q. And you testified that it was when you
20 were just rounding the building that you ran into
21 the robber, or where was that?

22 A. Where I am?

23 Q. Okay. When you were running -- maybe
24 I'm not making myself clear. As you were running
25 around the building with your wife, correct? You

1 were coming back to go back in the front door?

2 Like you made a circle, out the back door, around
3 the front of the strip mall, back into your front
4 door, correct?

5 A. Actually, we not try to go back to the
6 front door in the restaurant. Actually, we run
7 away around the building, and then at that time,
8 that man around the building on the back side and
9 we met each other out there.

10 Q. Was it in the back side you met the --

11 A. The side of the building.

12 Q. So --

13 A. I went back, turn around. He was in
14 front, turn around.

15 Q. Okay.

16 A. Yeah.

17 Q. And you say that he had the cash
18 register or cash drawer under his arm?

19 A. Yes. He came like this.

20 Q. Okay. And you say at that time there
21 was nothing over his face?

22 A. No.

23 Q. And so when you were coming around, you
24 ended up, though, coming down the front of the
25 strip mall back into your restaurant?

1 A. Yes.

2 Q. And in that strip mall at the time,
3 there's an antique store? Do you remember there
4 was an antique store?

5 A. Antique store, yes.

6 Q. And so when you came running back into
7 the store, you never saw your cashbox sitting on
8 the sidewalk?

9 A. No.

10 MS.: PROCTOR: Court's
11 indulgence.

12 THE COURT: Uh-huh.

13 BY MS. PROCTOR:

14 Q. So as I said, as you came running back
15 into the store, you never saw the cashbox in front
16 of an antique store -- the antique store?

17 A. No.

18 MS. PROCTOR: I have no further
19 questions.

20 THE COURT: Any redirect?

21 MR. LIETZOW: Nothing further from this
22 witness.

23 THE COURT: Any objection to this
24 witness being excused, from the State?

25 MR. LIETZOW: No.

1 THE COURT: From the defense?

2 MS. PROCTOR: No, Your Honor.

3 THE COURT: Sir, you're excused.

4 THE WITNESS: Thank you.

5 THE COURT: You're welcome.

6 Call your next witness.

7 MR. LEWIS: The State calls Sean

8 Perkins.

9 SEAN PERKINS,

10 being first duly sworn, testified as follows:

11 THE CLERK: Please be seated. Once
12 seated, please state your first and last name and
13 spell your last name loudly and clearly into the
14 record.

15 THE WITNESS: Afternoon, Your Honor.

16 My name is Sean Perkins, P-E-R-K-I-N-S.

17 THE COURT: You may proceed.

18 DIRECT EXAMINATION

19 BY MR. LEWIS:

20 Q. Morning, Mr. Perkins.

21 A. Morning.

22 Q. What is your occupation?

23 A. I'm a patrolman first class with the
24 City of North Charleston Police Department.

25 Q. And how long have you been employed

1 with North Charleston Police Department?

2 A. I've been a police officer for almost
3 15 years, five-and-a-half with the City of North
4 Charleston.

5 Q. What is your title?

6 A. Patrolman, first class.

7 Q. Would you explain to the jury what your
8 duties are?

9 A. As a patrolman, first class, I'm a
10 patrolman. We're assigned to patrol a designated
11 city -- designated area within the City of North
12 Charleston. Being a patrolman is kind of an
13 umbrella. We investigate traffic accidents, we
14 serve arrest warrants, we assist other agencies
15 within our jurisdiction, whether it be a medical
16 cause, fire department, Charleston County Sheriff's
17 Office or any other agency, and we also investigate
18 criminal -- illegal criminal activity.

19 Q. And let's get to why we are here.
20 Officer Perkins, on October 22, 2012, were you
21 working?

22 A. I was, yes.

23 Q. Were you on patrol?

24 A. Yes, sir, I was.

25 Q. Okay. Were you involved with the

1 Kendall Tyus case that day?

2 A. Yes, I was.

3 Q. Okay. And how did you get brought into
4 this case?

5 A. At approximately 7:27 hours, we were
6 dispatched to a robbery that just occurred at 5060
7 Dorchester Road, Suite 2A, which was the Under the
8 Sea Restaurant in North Charleston. That call for
9 service was in my assigned zone and I responded to
10 that.

11 Q. And, again, what time did you actually
12 make it to the restaurant?

13 A. I made it there within one minute. So
14 my dispatch was 7:27, and the records show that I
15 arrived at 7:27 as well.

16 Q. So not long at all?

17 A. Not long.

18 Q. When you arrived at the restaurant, was
19 anyone there?

20 A. The two victims, the owners of the
21 restaurant, Mr. and Mrs. Lee.

22 Q. Okay. And did you get a chance to
23 speak with them?

24 A. I did.

25 Q. And what did you learn after you spoke

1 with them?

2 A. I met them at the front door as soon as
3 I got there, made -- basically made sure they were
4 -- they were okay and then requested a quick
5 summary of what took place so I could relay that
6 information that I deemed important to the other
7 officers that were arriving. And I learned they
8 were just robbed at gun point by an unknown
9 subject.

10 Q. Okay. Was there a description of the
11 individual given?

12 A. Yes.

13 Q. And what, briefly, was that?

14 A. I was alerted to the fact that it was a
15 black male who came in brandishing a firearm and
16 ran at one of the victims, who then fled out the
17 back. It was a black male -- I can relate it to
18 the report. It was a black male reported at that
19 point and then we later confirmed it with some
20 video evidence.

21 Q. Okay. And when you were there, were
22 there any suspects in the area?

23 A. No.

24 Q. Okay. Did you make contact with any
25 fellow officers?

1 A. I did. I was the initial officer
2 on-scene and then obviously other officers would
3 arrive, a backup officer. And then over the radio,
4 you know, our sergeants basically want to know
5 what's going on because they're required to arrive
6 at certain scenes, which this would be one of them.

7 I relayed the information of what we
8 had so that then that sergeant could then make his
9 proper notifications that are required by him, such
10 as contacting other detectives, crime scene, K9, if
11 needed, or other agents.

12 Q. So crime scene, they did arrive?

13 A. Yes.

14 Q. And did you relay anything to them?

15 A. I did, just a brief description
16 initially of what took place.

17 Q. Officer Perkins, were you -- was
18 anything else brought to your attention while you
19 were at the restaurant?

20 A. Yes. Looking at the front of the
21 business, to the left of that, within 100 to
22 125 feet of the front door, there was a money tray
23 that came from the register and a handkerchief that
24 was found just along the front side of the
25 building.

1 I went over there and verified that
2 that item was indeed what was described and I stood
3 by that item until the crime scene could come over
4 and process it and collect it.

5 Q. So you didn't pick it up or anything?

6 A. No.

7 MR. LEWIS: Okay. May I approach the
8 witness, Your Honor?

9 THE COURT: You may.

10 BY MR. LEWIS:

11 Q. Officer Perkins, I'm handing to you
12 what has been introduced as -- in evidence as
13 State's 6, 7, 8, and 9. Would you take a look at
14 these?

15 A. Yes.

16 Q. Do you recognize those?

17 A. I do.

18 Q. And what are these photos of?

19 A. Two of the photos are the front of the
20 business in question, the Under the Sea Restaurant;
21 the other two photos were of the black cash
22 register tray that I just described laying to the
23 left of that business.

24 Q. And these photos, they accurately show
25 -- depict that day, October 22nd, 2012?

1 A. Yes, sir, they do.

2 MR. LEWIS: Permission to publish to
3 the jury?

4 THE COURT: Yes.

5 BY MR. LEWIS:

6 Q. This is State's Exhibit Number 6.

7 A. I'm sorry?

8 Q. Could you just explain to the jury what
9 we're looking at?

10 A. Yes. That's the front of the business
11 there, Under the Sea, and just below that sign is
12 the front door leading into the business.

13 Q. Okay. State's Exhibit Number 7?

14 A. That would be the two front doors that
15 I just described, and it's just kind of like a
16 shotgun style restaurant. You're looking into the
17 restaurant directly at the counter of the business
18 in the background.

19 Q. State's Exhibit Number 8?

20 A. Down on the ground by the yellow brick,
21 you will see the money tray or cash register tray
22 on the ground that I testified to that was just to
23 the left of the front doors that I just described.

24 Q. The same money tray that you did not
25 pick up right there?

1 A. Never touched it.

2 Q. And then State's Exhibit Number 9?

3 A. Just a closer shot taken of the same
4 money tray to the left of the business.

5 MR. LEWIS: Beg the Court's indulgence,
6 Your Honor.

7 BY MR. LEWIS:

8 Q. Officer Perkins, did you have any
9 further involvement in this case?

10 A. No, sir.

11 MR. LEWIS: Thank you. Please answer
12 any questions for the defense, Officer Perkins.

13 THE COURT: You may proceed.

14 CROSS-EXAMINATION

15 BY MS. PROCTOR:

16 Q. Good morning.

17 A. Morning. How are you?

18 Q. Fine. Now, you arrived on the scene
19 shortly after you received the dispatch call, like
20 a couple of minutes?

21 A. I was -- according to the records, it's
22 less than one minute.

23 Q. And you were the first officer to
24 arrive on the scene?

25 A. Yes, ma'am.

1 Q. And now, are you the case agent in this
2 case?

3 A. I'm just the initial responding officer
4 that does the initial report and then it's handed
5 over to detectives. They would be considered the
6 case agent.

7 Q. And you wrote a police -- your police
8 report in this case, correct?

9 A. Yes, ma'am.

10 Q. And you met Hannah and Sunny Lee at
11 that time?

12 A. Yes, ma'am.

13 Q. And from speaking with them, you
14 learned that a black male ran into the restaurant,
15 jumped over the counter, grabbed the cash tray, and
16 ran out?

17 A. Yes.

18 Q. And they also told you that, as this
19 was happening, they both ran out the back door?

20 A. Yes.

21 Q. And when they ran out the back door,
22 they took a left and they were coming around the
23 building, correct?

24 A. Yes.

25 Q. And when you spoke with them, they told

1 you that they happened to have a surveillance
2 video?

3 A. Yes, ma'am.

4 Q. And you watched the video?

5 A. Yes, ma'am.

6 Q. And in your report you stated the
7 subject was a black male, 5, 8 to 6, 2, wearing a
8 black knit cap, a white towel or T-shirt around his
9 face, dark-colored winter jacket with a hood, two
10 white stripes on each arm, dark pants, and white
11 sneakers?

12 A. Yes, ma'am.

13 Q. And the video also showed that the
14 robber leaned over the counter, reached in and
15 lifted out the money drawer?

16 A. Yes, ma'am.

17 Q. Now, at that time, crime scene came and
18 crime scene processed everything?

19 A. Yes, ma'am.

20 Q. And also I think Officer Wallace came?

21 A. Yes, sir.

22 Q. And Sergeant Bailey came with the K9 --
23 somebody came with the K9 unit. Was that Sergeant
24 Bailey?

25 A. Sergeant Bailey arrived by himself and

1 then the K9 arrived sometime --

2 Q. The K9 arrived and Detective Aiken
3 arrived and then Wallace and Evans?

4 A. Yes, ma'am.

5 Q. Now, you walked in front of the plaza
6 and -- and that's where you found the cashbox,
7 correct?

8 A. Yes.

9 Q. And that cashbox was just a few doors
10 down from the restaurant?

11 A. Yes.

12 Q. And the victims stated that -- that
13 they came running and they were running down this
14 way back to the restaurant where they -- they had
15 to run -- they said they came around the corner and
16 they ran back into the restaurant?

17 MR. LEWIS: Objection, Your Honor.

18 THE COURT: Basis?

19 MR. LEWIS: Hearsay.

20 THE COURT: You can only ask him what
21 he heard or perceived, unless it comes under an
22 exception.

23 BY MS. PROCTOR:

24 Q. Is that what you learned from speaking
25 with the victims during your investigation, that

1 they ran around the building?

2 A. They ran around the building, but it
3 was not the front. It was the side of the
4 building.

5 Q. They ran out towards the back of the
6 building --

7 A. Right.

8 Q. -- but they came back around and ran
9 back into the front door?

10 A. I didn't learn that. They encountered
11 the suspect that they described on the back corner,
12 which would have been opposite of that. When they
13 ran out the back, they ran actually in the same
14 direction and they met. I can't say whether they
15 came back to the front or they came back in the
16 back. I didn't ask that.

17 Q. And you never found a white T-shirt or
18 white towel or anything while you were out
19 searching in the front, correct?

20 A. No.

21 Q. And you said that you found a blue
22 kerchief or handkerchief out front, correct?

23 A. It was near the --

24 Q. Near the cashbox?

25 A. Yes, ma'am.

1 Q. And you took that blue handkerchief
2 into evidence?

3 A. I did not, no.

4 Q. You don't know if somebody took it?

5 A. Crime scene processes everything.

6 Q. And while you were just looking out in
7 the front, you never saw a black knit hat or
8 anything, it was just the kerchief -- the blue
9 kerchief and the cashbox?

10 A. Yes, ma'am.

11 MS. PROCTOR: Beg the Court's
12 indulgence.

13 THE COURT: Yes, ma'am.

14 MS. PROCTOR: No further questions.

15 THE COURT: Any redirect?

16 MR. LEWIS: No redirect.

17 THE COURT: Any objection to the
18 witness being excused, from the State?

19 MR. Lewis: None from the State.

20 THE COURT: From the defense?

21 MS. PROCTOR: No, Your Honor.

22 THE COURT: Sir, you're excused.

23 THE WITNESS: Thank you, Your Honor.

24 MR. LIETZOW: Your Honor, may we
25 approach?

1 THE COURT: Yes.

2 (Bench conference.)

3 MR. LIETZOW: My next witness is very
4 lengthy. I was wondering if we could take a
5 recess.

6 THE COURT: How long do you expect your
7 witness to be?

8 MR. LIETZOW: Possibly up to two hours.

9 MS. PROCTOR: Direct and cross?

10 THE COURT: Okay. Please stand back.

11 (End of bench conference.)

12 THE COURT: Madame Forelady, ladies and
13 gentlemen, we are going to take advantage of this
14 break in testimony to take a brief rest room break.
15 During the break, please do not discuss the case,
16 and leave your notepads in your seats.

17 (Jury out, 11:08 a.m.)

18 THE COURT: You may be seated. We'll
19 be at ease about ten minutes.

20 MR. LIETZOW: Thank you, Judge.

21 (A recess transpired.)

22 THE COURT: State ready to
23 proceed?

24 MR. LIETZOW: Yes.

25 THE COURT: Defense ready to proceed?

1 MS. PROCTOR: Yes, Your Honor.

2 THE COURT: Who is the next witness?

3 MR. LIETZOW: Crime scene tech

4 Kubicsko.

5 THE COURT: Is she in the courtroom?

6 MR. LIETZOW: Yes, ma'am.

7 THE COURT: Are you ready, ma'am?

8 THE WITNESS: Yes.

9 (Jury in, 11:31 a.m.)

10 THE COURT: Ladies and gentlemen, I
11 hope you enjoyed your break. We will now resume
12 testimony.

13 MR. LIETZOW: The state calls Lisa
14 Kubicsko..

15 LISA KUBICKSKO,
16 being first duly sworn, testified as follows:

17 THE CLERK: Please be seated. Once
18 seated, please state your first and last name and
19 spell the last name loudly and clearly into the
20 microphone.

21 THE WITNESS: Lisa K-U-B-I-C-S-K-O.

22 THE COURT: You may proceed.

23 MR. LIETZOW: Thank you, Judge.

24 DIRECT EXAMINATION

25 BY MR. LIETZOW:

1 Q. Morning, Ms. Kubicko.

2 A. Morning.

3 Q. Please tell the jury where you're
4 employed.

5 A. North Charleston Police Department as a
6 civilian crime scene tech.

7 Q. How long have you been with the North
8 Charleston Police Department?

9 A. I've been with them a little over
10 four-and-a-half-years.

11 Q. And is that -- have you been with North
12 Charleston the entire duration of your career in
13 law enforcement?

14 A. Yes, and as a crime scene technician
15 the entire time.

16 Q. What are your duties as a civilian in
17 the North Charleston Police Department?

18 A. My duties are to respond to a crime
19 scene. That could be anything from a B and E to --
20 a break-in to a car, a residence, business,
21 burglary, robbery, any kind of death investigation,
22 shooting, homicide, suicide.

23 I attend and I document the scene by
24 taking photographs, taking notes. I then locate
25 and collect evidence, collect them from the scene,

1 package them, prepare any kind of paperwork for
2 further analysis.

3 Q. You say you are a crime scene
4 technician. Are you also a latent examiner?

5 A. Yes.

6 Q. And how long have you worked as a
7 latent examiner?

8 A. Probably a little over four years.

9 Q. So you have a dual capacity in the
10 North Charleston Police Department?

11 A. Yes.

12 Q. Tell the jury a little bit about your
13 education.

14 A. I have a Bachelor's in forensic
15 investigative science from West Virginia University
16 and I'm also currently completing my Master's in
17 criminal justice from Charleston Southern
18 University.

19 Q. Have you received specialized
20 on-the-job training for crime scene analysis and
21 latent examinations?

22 A. Yes. I've attended several courses for
23 crime scene, whether it be shooting reconstruction,
24 child death investigations, forensic mapping. And
25 for latent work, I have attended a complex latent

1 course from Ron Smith and Associates.

2 Q. Have you received any certifications
3 related to your job duties?

4 A. Yes. I have gotten a certificate for
5 demonstrating proficiency in operating the
6 automatic fingerprint identification system from
7 SLED.

8 Q. Are you a member of any professional
9 organizations?

10 A. Yes. I'm a member of the International
11 Association for Identification.

12 Q. Do you attend continuing education
13 seminars so that you can stay up to date on the
14 latest methodologies and the latest procedures in
15 conducting your job?

16 A. Yes, I have attended several.

17 Q. Approximately, how many crime scenes
18 would you estimate that you've worked at as a crime
19 scene analyst?

20 A. At least over a hundred.

21 Q. And approximately how many fingerprints
22 or palm prints have you examined?

23 A. Thousands.

24 Q. Have you ever identified somebody
25 through their fingerprint that was found at a crime

1 scene?

2 A. Yes.

3 Q. How many times have you done that?

4 A. Over a hundred times.

5 Q. Approximately, how many crime scenes
6 have you been to?

7 A. Over a hundred. At least a hundred,
8 probably more.

9 Q. Have you ever testified as an expert in
10 state court before?

11 A. Yes.

12 MR. LIETZOW: Your Honor, at this time
13 I would move to enter Ms. Kubicko as an expert in
14 crime scene analysis and latent fingerprint
15 examination.

16 THE COURT: Any objection?

17 MS. VAN PALA: Objection under 701 and
18 702.

19 THE COURT: Madame Forelady, ladies and
20 gentlemen, I have a matter of law briefly that I
21 need to take up with the attorneys. During the
22 break, please do not discuss the case and please
23 leave your notepads in your seats.

24 (Jury out, 11:37 a.m.)

25 THE COURT: You may be seated.

1 As I understand it, the State is seeking to admit
2 her as an expert in the area of crime scene
3 analysis and latent fingerprint examination?

4 MR. LIETZOW: Yes, ma'am.

5 THE COURT: Why is that necessary? Is
6 she going to be examining prints --

7 MR. LIETZOW: Yes, ma'am.

8 THE COURT: -- or interpreting any
9 prints?

10 MR. LIETZOW: Yes, ma'am.

11 THE COURT: So that was not the scope
12 of what she was questioned about yesterday, which
13 was the collection of prints and running them
14 through AFIS?

15 MR. LIETZOW: That's correct, yes,
16 ma'am.

17 THE COURT: And so what part of this
18 case would necessitate her evaluating prints?

19 MR. LIETZOW: Just a quick factual
20 procedure, Your Honor. Ms. Kubicko responds to
21 the crime scene and takes the latent lifts, as you
22 heard yesterday. She then goes back and does the
23 AFIS hit, which gets probable cause for a warrant.
24 Approximately two weeks after the incident occurs,
25 she conducts a full-blown examination on the

1 remainder of the prints that were found at the
2 scene and --

3 THE COURT: You're talking about these
4 remaining prints she would be evaluating?

5 MR. LIETZOW: Yes, ma'am. There is an
6 additional five prints that she positively matches
7 to the Defendant that were taken from the crime
8 scene in addition to the one that you heard about
9 yesterday. There were also several more prints
10 that she either ruled were -- excluded the
11 Defendant or were not conclusive or not enough
12 information to identify said print.

13 And then, Your Honor, just so that
14 you're aware, she then responds to the Defendant's
15 house as part of the search warrant team and
16 collects all the evidence pursuant to the search
17 warrant, which is why she's a lengthy witness.

18 THE COURT: How many times -- you said
19 she's testified as an expert before. How many
20 times and in what courts and in what capacity?

21 BY MR. LIETZOW:

22 Q. How many times have you testified as an
23 expert in crime scene analysis?

24 A. I believe three times.

25 Q. Was that in general sessions, state

1 court?

2 A. Yes.

3 Q. How many times have you testified as a
4 latent print examiner?

5 A. This would be my first.

6 MR. LIETZOW: Would Your Honor like to
7 hear argument on the matter?

8 THE COURT: I need to hear the full
9 extent of her expertise -- or her education,
10 training, and experience in the area of latent
11 print examination.

12 BY MR. LIETZOW:

13 Q. Ms. Kubicko, let's zero in on exactly
14 all the training and education you have in regards
15 to latent fingerprint examination.

16 A. Okay. I attended West Virginia
17 University. As part of that degree that I
18 acquired, you begin -- the first two years are the
19 basic coursework and the last two years are
20 specialized in crime scene, whether it be
21 bloodstain, firearms.

22 And there was two courses on
23 fingerprints, which were both taught by FBI
24 employees. So that gives you a certificate of
25 30 hours for each course -- for completing that

1 course.

2 After graduating, I got employed with
3 North Charleston as a crime scene technician and,
4 also, along with that, to be working underneath the
5 current latent examiner, to begin working with them
6 on how North Charleston operates doing their latent
7 examinations, and just building that experience in
8 working with fingerprints. Then, I started there
9 in December, and in June, I went to SLED and took
10 their test, which I need to demonstrate to them
11 that I can enter a fingerprint into AFIS, do the
12 correct comparisons on the system, and make the
13 right determinations.

14 I also had to submit a fingerprint into
15 the system through AFIS and show proficiency
16 through that. You also have to do fingerprints and
17 palm print comparisons to known standards and
18 demonstrate to them that I am proficient in doing
19 that.

20 Q. And that's what you did in this case,
21 as far as --

22 A. Correct. And I received that
23 certificate. And then, at that point, through
24 North Charleston I began working my own cases,
25 running them through AFIS, doing my own manual

1 comparisons for casework. And then in -- let me
2 get the right month here -- December of 2012 is
3 when I took the complex latent print coursework
4 through Ron Smith and Associates, who is a known
5 group that puts on training for latent examiners.

6 Q. Is that a nationally recognized group
7 that trains in --

8 A. I believe it's national, yes. They put
9 on coursework all year long.

10 Q. Do they conduct themselves by a
11 standard that's regularly accepted in the latent
12 examination community?

13 A. Yes.

14 Q. Continue, please.

15 MR. LIETZOW: Your Honor, at this point
16 we would move that --

17 THE COURT: Was that all of her
18 casework, all of the CLEs that she's done in latent
19 prints?

20 BY MR. LIETZOW:

21 Q. Is there any continuing education
22 seminars that you've attended for latent
23 examination?

24 A. Yes. I have attended -- the system
25 that we use is made by Stat Room and Morfo Trak.

1 Each year they put on a continuing education
2 conference, usually in California. I have attended
3 two of those and there they go over updates with
4 the system, future technology that they plan to
5 use.

6 They go over the best practices for
7 entering fingerprints and palm prints, and I
8 attended some of the actual courses that they put
9 on that would give you a certificate for those
10 classes.

11 Q. Have you ever helped train anybody
12 younger than you or less experienced than you at
13 the North Charleston Police Department?

14 A. Younger, no, but, yes, I have trained
15 people in latent work. I'm actually in the process
16 of training two people right now; one is a
17 certified officer and one is a civilian crime scene
18 tech.

19 Q. Have you published any articles in
20 regards to latent identification work?

21 A. No.

22 MR. LIETZOW: Anything else you would
23 add, Ms. Kubicko?

24 Any further questions from the Court,
25 Your Honor?

1 THE COURT: What was the name of the
2 professional organization you said the name of?

3 THE WITNESS: Ron Smith and Associates.
4 That's who I received the complex latent print
5 certificate from.

6 BY MR. LIETZOW:

7 Q. Are you a member of the International
8 Association of Identification?

9 A. Yes.

10 Q. Is that in addition to the Ron Smith?

11 A. Well, Ron Smith and Associates, that's
12 the group that puts on the training courses.

13 Q. So the International Association of
14 Identification is an organization that you're a
15 member of.

16 A. Yes.

17 Q. Tell us about that organization and
18 what that entails.

19 A. They are actually the governing
20 association that has been the organization from the
21 beginning of fingerprints, the IAI. I couldn't
22 tell you what year it began, but that's always been
23 the governing body pretty much for discussing the
24 standards and procedures for that.

25 Q. And you are a member of that and you

1 adhere to that and follow their principles, their
2 advice on conducting latent examinations?

3 A. Yes.

4 THE COURT: What is the basis of the
5 objection?

6 MS. VAN PALA: Thank you, Your Honor.
7 Ms. Kubicko has testified that she has attended
8 latent coursework seminars. She has not testified
9 to how many and the dates of attendance.

10 THE COURT: I think she just did,
11 didn't she?

12 MS. VAN PALA: She testified to her
13 complex coursework through the Ron Smith and
14 Associates program, which was in December of 2012,
15 which was after the incident in this case and after
16 she reviewed the prints in this case. She said
17 that she is training two people now, but she has
18 not testified as to the people that she had trained
19 around the time of this incident and when she was
20 making her reports in October of 2012.

21 She testified that she attended a
22 seminar based on the -- from the -- excuse me, on
23 the computer system, two CLEs, update on the
24 technology; however -- she testified that she
25 learned about best practices with the technology;

1 she did not testify that it was an educational or
2 skill-building seminar.

3 She also testified without certainty as
4 to how many prints she has examined. She has not
5 testified to how many prints she has examined with
6 certainty and with accuracy. She has not testified
7 to any quality control procedures that she uses to
8 ensure reliability. She testified --

9 THE COURT: That doesn't go to her
10 being an expert. That goes to procedures and that
11 goes to the standards. The fingerprint standard is
12 nationwide. There is no variance in that. They
13 always use the same standard. I don't think
14 there's any question about the science, so that's a
15 nonissue as far as I'm concerned, unless she's
16 testifying that she's using a different standard.
17 They all use the same standard, and to some extent,
18 it's objective.

19 They can't tell you with 100 percent
20 certainty about any print. It all depends on
21 ridges and on the other stuff that they have to
22 rely on. So quality control has no bearing on
23 whether she is an expert or not.

24 MS. VAN PALA: Yes, Your Honor, I was
25 arguing the Jones factors. After her coursework at

1 West Virginia, she said that she only took two
2 classes on prints, 30 hours per course, immediately
3 then went to North Charleston and basically did a
4 self -- a self-taught program by her own work only.

5 THE COURT: That's what SLED does.

6 What's the difference?

7 MS. VAN PALA: It's through North
8 Charleston.

9 THE COURT: It doesn't matter. They
10 all do the same thing. City of Charleston does the
11 same thing. It doesn't mean that she's not an
12 expert. I am concerned -- and she has a degree,
13 which makes her a whole lot different than the
14 other folks that have done it. She has a degree
15 that's focused on that particular area and she's
16 testified that she has a certification in that
17 particular matter.

18 I don't know that it really matters
19 that she went to the Ron Smith course and got her
20 certification after this event. She already had
21 certification through the South Carolina Law
22 Enforcement Division for purposes of the
23 fingerprint analysis.

24 My concern, however, is, does she
25 really need to be qualified as an expert to testify

1 as to what she does in the course of her
2 profession?

3 MR. LIETZOW: Absolutely, Your Honor.

4 THE COURT: Well, yeah, it does take
5 specialized training.

6 MR. LIETZOW: I think she would need to
7 opine that the fingerprints found on the cash
8 register tray at the scene are those of Kendall
9 Jerome Tyus, Junior, and that would require an
10 expert analysis.

11 And if I may, just for clarity of the
12 record purposes, I believe State V. Myers sets out
13 the qualifications of an expert witness. That's
14 391 SC2D 551, which is a South Carolina Supreme
15 Court case, 1990. The qualification of an expert
16 witness is left to the sound discretion of the
17 trial Court, whose exercise as such will not be
18 disturbed on appeal, in the absence of an abuse of
19 that discretion.

20 They further clarify that there is no
21 abusive discretion as long as the witness has
22 subject matter of her testimony as would enable her
23 to give guidance and assistance to the jury in
24 resolving a factual issue which is beyond the scope
25 of the jury's good judgement and common knowledge.

1 Specifically, and most importantly, the test for
2 qualifications of an expert is a relative one that
3 is dependent upon the particular witness's
4 reference to the subject. For a Court to find the
5 witness competent to testify as an expert, the
6 witness must be better qualified than the
7 factfinder to form an opinion on that particular
8 subject of the testimony.

9 Your Honor, in this case Ms. Kubicko
10 is clearly more qualified on fingerprints and
11 latent examination than the jury. And I believe
12 her testimony and her education would dictate that
13 she is in a position to give that guidance to the
14 jury. And as far as her never being qualified as
15 an expert before, there's a first time for
16 everything, Your Honor. And I clearly believe and
17 -- believe her experience and education and
18 background would show that right now is that
19 perfect opportunity.

20 Thank you, Your Honor.

21 THE COURT: I need to know the dates
22 she got her certifications and her degrees.

23 BY MR. LIETZOW:

24 Q. Ms. Kubicko, please address that with
25 the Court.

1 A. Okay. I graduated from West Virginia
2 University in 2010, May of 2010. I also worked,
3 while I was attending West Virginia, for an FBI
4 research project and for that I was responsible for
5 obtaining latent prints, ten-print cards, palm
6 print cards and major case prints from test
7 subjects.

8 Q. What dates were those?

9 A. The employment was from August 8th to
10 December 8th -- I'm sorry, August '08 to
11 December '08.

12 Q. And Ron Smith, what year was that a
13 part of, and what year did you become a member of
14 the IAI, whatever you called it earlier?

15 A. The IAI was 2010.

16 Q. And you're still a member in good
17 standing?

18 A. Yes.

19 Q. So from 2010 to 2015?

20 A. At least to 2014. I'm not sure if
21 we've paid our dues for 2015 yet.

22 Q. Okay.

23 A. Let me start, April 30th of 2012, I
24 attended the continuing education course for the
25 Morfo Track 2012 Users Conference. There I

1 received a certificate of completion and
2 certificate of training. And that was for
3 fingerprints, latents plotting and searching Morfo
4 Biz, ten-print quality control and verification,
5 palm print quality control and increasing palm
6 print kit, Photo Shop for latents, advance latent
7 techniques, and latent verification and charting.

8 I did attend the 2012 spring Continuing
9 Education for Forensic Professionals program held
10 by the Forensic Science Initiative of West Virginia
11 University. Those courses did not have to do so
12 much with latent work, but there was a Courtroom
13 Presentation of Scientific Evidence that I did
14 take. Ron Smith and Associates' Complex Latent
15 Print Course, that was in December 10 of 2012 to
16 December 14, 2012. This was a 40-hour course and I
17 received a certificate of attendance.

18 MR. LIETZOW: Would it be helpful for
19 Your Honor to make her CV a Court Exhibit?

20 THE COURT: It would be, but I still
21 want her to tell me.

22 By MR. LIETZOW:

23 Q. Okay. Continue, Ms. Kubicko.

24 THE COURT: When did you receive your
25 certifications from the South Carolina Law

1 Enforcement Division?

2 THE WITNESS: That was June 9, 2011.

3 And the way they word it is, Certificate for
4 Successfully Demonstrating Competency in Automated
5 Fingerprint Identification Systems Operations. And
6 part of that certificate is being able to
7 demonstrate also doing the manual comparisons that
8 are necessary to operate the system and do
9 independently.

10 THE COURT: How many fingerprints have
11 you evaluated? How many have you examined for
12 comparison purposes?

13 MR. LIETZOW: Did you testify that you
14 did thousands earlier?

15 THE WITNESS: Yes. We keep monthly
16 stats. I couldn't pull that off the top of my head
17 right now, but we do keep monthly stats on latent
18 work, and for a month -- I'm usually over at least
19 200 a month.

20 MR. LIETZOW: In the time you've been
21 with North Charleston, you're confident it's at
22 least four digits now?

23 THE WITNESS: Yes.

24 MR. LIETZOW: And in that amount of
25 time, have you ever miscorrectly identified

1 somebody via a fingerprint?

2 THE WITNESS: No.

3 THE COURT: What type of quality
4 control do you have in your department regarding
5 the latent print evaluation process?

6 THE WITNESS: In 2012, we used a blind
7 verification process, whereas all my work would be
8 given to another latent examiner who did not know
9 my results, and they would blindly do their own
10 examination of those prints. And then they would
11 verify -- sign off, verifying that my report was
12 correct and my findings were correct.

13 THE COURT: Was that done with
14 Mr. Tyus' prints?

15 THE WITNESS: Yes.

16 MR. LIETZOW: Your Honor, may I bring
17 something to your attention? Pursuant to State v.
18 Martin, which is 706 SC2d, 40, which is South
19 Carolina Court of Appeals 2001; if there is a
20 defect in the amount or quality of educational
21 experience, then that fact goes to the weight of
22 the expert's testimony and not its admissibility.

23 So if Your Honor is inclined to believe
24 that Ms. Kubicko isn't educated enough, I believe
25 that would be an issue for the jury to weigh,

1 whether or not they want to trust her testimony or
2 not, whether it's admissible.

3 THE COURT: What is the basis of the
4 Defendant's objection to Ms. Kubicko's testimony?

5 MS. VAN PALA: Ms. Kubicko does not
6 satisfy the factors that this Court has already
7 referenced, specifically from State v. Jones.

8 THE COURT: State v. Jones is not the
9 issue here. There is no issue here regarding the
10 reliability of the science, correct? You're not in
11 good faith arguing there is some question regarding
12 the reliability of the fingerprint analysis?

13 MS. VAN PALA: No. But she does not
14 meet the standard --

15 THE COURT: You're arguing apples and
16 oranges. Jones only applies when there is some
17 level of science that is seeking to be sought that
18 is not conclusive, that has not been subject to
19 peer review, that is not reliable. That's when you
20 apply the Jones factors. You're talking about her
21 education, training and experience, which you're
22 arguing that she's not qualified because you don't
23 think she possesses sufficient education, training
24 and experience; totally different experience than
25 Jones.

1 How fingerprints are examined, how they
2 are evaluated, how latent prints are taken, there
3 is no mystery to that science. It's the same
4 science employed across the board by every latent
5 print examiner in this state and every other state,
6 as far as I know, although I've never held court in
7 any other state so I don't know. But I've heard
8 more latent print examinations than I care to
9 recall and they all employ the same science,
10 whether they're from the City of Charleston,
11 whether it's North Charleston, whether they're from
12 SLED.

13 I need you to be clear for the record,
14 are you arguing that the science that she's
15 employed is unreliable?

16 MS. VAN PALA: That was argued in our
17 motion in limine, which the Court has ruled upon.
18 Now, the Court is correct, we are arguing that,
19 based on her education, training, and experience,
20 she should not be qualified --

21 THE COURT: It was my opinion it didn't
22 have any merit in the first argument, because -- I
23 still need clarity. Are you saying that the
24 science she employed was unreliable, in good faith?

25 MS. VAN PALA: Not at this moment.

1 That was the subject of the motion.

2 THE COURT: You're not answering my
3 question, and it is a very direct one and it is not
4 unclear.

5 MS. VAN PALA: Your Honor, I would not
6 be asking her --

7 THE COURT: My question is very direct
8 and it is one that requires an answer. Whether
9 then or now, are you saying that the science that
10 is employed in examining latent fingerprints is
11 unreliable?

12 MS. VAN PALA: I will not be
13 questioning her on that topic.

14 THE COURT: Okay. So, now, the real
15 crux or gravamen of your argument is that she just
16 isn't qualified?

17 MS. VAN PALA: Yes, Your Honor.

18 THE COURT: And so what is the basis of
19 that argument?

20 MS. VAN PALA: Based on my argument
21 from before and also my -- and also the fact that
22 when she graduated from West Virginia, she had a
23 degree in CSI work, crime scene work, or whatever
24 the name was, which included two classes on latent
25 prints. She did not get a degree in latent prints.

1 I just wanted to make that clear. She graduated in
2 May 2010, this incident occurred on October 22nd of
3 2012. She was certified by SLED on -- excuse me.

4 THE COURT: 6/9/2011.

5 MS. VAN PALA: Thank you, Your Honor.

6 And this incident occurred in October of 2012 so
7 that was -- she was barely certified for a year at
8 that time. She also testified to many CLEs,
9 courses, training experiences and other accolades
10 she may have received after her analysis in this
11 case, which we argue isn't relevant to her
12 qualifications at the time that she did her report
13 which she will be testifying to today.

14 THE COURT: Anything further?

15 MS. VAN PALA: Yes, Your Honor, I
16 apologize. Thank you. She testified that she has
17 reviewed -- or, excuse me, examined thousands of
18 prints; however, she has not testified to how many
19 of those thousands -- through the peer review
20 process and this blind verification process --

21 THE COURT: They were all subject to
22 that. That was the question I asked her. I asked
23 her how many were subject to peer review, and she
24 said all, although that isn't really a relevant
25 factor. I was just curious.

1 And on his examination of the witness,
2 he asked if any of them had ever been wrong, and
3 her answer was no. So she did answer that
4 question.

5 Now, if you want to query her about
6 that, it's open, it's fair game. I told you-all
7 that from the beginning.

8 MS. VAN PALA: Thank you, Your Honor.

9 THE COURT: Anything further?

10 MS. VAN PALA: No, Your Honor.

11 THE COURT: Would the State like to
12 respond?

13 MR. LIETZOW: Just that I would like to
14 bring your attention back to State v. Martin. If
15 there is a defect in the amount or quality of
16 educational experience, then that goes to the
17 weight of the expert's testimony and not its
18 admissibility. Your Honor, you heard that she was
19 qualified by SLED to conduct these examinations.
20 That is the foremost law enforcement agency in the
21 State of South Carolina. It is their job to ensure
22 that the standards are being followed. Obviously,
23 they saw fit to issue her a license at the time
24 they performed this analysis.

25 Furthermore, she has testified that her

1 work in this case was reviewed, so the reliability,
2 although not quite relevant to this case, and the
3 scientific weight, that was obviously satisfied. I
4 think at this point, we're putting the witness on
5 trial and we're losing sight of the fact that she
6 is duly qualified as an expert and should be
7 allowed to testify as such.

8 Thank you.

9 THE COURT: You're welcome.

10 MS. VAN PALA: I apologize, may I have
11 one --

12 THE COURT: Very briefly.

13 MS. VAN PALA: I apologize.

14 THE COURT: I asked you if you had
15 anything further.

16 MS. VAN PALA: Yes, Your Honor. I
17 totally apologize, I forgot to mention this. I did
18 not receive a copy of her CV.

19 THE COURT: You need to give her a copy
20 of her CV -- give them a copy of her CV.

21 MR. LIETZOW: Would Your Honor like to
22 take a recess and I can go make one?

23 THE COURT: Do we have a copier -- do
24 you have an extra copy?

25 THE WITNESS: I have one.

1 THE COURT: How many do you have?

2 THE WITNESS: I have the one.

3 THE COURT: Why don't you send one of
4 the staff to get a copy?

5 MR. LIETZOW: May I approach the
6 witness?

7 THE COURT: You may.

8 Ms. Kubicko, the people who trained
9 you at North Charleston, how long had they been
10 latent print examiners?

11 THE WITNESS: One was Andrew Coker, a
12 certified officer. He's now a sergeant with the
13 department.

14 BY MR. LIETZOW:

15 Q. Has he ever testified as an expert
16 before?

17 A. Yes. I'm not sure how long -- how many
18 years he has, but I know he's very -- he's eligible
19 to retire very soon. He's got to be close to his
20 years.

21 Q. Did Al Hallman --

22 THE COURT: I didn't ask you to
23 comment. I'm questioning the witness.

24 Who else trained you, ma'am?

25 THE WITNESS: Al Hallman.

1 THE COURT: And how long has he been
2 doing this?

3 THE WITNESS: He wasn't employed with
4 the crime scene unit at this time. He was in -- on
5 the street.

6 THE COURT: When you came on the job,
7 who trained you?

8 THE WITNESS: Andrew Coker.

9 THE COURT: How long did he train you?

10 THE WITNESS: He trained me from when I
11 started, which was in December 2010, all the way up
12 until I got the SLED certificate.

13 THE COURT: And what is -- what exactly
14 is encompassed in him training you?

15 THE WITNESS: Basically, working
16 hand-in-hand, him showing me how to operate the
17 system; how North Charleston does their latent
18 work; how North Charleston writes their latent
19 reports, the paperwork that they use that goes --
20 associated with those examinations.

21 For example, the AFIS worksheet that
22 they use, the verification sheet that they use, and
23 just the procedures that -- that they use to go
24 about examining the prints and writing a report and
25 the verification process they use.

1 THE COURT: And who would have done the
2 peer review of your work at that time, in 2012?

3 THE WITNESS: Coker. If I may, Your
4 Honor, Andrew Coker has also been IAI certified for
5 latent examination.

6 THE COURT: And the IAI certification,
7 what does that entail for you to receive that
8 certification?

9 THE WITNESS: I don't know the
10 requirements of that right now.

11 THE COURT: Is that the international
12 association that you've been referring to?

13 THE WITNESS: Yes, the International
14 Association --

15 THE COURT: How did you become a member
16 of that?

17 THE WITNESS: I became a member first
18 from being a student, and then now, being with
19 North Charleston, I'm an associate member, which
20 basically means that I pay the dues to be a member
21 and follow with their publications --

22 THE COURT: And follow their standards?

23 THE WITNESS: -- and whatnot.

24 THE COURT: I'm sorry, repeat that.

25 THE WITNESS: And then I follow their

1 publications and their best practices.

2 THE COURT: And so you don't know what
3 is required to become certified through that
4 organization; is that what you said?

5 THE WITNESS: No, I do not.

6 THE COURT: Is that a requirement for
7 your job position?

8 THE WITNESS: No.

9 MR. LIETZOW: May I approach the
10 witness, Your Honor?

11 THE COURT: Uh-huh.

12 The Defendant in this case argues that
13 the witness did not possess the knowledge, skill,
14 training, experience, and education to be able to
15 provide opinion testimony. The Court disagrees
16 with that analysis and overrules the objection.

17 The witness has testified regarding her
18 education, training, and experience. Clearly,
19 pursuant to Rule 702, the scientific, technical and
20 -- I don't know whether latent fingerprint
21 testimony would fall within scientific or
22 technical, but it certainly would fall within some
23 hybrid, and it certainly requires specialized
24 knowledge.

25 That knowledge certainly will assist

1 the trier of fact to understand the evidence or to
2 determine the facts at issue; determining prints,
3 identifying prints or evaluating prints is beyond a
4 laypersons's knowledge, beyond the skill level of
5 the jury

6 The witness has testified regarding her
7 knowledge, skill, and experience, training and/or
8 education. And the case law is very clear
9 regarding this issue: Whether a person is
10 qualified as an expert is within the sound
11 discretion of the Court. But the Court is still
12 required in its gatekeeper function to make sure
13 that the person possesses the requisite skill and
14 knowledge that testifies as an expert; however,
15 knowing that, expert testimony requires no greater
16 weight than any other witness.

17 The jury can disregard it if it feels
18 it's outweighed by the evidence, they can disregard
19 it if they feel it is not supported by sufficient
20 education, training, and experience, or it can just
21 disregard it if it feels it's against the weight of
22 the evidence that's been presented in the case.
23 Again, in sum, an expert's testimony does not
24 require any greater weight than any other witness

25 The objections that have been

1 propounded by the defense goes go to the weight of
2 her testimony and not its admissibility. Clearly,
3 she has acquired by study or practical experience
4 the knowledge of the subject matter of her
5 testimony such that it would enable her to give
6 guidance and assistance to the jury in resolving
7 the factual issue, which is beyond the scope of
8 their good judgment and common knowledge.

9 There is no question regarding the
10 science that is employed in latent fingerprint
11 examination. It is the same that is employed by
12 every latent print examiner and there is no contest
13 regarding that. Her experience as a crime scene
14 investigator, as well as her education, her degree,
15 the BA that she received, clearly encompassed
16 fingerprint examination, as well as her
17 participation in the FBI project while in school
18 regarding latent fingerprint examination.

19 In addition to that, she received her
20 certification from the South Carolina Law
21 Enforcement Division in June of 2011. She has
22 maintained a professional association with an
23 organization which provides standards and best
24 practices regarding latent print examination. She
25 has testified that she also basically mentored or

1 was under the supervision of a more experienced
2 latent examiner who taught her from the time of her
3 employment with the North Charleston Police
4 Department and that her evaluations were also
5 subject to peer review -- a blind peer review by
6 that latent print examiner who also trained her,
7 that being Sergeant Coker.

8 She also testified that she has done
9 thousands of examinations, that she does
10 approximately over 200 per month -- or an estimated
11 200 per month, subject -- which are subject to the
12 same quality control procedures, which also involve
13 manual comparisons as well as use of the AFIS,
14 A-F-I-S, System.

15 She demonstrated her proficiency with
16 AFIS and IAFIS through SLED and received her --
17 again, her certification through them.
18 Her experience as a crime scene investigator, as
19 well as her Bachelor's, that's referring to her
20 education, as well as her continuing education and
21 other courses that she has taken, to demonstrate
22 that she has acquired the study of practical
23 experience which is requisite to the knowledge to
24 testify as an expert on the subject of fingerprint
25 analysis and comparison.

1 She is better qualified than the jury
2 to form an opinion on such topics and she is
3 competent to testify. The fact that she's not been
4 qualified as an expert before is not the barometer.
5 Everybody has to be qualified the first time to
6 testify. She has been qualified as an expert in
7 the area of crime scene analysis on three other
8 occasions in court -- general sessions court of the
9 state. Therefore, the motion to exclude as an
10 expert is denied. That is based on State v.
11 Anderson, State v. Price, State v. Koon, and State
12 v. Weaver.

13 Are we ready to proceed?

14 MR. LIETZOW: Yes, ma'am, the State is.

15 THE COURT: Please bring in the jury.

16 In State v. Anderson, the latent
17 fingerprint examiner had less experience than this
18 witness and the Court of Appeals said that they had
19 more than adequate experience to testify as an
20 expert, and it's been cited as precedent and cert
21 has been denied on both cases.

22 All objections the defense has raised
23 goes to the weight of her testimony. I stand by my
24 earlier conversation that we had regarding -- the
25 colloquy regarding any of the -- the foundation of

1 an expert's opinion is always subject to inquiry as
2 well as the thoroughness of the investigation that
3 was performed.

4 How many witnesses -- I'll ask that
5 question later.

6 (Jury in, 12:27 p.m.)

7 THE BAILIFF: All jurors present.

8 THE COURT: Thank you. You may be
9 seated.

10 Ladies and gentlemen, we appreciate
11 your patience as we dealt with that matter of law.
12 We do not take your time for granted.

13 The State may proceed with its
14 examination of the witness. You may proceed.

15 MR. LIETZOW: Thank you, Judge.

16 THE COURT: There is one other issue I
17 need to address with you all.

18 (Bench conference)

19 THE COURT: I have qualified her. You
20 can ask her all the questions on Cross -- if you
21 want to question her on Cross, that's fine.

22 MS. PROCTOR: And you had not qualified
23 her to the jury. I was going to let you finish the
24 questions.

25 MR. LIETZOW: Yes, ma'am.

1 MS. VAN PALA: Thank you, Your Honor.

2 (End of bench conference.)

3 BY MR. LIETZOW:

4 Q. Ms. Kubicko, let's talk a little bit
5 more about your training.

6 A. Okay.

7 Q. In 2008, you attended West Virginia
8 University FBI Research Project. Tell the jury a
9 little bit about what that -- those dates that
10 encompassed and what you studied in particular at
11 that project.

12 A. During that project I was employed for
13 them, and I was in charge of collecting latent
14 impressions, completing ten-print cards, palm-print
15 cards, and major key prints from the test subjects
16 that came through.

17 Q. Then in 2012, you attended a course
18 called Ron Smith and Associates. Please explain
19 what you learned at that course and educate the
20 jury a little bit as to what that course entailed.

21 A. That was a complex latent course that I
22 took. It's a step above maybe the basic ridgeology
23 and science of latent impressions. It deals with
24 -- dealing with the complex latent prints, which
25 could be a double impression, partial impression,

1 and it -- we practice manually comparing those
2 latent impressions to known standards repetitively
3 throughout the week, just to get as much practice
4 dealing with these partial prints, partial smudges,
5 and also the same with the palm prints.

6 I also worked with discussing the best
7 practices on how to go about getting them.

8 Q. And at the end of April of 2012, end of
9 May of 2012, you attended a Morpho Trak 2012
10 Conference. Please explain to the jury what you
11 learned at that conference.

12 A. That conference is put on by the
13 developers of the AFIS system that we use in our
14 office. They invite us, as part of our contract
15 with them for operating their system, to come and
16 meet with them, discuss the system, the best
17 practices for operating that system to enhance
18 getting the best results out of it.

19 Q. All of that was focused on comparing
20 latent prints lifted from some object to a known
21 standard?

22 A. Yes.

23 Q. And in 2011, South Carolina Law
24 Enforcement Division certified you -- what did they
25 certify you in and what did you have to do to get

1 that certification?

2 A. The certificate was for successfully
3 demonstrating competency in operating the automated
4 fingerprint identification system. To receive that
5 certificate I need to sit with the person testing
6 me and demonstrate that I know how to enter a
7 fingerprint into the system, search the database
8 correctly, compare the results to the latent print,
9 and make the correct determination on whether
10 identification or exclusion.

11 I also need to manually compare latent
12 impressions to known standards, and there was
13 probably about 20 of them that I needed to get
14 correct to receive the certificate.

15 Q. And does that certificate allow you to
16 perform this line of work in the State of South
17 Carolina under various police departments?

18 A. Yes.

19 Q. And, finally, how long have you been a
20 member of the International Association for
21 Identification?

22 A. I became a member in 2010 until I
23 believe 2012. And then I didn't pay dues for I
24 want to say a year, and then I picked it back up
25 through North Charleston.

1 Q. Okay. Were you trained by an expert
2 with more experience than you when you first came
3 to North Charleston Police Department?

4 A. Yes.

5 Q. And tell us about any blind peer
6 reviews that other latent examiners do in your
7 department with your work.

8 A. Any case where I make an identification
9 goes to a separate latent examiner who does not
10 know my results. They will independently compare
11 the latents to the known standards for themselves
12 and generate their own opinion on identification or
13 exclusion.

14 And then they will compare their
15 findings to mine and sign a verification sheet that
16 my work is correct and my report is correct.

17 Q. Was that done in this case?

18 A. Yes.

19 Q. And are you now training anybody with
20 less experience than you?

21 A. Yes.

22 Q. How many people?

23 A. Two.

24 Q. What are you training them to do?

25 A. I'm training them right now to work on

1 checking the quality of the prints that are
2 submitted to us; in addition to the prints that I
3 collect from the crime scene, the other crime scene
4 techs also collect latent prints and patrol
5 officers collect latent prints. So they will
6 submit them into our office and, first, we want to
7 do a quality check to determine -- if these prints
8 are in fact prints, if we can do anything with
9 them. It's simply to make sure it's not what we
10 call dirty tape.

11 So I am just working with them on
12 getting them to better determine the quality of the
13 print and whether they -- it's a print that could
14 be entered in AFIS or just a print that could be
15 manually -- manually compared to a known standard,
16 or if it is insufficient for any kind of
17 determination.

18 Q. And do you also perform blind peer
19 review for other analysts in North Charleston?

20 A. I did, but currently I'm the only
21 latent examiner.

22 Q. And, on average, how many do you
23 conduct in a month?

24 A. Approximately 200.

25 MR. LIETZOW: Your Honor, at this time

1 I would move to enter Ms. Kubicko as an expert in
2 crime scene analysis and latent fingerprint
3 examination.

4 THE COURT: So admitted, subject to the
5 objection.

6 MR. LIETZOW: Thank you.

7 BY MR. LIETZOW:

8 Q. Tell the jury how you became involved
9 in this case.

10 A. I was simply working evening shift when
11 the call came out requesting a crime scene
12 response.

13 Q. I'm showing you what has been marked
14 into evidence as State's Exhibit 10. Do you
15 recognize that photo?

16 A. Yes.

17 Q. Did you take that photo?

18 A. Yes.

19 Q. Does that fairly and accurately depict
20 what the restaurant looked like on that night?

21 A. Yes.

22 MR. LIETZOW: May I publish?

23 THE COURT: Yes, sir.

24 What is that number?

25 MR. LIETZOW: State's Exhibit 10.

1 BY MR. LIETZOW:

2 Q. What is that a picture of?

3 A. This is a picture of the business
4 looking directly in from the front door.

5 Q. When you got to the scene initially,
6 what did you do?

7 A. I initially got with the officers, just
8 to get a quick synopsis of what happened. I then
9 started taking my overall photographs.

10 Q. Were you made aware that there was a
11 surveillance video that was taken?

12 A. Yes.

13 Q. Did you have an opportunity to review
14 that video?

15 A. Yes.

16 MR. LIETZOW: Your Honor, at this point
17 I would like to publish the video for this witness
18 in order for her to describe the actions as a crime
19 scene tech.

20 THE COURT: Any objections?

21 What number is that?

22 MR. LIETZOW: That would be marked as
23 State's Exhibit Number 1, already in evidence.

24 THE COURT: It's already in evidence.

25 MS. VAN PALA: No objection to

1 publication.

2 THE COURT: You may proceed.

3 BY MR. LIETZOW:

4 Q. We're going to let him run it and run
5 it fully through, and then we'll pause, back-up,
6 and then proceed through it. Please advise the
7 jury as a crime scene analyst what that shows you
8 and how that dictated your next course of action,
9 please.

10 (Video played.)

11 MR. LIETZOW: May I approach the
12 witness, Your Honor?

13 THE COURT: You may.

14 BY MR. LIETZOW:

15 Q. Ms. Kubicko, I'm showing you what's
16 been marked into evidence as State's Exhibit 2.
17 What does that show you as a crime scene analyst?

18 A. This shows the suspect on top of the
19 counter. At this point I would say he's fully on
20 the counter, feet up in the air, reaching over the
21 counter, and he appears to be trying to open the
22 drawer and grab the money tray out of the drawer.

23 Q. I'm showing you State's Exhibit 3.
24 Based on the way he's reaching down, what did you
25 do as a crime scene analyst? At this point what is

1 he doing? What would be your opinion of what he
2 was doing?

3 A. At this point it appears he's grabbing
4 the money tray out of the drawer to take it.

5 Q. Does it appear that he's wearing
6 gloves?

7 A. No.

8 Q. I'm showing you State's Exhibit 4.
9 Based on that photo, are you able to determine
10 whether or not the suspect is wearing gloves?

11 A. Yes. I determined he was not wearing
12 gloves.

13 Q. So having seen the video and just
14 isolating these stills, what did you do as a result
15 of having the video?

16 A. Being able to watch the video, I was
17 able to use it as a blueprint to where I wanted to
18 process the -- collect fingerprints or DNA. So I
19 first focused in the video on how he made his
20 entry. I observed that he used the pull handle on
21 the front door, so that's probably the only area he
22 would have touched when he entered.

23 I observed him run to the counter. We
24 see him on the counter, appears to have the gun in
25 the left hand, lobs it over to the right hand and

1 reaches over the counter to pull the drawer and
2 take the money tray.

3 So I'm thinking that, one, he doesn't
4 have gloves on, so I expect to hopefully get
5 fingerprints. He touches the countertop. And then
6 when I watched the video to see how he left, it's a
7 push bar door to leave. I could not exclude that,
8 because there is no video facing the front door to
9 see how exactly he exited; however, you can see
10 from behind him that he pushed the door open.

11 So I wasn't sure whether or not he did
12 actually touch the interior side of the door or
13 not. So that is an area that I processed.

14 Q. Having a video, does that allow you to
15 zero in your focus and know what you need to do as
16 a crime scene analyst?

17 A. Yes. It's not often that we have video
18 evidence. We had this as a blueprint; to know
19 exactly what happened and what he made contact with
20 really gives us good clues to go off of for our
21 investigation.

22 Q. In addition to fingerprints, generally,
23 what other kinds of things are you looking for at a
24 crime scene?

25 A. In reference to an armed robbery, we

1 are interested in, did they bring anything into
2 this business? Did they bring a bag with them, a
3 backpack to put money in or anything? Of course
4 leaving the fingerprints, what did they touch?
5 DNA, did they leave any behind? What did they take
6 from the business? What route did they take as
7 they left? Did they drop anything on the way out?
8 Any evidence that could lead to identifying the
9 suspect I'm trying to find.

10 Q. Okay. I'm showing you what's been
11 marked for identification purposes only as State's
12 Exhibit 11.

13 MS. VAN PALA: Objection.

14 THE COURT: He hasn't moved to admit it
15 into evidence.

16 BY MR. LIETZOW:

17 Q. Do you recognize this photo, Ms.
18 Kubicko?

19 A. Yes.

20 Q. Who took that photo?

21 A. I took the photo.

22 Q. And does this photo fairly accurately
23 represent what it is that you photographed that
24 night?

25 A. Yes.

1 Q. Your Honor, at this point I would move
2 to have State's Exhibit 11 entered into evidence
3 and published to the jury.

4 THE COURT: Any objection?

5 MS. VAN PALA: Objection.

6 THE COURT: Basis?

7 MS. VAN PALA: Previous objection.

8 THE COURT: Please approach.

9 (Bench conference.)

10 THE COURT: Marked and admitted as
11 State's 11.

12 (STATE EXH. 11 in evidence.)

13 BY MR. LIETZOW:

14 Q. Ms. Kubicko, I'm showing you State's
15 Exhibit 11. What is that?

16 A. This is the interior side of the front
17 door. I had processed it using a technique with
18 black powder and a fiberglass brush that we use.
19 What I had did just to document where I took these
20 prints from, was number those latent cards, just so
21 when I took them back to the office, I could have a
22 link from this latent card to this location,
23 instead of filling out the back of the card at that
24 particular time while I was busy trying to process
25 the crime scene.

1 For me, it's easier to just sometimes
2 number them and take a photograph of them, so that
3 when I get back to the office, I can fill out the
4 back of the latent print card, which has all of the
5 information, date, time, location and -- location
6 of the crime and also the location of where I took
7 that lift from.

8 So this was a way for me to kind of
9 speed up that process. So this is a photo of
10 three -- four latent backer cards that were on the
11 interior side of the front door.

12 MR. LIETZOW: Okay. May I approach,
13 Your Honor?

14 THE COURT: You may.

15 BY MR. LIETZOW:

16 Q. I'm showing you what's been marked for
17 ID only as State's Exhibit 12. Do you recognize
18 that photo?

19 A. Yes.

20 Q. Does that fairly and accurately
21 represent that on that night?

22 A. Yes.

23 MR. LIETZOW: Permission to publish,
24 Your Honor. Permission to move into evidence and
25 publish.

1 THE COURT: Any objection?

2 MS. VAN PALA: Objection.

3 THE COURT: I need to see it.

4 Overruled; marked and admitted as number 12.

5 You may proceed.

6 (STATE EXH. 12 in evidence.)

7 BY MR. LIETZOW:

8 Q. You can't see the fourth one that you
9 referenced because it's hiding behind number 2, but
10 what does this photo show?

11 A. It's the same photo that we saw before;
12 however, the one card is lifted up so you could see
13 the fourth card that was under the other one.

14 Q. Did you lift fingerprints from the base
15 of the cash register that stayed inside of the
16 restaurant that night?

17 A. Yes.

18 Q. I'm showing you what's been marked and
19 entered into evidence without objection as State's
20 Number 13. I'm also showing you State's Number 14
21 for identification purposes only. Do you recognize
22 those two photos?

23 A. Yes.

24 Q. Did you take those two photos?

25 A. Yes.

1 Q. Does that fairly and accurately
2 represent what was depicted that night?

3 A. Yes.

4 THE COURT: Any objection to 14?

5 MS. VAN PALA: Objection.

6 THE COURT: Overruled; marked and
7 admitted, based on the Court's previous ruling as
8 in regards to 14, 12, and 11.

9 (STATE EXH. 14 in evidence.)

10 BY MR. LIETZOW:

11 Q. I'm showing you State's Exhibit 13, Ms.
12 Kubicko. What is that?

13 A. This is a picture taken from behind the
14 counter, facing the front door.

15 Q. I'm now showing you State's 14. Same
16 question.

17 A. This is the drawer of the register. I
18 had taken it out from underneath the drawer,
19 flipped it over, and processed it with black
20 powder. This is showing the one latent lift that I
21 took from the bottom of the drawer.

22 Q. At some point were you made aware that
23 a cash register tray was taken during the robbery?

24 A. Yes.

25 Q. When that was found, what did you do?

1 A. I was informed that it had been found
2 by officers and that they were standing by to
3 secure it until I could get over there to
4 photograph it. I took several photographs of the
5 drawer from far away as I was approaching where the
6 drawer was. It was located in front of Suite 210
7 which is a couple doors down from the incident
8 location.

9 Q. Showing you State's Exhibits 8 and 9,
10 already into evidence. Do you recognize those
11 photos?

12 A. Yes.

13 Q. Did you take those?

14 A. Yes.

15 MR. LIETZOW: May I publish, Your
16 Honor?

17 THE COURT: You may proceed.

18 BY MR. LIETZOW:

19 Q. You mentioned that you found the cash
20 register. Just to orient the jury, again, is that
21 what you saw when you walked up?

22 A. Yes.

23 Q. And that's the cash register tray that
24 we're referring to?

25 A. Yes.

1 THE COURT: You need to make reference
2 to what number that is.

3 MR. LIETZOW: Thank you. State's
4 Exhibit 8 that you just answered.

5 BY MR. LIETZOW:

6 Q. And is State's Exhibit 9 a close-up?

7 A. Yes.

8 Q. Was there anything left in the tray?

9 A. Yes. There was change left in the
10 tray.

11 Q. Was there any cash?

12 A. At this point, I was not aware that
13 there was, but, yes, there was.

14 Q. And what did you -- did you do anything
15 with the tray?

16 A. Yes. After photographing the tray, I
17 brought it back into the business. I wasn't sure
18 at first whether or not I was going to process it
19 at the business or take it to the lab and process
20 it, but I wanted to bring it back to the business.
21 That way I could take the change and return that to
22 the business.

23 Q. Okay. And were you able to lift any
24 latent fingerprints from that cash register tray?

25 A. Yes. I then determined that I was

1 going to process it there to give it back to them.
2 That way they could continue operating normally.
3 So I processed the tray with black powder and a
4 fiberglass brush and I took several latent prints
5 from it.

6 Q. Please explain to the jury how and why
7 fingerprints are significant to your investigation.

8 A. Fingerprints are very significant
9 because they can be a direct link to the suspect
10 and place him at the scene of the crime.

11 Q. Have you ever -- have you ever been
12 made aware that two people have the same
13 fingerprint?

14 A. No.

15 Q. What is an inked print?

16 A. An inked print is one of a known
17 standard from a known individual. You will ink
18 their fingers and apply that to a ten-print card
19 and that is what we consider a ten-print known
20 standard of that individual.

21 Q. What is a patent print?

22 A. A patent print is one that is visible
23 to the human eye. For example, if you had a
24 substance on your hand such as blood or paint, if
25 you touch the wall, you would leave a print and

1 that would be visible to the human eye.

2 Q. And a latent fingerprint?

3 A. A latent fingerprint is one that is
4 invisible to the human eye. In normal cases, if
5 you touch a soda can, you may leave your
6 fingerprints and you cannot see that. So that
7 requires some sort of processing to make it
8 visible.

9 Q. Explain how someone leaves their
10 fingerprints at the scene of a crime.

11 A. A person leaves a fingerprint because
12 the sweat glands in your fingertips coat the
13 ridges. So when you touch the surface, that sweat
14 is deposited onto that surface.

15 Q. And you mentioned surface. Is the
16 surface important for whether someone leaves a
17 fingerprint?

18 A. Yes. The surface can determine whether
19 you can recover it or not or even make it visible.
20 For example, if it's a very textured surface, it's
21 hard to retrieve a fingerprint from that. Also, if
22 it's -- the smoother the surface is and the less
23 porous the surface is, that would be one that you
24 would be more likely to recover a fingerprint from.

25 Q. So, for example, is a grainy wood

1 something that you would easily recover a
2 fingerprint from?

3 A. Not easily. There are certain
4 techniques that you could try, but it depends
5 really.

6 Q. Is this glass something that you would
7 be able to recover a fingerprint from?

8 A. Yes.

9 Q. Is it possible for a person to touch a
10 surface and not leave his fingerprints?

11 A. Yes.

12 Q. And explain that.

13 A. Sometimes people -- their sweat glands
14 don't produce a lot of oil, so it's simply not
15 there. Other times they might sweat a lot, so
16 whenever they're touching things, they're just
17 leaving smudges of oil and sweat. Other times it
18 depends on the weather. If their hands are wet
19 because it's raining outside, they may not leave a
20 print.

21 Q. How are you able to lift and preserve
22 the fingerprints so that you can later conduct the
23 comparisons?

24 A. The main technique that we use is the
25 black powder and the fiberglass brush, which is a

1 very fine carbon-based powder. We dip the brush in
2 and process the area. That powder adheres to the
3 oil deposited in the pattern of your fingerprint.

4 So then what we do is take a clear
5 lifting tape and place it over that fingerprint.
6 Lift the tape, which lifts the powder in that
7 pattern, and place that on the white backer card
8 like you saw in the photograph. And that preserves
9 it so that we can later do the latent examination
10 on it.

11 Q. Did you recover any fingerprints from
12 the crime scene in this case?

13 A. Yes.

14 Q. Let's just briefly discuss -- explain
15 to the jury where you were able to recover latent
16 print lifts from, from the crime scene.

17 A. I recovered the four latent backer
18 cards that you saw from the interior front door. I
19 collected the one from the bottom of the drawer
20 inside the business, which you saw the photo of.
21 And I collected one from the money tray, which
22 itself had several -- I'm sorry, three from the
23 money tray. Each card had several pieces of tape
24 on it.

25 Q. Did you recover any other forensic

1 evidence from the crime scene?

2 A. Yes. I collected the video and there
3 was also a blue bandana located on the ground near
4 money tray that was collected.

5 Q. Did you recover any DNA?

6 A. Yes.

7 Q. Where did you recover the DNA from?

8 A. I -- again, looking at the video, I
9 wanted to determine where he had touched and where
10 would be a good place to collect DNA evidence from.
11 So I did take one swab of the interior -- the
12 interior door bar, because I knew there was a
13 possibility that he could have used that push bar
14 to exit; however, I went into that knowing it was a
15 very public touched area, so I may not get the best
16 results from that.

17 I observed that he did touch the
18 countertops. So after processing the countertop, I
19 didn't see any good sufficient fingerprints to
20 lift; however, the black powder does adhere to
21 smudges or armed impressions or any oil sweat
22 deposited. So I did collect one DNA swab from the
23 top of the counter.

24 Q. Is that -- was that counter the counter
25 where customers would come up to and order their

1 meals?

2 A. Yes. So, again, a public area. I also
3 collected a DNA swab from the bottom of the cash
4 drawer, which is the same area you saw on the photo
5 of the latent lift.

6 Q. And that's the one that remained inside
7 the restaurant?

8 A. Yes.

9 Q. Any other places?

10 A. One more from the money tray. On the
11 top of the money tray there was a silver piece to
12 it, the DNA swab was collected from that piece
13 because I did see some fingerprint impressions;
14 however, there was no ridge detail on there. So,
15 for me, that was a good piece to possibly collect
16 some DNA from.

17 Q. After you were done photographing the
18 scene and looking for DNA and fingerprints, what
19 did you do?

20 A. At that point, the investigation was
21 complete and I returned to our central station.

22 Q. When you got there, explain to the jury
23 what your next step in the process was.

24 A. When I returned, I walked away from
25 that knowing that I had collected good fingerprints

1 from the money tray. So I decided that I was going
2 to enter one of the fingerprints into AFIS to try
3 and identify a suspect.

4 Q. And did you, in fact, select one of the
5 fingerprints lifted to do that?

6 A. Yes. I selected the best -- what I
7 determined to be the best fingerprint that I had
8 collected, one that was clear, had a lot of ridge
9 detail, that would allow me to make my
10 identification from it.

11 Q. I'm showing you what was marked for
12 identification purposes only as State's Exhibit
13 Number 15. Do you recognize that?

14 A. Yes.

15 Q. Were are you the one that produced
16 this?

17 A. Yes.

18 Q. Does this fairly and accurately
19 represent the fingerprints that you recovered from
20 the scene on the night of the incident?

21 A. Yes.

22 MR. LIETZOW: At this point, Your
23 Honor, I would move to have State's Exhibit 15 into
24 evidence and request permission to publish to the
25 jury.

1 THE COURT: Any objection?

2 MS. VAN PALA: Objection.

3 THE COURT: Overruled. State's Exhibit
4 15 marked and admitted.

5 (STATE EXH. 15 in evidence.)

6 BY MR. LIETZOW:

7 Q. Ms. Kubicko, is this the fingerprint
8 -- is this one of the fingerprints that you
9 determined you were going to enter into the
10 database?

11 A. Yes. The fingerprint that is labeled
12 1.1 is the fingerprint that I entered into the
13 database.

14 Q. Where was this series of latent
15 fingerprints taken from at the crime scene?

16 A. These were all taken from the money
17 tray that was located on the sidewalk in front of
18 Suite 210.

19 Q. All right. So tell us what you did
20 with fingerprint 1.1.

21 A. So with 1.1, to run the fingerprint in
22 the system what we do is the system has a camera
23 attached which takes a picture of that fingerprint.
24 It then brings it up and I'm able to play with the
25 contrast, the brightness, just to take make it more

1 visible. Then I will identify certain ridge
2 characteristics or what we call minutiae, which are
3 ending ridges or bifurcations. Ending ridge is a
4 ridge that will end and a bifurcation is one ridge
5 that would turn into two ridges.

6 So those are the two characteristics
7 that we use in the system to mark. So I searched
8 the system -- I marked those system and submitted
9 the search for that print. I marked -- for the
10 first search that I did, I marked 26 points of
11 minutiae. And I ran this in the database as finger
12 number nine, which would be your left ring finger.
13 The finger number system that we use corresponds to
14 how ten-print cards are made.

15 Number one is the right thumb, two,
16 three, four, five, six, left thumb and so forth.
17 So we use this same numbering system when we do our
18 work. So the first search I did, I didn't get a
19 result and that's because I ran it as finger nine
20 -- the finger nine.

21 So after looking at the latent print,
22 looking at 1.1 and 1.2, 1.3 and 1.4, I see those,
23 as a latent examiner, as a simultaneous impression,
24 meaning that they were deposited at the same time.
25 They appear to be in the same pattern as a normal

1 handprint on a surface.

2 So based on the length of those
3 fingers, I thought it was the number nine finger.
4 At that point I determined, you know what, maybe it
5 is the right hand instead of the left. Let me run
6 it as the finger nine and the number three, as the
7 middle finger. So I ran that with 46 points of
8 minutiae this time and I got an AFIS hit, which
9 identified it as finger number three, the right
10 middle finger.

11 Q. When you get an AFIS hit, explain what
12 their system returns. What does that mean?

13 A. So I set the parameters for the search
14 to return ten respondents, ten known fingerprints
15 that could possibly be a match. And it ranked it
16 from number 1 to 10; 1 being scored with the best
17 possible match. I then start with the number 1 and
18 manually compare the latent print 1.1 to the first
19 search response.

20 If I determine that that is an
21 identification, I stop there, because I'm
22 100 percent certain that this is --

23 MS. VAN PALA: Objection.

24 THE COURT: Basis?

25 MS. VAN PALA: 702 and 705.

1 THE COURT: You've already argued that
2 in camera; it's preserved; overruled.

3 BY MR. LIETZOW:

4 Q. Okay. I'm going to show you what's
5 been marked for identification purposes only as
6 State's Exhibits 16, 17, and 18. Do you recognize
7 these?

8 A. Yes.

9 Q. And do these fairly and accurately
10 represent the known standards that you compared the
11 latents from to the crime scene on -- when you
12 actually performed that comparison?

13 A. Yes.

14 MR. LIETZOW: At this point, Your
15 Honor, I would move 16, 17, and 18 into evidence.

16 THE COURT: They will be marked for ID
17 only at this time. Marked for ID only --

18 MR. LIETZOW: Yes, ma'am. I'm moving
19 them into evidence.

20 THE COURT: I recognize that and I have
21 said they are marked for ID only at this time.

22 MR. LIETZOW: Okay.

23 THE COURT: What were the numbers
24 again? 16, 17 and 18?

25 MR. LIETZOW: Yes, ma'am.

1 (STATE EXH. 16, Ten-Print Card, was
2 marked for identification.)

3 (STATE EXH. 17, Ten-Print Card, was
4 marked for identification.)

5 (STATE EXH. 18, Ten-Print Card, was
6 marked for identification.)

7 BY MR. LIETZOW:

8 Q. So you got a match back. Did you have
9 any idea who that individual was when you got that
10 match returned to you?

11 A. No. All the responses come back to a
12 South Carolina identification number. So at this
13 point there was no name associated with who it's
14 hitting to.

15 Q. Okay. And when you established that
16 match or when the system returned the possible ten
17 that it could have been and you established a match
18 after comparing 1.1 to the first one that the
19 system gave you, what did you do with that
20 information?

21 A. I then, one, reported it on an AFIS
22 worksheet that we use to keep track of how many
23 minutiae points we searched and the search
24 parameters and all that. I then use a different
25 part of the system to look up that SID number to

1 determine the name associated with it.

2 Q. And what was the name associated with
3 that SID number?

4 A. Kendall Tyus.

5 Q. What was the date of birth for the
6 Kendall Tyus that was associated with that SID
7 number?

8 A. [REDACTED]

9 Q. After you determined that Kendall Tyus
10 was 1.1 essentially, what did you do with that
11 information?

12 A. I then gave -- one, wrote a report on
13 that; two, gave it to another latent examiner to
14 verify that, and once it was verified, we then
15 informed the detectives of that.

16 Q. Okay. And then did they use that
17 information to then go and make an arrest on
18 Kendall Jerome Tyus?

19 A. Yes.

20 Q. What did you do next?

21 A. I responded to what they determined to
22 be his place of residence to assist them with the
23 search warrant.

24 Q. How were you -- how did you become
25 aware of where Mr. Tyus was -- his place of

1 residency?

2 A. I gave them the name, date of birth,
3 any information that the AFIS system gives to me.
4 They then use their system. I believe they search
5 their DMV to get his address.

6 Q. Okay. So you responded to that scene
7 then?

8 A. Yes.

9 Q. What did you do at that scene? What
10 was your role at that scene?

11 A. My role was to, one, photograph the
12 residence and assist in searching for evidence,
13 photographing that evidence, and collecting it from
14 the residence.

15 Q. Okay. Did you perform any further
16 fingerprint latent examination in this case?

17 A. Yes.

18 Q. When did that happen in relation to the
19 time line of this case?

20 A. This happened -- January 11th is when I
21 issued the latent report.

22 Q. Okay. Let's focus on the fingerprints
23 now and we'll come back to the house. So this is
24 the latent recovered from the cash register tray
25 outside. Explain to the jury then how you were

1 able to then conduct your full examination of this
2 evidence.

3 A. For this latent backer card, as I said
4 earlier, I determined that 1.1, 1.2, 1.3, and 1.4
5 were simultaneous impressions, meaning that they
6 were left at the same time by touching the surface.
7 That gives me a clue as to what fingers I should
8 start my comparisons with.

9 So I compared 1.2 to the right index
10 finger number two and made an identification, 1.3
11 to the right ring finger and made an
12 identification, and 1.4 to the right little finger
13 and made an identification.

14 Q. Made an identification to who?

15 A. To Kendall Tyus.

16 Q. Now, I want you to educate the jury a
17 little bit about how you go about doing that
18 process. Turning to what has been marked for ID
19 purposes only as State's Exhibits 16, 17, and 18.
20 Hold onto those for a second.

21 So tell us how you were able to acquire
22 those. Are those kept in a database that's
23 statewide?

24 A. Yes.

25 Q. Who maintains the database?

1 A. South Carolina Law Enforcement
2 Division, SLED.

3 Q. Do you know approximately when those
4 fingerprint ten-print cards were created?

5 A. Yes, I could tell you.

6 Q. Just the date that they were created.

7 A. These were created on December 30,
8 2011.

9 Q. Okay. And SLED maintained the
10 fingerprints?

11 A. Yes.

12 MS. VAN PALA: Objection.

13 THE COURT: Basis?

14 MS. VAN PALA: May we approach?

15 (Bench conference.)

16 MS. VAN PALA: I think he's trying --

17 THE COURT: We'll take it up in just a
18 minute. I'm going to have the jurors mad if I
19 don't break for lunch.

20 Step back.

21 (End of bench conference.)

22 THE COURT: Madame forelady, ladies and
23 gentlemen, actually, I just realized it was five
24 after 1:00. We're going to take advantage of this
25 break in testimony to take your lunch recess.

1 We'll break until 2:30, because I need to deal with
2 this matter of law before the lawyers and I go to
3 lunch, which may take us some time.

4 So, during the break, please do not
5 discuss the case amongst yourselves or with anyone
6 else. Please leave your notepads in your seats and
7 when you return to the courthouse, please don't
8 have any contact with anyone.

9 Have a good lunch. See you at 2:30.
10 Return directly to your jury room.

11 (Jury out, 1:07 p.m.)

12 THE COURT: You may be seated. Before
13 we proceed with that, I need the -- what is the
14 objection to State's Exhibits 16, 17, and 18? Or
15 is there any objection to those?

16 MS. VAN PALA: Yes, two.

17 THE COURT: Uh-huh.

18 MS. VAN PALA: The first is subject to
19 my motion in limine.

20 THE COURT: I've already overruled
21 that.

22 MS. VAN PALA: Preserving that. And
23 then the second objection, it would be to the
24 picture that appears on one of the ten-print cards
25 -- on the back of one of the ten-print cards.

1 THE COURT: Can I see that, please? I
2 need to see 16, 17 and 18.

3 MR. LIETZOW: Yes, ma'am.

4 Do you have them, Ms. Kubicko?

5 THE COURT: I need to see all three of
6 them.

7 MS. VAN PALA: There's one on the LMO.

8 THE COURT: Does the State have any
9 exception to redacting his picture from the back of
10 the card?

11 MR. LIETZOW: No, ma'am.

12 THE COURT: That would resolve the
13 issue then, wouldn't it?

14 MS. VAN PALA: We talked about it and
15 we weren't sure what the best way to redact it
16 would be.

17 MR. LIETZOW: Your Honor, my one
18 concern would be that if I provided a photocopy of
19 one of them and then the original on the other two,
20 it makes it look a little --

21 MS. VAN PALA: I agree.

22 THE COURT: So what do you want to do,
23 just cover it up?

24 MR. LIETZOW: I would be fine with
25 that, but I think that you would have to give a

1 curative -- or some sort of instruction to the
2 jury, don't look at what's behind this.

3 THE COURT: I don't think they would
4 look at it.

5 MS. VAN PALA: I think that would draw
6 attention to it.

7 THE COURT: Frankly, I don't see a
8 problem with the picture. It looks like a driver's
9 license photo to me. If you-all don't have a
10 problem covering it up, I don't have a problem with
11 you redacting it. You-all can figure out how you
12 want to redact it.

13 They will be marked and admitted as 16,
14 17, and 18, subject to the redaction.

15 MR. LIETZOW: Thank you.

16 (STATE EXH. 16 in evidence.)

17 (STATE EXH. 17 in evidence.)

18 (STATE EXH. 18 in evidence.)

19 THE COURT: What are we dealing with
20 now?

21 MS. VAN PALA: My objection that I
22 asked to approach on was that I felt like we had
23 stipulated to call AFIS the database, so we
24 wouldn't get into the fact that my client might
25 have a prior record, for the jury. And I kind of

1 felt like we were getting close and I don't think
2 that the State needs to go into that much detail to
3 authenticate and lay a foundation for the ten-print
4 card.

5 THE COURT: You were getting terribly
6 close. Why would he be in a SLED database unless
7 he was arrested?

8 MR. LIETZOW: I agree. And, frankly, I
9 thought that you were politely -- were warning me,
10 by not moving those into evidence, to lay a better
11 foundation, so that's why I was trying to lay a
12 better foundation.

13 THE COURT: No. I took them under
14 advisement because his picture was on there and I
15 knew she was --

16 MR. LIETZOW: Oh, I'm sorry for the
17 misunderstanding then. I thought that was your way
18 of saying, do a better job.

19 THE COURT: No. I would tell you that.
20 I think you-all know me well enough, I don't mince
21 words. I'm real direct.

22 MS. VAN PALA: Out of an abundance of
23 caution, may we request a limine instruction --

24 THE COURT: For what?

25 MS. VAN PALA: -- or a curative

1 instruction --

2 THE COURT: For what?

3 MS. VAN PALA: -- on the SLED portion?

4 Because up to now --

5 THE COURT: It's up to you. If you
6 want me to say something about it, it's going to
7 hurt you, because now they're going to wonder why
8 you're talking about it.

9 MS. VAN PALA: Okay.

10 THE COURT: And then they're going to
11 start thinking about it, versus it just being a
12 passing comment that they don't think about it
13 anymore because it isn't mentioned anymore. I will
14 instruct him not to mention it anymore. And,
15 frankly, if you all have stipulated to calling it
16 the database, that's what you need to stick to
17 calling it.

18 MR. LIETZOW: Ms. Kubicko --

19 THE COURT: That's what you stipulated
20 to, correct?

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: Then you need to continue
23 to refer to that as the database.

24 MR. LIETZOW: Yes, ma'am.

25 MS. VAN PALA: Thank you.

1 THE COURT: Anything else we need to
2 take up before we break for lunch? From the State?

3 MR. LIETZOW: No, ma'am.

4 THE COURT: From the defense?

5 MS. VAN PALA: No, Your Honor.

6 THE COURT: Have a good lunch. See you
7 at 2:30. Make sure the Court Reporter has all of
8 the exhibits, please.

9 Ma'am, please, don't discuss your
10 testimony with anyone during the break.

11 THE WITNESS: Yes, ma'am.

12 (A luncheon recess transpired.)

13 THE COURT: State ready to proceed?

14 MR. LIETZOW: Yes.

15 THE COURT: If the witness will retake
16 the stand, and I will remind you that you are still
17 under oath.

18 You can go ahead and get the jury.

19 (Bench conference.)

20 THE COURT: Why haven't you made an
21 offer to him?

22 MR. LIETZOW: I didn't think it
23 justified an offer.

24 THE COURT: You haven't had anybody
25 identify that he had a gun. Just letting you know.

1 MR. LIETZOW: I realize that.

2 THE COURT: You don't have an

3 eyewitness that saw him with a gun.

4 How old is he?

5 MR. LIETZOW: 25.

6 MS. PROCTOR: He was 20 at the time.

7 MS. VAN PALA: I think he has two

8 simple possession tickets.

9 MS. PROCTOR: This happened two days

10 before his 21st birthday, so he was 20.

11 THE COURT: Any indication that anybody

12 else was involved?

13 MS. PROCTOR: No, ma'am.

14 MR. LIETZOW: I don't know.

15 THE COURT: Is this in a string of

16 robberies?

17 MR. LIETZOW: Just an isolated

18 incident.

19 THE COURT: We will talk more. You can

20 stand back.

21 (End of bench conference.)

22 (Jury in, 2:43 p.m.)

23 THE BAILIFF: All jurors present and

24 seated.

25 THE COURT: Thank you.

1 Ladies and gentlemen, I hope that you
2 had a pleasant and restful lunch. We will now
3 resume testimony of the witness.

4 State may proceed.

5 MR. LIETZOW: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 MR. LIETZOW: May I approach the
8 witness?

9 THE COURT: You sure may.

10 BY MR. LIETZOW:

11 Q. I'm showing you State's Exhibits 16,
12 17, and 18, which at this point have been marked
13 into evidence. Just real quickly, can you identify
14 the height and weight of the Defendant based on the
15 ten-print card?

16 A. 5, 10, 165.

17 Q. Okay. Thank you. Before we took our
18 lunch break, we got to the point where you had
19 positively identified fingerprint 1.1 to the
20 Defendant. And I believe you were getting ready to
21 talk to us about the remaining comparisons that you
22 conducted. So can you -- can you describe to the
23 jury the basic factors that are used to identify
24 somebody with their fingerprints?

25 A. Yes. The two principles that we use

1 that allow us to use fingerprints to identify one
2 person and one person only is the fact that they
3 are unique. Each person has their own fingerprints
4 and they are persistent, meaning that they are the
5 same throughout your life. Even if you cut
6 yourself, they will regrow in the same pattern,
7 unless you cut yourself deep enough to cut through
8 the skin deep and -- into, and that would create a
9 scar, which essentially further identifies you
10 because now you have a scar on your finger.

11 Q. Ms. Kubicko, I'm showing you State's
12 Exhibit 15. Remind the jury what that is, please.
13 Actually, I'm going to publish that.

14 A. That is, as a latent examiner, what I
15 initialed as L1 and dated and initialed when I did
16 the comparisons. And that is one latent backer
17 card that I collected from the money tray found
18 outside of Suite 210.

19 Q. Okay. So through the database you were
20 able to determine that Kendall Tyus positively
21 matched fingerprint 1.1?

22 A. Correct.

23 Q. And then you said later, approximately
24 January 11th of 2013, you conducted a full-blown
25 examination of the remaining prints found at the

1 scene?

2 A. Yes.

3 Q. At that point, then, explain to the
4 jury how you -- what you found at the scene to the
5 known standards of Kendall Tyus.

6 A. When I'm doing my manual comparisons,
7 I'll take each print individually and compare each
8 one. In this case I believe we discussed that; I
9 found that 1.2, 1.1, 1.3, 1.4 were simultaneous
10 impressions, meaning deposited on the surface at
11 the same time. I could tell that basically they
12 appear as though they're the correct orientation as
13 four fingers would be. I determined that they were
14 deposited by a right hand.

15 So when I do my comparisons, I started
16 with 1.2 to the right index, 1.1 I had already
17 identified, 1.3 to the right ring, and 1.4 to the
18 right little, and I positively identified that to
19 those of Kendall Tyus.

20 Q. And I believe you have in your hands --
21 describe to the jury what you are comparing those
22 things to.

23 A. So once I got the database hit to the
24 identification number and I looked up what name
25 came to the identification number, I can then print

1 their known standards, and that is what I would use
2 to compare to the -- on the latent print.

3 Q. And, Ms. Kubicko, I'm showing you
4 what's been marked as State's Exhibit 16. Is this
5 what would be known as a ten-print card?

6 A. Yes.

7 Q. And is that what you compared the
8 latents to --

9 A. Yes.

10 Q. -- to be able to conduct your
11 comparisons?

12 A. Yes.

13 Q. Ms. Kubicko, I'm showing you what's
14 been marked as State's Exhibit 19 for ID purposes.
15 Do you recognize that?

16 A. Yes.

17 Q. Did you create that?

18 A. Yes, sir.

19 Q. Is this a piece of demonstrative
20 evidence you use to further educate the jury about
21 the process that you went through on that date?

22 A. Yes.

23 MR. LIETZOW: At this point I would
24 like to publish this to the jury, have Ms. Kubicko
25 come down from the stand.

1 THE COURT: Any objection?

2 MS. VAN PALA: Objection to its
3 admission.

4 THE COURT: He's using it for
5 demonstrative purposes only.

6 MS. VAN PALA: No objection.

7 THE COURT: So it will be marked for
8 identification only. You may proceed.

9 (STATE EXH. 19, Fingerprint board, was
10 marked for identification.)

11 MR. LIETZOW: May Ms. Kubicko come
12 down --

13 THE COURT: You may step down. You
14 need to have her speak toward the Court Reporter.

15 MR. LIETZOW: Yes, ma'am.

16 BY MR. LIETZOW:

17 Q. If you could stand where you can
18 address the jury, but also project to the Court
19 Reporter.

20 Show this to the jury and at this point
21 I'm going to let you show the jury exactly how you
22 go about making a match in the case.

23 A. This is a latent board that I created
24 just to demonstrate how I go about my comparisons.
25 What I have is the latent impression 1.1 that you

1 saw on the latent backer card and this is the inked
2 fingerprint of the middle finger of Kendall Tyus.
3 This is the hit that was created in the database.

4 So the first thing I want to do when
5 I'm comparing the unknown latent to a possible
6 known standard is look at the general pattern. We
7 have several pattern types: Loop, right loop, left
8 loop, whirls and arches. So in this case I
9 determined I have the same pattern type, same ridge
10 flow, so then I continue to look for specific
11 characteristics a little more closely and that's
12 when I marked the ending ridges or bifurcations
13 that I have found.

14 So here I have demonstrated ten
15 specific matching characteristics between the two.
16 There are many more. I've just marked two clearly
17 so that you can see, and I'm sure if you look close
18 enough you can even see one that are not marked
19 that would be a match. So this is the same process
20 that I went through with each individual print that
21 I identified.

22 Now, in addition to identifying some,
23 we can also exclude. We could exclude someone if
24 the patterns are actually different, if they don't
25 have the same characteristics in both, and if they

1 don't have the same spatial arrangement, meaning
2 what I do is not only do I find the corresponding
3 detail, they need to be in the same spatial
4 arrangement. And we find that out by counting
5 ridges.

6 So I will count ridges from one point
7 to the other and make sure that they all match in
8 both, and that's how I make the identification.

9 Q. Thank you, Ms. Kubicko. You can
10 return to your seat, please.

11 So just to clarify, that piece of
12 demonstrative evidence was fingerprint 1.1?

13 A. Yes.

14 Q. And I will now republish State's 15,
15 and I will address this in a minute, but I wanted
16 it up there. When you establish a match, does
17 someone verify your work?

18 A. Yes.

19 Q. In this case, was it verified?

20 A. Yes.

21 Q. Who verified your work?

22 A. For the initial report that I did for
23 just 1.1, that was verified by Sergeant Coker.

24 Q. And did he agree with your analysis?

25 A. Yes.

1 Q. And I want to talk about how the
2 fingerprints were made. It was your impression
3 that it was a simultaneous impression?

4 A. Yes.

5 Q. Now, we have a series of four
6 fingerprints on this card and then 1.15. Is all
7 five of these from the same hand or different
8 hands?

9 A. Different hands.

10 Q. Okay. So which one is 1.5 from?

11 A. 1.5 is also another lift from the money
12 tray, separate from the one lift that contains 1.1,
13 1.2, 1.3, and 1.4.

14 Q. Did you have a positive match to 1.5 in
15 this case?

16 A. Yes.

17 Q. And what finger did that positively
18 match the Defendant on?

19 A. That matched the left index finger,
20 number seven, of Kendall Tyus.

21 Q. So based on the way that these
22 fingerprints were oriented on the cash register
23 tray, is it possible that they could have been made
24 in a manner such as this?

25 A. Yes.

1 Q. So then is it possible they could have
2 been made, you know, gripping something like that?

3 A. Yes.

4 Q. From the side or from the underhand --
5 you can't really tell, but it is possible, though,
6 that based on the way those fingerprints are bent,
7 essentially it could have been made by something
8 like this?

9 A. Yes.

10 Q. Can you explain to the jury some of the
11 other types of results -- I believe you briefly
12 mentioned it, but what are some of the other
13 results you can get in fingerprint comparisons?

14 A. So when comparing, we can also exclude
15 somebody, and that means that it is 100 percent
16 without a doubt not that individual. And I
17 explained we can exclude somebody based off the
18 general pattern type; when you're comparing a loop
19 and a whirl, obviously they're not the same. Or
20 finding the specific characteristics and counting
21 those ridges between. If that doesn't match up, we
22 can also exclude them.

23 We can also determine that it is
24 insufficient for identification. That basically
25 means that it's a smudge, it doesn't have any ridge

1 detail that is useful or that it doesn't have
2 enough, meaning it doesn't have enough ridge
3 characteristics that the latent examiner would be
4 comfortable identifying or excluding.

5 Q. Okay. So when you have a match, you
6 would be 100 percent certain then that the two
7 fingerprints are the same?

8 A. Yes.

9 Q. And when you have an exclusion, you are
10 100 percent certain that the fingerprint is not
11 what you are comparing to the known standard?

12 A. Correct.

13 Q. And so with insufficient, is that it
14 could be, it couldn't be, you just don't know?

15 A. Insufficient -- I'm sorry, I may have
16 worded that wrong. Insufficient meaning there is
17 no fingerprint, it's a smudge; it's not useful for
18 anything.

19 Inconclusive meaning it could be, it
20 could not, I can't determine. There might be some
21 ridge characteristics, but not enough that I would
22 be competent enough to identify or exclude
23 somebody.

24 Q. So we know some other latents were
25 lifted from the scene. We've talked about the

1 matches, but just so the jury is aware, what were
2 the other results from the latents that you lifted
3 from the scene, starting with L2, which was taken
4 from inside the door?

5 And just -- did you prepare a report
6 with all these findings?

7 A. Yes.

8 Q. And that's how you're able to recall
9 what they are today?

10 A. Yes.

11 Q. So if you need to go into that to
12 refresh your recollection, then please tell the
13 jury the results of L2.

14 A. L2, there were two fingerprints. 2.1,
15 I excluded Kendall Tyus, and 2.2 was insufficient
16 for identification, and L2 was taken from the
17 interior side of the door.

18 Q. Where it was pushed to get out of the
19 restaurant?

20 A. Correct.

21 Q. So 2.1, you know for a fact that was
22 not Kendall Tyus?

23 A. Correct.

24 Q. And then you took a print called L3,
25 which I believe was a palm print from the cash

1 register outside?

2 A. Yes.

3 Q. The cash register tray where the
4 matches were found?

5 A. Yes.

6 Q. What was the result of that palm print?

7 A. That was inconclusive.

8 Q. Okay. And then L4 is a second joint
9 from the cash register tray outside. What was the
10 result of that?

11 A. That was also inconclusive.

12 Q. And then L5, which is the bottom of the
13 cash register -- that was the base of the cash
14 register which remained inside the store, what was
15 the result of that print?

16 A. That was insufficient for
17 identification.

18 Q. And then L6, which was also taken from
19 the inside door portion of the restaurant, what was
20 the result of that?

21 A. Insufficient for identification.

22 Q. L7, inside the door.

23 A. Insufficient for identification.

24 Q. And finally, L8, inside the door.

25 A. Insufficient for identification.

1 Q. So let's recap. You had a series of
2 latent lifts that you recovered from the scene.
3 Again, which latent prints were recovered from the
4 scene matched Kendall Tyus?

5 A. Those were L.1, 1.2, 1.3, 1.4, 1.5,
6 which were all collected from the money tray found
7 outside.

8 Q. And 1.1, 1.2, 1.3, and 1.4 were made
9 how?

10 A. Simultaneous, at the same time.

11 Q. And it's possible that they could have
12 been made in some manner like this?

13 A. In some fashion, yes, all fingers
14 touched at the same time.

15 Q. Are you able to tell exactly where from
16 the cash register tray those were taken?

17 A. No. I know it was either the side or
18 the bottom of the tray.

19 Q. And then the remainder of the lifts,
20 one of those was excluded from the Defendant,
21 right? Of -- from the rest of the crime scene?

22 A. Right.

23 Q. Okay. And then -- so -- and then the
24 rest of them were either insufficient or
25 inconclusive?

1 A. Yes.

2 Q. When you prepared the remainder of your
3 report, which detailed everything else that you
4 found, including 1.2, 3, 4, and 5, and then all the
5 other lifts, did somebody verify your work in that
6 case?

7 A. Yes.

8 Q. Who verified your work in that case?

9 A. Al Hallman.

10 Q. Did he agree with your assessment that
11 those are Kendall Tyus's fingerprints on the cash
12 register tray?

13 A. Yes.

14 Q. And did he agree with your assessment
15 on all of the remaining lifts, that were either
16 excluded or inconclusive or insufficient?

17 A. Yes.

18 Q. Okay. Did you and I meet prior to this
19 case coming to trial today to prepare?

20 A. Yes.

21 Q. And what did we discover during the
22 course of that meeting in regards to one of your
23 reports?

24 A. Well, we were going over the latent
25 report, the full latent report that I prepared for

1 this case. We found a copy and paste typo that I
2 had made. To go over it, for example, for 1.3 on
3 the initial report, I had wrote, positive
4 identification to the right index finger, number 4
5 of Kendall Tyus.

6 So correctly it is identified to the
7 number four finger; however, the number four finger
8 is the right ring finger. So I had written 1.2,
9 which is identification to the right index, finger
10 number two, copy and pasted that to 1.3, changed
11 the 2 to a 4 and did not change the right index to
12 the right ring. I did the same for 1.4, and 1.5.
13 was correct.

14 Q. Okay. So, Ms. Kubicko, this is the
15 right middle finger, number 3, correct?

16 A. Yes.

17 Q. And that was correctly identified in
18 your original report, right?

19 A. Yes.

20 Q. And then this is 1.2, which I believe
21 is a right index finger, correct?

22 A. Yes.

23 Q. And was that labeled correctly in your
24 original report?

25 A. Yes.

1 Q. Okay. And then the next one would be
2 1.3. Which finger is that?

3 A. That is the number 4.

4 Q. And how was that labeled in your
5 original report?

6 A. In the original report, it was labeled
7 as the right index finger, number 4.

8 Q. So it was correctly identified via the
9 number, but you just transferred the same name from
10 this one over to this one accidentally?

11 A. Correct.

12 Q. And then for 1.4, which finger is that?

13 A. That is the finger number 5.

14 Q. And did you correctly identify that in
15 the original report via the number system?

16 A. Yes.

17 Q. Again, but did you incorrectly transfer
18 the name of this finger over to name of that
19 finger?

20 A. Yes.

21 Q. So when we met, we discovered that typo
22 error. I want to be very clear to the jury on one
23 thing. Did that typo or those scrivener errors,
24 we'll call them, in the original report change the
25 findings of your positive matches in any way?

1 A. No.

2 MS. VAN PALA: Object to leading.

3 THE COURT: Sustained, leading.

4 Rephrase.

5 BY MR. LIETZOW:

6 Q. After we met, were your findings
7 altered in any way?

8 A. No.

9 MS. VAN PALA: Objection; leading.

10 THE COURT: It's sustained, but she's
11 already answered the question. Watch the leading,
12 please.

13 BY MR. LIETZOW:

14 Q. What did you change in your -- in your
15 -- did you do something to rectify the situation?

16 A. Yes; we amended our report.

17 Q. And explain to the jury what you did
18 when you made that amended report.

19 A. When I corrected the report, I just
20 changed it to reflect the right name of the
21 fingers. So I changed -- in 1.3, I changed for it
22 to say, instead of right index, the right ring, and
23 1.4 to say, instead of the right index, the right
24 little.

25 I did not change the finger numbers. I

1 did not change what finger the identification was
2 made to. It did not change any of the results that
3 I had made, just a typo error of calling it the
4 wrong finger from copying and pasting on the
5 report.

6 Q. Before we move to the search warrant,
7 when you got to the scene, did you have any idea
8 who Kendall Jerome Tyus was?

9 A. No.

10 Q. When you originally ran your prints
11 through the database, did you have any idea who
12 Kendall Jerome Tyus was?

13 A. No.

14 Q. Let's move to the search warrant. Can
15 you explain your involvement with the search
16 warrant?

17 A. Yes. I responded with detectives in
18 order to photograph the residence, photograph any
19 evidence that we found, help them search.

20 Q. Ms. Kubicko, I show you what's been
21 marked for State's Exhibit 20 and State's Exhibit
22 21. Do you recognize those two photos?

23 A. Yes.

24 Q. Did you take photo 20?

25 A. Yes.

1 Q. And is that a fair and accurate
2 representation of what you saw that night when you
3 photographed it?

4 A. Yes.

5 MR. LIETZOW: Your Honor, I would move
6 to enter this into evidence and publish to the
7 jury.

8 THE COURT: When you say, this, what
9 are you referring to?

10 MR. LIETZOW: Sorry, State's Exhibit
11 20.

12 THE COURT: Any exception?

13 MS. VAN PALA: Objection, Your Honor.

14 THE COURT: Approach.

15 (Bench conference)

16 THE COURT: What's the basis of the
17 objection?

18 MS. VAN PALA: Subject to my motion in
19 limine about the search warrant. I'm making the
20 contemporaneous objection.

21 THE COURT: This picture is where the
22 warrant was executed.

23 (End of bench conference)

24 THE COURT: Overruled; marked and
25 admitted.

1 (STATE EXH. 20 in evidence.)

2 MR. LIETZOW: Permission to publish.

3 THE COURT: You may proceed.

4 BY MR. LIETZOW:

5 Q. What is this picture showing?

6 A. This is the picture I took
7 demonstrating the address of the residence that we
8 were at.

9 Q. And what is the address of the
10 residence you responded to?

11 A. That is [REDACTED].

12 Q. Okay. And what state, city, county is
13 that in?

14 A. North Charleston.

15 Q. And do you recognize State's Exhibit
16 21?

17 A. Yes.

18 Q. Is that a sufficient demonstrative
19 piece of evidence identifying the Defendant's
20 house's location versus where the incident
21 occurred?

22 A. Yes.

23 MR. LIETZOW: Your Honor, State's
24 Exhibit 21 for ID purposes only.
25 Only.

1 THE COURT: Any objection?

2 MS. VAN PALA: No.

3 THE COURT: ID only.

4 MR. LIETZOW: Permission to publish.

5 THE COURT: You may proceed.

6 BY MR. LIETZOW:

7 Q. Please explain what this is.

8 A. The red dot is identifying where the
9 Defendant's residence is.

10 Q. And that would be that red dot that you
11 were talking about? (Indicating)

12 A. Yes.

13 Q. And what is this located down here?

14 A. That's the shopping plaza where the
15 Under the Sea Restaurant is.

16 Q. Okay. When you got there initially
17 before the search warrant was served, what
18 happened?

19 A. The detectives made contact with the
20 people who were in the residence in order to secure
21 it and get the search warrant.

22 Q. Who was in the residence at that time?

23 A. Kendall Tyus and a female.

24 Q. What did they do at that point?

25 A. The detectives spoke with Kendall Tyus

1 and the female, and we hung tight until the search
2 warrant was secured and signed.

3 MS. VAN PALA: Your Honor, objection.
4 May we approach?

5 THE COURT: You may.
6 (Bench conference.)

7 MS. VAN PALA: I wanted to ask that you
8 would remove -- if the Solicitor could remove what
9 he's publishing, because it's not going back --

10 THE COURT: I don't know if he's going
11 to make any further reference to it.

12 MR. LIETZOW: I'll remove it.
13 (End of bench conference.)

14 THE COURT: Proceed.

15 BY MR. LIETZOW:

16 Q. Later in time, the detectives came back
17 with a search warrant?

18 A. Yes.

19 Q. Were you there with them at that point?

20 A. Yes.

21 Q. What was your primary -- what was your
22 role at that point?

23 A. My role was to assist them and search
24 the residence for any evidence pertaining to this
25 case, and also document anything they found in the

1 residence as it was when we arrived.

2 Q. I'm showing you what's been marked for
3 ID purposes only as State's Exhibit 22, 23. Do you
4 recognize those two photos?

5 A. Yes.

6 Q. Did you take those two photos?

7 A. Yes.

8 Q. Do those pictures fairly and accurately
9 represent that which you photographed that night?

10 A. Yes.

11 MR. LIETZOW: Your Honor, the State's
12 seeking to enter Exhibits 22 and 23 into evidence.

13 THE COURT: Any objection?

14 MS. VAN PALA: Objection.

15 THE COURT: Overruled; marked and
16 admitted.

17 (STATE EXH. 22 in evidence.)

18 (STATE EXH. 23 in evidence.)

19 MR. LIETZOW: May I publish, Your
20 Honor?

21 THE COURT: You may.

22 BY MR. LIETZOW:

23 Q. Let's start with Exhibit 22, Ms.
24 Kubicko. What is that?

25 A. A photo I took as I was standing at the

1 front door, which enters directly into the living
2 room.

3 Q. Did you notice anything of evidentiary
4 value when you walked into the house?

5 A. Yes. While looking in the living room,
6 public view, we observed some money under the
7 couch.

8 Q. And I'm now showing you State's
9 Exhibit 23. Is that --

10 A. Yes. Yes, that's what we saw under the
11 couch and it was being held down by a drink
12 coaster.

13 Q. Okay. I'm showing you State's Exhibit
14 24 for identification purposes only. Do you
15 recognize that?

16 A. Yes.

17 Q. Did you take that?

18 A. Yes.

19 Q. Does that fairly and accurately
20 represent what was taken that night?

21 A. Yes.

22 MR. LIETZOW: Your Honor, at this point
23 I would move to enter State's Exhibit 24 into
24 evidence and publish it to the jury.

25 MS. VAN PALA: Objection.

1 THE COURT: Overruled; marked and
2 admitted. You may proceed.

3 (STATE EXH. 24 in evidence.)

4 BY MR. LIETZOW:

5 Q. What is this a picture of?

6 A. This is a picture of that money laid
7 out.

8 Q. Was that -- clarify where that money
9 was found.

10 A. Under the couch.

11 Q. Where did you go next when you were
12 executing the search warrant?

13 A. I continued taking those overall
14 photographs and also taking close-ups as we found
15 things. So after the living room, we then turned
16 to the right to go down the hallway to where the
17 bedrooms were.

18 Q. Were you able to determine which
19 bedroom in the residence belonged to Kendall Tyus?

20 A. Yes.

21 Q. I'm going to show you State's Exhibit
22 25 for ID purposes and State's Exhibit 28 for ID
23 purposes. Do you recognize those photos?

24 A. Yes.

25 Q. Did you take those photos?

1 A. Yes.

2 Q. Does that fairly and accurately
3 represent what you photographed that night?

4 A. Yes.

5 MR. LIETZOW: Your Honor, at this point
6 I would move State's 25 and State's 28 into
7 evidence and permission publish to the jury.

8 THE COURT: Any objection?

9 MS. Van Pala: Objection.

10 THE COURT: Marked and admitted,
11 subject to the objection.

12 (STATE EXH. 25 in evidence.)

13 (STATE EXH. 28 in evidence.)

14 BY MR. LIETZOW:

15 Q. Ms. Kubicko, what is picture 25
16 showing us?

17 A. This is a picture of what was on --
18 inside Kendall Tyus' room, looking in from the
19 door.

20 Q. And what does picture 28 show us?

21 A. This is a picture of inside one of the
22 dresser drawers and here you can see coins.

23 Q. If you look on that piece of paper
24 right there, what does that tell you?

25 A. I believe this is a pay stub with the

1 name, Kendall Tyus, on it.

2 Q. Okay. And what is that right there?

3 (Indicating)

4 A. That is a live round.

5 Q. Okay. How many -- did you find any
6 other live rounds at that time?

7 A. Yes.

8 MR. LIETZOW: Your Honor, I'm showing
9 Ms. Kubicko what's been marked as State's Exhibit
10 29 for identification only.

11 BY MR. LIETZOW:

12 Q. Do you recognize that?

13 A. Yes.

14 Q. How are you able to recognize that?

15 A. I recognize this. This is the format
16 that we use in the office to label our evidence,
17 and it has my name on it.

18 Q. Did you collect that?

19 A. Yes.

20 Q. Open it and just briefly look in it.

21 Has that been tampered with in any way since the
22 date you collected it?

23 A. No.

24 MR. LIETZOW: Your Honor, at this point
25 I would move to enter State's Exhibit 29 into

1 evidence and take it out of the package and publish
2 it to the jury.

3 MS. VAN PALA: Objection.

4 THE COURT: Overruled. You may
5 proceed.

6 (STATE EXH. 29 in evidence.)

7 BY MR. LIETZOW:

8 Q. Ms. Kubicko, what did -- and so we
9 showed that one picture of a bullet. What else or
10 how many more did you find at that point?

11 A. There were nine total in that drawer.

12 Q. And go ahead and take these out and
13 tell the jury what caliber those were.

14 A. They are all 9-millimeter live rounds.

15 Q. I'm just going to take one from you.
16 When you say live round, what does that mean?

17 A. A live round meaning a full round; put
18 it in a gun and -- it's not just like a shell
19 casing or the lead; it's a full live round.

20 Q. And you were able to determine what
21 caliber it is how?

22 A. On the head stamp it says, W-I-N, which
23 stands for Winchester, 9-millimeter Luger.

24 Q. And where were those found?

25 A. These were found in that dresser drawer

1 that was photographed.

2 Q. Inside whose room?

3 A. Inside Kendall Tyus' room.

4 Q. I'm now going to put those aside, and
5 I'm showing you what's been marked as State's
6 Exhibit 31 for ID purposes only.

7 A. Yes.

8 Q. Do you recognize that?

9 A. Yes.

10 Q. Did you take a picture of that?

11 A. Yes.

12 Q. Does that fairly and accurately
13 represent it as you saw it when you walked in that
14 night?

15 A. Yes.

16 MR. LIETZOW: Permission to move in --
17 to enter State's Exhibit 31 into evidence and
18 publish to the jury.

19 MS. VAN PALA: Objection.

20 THE COURT: Overruled; marked and
21 admitted.

22 (STATE EXH. 31 in evidence.)

23 BY MR. LIETZOW:

24 Q. What is this a picture of?

25 A. This is a picture -- I'm standing near

1 the entryway door into the room, facing more so to
2 the right side of the room, which shows the door
3 that leads into the closet.

4 Q. Of an evidentiary note, what do you
5 notice in that photo?

6 A. In this photo I recognize the pair of
7 white sneakers that look consistent with what the
8 suspect was wearing in the video.

9 Q. I'm showing you what was marked as
10 State's Exhibit 30 for identification purposes
11 only. Do you recognize that?

12 A. Yes.

13 Q. How are you able to recognize that?

14 A. This is my format to package the
15 evidence and my name on it.

16 Q. So did you collect the evidence at that
17 time?

18 A. Yes.

19 Q. And has that been changed or altered or
20 tampered with in any way since the day you
21 collected it?

22 A. No.

23 MR. LIETZOW: Your Honor, at this
24 point, I would move to enter State's Exhibit 30
25 into evidence and publish to the jury.

1 MS. VAN PALA: Objection.

2 THE COURT: Overruled. You may
3 proceed. Marked and admitted.

4 (STATE EXH. 30 in evidence.)

5 BY MR. LIETZOW:

6 Q. Take those out of the package and hold
7 them up, please.

8 A. (Complies)

9 Q. Are you familiar with sneakers?

10 A. A little bit.

11 Q. Would you classify those as low-tops,
12 high-tops, or mid-tops?

13 A. Mid-tops.

14 Q. Do they have an air bubble in them? Do
15 you know what an air bubble is?

16 A. I believe so, like a puff puff. I
17 don't know.

18 Q. That's fine. Never mind.

19 I'm showing you State's Exhibits 32 and
20 33 for identification purposes only. Do you
21 recognize those two photos?

22 A. Yes.

23 Q. Did you take those?

24 A. Yes.

25 Q. Do they fairly and accurately represent

1 what you photographed on night?

2 A. Yes.

3 MR. LIETZOW: Your Honor, at this point
4 I'd move to have State's Exhibit 32 and 33 into
5 evidence and publish for the jury.

6 THE COURT: Any objection?

7 MS. VAN PALA: Objection.

8 THE COURT: Overruled; marked and
9 admitted. You may proceed.

10 (STATE EXH. 32 in evidence.)

11 (STATE EXH. 33 in evidence.)

12 BY MR. LIETZOW:

13 Q. Ms. Kubicko, please tell the jury what
14 this is a photo of.

15 A. This is a photo of inside a closet.
16 Looks like a sack of dirty clothes.

17 Q. What do you notice in that photo?

18 A. I notice a jacket, particularly with
19 the white stripe, that looks consistent with the
20 jacket in the video.

21 Q. And whose room were you in?

22 A. Kendall Tyus'.

23 Q. I'm showing you State's Exhibit 33.
24 What is this a photo of?

25 A. After pulling that jacket out of the

1 closet, we laid it on the bed and photographed it.
2 It's the same jacket.

3 Q. Ms. Kubicko, I'm showing you what was
4 marked as State's Exhibit 34 for identification
5 purposes only. Do you recognize that?

6 A. Yes.

7 Q. How are you able to recognize that?

8 A. My name and packaging.

9 Q. Did you collect that?

10 A. Yes.

11 Q. Has that in any way been altered or
12 tampered with, other than the Solicitor's office
13 opening it up and preparing it for trial, since the
14 day you recovered it?

15 A. No.

16 MR. LIETZOW: At this point, I would
17 seek to enter 34 into evidence and publish it for
18 the jury.

19 MS. VAN PALA: Objection.

20 THE COURT: Overruled; marked and
21 admitted.

22 (STATE EXH. 34 in evidence.)

23 BY MR. LIETZOW:

24 Q. Could you stand up and take that out
25 and show the jury what it is that you collected?

1 A. (Complies)

2 Q. Ms. Kubicsko, does that have a hood on
3 it?

4 A. Yes.

5 Q. And what kind of lining does that
6 jacket have?

7 A. Just a cotton --

8 Q. Gray?

9 A. Gray, yeah.

10 Q. And can you turn that jacket around?
11 Is there something noteworthy on the back? Does it
12 have a lighter blue stripe across the back?

13 A. Yes.

14 Q. And the sleeves having two white
15 stripes?

16 A. Yes.

17 Q. Ms. Kubicsko, I'm showing you State's
18 Exhibit 35 and 36. Do you recognize those photos?

19 A. Yes.

20 Q. Did you take those?

21 A. Yes.

22 Q. Does that fairly and accurately
23 represent the pictures as you took them that night?

24 A. Yes.

25 MR. LIETZOW: Your Honor, at this point

1 I would seek to move State's Exhibit 35 and State's
2 Exhibit 36 into evidence.

3 MS. VAN PALA: Objection.

4 THE COURT: Let me see them. Marked
5 and admitted.

6 (STATE EXH. 35 in evidence.)

7 (STATE EXH. 36 in evidence.)

8 MR. LIETZOW: Permission to publish?

9 THE COURT: You may proceed.

10 BY MR. LIETZOW:

11 Q. Ms. Kubicko, what is picture 35
12 showing?

13 A. This is a picture of a chair that was
14 located in the adjacent room to Kendall Tyus's. We
15 were searching through, lifted the seat cushion,
16 and observed the money in the couch or chair.

17 Q. And State's Exhibit 36?

18 A. This is just a close-up of that money.

19 Q. When you are executing a search
20 warrant, are you just tearing the place up? How do
21 you go about doing that?

22 A. Not tearing the place up, but, yes, we
23 are going room from room searching drawers. In
24 this case, we're going into it knowing that we're
25 looking for the clothing that the suspect was

1 wearing, a firearm, money, anything that could be
2 linked to the crime.

3 So in this case, since we were looking
4 for money, possible places to hide money, places
5 that clothing would be, and also looking for a gun.

6 Q. I'm showing State's Exhibit 37 for
7 identification purposes only, State's 38 for
8 identification purposes only, State's 39 for
9 identification only and State's 40 for
10 identification only. Do you recognize all of those
11 photos?

12 A. Yes.

13 Q. Did you take all of those pictures?

14 A. Yes.

15 Q. Do all of those pictures fairly and
16 accurately represent the items that you
17 photographed on that night?

18 A. Yes.

19 MR. LIETZOW: State's moving to enter
20 Exhibits 37, 38, Your Honor, 39, Your Honor, and 40
21 into evidence and permission to publish to the
22 jury.

23 THE COURT: Madame Forelady, and ladies and
24 gentlemen, I have a very brief matter of law to
25 take up with the attorneys. During the break

1 please do not discuss the case and please leave
2 your notepads in your seat.

3 (Jury out, 3:20 p.m.)

4 THE COURT: You may be seated. It's my
5 understanding, and I just want to be clear, that
6 the basis of the defense's objection to these
7 series of photographs is based on the motion in
8 limine regarding the fingerprints and how the
9 police came to find Mr. Tyus and identify him as a
10 suspect; is that accurate?

11 MS. VAN PALA: That's correct, Your
12 Honor. Also, they're cumulative.

13 THE COURT: How are they cumulative?

14 MS. VAN PALA: They are pictures of a
15 firearm and they have the actual firearm.

16 THE COURT: It's two different things,
17 apples and oranges. They are entitled to
18 corroborate what they found in the residence.

19 MS. VAN PALA: Court's indulgence.

20 THE COURT: Uh-huh.

21 MS. VAN PALA: Your Honor, to this
22 point there has not been testimony that an actual
23 eyewitness witnessed the perpetrator with a gun.
24 It's only been the visual surveillance.

25 THE COURT: Does the video show him

1 with a gun -- show the perpetrator with a gun in
2 his hand?

3 MS. VAN PALA: What could be
4 interpreted as a gun.

5 THE COURT: I need to see that because
6 I'm unclear. There has to be some link between
7 what you found at his house and what you -- you
8 have to have an eyewitness that says, I saw him
9 with a gun or what I thought was a gun or a deadly
10 weapon. Or that video has to show what appeared to
11 be a gun or a representation of a gun.

12 That's like you coming to my house and
13 executing a search warrant, saying, because you
14 found a legally registered gun at my house, that I
15 committed a robbery. You have to have some link.
16 You have to connect the dots. You don't get to
17 say, because I have a gun, I committed the robbery.

18 MR. LIETZOW: May I approach?

19 THE COURT: I need to see the video.

20 Mr. LIETZOW: I'm showing Your Honor
21 what was marked as State's Exhibit 5, which it is
22 the State's contention that the individual --

23 THE COURT: Oh, I see. I want to see
24 the video, though, that portion of the video
25 surveillance.

1 MR. LIETZOW: Yes, ma'am.

2 THE COURT: Did you-all show that to
3 the jury?

4 MR. LIETZOW: Yes, ma'am.

5 THE COURT: Because it went by so fast.
6 Let me see it again please.

7 (Video played.)

8 THE COURT: Is that the extent of what
9 you showed to the jury?

10 MR. LIETZOW: Yes, ma'am.

11 THE COURT: What exhibit is that?
12 Which exhibit is it and which part of the exhibit
13 is it?

14 MR. LIETZOW: This is State's Exhibit
15 Number 1, video number 8, at the 24-, 25-minute
16 mark. And I believe Your Honor has the still that
17 we produced from that video.

18 THE COURT: I do. That's all I need.

19 MR. LIETZOW: And that was State's 5, I
20 believe, Your Honor.

21 THE COURT: It is. Anything further --
22 anything further regarding the basis of the
23 objection to State's Exhibit 37, 38, 39, and 40
24 from the defense?

25 MS. VAN PALA: Beg the Court's

1 indulgence.

2 THE COURT: Uh-huh.

3 MS. VAN PALA: Your Honor, we would
4 like to point out for the benefit of the record
5 that Sunny testified that he was in the kitchen the
6 whole time, so he didn't have an eyewitness
7 account. Thank you, Your Honor.

8 THE COURT: You're welcome.
9 Anything further from the State?

10 MR. LIETZOW: Would you require a
11 response to that?

12 THE COURT: If you want to; it's up to
13 you.

14 MR. LIETZOW: We've been able to enter
15 this in through the hearsay exception from the
16 custodian of the records. Sunny testified setting
17 the surrounding incident, describing that he was
18 inside the restaurant, his wife was inside the
19 restaurant, and when it happened they fled.

20 It's our position that through this
21 video we're able to establish that an armed robbery
22 did occur, and that through the circumstantial
23 evidence and the direct evidence of the fingerprint
24 and circumstantial evidence of what was found at
25 Kendall Tyus's house pursuant to the search

1 warrant, we're able to sufficiently link him to
2 that armed robbery right there.

3 THE COURT: Can I see 37, 38, 39, and
4 40, please?

5 MR. LIETZOW: May I approach?

6 THE COURT: Yes.

7 MR. LIETZOW: That's approximately
8 where they located the next photo; they moved some
9 of that around, the insulation. And this is an
10 overview.

11 THE COURT: Okay. Thank you. You may
12 stand back. The objection is overruled.

13 At first I could not -- whenever the
14 State relies on circumstantial evidence, it has to
15 go beyond conjecture. And while they do not have
16 an eyewitness that places the Defendant at the
17 scene with what appeared to be a gun or a
18 representation of a gun, very clearly the video,
19 and I'm referring to State's Exhibit 5, which is a
20 still from State's Number 1, both of which were
21 admitted without objection, are contemporaneous --
22 the video speaks for itself, it does not require an
23 eyewitness, where it purports to show the actual
24 robbery.

25 Very clearly in that surveillance

1 video, there appears to be a gun or the
2 representation of a deadly weapon, that being a
3 gun, very clearly in the grip of the alleged
4 perpetrator -- well, the perpetrator of this event
5 who is alleged to be the Defendant. And there is
6 certainly now -- the link that I was concerned
7 about has been clarified and it is relevant, it is
8 probative and the objection is overruled as regards
9 37, 38, 39, and 40. They will be marked and
10 admitted. Your objection will be noted for the
11 record.

12 If you hadn't had the video, you
13 wouldn't need an eyewitness, but you don't need
14 both. Very clearly -- for purposes of the record,
15 the gun in the video looks very similar, if not the
16 same, to the gun that was seized during the search
17 warrant.

18 MR. LIETZOW: That's my argument in
19 closing, Your Honor.

20 (STATE EXH. 37 in evidence.)

21 (STATE EXH. 38 in evidence.)

22 (STATE EXH. 39 in evidence.)

23 (STATE EXH. 40 in evidence.)

24 (Jury in, 3:30 p.m.)

25 THE BAILIFF: All jurors present and

1 seated.

2 THE COURT: Thank you. You may be
3 seated. Ladies and gentlemen, we appreciate your
4 patience. We will now resume with the testimony.
5 You may proceed.

6 MR. LIETZOW: Thank you, Your Honor.
7 State's Exhibits 37, 38, 39, and 40, which have
8 been moved into evidence. Your Honor, requesting
9 permission to publish.

10 THE COURT: You may proceed.

11 BY MR. LIETZOW:

12 Q. I'm showing you State's Exhibit 37.

13 What is this a photo of?

14 A. This is a photo of one of the initial
15 overall photographs I took while in the residence.
16 This is depicting, as taken from the living room,
17 looking to the right down the hallway towards the
18 bedroom.

19 Q. What is significant about this
20 photograph?

21 A. What is significant is the material we
22 see on the floor there right below the attic.

23 Q. What is that?

24 A. It appeared to be like the insulation
25 that was in the attic.

1 Q. What does that tell you as a --

2 A. That somebody may have been in the
3 attic recently.

4 Q. What did you do as a result?

5 A. Throughout the search, we then went up
6 into the attic, and that's where they found the
7 firearm.

8 Q. I'm showing you photograph 38. What is
9 this a photo of, Ms. Kubicko?

10 A. This is a picture of the attic, very
11 hard to tell -- it's very small. The insulation up
12 there was not a lot. You couldn't even walk up
13 there at all. It was very small.

14 Q. And where in relation to the entrance
15 of the attic is this?

16 A. It was on the stairs. It was directly
17 to the right, hidden under the insulation.

18 Q. And I'm showing you State's Exhibit
19 Number 39. What is this a photo of?

20 A. This was a photo that was taken after
21 it was removed from underneath the insulation.
22 That way you could actually see it in the
23 photograph.

24 Q. State's 40, what is that a photo of?

25 A. We then took the firearm, made it safe

1 by removing the magazine and making sure there was
2 no round in the chamber, and then took the
3 photograph of it.

4 Q. When you recovered the firearm, was --
5 what is a magazine?

6 A. A magazine is the clip that holds the
7 live rounds into the gun.

8 Q. Was the magazine inserted into the gun
9 when you recovered it?

10 A. Yes.

11 Q. Was the weapon loaded when you
12 recovered it?

13 A. I do not have it noted whether or not
14 there was a live round in the chamber or not. The
15 magazine was in the gun, so it was ready to fire.

16 Q. I'm showing you State's Exhibit 41. Do
17 you recognize that?

18 A. Yes.

19 Q. How are you able to recognize that?

20 A. My name and packaging and my initials
21 on the seal.

22 Q. What is that?

23 A. This is the firearm that we collected
24 from the residence.

25 Q. And if you don't mind briefly opening

1 it, has that been changed or altered or tampered
2 with in any way?

3 A. No.

4 Q. When you take a firearm into evidence,
5 do you note the serial number on the gun?

6 A. Yes.

7 Q. Describe what a serial number is.

8 A. The serial number is the identification
9 number that the manufacturer will give the weapon
10 so it's traceable.

11 Q. Is that serial number on the weapon
12 matching the serial number for the weapon that you
13 collected on that date?

14 A. Yes.

15 MR. LIETZOW: Okay. At this time, Your
16 Honor, I'm requesting to enter State's Exhibit 41
17 into evidence and publish to for the jury.

18 MS. VAN PALA: Objection, Your Honor.

19 THE COURT: Let me see the gun.
20 Overruled; marked and received in
21 evidence.

22 (STATE EXH. 41 in evidence.)

23 THE COURT: You may proceed.

24 BY MR. LIETZOW:

25 Q. Hold that up so the jury can see that.

1 Is this the firearm that you recovered?

2 A. Yes.

3 Q. What caliber firearm is this?

4 A. It's a 9-millimeter.

5 Q. And is that a revolver or a
6 semi-automatic?

7 A. Semi-automatic.

8 Q. Okay. And is this the magazine that
9 you found loaded inside the gun?

10 A. Yes.

11 Q. Were there originally bullets inside
12 the magazine?

13 A. Yes.

14 Q. Those have since been removed?

15 A. Yes.

16 Q. I'm showing you State's Exhibit 42,
17 which came from State's Exhibit 41. If you would
18 open that. Do you recognize that?

19 A. Yes. Those are 9-millimeter live
20 rounds taken out of the magazine.

21 MR. LIETZOW: Your Honor, at this time,
22 I would move to enter 42 into evidence.

23 MS. VAN PALA: Objection.

24 THE COURT: Overruled; marked and
25 admitted as State's Exhibit 42.

1 (STATE EXH. 42 in evidence.)

2 By MR. LIETZOW:

3 Q. Finally, Ms. Kubicko, I'm showing you
4 what was marked as State's Exhibit Number 26 for
5 identification purposes only. Do you recognize
6 that?

7 A. Yes.

8 Q. Did you take that photo?

9 A. Yes.

10 Q. And does that fairly and accurately
11 represent what you captured?

12 A. Yes.

13 MR. LIETZOW: Your Honor, at this time,
14 I would move to enter State's Exhibit 26 into
15 evidence and publish it to the jury.

16 MS. VAN PALA: Objection.

17 THE COURT: Overruled; marked and
18 admitted into evidence.

19 (STATE EXH. 26 in evidence.)

20 BY MR. LIETZOW:

21 Q. Ms. Kubicko, at what point did you-all
22 recover this?

23 A. I'm not sure exactly at what point it
24 was recovered, but this was the photograph I took
25 of the license.

1 Q. What is the address of Kendall Jerome
2 Tyus?

3 A. [REDACTED].

4 Q. Is that where you all went to execute
5 the search warrant?

6 A. Yes.

7 Q. Is that where you found all the
8 evidence?

9 A. Yes.

10 MR. LIETZOW: Beg the Court's
11 indulgence.

12 THE COURT: Uh-huh.

13 MR. LIETZOW: That's all the questions
14 I have for you, Ms. Kubicko. Please answer any
15 that the defense has.

16 THE COURT: You may proceed.

17 MS. VAN PALA: Thank you. Beg the
18 Court's indulgence.

19 THE COURT: Uh-huh.

20 MS. VAN PALA: May it please the Court?

21 THE COURT: Uh-huh. You may proceed.

22 CROSS-EXAMINATION

23 BY MS. VAN PALA:

24 Q. Afternoon. I'm Tamara Van Pala. You
25 cannot testify that the firearm that is sitting on

1 this table is the same firearm that was used in the
2 armed robbery?

3 A. No.

4 Q. You cannot testify that the bullets
5 that the State has entered into evidence are the
6 same bullets that could have been used in this
7 armed robbery?

8 A. No.

9 Q. You cannot testify that that jacket
10 that is sitting on the table is the same jacket
11 that the assailant wore during the robbery?

12 A. No. However, if you take everything in
13 totality like we need to do --

14 MS. VAN PALA: Your Honor --

15 THE COURT: She's allowed to explain
16 her answer.

17 Ma'am, you may answer yes or no and
18 then explain the answer. Do you need the question
19 repeated?

20 THE WITNESS: Yes, please.

21 THE COURT: Repeat the question.

22 BY MS. VAN PALA:

23 Q. You cannot testify that that jacket is
24 the same jacket that the person wore on the
25 surveillance video?

1 A. No.

2 Q. You cannot testify that those sneakers
3 that the State has entered into evidence are the
4 same sneakers that the person wore on the
5 surveillance video?

6 A. No.

7 Q. You cannot testify that the firearm was
8 loaded at the time that you discovered it?

9 MR. LIETZOW: Objection.

10 THE COURT: Basis?

11 MR. LIETZOW: I believe she did testify
12 to that.

13 MS. VAN PALA: May we approach?

14 THE COURT: She didn't testify they
15 were the same sneakers. She testified they were
16 similar to the ones that were in the video.

17 MR. LIETZOW: May we approach, Your
18 Honor?

19 THE COURT: Yes.

20 (Bench conference)

21 MR. LIETZOW: Is this the bullet that
22 was in the gun; is that what you were saying?

23 THE COURT: We were beyond the gun
24 question. She was asking about the sneakers.

25 MS. VAN PALA: I asked about the

1 sneakers and then I asked about the gun, because
2 her report -- her report --

3 THE COURT: The last question you asked
4 was about sneakers.

5 MR. LIETZOW: There may be -- I was
6 objecting to the firearm question.

7 MS. VAN PALA: I asked her the
8 question, you cannot say that that gun was loaded
9 when you retrieved it from the house.

10 MR. LIETZOW: She testified it was
11 loaded when she retrieved it.

12 MS. VAN PALA: She said that she didn't
13 note it in her report whether --

14 THE COURT: She said there was a full
15 magazine in the gun. If there's a bullet in the
16 chamber, that's a whole other --

17 MS. VAN PALA: The magazine is in the
18 gun and she said there no bullets in the chamber.
19 In my mind, that's not loaded, but she said she
20 couldn't determine that.

21 THE COURT: Ask her that question
22 specifically.

23 (End of bench conference.)

24 THE COURT: You may proceed.

25 BY MS. VAN PALA:

1 Q. You cannot testify that there was a
2 magazine in that firearm at the time that you
3 retrieved it?

4 A. Yes; there was a magazine in the
5 firearm at the time that we retrieved it.

6 Q. You did not just testify that your
7 report is inconclusive?

8 A. In regards to the firearm? I might be
9 misunderstanding the question. Can you repeat it?

10 MS. VAN PALA: Court's indulgence.

11 THE COURT: Yes, ma'am.

12 BY MS. VAN PALA:

13 Q. Ms. Kubicko, in your report you did
14 not determine -- you did not note that the firearm
15 had a live round at the time that you retrieved it.

16 A. I did not note whether there was a live
17 round in the chamber or not; however, the firearm
18 was loaded with a magazine that contained nine live
19 rounds.

20 Q. But you cannot determine that that
21 firearm was loaded with a round in the chamber at
22 the time that you retrieved it?

23 A. No. I did not notate that.

24 Q. You've been qualified as an expert in
25 crime scene investigation three times, correct?

1 A. Yes.

2 Q. And this is your first time that you've
3 been qualified as an expert in latent prints?

4 A. Yes.

5 Q. And you graduated with a degree in
6 forensic and investigative science in 2010,
7 correct?

8 A. Yes.

9 Q. And you received training from North
10 Charleston Police Department from December of 2010
11 through June of 2011?

12 A. Yes.

13 Q. And you received a certification in
14 June of 2011 as a result?

15 A. Yes.

16 Q. That was about six months before this
17 incident, correct?

18 A. Yes.

19 Q. You are a crime scene technician,
20 correct?

21 A. Yes.

22 Q. You respond to the scene?

23 A. Yes.

24 Q. You don't interview witnesses as part
25 of your job?

1 A. No.

2 Q. You do not investigate the facts,
3 correct?

4 A. I do.

5 Q. You get an overview of the facts?

6 A. Yes.

7 Q. To determine what evidence might be
8 important so you can investigate?

9 A. Yes.

10 Q. Then you collect evidence?

11 A. Yes.

12 Q. And you organize evidence?

13 A. Yes.

14 Q. And you do this pursuant to your
15 training?

16 A. Yes.

17 Q. You were trained how to collect
18 evidence?

19 A. Yes.

20 Q. You were trained how to store evidence?

21 A. Yes.

22 Q. How to properly document evidence?

23 A. Yes.

24 Q. How to organize it?

25 A. Yes.

- 1 Q. Package it, mark it?
- 2 A. Yes.
- 3 Q. Mark it with the date and the time that
- 4 it was collected?
- 5 A. Yes.
- 6 Q. Where the evidence came from?
- 7 A. Yes.
- 8 Q. A description?
- 9 A. Yes.
- 10 Q. And you initial the package?
- 11 A. Yes.
- 12 Q. And you were trained in how to gather
- 13 fingerprints?
- 14 A. Yes.
- 15 Q. You were trained in how to gather DNA
- 16 evidence?
- 17 A. Yes.
- 18 Q. And you were trained in how to dust for
- 19 prints?
- 20 A. Yes.
- 21 Q. You were trained in how to lift prints
- 22 from all kind of surfaces?
- 23 A. Yes.
- 24 Q. You were trained to put them on a
- 25 latent backer card, correct?

1 A. If that is the technique that we're
2 using and that would be the correct way to preserve
3 it, yes.

4 Q. You write information about that print
5 on the back of the latent backer card?

6 A. Yes.

7 Q. You write where the prints came from?

8 A. Yes.

9 Q. You write your name?

10 A. Yes.

11 Q. The date?

12 A. Yes.

13 Q. And that's how you keep them organized?

14 A. Yes.

15 Q. It's how you know where they came from
16 and what they are?

17 A. Yes.

18 Q. You get training on how to organize the
19 fingerprints that you've collected, correct?

20 A. Organized in -- how?

21 Q. You number the fingerprints one through
22 ten?

23 A. Not as a crime scene technician, no.

24 Q. As a latent print reviewer?

25 A. Yes.

1 Q. Is that the proper term?

2 A. Latent examiner.

3 Q. Latent examiner. Thank you.

4 You write down the finger number, one
5 through ten?

6 A. In my report, yes.

7 Q. You write down whether it's an index
8 finger, a middle finger, or a ring finger, or a
9 pinkie?

10 A. Little fingers, yes.

11 Q. You write down left or right hand?

12 A. Yes.

13 Q. You write down whether it's a palm
14 print?

15 A. Yes.

16 Q. Or a joint print?

17 A. Yes.

18 Q. You can have more than one lift on a
19 single backer card?

20 A. Yes.

21 Q. So you can have more than one set of
22 prints on a single latent card -- latent backer
23 card?

24 A. Meaning from different individuals on
25 one latent card?

1 Q. Perhaps.

2 A. Yes.

3 Q. And you write that down to keep that
4 organized?

5 A. I'm unsure what you're asking.

6 Q. I apologize. Let me clarify.

7 You write down whether you have more
8 than one set of prints on each latent card?

9 A. We will identify each latent backer
10 card by identifying it as L1, L2, meaning latent
11 backer card 1 or latent backer card 2, and then
12 each individual lift on that card. We will then
13 identify each individual fingerprint as 1.1, 1.2
14 and so forth. The same thing with L2 that --
15 different fingerprints on that card would be 2.1,
16 2.2 and so forth.

17 Q. Thank you. And you can also give each
18 latent backer card a number that is not L1?

19 A. No, not as a latent examiner. That is
20 how we do it as a latent examiner.

21 Q. But you can also make a notation that
22 it's just an Arabic numeral 1, 2, 3 on the backer
23 card?

24 A. I would not do that as a latent
25 examiner; when I'm acting in that capacity, should

1 I say.

2 MS. VAN PALA: Court's indulgence.

3 THE COURT: Uh-huh.

4 BY MS. VAN PALA:

5 Q. This is a latent backer card, correct?

6 A. Yes.

7 Q. Just wanted to make sure my terminology
8 was correct.

9 Let the record reflect --

10 MS. VAN PALA: Permission to approach
11 the witness.

12 THE COURT: You may.

13 MS. VAN PALA: Please let the record
14 reflect that I'm showing the witness Defendant's
15 Exhibit 36 for identification only.

16 BY MS. VAN PALA:

17 Q. This is also a latent backer card,
18 correct?

19 A. This is a photocopy made of two of the
20 latent backer cards collected at the scene.

21 Q. And those have Arabic numerals written
22 on them?

23 A. Yes.

24 Q. Just a single one?

25 A. Yes.

1 Q. In addition to an L1 or L2?

2 A. Yes.

3 Q. And the L1 and L2 refers to prints?

4 A. Yes. The L1 or L2 is what as a latent
5 examiner I identified this latent backer card to
6 coincide with my latent report.

7 Q. Thank you. But in this case you also
8 gave five of your latent backer cards numbers?

9 A. Yes. While I was doing the crime scene
10 aspect of this job, I had processed the interior
11 side of the door, and to save time, instead of
12 sitting there and wasting the time filling out the
13 back of the latent cards, I put those numbers on
14 the latent backer cards and photographed them.
15 That way I had a record of where exactly those
16 latent lifts were collected from, so then after
17 when I got back to the office I could then sit and
18 fill out the back of the card based on my
19 photographs.

20 Q. And in this case, when you responded to
21 the scene, it was dark outside, correct?

22 A. Yes.

23 Q. And you reviewed the surveillance
24 footage?

25 A. Yes.

1 Q. And you discovered the cash tray
2 outside, correct?

3 A. I didn't discover it, but, yes, I was
4 told about it.

5 Q. And the cash tray was in front of the
6 antique store.

7 A. Yes.

8 Q. And you found no coins on the floor in
9 the general vicinity, correct?

10 A. Incorrect. I believe one of the
11 pictures does show one coin on the ground.

12 MS. VAN PALA: Permission to approach
13 the witness.

14 THE COURT: You may approach.

15 MS. VAN PALA: Please let the record
16 reflect that I'm showing the witness State's
17 Exhibit Number 14.

18 BY MS. VAN PALA:

19 Q. Does that depict a coin?

20 A. This is not the money that I found
21 outside of the business.

22 Q. Is that the coin that you were talking
23 about?

24 A. No. I don't see a coin.

25 Q. State's Exhibit Number 9. That is the

1 cash tray outside?

2 A. Yes.

3 Q. In front of the antique store?

4 A. Yes.

5 Q. And there were no coins?

6 A. There are coins in the drawer, or in
7 the money tray, should I say.

8 Q. But there were no coins on the ground
9 around the money tray?

10 A. Not that I can see in this photograph.
11 There are other photographs, however.

12 MS. VAN PALA: Thank you. Permission
13 to publish.

14 The COURT: You may proceed.

15 MS. VAN PALA: Thank you.

16 BY MS. VAN PALA:

17 Q. No coins that you can determine,
18 correct?

19 A. I can't tell from this photo, no.

20 Q. You also took pictures?

21 A. Yes.

22 Q. You took 107 pictures?

23 A. Yes.

24 Q. You took pictures of the restaurant?

25 A. Yes.

- 1 Q. Of the register inside?
- 2 A. Yes.
- 3 Q. You took pictures of the cash tray
- 4 outside, like we just saw?
- 5 A. Yes.
- 6 Q. You took pictures of the counter?
- 7 A. Yes.
- 8 Q. You took pictures behind the counter?
- 9 A. Yes.
- 10 Q. You took pictures of the countertop?
- 11 A. Yes.
- 12 Q. You did not take pictures of the edge
- 13 of the counter?
- 14 A. Edge of what counter? Edge of the
- 15 front counter?
- 16 Q. Yes.
- 17 A. Front side or back side?
- 18 Q. Back side.
- 19 A. I believe there is a photo showing the
- 20 countertop, facing the front door.
- 21 Q. You determined, based on your review of
- 22 the surveillance footage, that the assailant
- 23 reached over the countertop, correct?
- 24 A. Yes.
- 25 Q. But you did not take pictures of where

1 he could have grabbed on the countertop -- on the
2 counter edge, excuse me?

3 A. There is a picture of the countertop
4 edge.

5 Q. Included in the general picture?

6 A. Right.

7 Q. You did not take pictures of underneath
8 the counter?

9 A. No.

10 Q. You did not dust for prints on the edge
11 of the counter?

12 A. Yes, I did. When I say that -- when I
13 say I processed the countertop, I processed the
14 countertop in its totality.

15 Q. And you did not remove any prints from
16 that area of the countertop?

17 A. No. I did not observe any that would
18 be sufficient to make any kind of determination,
19 and the counter, although it appears to be -- it's
20 a hard surface, it appears to be a good surface,
21 once you start processing a countertop like that,
22 the texture of it comes out, which makes it very
23 hard. It's a very fine texture.

24 Q. So you took pictures of the fingerprint
25 cards?

1 A. Yes.

2 Q. You took pictures of the backer cards?

3 A. Yes.

4 Q. You took pictures of the backer card
5 numbers?

6 A. That I gave to photographs, yes.

7 Q. You took pictures of the DNA swabs?

8 A. Yes.

9 Q. You took pictures of the numbers that
10 you gave the DNA swabs?

11 A. Yes.

12 Q. And those pictures show you where you
13 found the evidence?

14 A. Yes. Those numbers allow me to go back
15 to the photos and relate where that item was taken.
16 For example, the DNA swabs, I numbered the DNA
17 swabs and photographed them where I put them.
18 Again, so that when I went back to the office and I
19 was packaging my evidence and filling out my chain
20 of custody, I could accurately describe where I
21 took that DNA swab from.

22 Q. You took eight latent backer cards
23 altogether, correct?

24 A. Yes.

25 Q. You took pictures of only five?

1 A. Yes.

2 Q. You took six pictures of five latent
3 backer cards?

4 A. I don't know the numbers offhand.

5 MS. VAN PALA: Permission to approach
6 the witness?

7 THE COURT: You may approach.

8 MS. VAN PALA: Thank you.

9 By MS. VAN PALA:

10 Q. Defendant's Exhibits 12, 13, and 14,
11 marked for identification only. State's
12 Exhibits 11, 12, and 14. You took six pictures of
13 five cards.

14 A. Yes. There are six here of cards, and
15 that's assuming I don't -- I have all of the
16 pictures I took in front of me. That's assuming
17 that you have handed me all of the pictures of the
18 cards, yes.

19 Q. May I? Thank you.

20 So you determined that Kendall's prints
21 were found only on the cash tray outside?

22 A. I identified his fingerprints on the
23 cash tray, yes.

24 Q. But not the door?

25 A. They could have been on the door;

1 however, I did not locate them, lift them.

2 Q. And not on the cash register drawer on
3 the interior?

4 A. The one outside of the business?

5 Q. The one inside, the interior cash
6 register drawer.

7 A. I did process the bottom of it and did
8 make one latent lift and that was insufficient for
9 identification.

10 Q. But that means that that print does not
11 match Kendall's?

12 A. It means that that print was not of
13 quality to make a determination.

14 Q. It is still not a positive
15 identification to Kendall, right?

16 A. Yes. And it is also not an exclusion.

17 Q. You cannot say with certainty that you
18 took prints -- you lifted for prints off the side
19 or the bottom of the cash drawer, correct?

20 A. Did I process the sides and bottom of
21 the money tray; is that what you're asking? The
22 outside money tray, yes, I processed the sides and
23 the bottom of it. I processed the entire thing.

24 Q. But you testified on Direct that you
25 cannot say that the prints that you lifted came

1 from the side of the money tray or the bottom of
2 the money tray?

3 A. Yes. I can say that they came from the
4 side or the bottom.

5 Q. But you didn't photograph where you
6 took the prints from the money tray?

7 A. No. This is from my memory of what I
8 did on the crime scene.

9 Q. And, similarly, you did not label the
10 lift card with an Arabic numeral, like you had in
11 the others?

12 A. I did not, because I filled out the
13 latent card indicating the location of the lift at
14 that point in time.

15 Q. And you took pictures of only five of
16 the latent cards?

17 A. Right, because the rest were taken from
18 the money tray.

19 Q. And the latent card including the print
20 from the cash register tray outside was not one of
21 them?

22 A. Was not one of the ones given a number,
23 because I filled it out right after I collected it,
24 yes.

25 Q. And it was not given a picture? You

1 did not take a picture, excuse me?

2 A. No.

3 Q. So based on the photographs and the
4 latent lift, you cannot say with certainty whether
5 someone grabbed the tray?

6 A. Somebody would have had to grab the
7 tray to leave the latent impressions on there.

8 Q. You cannot testify with certainty that
9 it was a definitive grip?

10 A. To leave -- I can say for 100 percent
11 that that is a simultaneous impression, meaning
12 that those four fingers were deposited on this at
13 the same time.

14 Q. In fact, in this case, Kendall's prints
15 -- you excluded Kendall's prints from the lifts you
16 took from the front door?

17 A. I excluded one of the fingerprint
18 impressions taken from the door to him.

19 Q. And the others were insufficient?

20 A. On L2, which was taken from the
21 interior door, one fingerprint was excluded and one
22 fingerprint was deemed insufficient for
23 identification. And the other cards that were
24 taken from there were in its entirety insufficient
25 for identification.

1 Q. But the one that was sufficient was not
2 a match to Kendall?

3 A. Correct.

4 Q. In this case you also swabbed for DNA,
5 correct?

6 A. Yes.

7 Q. You did not swab for DNA on the front
8 grip of the front door?

9 A. No.

10 Q. You did not attempt to lift prints from
11 the front door?

12 A. Just the interior side.

13 Q. But not the front grip that the
14 assailant would have touched when entering the
15 premises?

16 A. The front pull bar, no, because it's a
17 very public area and we go into it knowing that,
18 one, the employees went in and out after the
19 incident, the cops arrived and probably went in and
20 out. That's the only way to open the door. It's a
21 very public area.

22 Q. You took four swabs of DNA total?

23 A. Yes.

24 Q. You swabbed the interior cash register
25 drawer, correct?

1 A. Yes. That same spot that I processed
2 the drawer for fingerprints, I also swabbed after I
3 made the lift.

4 Q. You swabbed the money tray that was
5 found outside, correct?

6 A. Yes. I swabbed the one area of it in
7 which I saw fingerprints that were insufficient for
8 identification, so I swabbed it. That way I could
9 possibly collect the DNA since the fingerprints
10 were no good on it.

11 Q. You took swabs of the countertop?

12 A. Yes.

13 Q. And you took swabs of the interior
14 door?

15 A. Yes. The interior push bar.

16 Q. But none of those tests are positive
17 matches to Kendall?

18 A. When we collect DNA swabs --

19 MS. VAN PALA: Your Honor --

20 THE COURT: I need all of you to
21 approach for me, please.

22 (Bench conference.)

23 THE COURT: I'm confused that you're
24 questioning her as to an area that you strenuously
25 objected to, and then they subsequently said they

1 were going -- not going to go into it, coupled with
2 the fact she has not testified to anything about
3 DNA.

4 MS. VAN PALA: She testified she took
5 the swabs --

6 THE COURT: Doesn't matter. She took
7 the swabs. That's all she is qualified to do. She
8 is not qualified to talk about all of the empirical
9 data.

10 MS. VAN PALA: Withdrawn.

11 THE COURT: And be careful when the
12 door opens because it's going to swing wide.

13 (End of bench conference)

14 THE COURT: The objection is sustained.
15 The question is withdrawn; lack of expertise,
16 foundation, or qualification.

17 BY MS. VAN PALA:

18 Q. You found a bandana outside, correct?

19 A. Correct.

20 (The proceedings were interrupted.)

21 THE COURT: You may proceed.

22 BY MS. VAN PALA:

23 Q. You discovered a bandana outside,
24 correct?

25 A. Yeah.

1 Q. You did not process that bandana for
2 DNA, correct?

3 A. If we were going to process it, that
4 would be something that we would send in its
5 entirety to SLED.

6 Q. And, in this case, you did not?

7 A. In this case we chose not to; one,
8 because we could not see a bandana in the video, so
9 we can't say -- who is to say that that bandana is
10 even related to this crime. It could have been
11 just left out there from before.

12 In addition, we are limited to what we
13 can send to swab for all of our cases. For a
14 violent crime, we can only send five, and anything
15 less than a violent crime, we can only send two
16 items of DNA. So in addition to our agency sending
17 items to SLED, so are all the other agencies in the
18 area.

19 So we are very cautious when sending
20 items to SLED because they have a huge backlog. We
21 don't get DNA results for over a year sometimes
22 from our cases. So with all of that in mind, in
23 this case, we did send two items of DNA to SLED
24 along with the known standards of the victims, but
25 the bandana was not one of them.

1 MS. VAN PALA: Thank you. Matter of
2 law.

3 THE COURT: You opened the door.
4 You're stuck with the answer.

5 MS. VAN PALA: Oh, pursuant to my
6 motion in limine.

7 THE COURT: Please approach.
8 (Bench conference)

9 THE COURT: I'm listening.

10 MS. VAN PALA: Those are my questions
11 because -- the questions that are subject to
12 Mr. Lietzow's motion:

13 THE COURT: Uh-huh. All right.
14 You can stand back.

15 (End of bench conference)

16 THE COURT: Madame Forelady, ladies and
17 gentlemen, we have a brief matter of law to take up
18 with the attorneys. During the break please don't
19 discuss the case and please leave your notepads in
20 your seats.

21 (Jury out, 4:06 p.m.)

22 THE COURT: You may proceed.

23 MS. VAN PALA: Thank you, Your Honor.

24 THE COURT: You're welcome.

25 MR. LIETZOW: Your Honor, as a matter

1 of course, do I need to continue objecting to the
2 questions I find objectionable or are we going to
3 have you listen to everything in their entirety --

4 THE COURT: I think I need to listen
5 to them in their entirety. We're in camera, no
6 jury.

7 MR. LIETZOW: Thank you.

8 THE COURT: Proceed.

9 IN CAMERA EXAMINATION

10 BY MS. VAN PALA:

11 Q. Your work and your investigations are
12 the subject of a present and ongoing investigation,
13 correct?

14 A. Yes.

15 Q. A North Charleston Police Department
16 investigation, correct?

17 A. That I was not involved in, yes.

18 Q. But is it not true that the North
19 Charleston Police Department is currently reviewing
20 your work for its accuracy?

21 A. That's incorrect.

22 Q. Is it not true that the North
23 Charleston Police Department has reopened your
24 investigations?

25 A. No. I assumed at first -- are you

1 discussing the fact that the City of North
2 Charleston is under investigation?

3 Q. The North Charleston -- is it not true
4 that the North Charleston Police Department has
5 sent off your findings on fingerprint examinations
6 for independent verification?

7 A. I'm not quite sure how to answer that.
8 Not -- there was a case that came -- I was
9 Subpoenaed for a case at one point and the defense
10 decided to get -- to have my fingerprint
11 examination checked out by another examiner, yes.
12 Who did find that my analysis was correct, yes.

13 Q. And your work has not been reviewed for
14 its inaccuracy.

15 A. It is reviewed for its inaccuracy every
16 time it goes through a verification process.

17 Q. Other than Coker and Hallman, your
18 supervisors who verified your prints, have other
19 fingerprint examiners outside of your department
20 verified your prints?

21 A. Other than that one time, no.

22 Q. And your prints were not found to be
23 inaccurate?

24 A. Correct, they were not inaccurate.

25 Q. And your investigation has not been

1 found inaccurate?

2 A. My investigation into what?

3 Q. Your print examination.

4 A. Has not been found to be inaccurate,
5 correct.

6 MS. VAN PALA: Court's indulgence.

7 That's it.

8 THE COURT: Still trying to figure out
9 how any of this is relevant and you don't even have
10 a good faith basis to challenge it. You have to
11 have independent corroboration. You can't go off
12 of speculation and hyperbole.

13 MR. LIETZOW: I would literally object
14 to every single question she asked.

15 MS. VAN PALA: I withdraw them all.

16 THE COURT: Yes. I think that's
17 prudent. All right. Let's take a quick rest room
18 break and we will resume. Is there anything more
19 in Cross Examination?

20 MS. VAN PALA: No, Your Honor.

21 THE COURT: All right. We'll resume
22 with Redirect. I guess we need to deal with this.
23 To what extent does the State plan to go into the
24 DNA on Redirect?

25 MR. LIETZOW: Very limited, Your Honor.

1 I'm not presenting DNA as part of my case.

2 THE COURT: Okay. I just wanted to
3 make sure in case I needed to take that up before
4 we resumed.

5 We'll be at ease for about ten minutes.

6 Ma'am, you can step down. Don't
7 discuss your testimony with anyone.

8 (A recess transpired.)

9 THE COURT: State ready to proceed?

10 MR. LIETZOW: Yes, ma'am.

11 THE COURT: Defense ready to proceed?

12 MS. VAN PALA: Yes, Your Honor.

13 THE COURT: Please bring in the jury.

14 While we're waiting, are there any
15 witnesses on the State's list you do not intend to
16 call?

17 MR. LIETZOW: The State intends to rest
18 its case in chief after this witness, Your Honor.

19 THE COURT: Okay. Are there any of
20 these witnesses that the defense wishes to call
21 that need your assistance in procuring their
22 appearance?

23 MS. PROCTOR: I'm sorry, what?

24 MS. VAN PALA: No, Your Honor.

25 THE COURT: They've indicated they're

1 going to rest after this witness. There are some
2 other witnesses listed. I didn't know if you-all
3 planned on calling any of them.

4 MS. PROCTOR: Oh, no, Your Honor.

5 (Jury in, 4:32 p.m.)

6 THE BAILIFF: All jurors present, Your
7 Honor.

8 THE COURT: Thank you. You may be
9 seated. We will resume with the testimony of the
10 witness. The State may proceed.

11 Did you have any further questions of
12 this witness?

13 MS. VAN PALA: No further questions.
14 Thank you, Your Honor.

15 THE COURT: You may proceed.

16 REDIRECT EXAMINATION

17 BY MR. LIETZOW:

18 Q. Just briefly, Ms. Kubicko. You did a
19 total of how many comparisons on the cash register
20 tray, the one that was found outside?

21 A. Five.

22 Q. Did you recover any other latent prints
23 off of that cash register tray?

24 A. Yes.

25 Q. Explain.

1 A. Oh, I'm sorry. On L1, there was five
2 comparisons I did. On -- there was also L3.1,
3 which is the palm print and the second joint one.
4 So a total of seven.

5 Q. How many comparisons total did you
6 perform?

7 A. Seven.

8 Q. And how many of those were positive
9 matches to Mr. Kendall Tyus?

10 A. Five.

11 Q. Where were those latent lifts recovered
12 from?

13 A. Those five were lifted from the money
14 tray that was found outside.

15 Q. And of those remaining, how many can
16 you definitively exclude the Defendant as being?

17 A. One.

18 Q. And the rest were what?

19 A. Two were inconclusive and the rest were
20 insufficient for identification.

21 Q. Which means it could be, it couldn't
22 be, you just cannot say with certainty?

23 A. The two that were inconclusive means it
24 could be, couldn't be, can't say. The insufficient
25 for identification means that they're no good, you

1 cannot make a determination at all.

2 Q. And you had no -- did you have any idea
3 who Kendall Tyus was at the beginning of this
4 investigation?

5 A. No.

6 MR. LIETZOW: Nothing further, Your
7 Honor.

8 THE COURT: Any objection to the
9 witness being excused from the State?

10 MR. LIETZOW: No, ma'am.

11 THE COURT: From the defense?

12 MS. VAN PALA: No, Your Honor.

13 THE COURT: Ma'am, you're excused.
14 State may proceed.

15 MR. LIETZOW: Your Honor, at this time,
16 the State is resting their case in chief.

17 THE COURT: Madame Forelady, ladies and
18 gentlemen, the State has rested their case. I have
19 some brief matters of law to take up with the
20 attorneys. During this break, please do not
21 discuss the case. If you would leave your notepads
22 in your seats. Thank you for your patience.

23 (Jury out, 4:35 p.m.)

24 THE COURT: You may be seated. The
25 State has rested. Are there any motions?

1 MS. PROCTOR: Your Honor, at this time
2 the defense would make a motion for a directed
3 verdict. Taking the evidence in the light most
4 favorable to the State, we feel that the State has
5 failed to produce evidence of his guilt. I don't
6 think there has been any evidence from the owners
7 of the restaurant that -- the person who testified
8 was Sunny Lee. He stated he never did see a gun.
9 I think if this goes to the jury, I would ask that
10 it go as strong-arm robbery.

11 THE COURT: Anything further?

12 MS. VAN PALA: Your Honor, we renew all
13 of our motions -- objections, excuse me.

14 THE COURT: Would the State like to
15 respond?

16 MR. LIETZOW: Just briefly, Your Honor.
17 Pursuant to State v. Williams, when ruling on the
18 motion for a directed verdict, the trial Court was
19 concerned with the existence or nonexistence of the
20 evidence, not its weight. And that evidence must
21 be viewed in the light most favorable to the State.

22 At this point, Your Honor, we have
23 entered a surveillance video which shows an armed
24 robbery occurring. It shows an individual armed
25 with a deadly weapon, taking and carrying away the

1 property of another by use of force or threat. We
2 would argue that we have met the elements, through
3 the evidence, of armed robbery and possession of a
4 weapon during the commission of a violent crime.

5 Additionally, Your Honor, through
6 direct evidence of a fingerprint and through
7 circumstantial evidence of items found at
8 Mr. Tyus's residence, pursuant to a search warrant,
9 in close proximity to the incident occurring, we
10 have clearly established that Mr. Tyus was the
11 individual who committed that armed robbery, and we
12 would respectfully request that you deny the
13 defense's motion for a directed verdict and allow
14 the jury to return their own verdict.

15 Thank you, Your Honor.

16 THE COURT: Anything further?

17 MS. PROCTOR: Again, Your Honor, I just
18 don't believe there has been any testimony of a
19 victim seeing him with a gun. I think the video
20 shows it, but there's been no testimony that
21 anybody else saw it.

22 THE COURT: If the Defendant testifies,
23 is there any record that the State would be seeking
24 to impeach his credibility?

25 MR. LIETZOW: No, Your Honor.

1 THE COURT: Considering the evidence in
2 the light most favorable to the State, the Court is
3 concerned with the existence or nonexistence of
4 evidence and not its weight. The State must prove
5 by direct or substantial circumstantial evidence
6 the offence, at least that is the Court's standard
7 to judge the evidence. Whether there is direct or
8 substantial circumstantial evidence reasonably
9 tending to prove the Defendant's guilt is for the
10 fact-finder. It's not for me to weigh the
11 evidence. It's not for me to determine the
12 credibility of witnesses; it is not the Court's
13 providence.

14 In order to prove armed robbery, which
15 is 16-11-330, the State must prove that the
16 Defendant took property from the person or presence
17 of another with violence, and that if not prevented
18 by fear, the person would have kept their property.
19 They must also prove that the Defendant carried the
20 property away with the permanent intent to deprive
21 the owner of the property and use it for his own
22 use.

23 And then finally, they must prove that
24 it was done with violence, or by putting the owner
25 of the property in fear of violence, and that is

1 either proven by showing the Defendant was armed
2 with a deadly weapon or that the Defendant either
3 by action or words, while using a representation of
4 a deadly weapon or object during the robbery.

5 There is direct and substantial
6 circumstantial evidence proving each of these
7 elements, as well as possession of a firearm during
8 the commission of a violent crime, as armed robbery
9 is a violent crime, and a firearm is -- comes
10 within the ambit of 15-23-490. There is direct
11 testimony, while not -- while Mr. Lee did not see
12 the Defendant, he testified he was in the kitchen
13 in the back, he testified that he heard his wife
14 scream, that as a result of these incidents they
15 fled out of the back of the business and then came
16 into contact with who they believe the Defendant --
17 who they believed the perpetrator of the offense to
18 be near the rear of their business.

19 He also testified that his wife has
20 limited English proficiency. And I don't know why
21 the State didn't call her as a witness; maybe
22 that's the reason. I don't want to speculate. It
23 really isn't here nor there as regards the Court's
24 assessment of the State's burden of proof at this
25 juncture. The video in and of itself is enough to

1 establish an armed robbery.

2 Videos are self authenticating, they're
3 accurate, they show -- unless they've been
4 hypothecated in some way, but this video shows the
5 incident in its totality of an individual
6 purporting to wear the clothes that were later
7 seized at the Defendant's house, as well as a gun
8 that looked eerily similar to the gun's model and
9 make, otherwise in the video, as well as the
10 State's ability to recover money found in different
11 hiding places in the residence.

12 And these things both circumstantially
13 -- amount to substantial circumstantial evidence as
14 well as direct evidence, that being of the video
15 surveillance of this event, either that the
16 Defendant had a gun or a deadly weapon or had the
17 representation of a deadly weapon or object;
18 therefore, the motion for directed verdict is
19 denied.

20 Sir, stand for me, please, and raise
21 your right hand.

22 KENDALL JEROME TYUS,
23 being first duly sworn, testified as follows:

24 THE DEFENDANT: Yes, ma'am.

25 EXAMINATION

1 BY THE COURT:

2 Q. You can put your hand down, sir. State
3 your full name for the record.

4 A. Kendall Jerome Tyus, Junior.

5 Q. And, sir, at this time I'm going to
6 explain to you certain of your rights. If you do
7 not understand something that I say, please let me
8 know. If you need me to repeat something, please
9 let me know. Do you understand?

10 A. Yes, ma'am.

11 Q. Sir, we have now reached the stage of
12 the trial where you may present your defense. Just
13 one second. As I explained, we have now reached
14 the stage of the trial where you may present your
15 defense. You have the right to claim the
16 protections given to you by the Fifth Amendment of
17 the Constitution of the United States. That
18 amendment states in part that no person shall be
19 compelled in any criminal case to be a witness
20 against himself.

21 This means that you cannot be required
22 to testify. You have the right to testify;
23 however, no one can make you testify. This is a
24 personal right and no one can waive this right
25 except you. If you decide to testify, you will be

1 subject to the same rules that govern other
2 witnesses and you may be examined and
3 cross-examined on any relevant issue in this case.

4 In addition, if you have any
5 convictions involving dishonesty, or a false
6 statement, or for crimes punishable by imprisonment
7 for more than one year and the Court determines
8 that the probative value of admitting this evidence
9 outweighs its prejudicial effect to you, the
10 Solicitor will be able to introduce your record to
11 attack your credibility; however I have asked that
12 question and they have decided that you do not have
13 any record that they would be seeking to use to
14 impeach your credibility.

15 If you decide to testify, this decision
16 on your part must be made freely, voluntarily and
17 intelligently with knowledge of the protections
18 given to you by the Fifth Amendment and the
19 consequences of your decision to testify.

20 If you decide not to testify, I will
21 instruct the jury that they cannot give that fact
22 any consideration whatsoever, that there is to be
23 absolutely no prejudice to you, and that they
24 cannot discuss the fact that you did not testify in
25 any manner whatsoever, that the burden remains on

1 the State to prove each and every element of the
2 offences that you've been charged with beyond a
3 reasonable doubt, that you have no burden in this
4 case to prove your innocence or otherwise.

5 It is left entirely up to you whether
6 or not you decide to testify. You may speak with
7 your attorney, your family members or friends, or
8 anyone else, but the final decision is yours.

9 Do you understand these rights as I
10 have explained them?

11 A. Yes, ma'am.

12 Q. Do you need to ask me any questions
13 about what I have explained to you?

14 A. No, ma'am.

15 Q. Have you discussed with your lawyers
16 whether you should or should not testify?

17 A. I have, but if you could give me a
18 brief second.

19 THE COURT: Sure. We'll be at ease for
20 a few moments. Do you need to go back here and do
21 it, or do you feel comfortable out here?

22 THE DEFENDANT: Let's go in there.

23 THE COURT: Accommodate them, please.

24 MS. VAN PALA: Thank you, Your Honor.

25 THE COURT: You're welcome. When

1 you're done talking, let me know.

2 (A recess transpired.)

3 MS. PROCTOR: Once he comes out, we're
4 ready.

5 BY THE COURT:

6 Q. Sir, stand, please. I will remind you
7 you are still under oath.

8 Have you had a full opportunity to
9 discuss with your lawyers whether you should or
10 should not testify?

11 A. Yes, ma'am, I have.

12 Q. And, sir, do you need to speak with
13 them any further at this time?

14 A. No, ma'am, I don't.

15 Q. And do you wish to testify or do you
16 not wish to testify?

17 A. No, ma'am, I do not.

18 THE COURT: You may take your seat.
19 Does the defense have any other witnesses they wish
20 to call?

21 MS. PROCTOR: No, Your Honor. At this
22 time the defense would rest and we would just renew
23 all our motions.

24 THE COURT: I'll give you a chance to
25 rest in the presence of the jury and then go from

1 there.

2 All right. Please bring in the jury.

3 (Jury in, 4:53 p.m.)

4 THE BAILIFF: All jurors present and
5 seated.

6 THE COURT: You may be seated. Ladies
7 and gentlemen, we appreciate your patience. The
8 defense may proceed.

9 MS. PROCTOR: Thank you, Your Honor.
10 At this time the defense rests.

11 THE COURT: Madame Forelady, and ladies
12 and gentlemen, both the State and the defense have
13 rested their cases. The next part of the process
14 is closing arguments and the Court's instructions
15 on the law. We will resume in the morning at 9:30
16 for that purpose, because to proceed this evening
17 would take us well beyond 7:00 and I think that's a
18 lot to ask of you all. It's best to start fresh in
19 the morning.

20 During this break, it is essential that
21 you have no discussion among yourselves or with
22 anyone else regarding the testimony and evidence
23 that you have heard in this case. While you have
24 heard all the evidence and testimony, you have not
25 heard the Court's instructions, nor have you heard

1 the parties' closing arguments which are designed
2 to have you agree -- or to persuade you to agree
3 with their version of the facts in this case. So
4 it is essential that you remain as open-minded as
5 possible until such time as we have completed the
6 process.

7 Please do not read, watch, or listen to
8 any media accounts about this case. Also, do not
9 do any independent research regarding any issue or
10 matter involved in this case on the Internet. And
11 again, please refrain from making any comments
12 regarding your status on the -- any social
13 networking sites.

14 We will resume in the morning at 9:30.
15 Please come directly to your jury room. When you
16 arrive, the clerk will take your orders for lunch
17 in the event that we need to order lunch, so the
18 more quickly we can get that completed, the more
19 quickly we can then resume with closing argument
20 and instruction.

21 If you would leave your notepads in
22 your seats, we will secure them during the recess.
23 Have a wonderful evening and we will see you in the
24 morning at 9:30.

25 (Jury out, 4:55 p.m.)

1 THE COURT: You may be seated. The
2 defense has rested their case. Are there any
3 motions - --

4 MS. PROCTOR: Your Honor, we would
5 renew all of our motions we made throughout the
6 trial and again renew our directed verdict motion.

7 THE COURT: Does the State wish to
8 respond?

9 MR. LIETZOW: No, ma'am.

10 THE COURT: Court will deny the motion
11 based on its previous ruling and incorporate that
12 ruling in its totality in this portion of the
13 record.

14 I will give the jury a general
15 instruction regarding their responsibility and my
16 responsibility; how they are to judge witness
17 credibility and believability. I will give them a
18 general instruction regarding expert witness
19 testimony as well as the Defendant not testifying
20 in the case. I will give them a general
21 instruction on direct and circumstantial evidence,
22 as well as a general instruction regarding the
23 charge, arrest, and the indictment not being
24 evidence, as well as on the presumption of
25 innocence.

1 I will also charge Victor v. Nebraska
2 on reasonable doubt. I will then charge the
3 elements of armed robbery, which is 16-11-330, as
4 well as elements of possession of a weapon during
5 the commission of or attempt to commit a violent
6 crime, which is 16-23-490, incorporating the
7 definitional section of 16-160.

8 I'll also instruct on the elements of
9 identification, which have to be proved beyond a
10 reasonable doubt, also instruct on multiple
11 charges, and then charge on the form of the
12 verdict.

13 Are there any exceptions from the
14 State?

15 MR. LIETZOW: No.

16 THE COURT: From the defense?

17 MS. PROCTOR: No, Your Honor.

18 THE COURT: And I assume by having no
19 exceptions, you are not requesting any lesser
20 included offences? And I'm referring to the
21 defense.

22 MS. PROCTOR: Court's indulgence.
23 Your Honor, we would ask the strong strong-arm
24 robbery.

25 THE COURT: Any exception from the

1 State?

2 MR. LIETZOW: Yes, ma'am.

3 THE COURT: Basis of the exception?

4 MR. LIETZOW: I do not believe that any
5 evidence was presented that would indicate this was
6 a strong-arm robbery. All the evidence has been
7 that there was a weapon used, escalating that to an
8 armed robbery. Clearly in the video --

9 THE COURT: Tell me something right
10 quick. What prejudice do you suffer by me
11 instructing it, even though there really isn't any
12 evidence to support it?

13 MR. LIETZOW: The possible sentence
14 that would be imposed based on a conviction, Your
15 Honor.

16 THE COURT: If they were inclined to do
17 strong-arm instead of armed robbery, that means
18 they would have been inclined to find not guilty on
19 armed robbery. So how are you prejudiced?

20 MR. LIETZOW: I just -- Court's
21 indulgence.

22 Your Honor, I believe I would rather go
23 all or nothing. I don't want there to be any
24 confusion to the jury whether it was a gun or not a
25 gun. I'm clearly basing my case on the fact that

1 that was a gun. If there is no evidence presented
2 otherwise, I just don't think it would be
3 appropriate to charge --

4 THE COURT: What evidence is there to
5 support the request to instruct strong-arm robbery,
6 Ms. Proctor?

7 MS. PROCTOR: The fact that nobody --
8 the victim testified he never saw a gun.

9 THE COURT: But there was clearly a gun
10 in the video.

11 MS. PROCTOR: Well, there is no people
12 in the video.

13 THE COURT: I think you can assume,
14 when a business is opened -- there is a lady that's
15 at the register before --

16 MS. PROCTOR: No. No. We've seen all
17 the videos and the one thing that whoever robbed
18 the place made sure of, that all of the people were
19 out of the restaurant. And you look at all eight
20 cameras, this was the lady --

21 THE COURT: I don't think there's a
22 requirement that somebody be there.

23 MS. PROCTOR: Okay.

24 THE COURT: It's just that you take the
25 property.

1 MS. PROCTOR: Everybody was gone.

2 There was nobody in there.

3 THE COURT: Well, there's testimony
4 that somebody was there and screamed and was a part
5 of this event. They just didn't call her to
6 testify.

7 MS. PROCTOR: And he said he thought
8 she was screaming about a rat. That was his
9 testimony.

10 THE COURT: That was his testimony
11 until he provided clarity that that's not what she
12 was screaming about.

13 I really don't think there's any
14 evidence to support a strong-arm robbery, but I'm
15 going to instruct it anyway. I don't see any
16 prejudice to the State in instructing it. If the
17 jury is inclined to find him guilty of a strong-arm
18 robbery, or common law robbery as we refer to it,
19 that means they would have been inclined to find
20 him not guilty on the element of armed robbery.

21 Anything further from the State?

22 MR. LIETZOW: Your Honor, I'm just
23 respectfully requesting you note my exception to --

24 THE COURT: I've already noted it when
25 I asked your opinion about it and you gave me your

1 argument.

2 MR. LIETZOW: Thank you. Nothing
3 further.

4 THE COURT: You're welcome. Anything
5 further from the defense regarding any requests for
6 instruction?

7 MS. PROCTOR: No, Your Honor.

8 THE COURT: Can you make sure for me
9 all the evidence is in place for the Reporter and
10 nobody has inadvertently put anything on the table
11 or otherwise that she can document?

12 MR. LIETZOW: May I?

13 THE COURT: Yes, sir. Both approach.
14 (Counsel to the bench.)

15 THE COURT: Any exception to the form
16 of the verdict?

17 MR. LIETZOW: Other than what I
18 objected to earlier.

19 THE COURT: From the defense?

20 MS. PROCTOR: No, ma'am.

21 THE COURT: We'll resume in the morning
22 at 9:30.

23 Is the State going to open and close?

24 MR. LIETZOW: No, ma'am.

25 THE COURT: I wasn't sure whether there

1 was any evidence introduced by the defense. Was
2 that Defendant's Exhibit only for ID?

3 MS. VAN PALA: Yes, Your Honor.

4 THE COURT: So you all -- is it the
5 defense's position that they have preserved last
6 argument?

7 MS. VAN PALA: Yes, Your Honor.

8 THE COURT: How long will closing
9 arguments be?

10 MR. LIETZOW: I don't have anything
11 more than about ten minutes.

12 THE COURT: How long for the defense's
13 closing argument?

14 MS. PROCTOR: Probably ten or
15 15 minutes at the most, maybe. I don't think it
16 will be lengthy.

17 THE COURT: Have a good evening. See
18 you tomorrow morning at 9:30.

19 (These proceedings were recessed at
20 5:18 p.m., to be continued at a later date and
21 time.)

22

23

24

25

1 (State v. Tyus, July 15, 2015, 9:30
2 a.m., Charleston County, Charleston, South
3 Carolina.)

4 THE COURT: Yes, ma'am.

5 MS. PROCTOR: I have a question I guess
6 I never thought of before. When we're doing our
7 closings, are we allowed to show or publish to the
8 jury photos that are not in evidence?

9 THE COURT: No. If it was
10 demonstrative, you can't use them in closing. You
11 can only use what has been entered into evidence.

12 MS. PROCTOR: I understand. The State
13 was going to use the map picture and I know --

14 THE COURT: They could have entered it
15 into evidence, really, because the map is
16 historical data.

17 MS. PROCTOR: Well, we had objected to
18 it at the time, anyway, so that's on the record,
19 but I just wanted to --

20 THE COURT: I didn't know you objected
21 to the map.

22 MS. PROCTOR: It was under the search
23 warrant.

24 THE COURT: Yeah, but they could have
25 gone on the Internet and got a map.

1 MS. PROCTOR: Well, we know -- Tammy
2 objected for her reasoning, and it wasn't admitted.

3 THE COURT: Well, what the State did
4 was marked it for ID, and the fact there was an
5 exception was never brought to my attention because
6 if it was, I would have overruled it and they would
7 have been able to use it.

8 A map I think comes under the nature of
9 historical data. They could have gotten it off of
10 the Internet from any national service that is
11 verifiable. A map -- I mean, a map is a map. You
12 can't hypothecate a map -- well, you could, but who
13 would?

14 MS. PROCTOR: Our point was, it was
15 under the search warrant. If the search warrant
16 was invalid, they wouldn't have gotten the map. So
17 that's what made them go to his house. So we're
18 saying, if the search warrant is not valid, then
19 they wouldn't have known where he lived and they
20 wouldn't have done a search of his house, so that
21 was the purpose of the map.

22 THE COURT: A map is a map is a map is
23 a map.

24 MS. PROCTOR: Also, if we could take
25 two minutes, because I think Chris might need to go

1 through the pictures to make sure what's up there
2 is in evidence.

3 MR. LIETZOW: I was going to ask if I
4 could approach.

5 THE COURT: That's fine. Just give the
6 Court Reporter everything that's been marked for
7 identification only.

8 All right. State ready to proceed?

9 MR. LIETZOW: Yes, Your Honor.

10 THE COURT: Is the defense ready to
11 proceed?

12 MS. PROCTOR: Thank you. Yes, Your
13 Honor.

14 THE COURT: Please bring in the jury.

15 MR. LIETZOW: Do you have any problems
16 with me using the laser pointer during the closing?

17 THE COURT: As long as you don't point
18 it at me. Or anybody else.

19 MR. LIETZOW: Possibly the only person
20 would be Madame Court Reporter, but I would be
21 going over her head.

22 (Jury in, 9:59 a.m.)

23 THE BAILIFF: All jurors present, Your
24 Honor.

25 THE COURT: Thank you. You may be

1 seated.

2 Morning, ladies and gentlemen, I hope
3 that everybody had a pleasant evening. We have now
4 reached the stage of the trial where we will have
5 closing arguments and instruction. I would ask
6 that you give the attorneys your undivided
7 attention.

8 State may proceed.

9 MR. LIETZOW: Judge Jefferson, defense
10 team, may it please the Court.

11 THE COURT: Yes, sir.

12 MR. LIETZOW: Ladies and gentlemen,
13 Kendall Jerome Tyus, Junior, is charged with armed
14 robbery, possession of a weapon during the
15 commission of a violent crime. One of the most
16 important aspects of this trial has been the
17 surveillance video. I want to take a quick second
18 to let you know that there are several minutes
19 before and after the actual incident occurs. You
20 will have the opportunity to have the video back
21 with you in the jury room.

22 There are eight different cameras. If
23 you want to view it from different angles, you will
24 have that ability. If you go to 24:19, that's
25 approximately where the video starts on all of

25 Again, on the video it's even clearer.

1 (Video playing.) Right here, right here, the
2 individual is reaching over the counter, taking and
3 carrying away the personal property of another with
4 the intent to deprive them of that possession. All
5 of the elements of armed robbery are met and that
6 video demonstrates that.

7 There is no middle ground in this case.
8 There is no question that an armed robbery has
9 occurred. How do we know Kendall Jerome Tyus,
10 Junior, is the individual in that video? The
11 individual who committed the armed robbery?

12 Mr. Lewis, if you could go to video
13 four. While he's letting that load, take a look at
14 Kendall Tyus's ten-print card. On that you will
15 see his height listed as 5, 10, weight at 165.
16 Same thing on his driver's license. I submit to
17 you, medium height, medium build.

18 (Video playing.) The individual on
19 that video is not short, is not excessively tall,
20 not excessively overweight. The individual on that
21 video is medium height and medium build. You heard
22 a lot of evidence in this case about fingerprints.
23 Take a look at the video and you will notice that
24 the person that is committing this armed robbery is
25 not wearing gloves.

1 The cash register tray was taken during
2 the commission of the armed robbery, carried
3 outside, and deposited. On that cash register tray
4 was five fingerprints that matched Mr. Kendall
5 Tyus's. The first print that was used in order to
6 determine that Kendall Tyus's fingerprint was on
7 that was his right middle finger.

8 Ms. Kubicsko testified she took that
9 fingerprint lift off of the cash register,
10 submitted it into the database, which is an
11 automated system, and it returned ten results. It
12 ranked those ten results as one, being the most
13 likely to be a match, to ten. She then compared
14 the latents from the cash register tray to the
15 known right middle finger of Kendall Tyus. It was
16 a positive match.

17 A few weeks later, she then told you
18 she performed a more full comparison. During the
19 course of that comparison, she compared the latent
20 removed from the cash register tray to the right
21 known index finger of Kendall Jerome Tyus and it
22 was a match. She compared the latent removed from
23 the cash register tray to the right ring finger of
24 Kendall Jerome Tyus and it was a match. Same thing
25 for the right little finger. And, importantly, she

1 told you that those fingerprints were made from a
2 simultaneous impression.

3 You can try it yourself back in the
4 jury room. You can see as a result of -- like
5 this. When Kendall Tyus grabbed that cash register
6 tray, he made that simultaneous impression with his
7 fingerprints. She also did a comparison of the
8 left index finger and that was also a positive
9 match. Fingers from two different hands touched
10 the cash register tray.

11 Sunny Lee told you there was no
12 legitimate reason that Kendall Tyus's fingerprints
13 should have been on that cash register. He did not
14 work at the business; no legitimate reason his
15 fingerprints should have been on that cash
16 register.

17 After investigators got a positive
18 match on Kendall Tyus, they began investigating
19 him, and through the Department of Motor Vehicles
20 registration they were able to determine he resided
21 at [REDACTED]. We know that that is his
22 residence because when investigators got there mere
23 hours after the incident, he was there, he was
24 present, and they took him into custody. On his
25 ID, his address is listed as [REDACTED].

1 Investigators were able to further
2 narrow down which room inside of that residence
3 Kendall Tyus resided in. If you recall, they found
4 his pay stub inside a drawer inside the room that
5 was his.

6 You were shown a map that highlighted
7 the close proximity of [REDACTED] and
8 Under the Sea Restaurant. The way the bird flies,
9 this would be less than a quarter mile. Close
10 proximity provides ample opportunity.

11 Officer Sean Perkins told you, when he
12 got on-scene, there was no visible suspects. Sunny
13 Lee also reminded you that he didn't see any cars
14 after the incident and he saw the Defendant flee on
15 foot. Kendall Tyus was able to commit this armed
16 robbery and run straight home in a very short
17 amount of time.

18 I submit to you that, along with the
19 fingerprints, the most important piece of evidence
20 in this case is the jacket. Let's take a very
21 close look at this jacket. You will have this
22 jacket back there, so you can look at it yourself.
23 The first thing that I noticed is that it's blue,
24 same as this jacket. The second thing, very
25 distinctive, two white stripes that run from the

1 shoulder all the way down the sleeve.

2 Unfortunately, my laser pointer is not
3 showing on the glare of the screen. I want to draw
4 your attention up to where the hood is located on
5 the jacket. That jacket has a hood. This jacket
6 has a hood. Look closer at the hood. On the
7 inside of that you can see it's lined with some
8 sort of gray cotton or fleece, just like this
9 jacket.

10 Go to video four, please. (Video
11 playing.) Take a look at 24:30, ladies and
12 gentlemen. What do you notice on the back of that
13 jacket? A lighter blue stripe running across the
14 back and the middle. Lighter blue stripe running
15 across the back and the middle of this jacket.
16 When investigators were able to determine which
17 room was Kendall Tyus's, they began looking around.
18 Right there in the closet was that jacket. You
19 notice it's on the top of a pile of clothes, like
20 somebody had just taken it off and set it down
21 recently. Here's another picture showing a
22 close-up. You have the actual jacket, so you can
23 look at that. The jacket worn by the individual
24 committing the armed robbery is the same jacket
25 that was found in Kendall Tyus's room.

1 Next we have the sneakers. Video
2 eight, please. You can pause it a little bit more.
3 That's good. What I notice about these sneakers,
4 first of all, they are sneakers, not boots or dress
5 shoes; secondly, they're white; third, you look
6 closely, these would be considered mid-top shoes.
7 They are not low-top running shoes, not excessively
8 high-top basketball shoes. They are mid-top shoes.
9 If you look even closer, do this when you get back
10 there, you can notice there is a little bit of
11 discoloration right where my right index finger is
12 at. You might not think that's much. To me, that
13 looks like an air bubble in a shoe. That's an air
14 bubble. When investigators walked into Kendall
15 Tyus's bathroom, this is what they saw. Like
16 somebody had just walked in, kicked off his shoes,
17 set them right up against the wall. The shoes that
18 the individual was wearing in this armed robbery, I
19 think it's safe to say, were the same shoes found
20 in Kendall Tyus's bedroom.

21 Money: Right as you walk into [REDACTED]
22 [REDACTED], there is the couch; wad of money
23 hidden under the couch. A five and some smaller
24 bills, a one. Just like they're lined up in a cash
25 register tray, lined up with the ones, lined up

1 with the fives. Hidden in a love seat, another wad
2 of cash. This one with some bigger bills, 20s,
3 just like they would be in a cash register tray.
4 In the bedroom, in the drawer, some loose change
5 right next to those 9-millimeter bullets. People
6 don't hide money like this unless they have a
7 reason to hide money like this. Kendall Tyus hid
8 that money in his house because he didn't want
9 anybody to find it, because he just stuck a gun in
10 somebody else's face and stole it.

11 Finally, we have the gun. There is two
12 different kinds of guns, handguns. There are
13 revolvers and there are semiautomatics. A revolver
14 handgun would be like what you would consider the
15 Wild West guns. They have a little cylinder that
16 protrudes out the side of them. They're quite
17 distinctive. A semiautomatic handgun is slimmer in
18 profile and requires a magazine to be injected into
19 the bottom of it to feed the ammunition into the
20 gun. The gun used in this armed robbery is a
21 semiautomatic. You can see there, there is no
22 protrusion on the side that would indicate it's a
23 revolver.

24 The next thing you notice is the color
25 is black. The third thing I would like you to

1 notice is the size. Generally speaking, there are
2 three different sizes of handguns. They would be
3 called compact guns, which are easily hidden, they
4 fit in the palm of your hand. There are the
5 midsized guns, which are hybrids between the two,
6 and then the large guns with the barrel that
7 protrudes out real far and a real long handle.
8 This gun is a midsized semiautomatic, a black
9 midsized semiautomatic.

10 While the investigators were searching
11 through the house, they noticed some white
12 insulation on the floor beneath the attic. If
13 anybody has a similar attic like this, you'll know
14 that when you open up the attic, part of the
15 insulation falls down onto the ground.
16 Investigators took this to mean that somebody
17 recently went up there. When they went up there
18 and looked right off to the side, that's what they
19 found.

20 This gun is going to go back into
21 evidence with you. For everybody's safety, we're
22 not going to send the bullets back with you, but
23 the gun has been made safe. This is the gun that
24 was found in Kendall Tyus's attic, hidden in
25 Kendall Tyus's attic. It's a black semiautomatic

1 handgun, midsized. Doesn't fit in my palms, isn't
2 really, really big.

3 I submit to you there are very strong
4 similarities between the gun used in the armed
5 robbery and the gun found hidden in Kendall Tyus's
6 attic. That gun is also a 9-millimeter handgun
7 and, in the drawer inside of Kendall Tyus's room,
8 were 9-millimeter bullets and also there were
9 9-millimeter bullets loaded into the magazine that
10 was loaded into the gun.

11 Finally, in just a few minutes the
12 Honorable Judge Jefferson is going to address you
13 on the law. She's going to go into great detail
14 about the things that you should consider. One of
15 the things that is very important is beyond a
16 reasonable doubt. The State -- I have the burden
17 of proving all of the elements of this offence
18 beyond a reasonable doubt. That does not mean I
19 have to prove this case beyond every single doubt.
20 That's not possible, unless you were there and
21 witnessed the entire thing from start to finish
22 with your own eyes. There is only one person in
23 the world that knows this case beyond all doubt.
24 I must present evidence to you that leaves you
25 firmly convinced. Are you firmly convinced that

1 Kendall Tyus committed this armed robbery?

2 Yesterday Mr. Lewis stood in front of
3 you and told you that this case would require you
4 to use your common sense. He assured you that we
5 would not be asking you to make any unreasonable
6 conclusions, and he told you that this case would
7 not require any gigantic leaps of faith. An armed
8 robbery and the possession of a weapon during the
9 commission of a violent crime occurred on that
10 video. No question about that.

11 Kendall Tyus's height and weight
12 matched the approximate height and weight. His
13 fingerprints are on the cash register tray, there's
14 the jacket found in his house, the shoes found in
15 his house, the money found hidden in his house, gun
16 found hidden in his attic.

17 At this point, I think it's safe to say
18 that Kendall Tyus committed an armed robbery with
19 possession of a weapon during a violent crime. I
20 ask you to follow your oath as a juror, apply the
21 facts to the law and find Kendall Tyus guilty of
22 armed robbery, find Kendall Tyus guilty of
23 possession of a weapon during a violent crime.

24 Thank you.

25 MS. PROCTOR: May it please the Court?

1 THE COURT: Yes, ma'am.

2 MS. PROCTOR: Beg the Court's
3 indulgence.

4 THE COURT: Take your time.

5 MS. PROCTOR: Morning. As I said in my
6 opening, it could be Kendall Tyus, it may be
7 Kendall Tyus, but that is not enough to convict
8 somebody of a serious charge like armed robbery.
9 Now, Under the Sea Restaurant was robbed three
10 years ago. Sunny testified -- now, he never saw
11 the robber at all. And the only person who saw the
12 robber was his wife, Hannah.

13 Why didn't she testify and come in and
14 tell you what happened? He said, well, she doesn't
15 speak English that well. Well, he could have
16 translated. It would have been important for her
17 to come in here and tell you what happened. She is
18 the only person who saw him enter that restaurant.
19 She could have explained to you the gun, what the
20 gun looked like, what happened.

21 The only time that Sunny saw who robbed
22 the restaurant was afterwards. He saw the person
23 when he said he ran around the corner. He and
24 Hannah were running around the corner of the
25 restaurant and came around to the front.

1 The officer said he wasn't sure what
2 door Sunny came in, but you'll see it on the video.
3 I won't show it to you now because you will have
4 the video back in the jury box. As the Solicitor
5 stated, the robbery on the video took place at
6 around 24 minutes.

7 And you will see at the end of the
8 video, probably at about -- about a minute later,
9 when Sunny comes in the front door and then his
10 wife comes in. Sunny said he didn't see -- he
11 couldn't identify the robber. He said, at the time
12 he ran around the corner, there was nothing on his
13 face. Well, you saw the video. The person had
14 quite a big -- whether it was a towel or napkin --
15 they described it. There's been no evidence.
16 Where is that if he saw him so fast? They never
17 found that.

18 He also said that the robber was
19 carrying a cashbox under his arm. So when he ran
20 around the front, he's stating the person had no
21 mask on or no towel on. The person had the cashbox
22 under his arm. And you will have pictures -- you
23 will have pictures of this cashbox back in your
24 jury room. I want you to look at them carefully.
25 He also said that he came around the front and did

1 not see the cashbox that is sitting right there on
2 the antique store. In this strip mall, it's a type
3 of mall that Sunny's restaurant is in the corner.
4 Then there is approximately four or five stores,
5 and then there is a wall that juts out and then
6 there are more businesses, and so this business is
7 out some and this is where the box was. So you
8 would go down, there's a couple of -- a long wall
9 and then four or five restaurants and Under the Sea
10 Restaurant was in the corner. So he would have had
11 to run by there, and he didn't see it.

12 Now, Officer Perkins testified that he
13 was there in approximately one minute. Well,
14 again, you'll have the timestamp on the video.
15 Officer Perkins did not arrive until approximately
16 -- it's on the time stamp at 29 minutes. So it was
17 four or five minutes before he arrived, and that's
18 very important.

19 Also, you will notice, if you look at
20 the video for awhile, you will see Sunny run in the
21 restaurant, a couple of seconds later his wife runs
22 into the restaurant, and then you can see his wife
23 walk back to the door to unlock it; because when
24 she comes in, she locks the door, which makes
25 sense, and then she looks out and sees a police

1 car. And that's about four minutes later. So she
2 walks to the door and unlocks it.

3 And you will notice that the police car
4 does not have its blue lights on, it just comes in,
5 and I will explain it in a minute why that's very
6 important. If anybody walking by would have seen
7 that police car, they could have assumed they were
8 eating, because there were no blue lights, no other
9 officers there at the time.

10 Now, he said --- he stated his
11 description of the robber was -- he wrote in his
12 report 5, 8 to 6, 2, a black knit cap. Again,
13 nobody found a black knit cap in his house or in
14 the surrounding area. He had a white towel on his
15 face. Nobody ever found that. If it was at
16 Kendall's house, they would have taken it and
17 tested it for DNA.

18 There were dark pants -- he had dark
19 pants, sneakers, and a jacket with a hood. And you
20 saw the video. The Solicitor said, oh, the video,
21 the size matches him exactly. Look at him. That
22 person looks stocky, not somebody that is tall and
23 thin.

24 Now, Perkins, when he arrives four
25 minutes later, he talks to the victim and that

1 probably takes a little while. Walked around
2 inside the store, they tell him they have a video.
3 So he probably watches the video at that time.
4 Again, he walks outside and he finds the cashbox.
5 And, again, how could the cashbox be lying here if
6 Sunny said it was under his arm?

7 And, also, you will notice in this
8 picture, which you will have, State's Exhibit 9,
9 that all -- all of the coins are exactly where they
10 are supposed to be. If somebody has this under
11 their arm, that would have been falling out. And
12 crime scene technician Kubicsko said, oh, no, there
13 was money laying around outside. This is a
14 picture. There were no coins laying outside. This
15 is a box that has been placed there.

16 Officer Perkins also stated, well, we
17 also found a blue bandana that was laying around.
18 Why did they not test that? Just because somebody
19 said they didn't have a blue bandana -- the blue
20 bandana was sitting by the cashbox. You're
21 collecting evidence; test it. It could have
22 saliva. It could have hair. Test it, if you find
23 a piece of material that's sitting right next to
24 something that's been stolen. That wasn't done.

25 Now, at Kendall's house, they found a

1 gun. It's not illegal to have a gun. A lot of
2 people have guns and some people keep them in the
3 attic. There's been no evidence -- and, again,
4 it's conjecture. They want you to say, well, this
5 gun could have been used in the robbery. They
6 don't know. There hasn't been any evidence that
7 the gun was tested.

8 There is no evidence that this gun was
9 shown to -- there's no evidence that that gun was
10 shown to Sunny or his wife to say, does this look
11 like the gun that was used? That didn't happen.
12 The Solicitor said, well, we want you to assume
13 it's the gun that was used that night because there
14 was insulation found on the floor. When you take
15 -- go back to the jury room and you look at the
16 pictures, there is stuff everywhere. There's
17 clothes on the floor. There is no evidence that
18 that insulation has been there for one hour. It
19 could have been there for awhile. The house -- I
20 mean, I don't mean to say it, but his room and
21 everything around it, it's a little messy. There
22 are a lot of things -- you cannot say, just because
23 there's some insulation, that gun was used in a
24 robbery. And, again, it's not against the law to
25 have a gun and you can have one.

1 Tennis shoes; these are white Jordans.
2 This was three years ago. They didn't have the
3 flashy blue and red and green and iridescent like
4 they have now. White Jordans, how common were
5 those? And he said, oh, it has a little bubble on
6 it. Those are Jordans. They all have those little
7 bubbles. It's not like those special kind of shoe.
8 Three years ago, how many people had white Jordans?
9 The blue jacket; this was an athletic wear jacket.
10 They sell those all the time; you can see them --
11 they're everywhere. Every store, you see that is
12 very common. That wasn't something that he had to
13 special order. That's a very common jacket. Three
14 years ago that's what people wore.

15 Now, the police said -- this is
16 interesting -- they only found \$202 in his house.
17 This was the close of business at a restaurant.
18 They would have had more than \$202. And why am I
19 bringing all of this up? Kendall's prints were on
20 that tray, and you will see this tray. This box
21 was sitting outside for awhile. The police didn't
22 catch it within a minute.

23 This box was sitting there, and as the
24 Solicitor stated, Kendall lived right around the
25 corner. Anybody out there -- you see a box and you

1 see money in it? Should he have done it? No. Did
2 he pick it up and take it? Yes. Is that against
3 the law? Yes.

4 But if you will notice -- and the
5 reason I brought up the change, this shows that
6 whoever stole the money, put the box -- they saw
7 Sunny run around the corner. They just dropped the
8 box, grabbed what they can and run. Kendall comes
9 along a couple of minutes later. Well, the police
10 officer said he was there in a minute. Well, it's
11 been four minutes; it's still sitting out there.
12 He was inside of the restaurant for a little while;
13 it's still sitting out there.

14 The officer didn't have the blue lights
15 on, so if somebody walking by saw the police
16 officer, he could have been in there eating, had no
17 idea it had anything to do with the robbery, coming
18 along, seeing money and taking it.

19 Kendall's prints are not on the front
20 door of the restaurant. They're not on the inside
21 of the restaurant. And look at the tape carefully
22 because you will see how many times someone's
23 prints should be on there. When he jumps over the
24 counter -- when he jumps over the counter, you will
25 see he grabs the counter like this (Indicating)

1 gentlemen, I'm going to give you a brief restroom
2 break. During the break, please do not discuss the
3 case and please leave your notepads in your seats.
4 You can go with the bailiffs, please.

5 (Jury out, 10:39 a.m.)

6 (There was a break in these proceedings.)

7 THE COURT: Anything before we proceed
8 with instructions?

9 MR. LIETZOW: Nothing from the State,
10 Your Honor.

11 THE COURT: If you could -- anybody
12 need to go to the restroom? Now, when we're having
13 closing instructions as well as -- I let it slide
14 during argument because I didn't want to say
15 anything, but there should be no movement in the
16 gallery when the lawyers are talking and when the
17 Court is talking. It's very distracting to the
18 jurors. They can't pay attention -- it's human
19 nature, when that door swings for them to pay
20 attention.

21 So it's very distracting to the
22 process. So out of respect, if you aren't going to
23 be able to sit through instruction, you need to
24 excuse yourself; but otherwise, you will not be
25 allowed to go in and out -- make sure nobody comes

1 in or out of that door during instruction.

2 As soon as MS. VAN PALA gets back, we
3 will proceed with instruction.

4 (Brief pause.)

5 THE COURT: Ladies and gentlemen, we
6 appreciate your patience. I have a class that
7 comes of high school students and pre-high school
8 students that come every year during the summer.
9 They do a moot court program and they were here
10 this morning and I wanted to give them the
11 opportunity to ask questions. So I appreciate you
12 all allowing us that little bit of an extended
13 break so I could talk to them before they had to
14 leave to return to their school for the remainder
15 of their program today.

16 During this trial, ladies and
17 gentlemen, you and I have certain duties to
18 perform. As the trial Judge, it is my
19 responsibility to preside over the trial of this
20 case and I also have the duty to rule upon or pass
21 upon the admissibility of evidence offered during
22 this trial. You are to consider only the competent
23 evidence that is before you and you are to
24 disregard and disabuse from your mind any testimony
25 ordered stricken from the record in this case

1 during the progress of this case, if there has been
2 any. You are to consider only the testimony which
3 has been presented from the witness stand, together
4 with any exhibits which have been made a part of
5 the record in this case.

6 I have the additional duty to charge or
7 instruct you on the law applicable to this case.
8 As the presiding Judge, I'm the sole judge of the
9 law of this case and it is your duty as jurors to
10 accept and apply the law as I now state it to you.
11 If you have a preconceived idea as to what the law
12 is or what the law ought to be in the case, or in
13 this case, and it should not agree with what I now
14 tell you the law is, you are obligated under the
15 oath you've taken to abandon this preconception on
16 your part, because you are sworn to accept the law
17 and apply the law precisely as I now state it to
18 you.

19 In every case tried in this court
20 before a jury, the jury becomes the sole and
21 exclusive judges of the facts in this case. You,
22 the jury, are the judges of the facts in this case.
23 This Court is the judge of the law. The
24 Constitution of our state has declared that a trial
25 Judge shall not intimate, state, comment upon or

1 make any statement to a trial jury about the facts
2 in the case. Since you, the jury, are the sole
3 judges of the facts in this case, you are not to
4 infer anything from what I have said during the
5 progress of this trial in ruling upon the
6 admissibility of evidence or otherwise, or anything
7 that I say to you now during the course of this
8 instruction, that I have any opinion about the
9 facts. The law does not allow me to have an
10 opinion about the facts. This is a matter solely
11 for you, the jury, to determine. As jurors, then,
12 it is your duty, as I have instructed, to determine
13 the effect, the value, the weight of the -- and
14 truth of the evidence which has been presented
15 during the trial.

16 Necessarily, you must assess the
17 credibility of the witnesses who have testified in
18 this case. Credibility is simply a legalistic term
19 meaning believability. It becomes your duty as
20 jurors to analyze and to evaluate the evidence and
21 determine that evidence which convinces you of its
22 truth. Some of the things you may consider as you
23 decide whether or not to believe a witness's
24 testimony about a particular matter includes, what
25 was the manner and appearance of the witness who

1 testified? Was he or she straightforward or
2 hesitant in answering? Was the testimony of a
3 witness consistent or inconsistent? How did the
4 witness come to know the facts that he or she
5 testified to or what was his or her ability to know
6 these facts? Is there some reason a witness would
7 want to give testimony which would help or hurt one
8 side or the other? In other words, was the witness
9 biased or prejudiced and was the testimony of the
10 witness strengthened or weakened by other testimony
11 or evidence?

12 I further instruct you that in
13 determining the question of the credibility or
14 believability of witnesses who have testified in
15 this case, you may believe one witness as against
16 several witnesses, or several witnesses against one
17 witness. You may believe a part of the testimony
18 of a witness and reject the remaining testimony of
19 that same witness. If you have a good and sound
20 reason, you may believe the testimony of a witness
21 in its entirety or reject the testimony of a
22 witness in its entirety. You may consider the
23 demeanor of a witness. That is the manner and
24 appearance of the witness from the witness stand.
25 You can believe as much or as little of each

1 witness's testimony as you think proper.

2 Throughout this process, ladies and
3 gentlemen, you have but one objective, to seek the
4 truth regardless of its source. The Rule -- our
5 Rules of Evidence ordinarily do not permit
6 witnesses to testify to opinions or conclusions.
7 An exception to this Rule exists for witnesses we
8 call expert witnesses. A witness who by their
9 education, training, and experience has become an
10 expert in some art, science, profession or calling,
11 may state an opinion as to relevant and material
12 matters in which the witness claims to be an expert
13 and may also state the reasons for that opinion.

14 You should consider any expert opinion
15 received in evidence in this case like any other
16 evidence. Give it the weight you think it
17 deserves. If you decide that the opinion of an
18 expert witness is not based on sufficient
19 education, training, and experience, or if you
20 conclude that the reasons given in support of the
21 opinion are not sound, or that the opinion is
22 outweighed by other evidence, you may disregard the
23 opinion entirely. An expert witness's testimony is
24 to be given no greater weight than that of other
25 witnesses simply because the witness is an expert.

1 Further, you are not required to accept an expert's
2 opinion even though it is not contradicted.

3 I instruct you and emphasize that the
4 fact that the Defendant did not testify is not a
5 factor to be considered by you in any way in your
6 deliberation and in your consideration of the guilt
7 or innocence of the Defendant. It must not be
8 considered by you in any manner whatsoever.

9 A Defendant has the constitutional right to remain
10 silent and the assertion of this right must not be
11 considered by you in your deliberations. I repeat,
12 under your oath, you are to draw no conclusion
13 whatsoever from the fact that the Defendant in this
14 case did not testify. The fact that this Defendant
15 did not testify should not be discussed in any
16 manner whatsoever in the jury room during your
17 deliberations.

18 The burden of proof, as I have stated
19 to you, is not to prove his innocence. The burden
20 of proof remains on the State to prove each and
21 every element of the offence beyond a reasonable
22 doubt. There are two types of evidence which are
23 generally presented during a trial, direct evidence
24 and circumstantial. Direct evidence is the
25 testimony of a person who asserts or claims to have

1 actual knowledge of a fact, such as an eyewitness.
2 Circumstantial evidence is proof of a chain of
3 facts and circumstances indicating the existence of
4 a fact. The law makes absolutely no distinction
5 between the weight or value to be given to either
6 direct or circumstantial evidence. Nor is a
7 greater degree of certainty required of
8 circumstantial evidence than of direct evidence.
9 And as I have already explained, there are two
10 types of evidence that are generally presented;
11 again, direct and circumstantial evidence.

12 Crimes may be proven by circumstantial
13 evidence. Again, the law makes no distinction
14 between the weight or value to be given to either
15 direct or circumstantial evidence; however, to the
16 extent the State relies on circumstantial evidence,
17 all the circumstances must be consistent with -- on
18 each other and when taken together point
19 conclusively to the guilt of the accused beyond a
20 reasonable doubt. If these circumstances merely
21 portray the defendant's behavior as suspicious,
22 this proof has failed. The State has the burden of
23 proving the Defendant guilty beyond a reasonable
24 doubt. This burden rests with the State,
25 regardless of whether the State relies on direct

1 evidence, circumstantial evidence, or some
2 combination of the two.

3 Ladies and gentlemen, you should weigh
4 all of the evidence in this case. After weighing
5 all of the evidence, if you are not convinced of
6 the guilt of the Defendant beyond a reasonable
7 doubt, you must find the Defendant not guilty.

8 Conversely, if you are convinced of the guilt of
9 the Defendant beyond a reasonable doubt, then you
10 must find him guilty.

11 I instruct you that the fact that the
12 Defendant was arrested, charged, and indicted is
13 not evidence in this case, nor does it create any
14 presumption or inference of guilt. This
15 documentation, ladies and gentlemen, are simply
16 formal written instruments which contain the charge
17 or charges made against the Defendant. They simply
18 serve as the formal documentation by which this
19 case is processed or brought into the Court.

20 The Defendant has pled not guilty to
21 the Indictments and that plea casts the burden of
22 proof on the State to prove the Defendant guilty.
23 Because the person charged with committing a
24 criminal offense in South Carolina is never
25 required to prove himself innocent.

1 I instruct you, Madame Forelady, ladies
2 and gentlemen, that it is a cardinal and important
3 rule of the law of evidence that the Defendant in a
4 criminal trial, no matter what the seriousness of
5 the charge or charges made against him may be, will
6 always be presumed to be innocent of the crime for
7 which he's indicted, unless his guilt has been
8 proven by evidence satisfying you of that guilt
9 beyond a reasonable doubt.

10 This presumption of innocence does not
11 cease when you retire to deliberate, but it
12 accompanies the Defendant from the time of his
13 appearance throughout the trial until you reach a
14 verdict in this case. Our Supreme Court has said
15 that the presumption of innocence is like a robe of
16 righteousness placed about the shoulders of the
17 defendant and it remains with him and assigns him
18 to that class, the innocent, until that presumptive
19 robe of righteousness has been stripped from his
20 person by evidence satisfying you of that guilt
21 beyond a reasonable doubt.

22 Ladies and gentlemen, the presumption
23 of innocence is not mere legal theory, it is not
24 just a legal phrase. It is the substantial right
25 to which every Defendant is entitled, unless you,

1 the jury, are satisfied, from the evidence of his
2 guilt beyond a reasonable doubt. The State has the
3 burden of proof of proving the Defendant guilty
4 beyond a reasonable doubt. Some of you may have
5 served as jurors in a civil case, where you were
6 told that it is only necessary to prove that a fact
7 is more likely true than not true, such as by the
8 greater weight or the preponderance of the
9 evidence. In criminal cases, the State's proof
10 must be more powerful than that. It must be beyond
11 a reasonable doubt. Proof beyond a reasonable
12 doubt is proof that leaves you firmly convinced of
13 the defendant's guilt. There are very few things
14 in this world that we know with absolute certainty,
15 and in criminal cases, the law does not require
16 proof that overcomes every possible doubt. If,
17 based on your consideration of the evidence, you
18 are firmly convinced that the Defendant is guilty
19 of the crime charged, then you must find the
20 Defendant guilty. If on the other hand, you think
21 there is a real possibility that the Defendant is
22 not guilty, you must give the Defendant the benefit
23 of that doubt and find him not guilty.

24 The Defendant is charged with armed
25 robbery. In order to prove this offence, the State

1 must first prove beyond a reasonable doubt that the
2 Defendant took personal property from the person or
3 presence of another person. Property is in the
4 presence of a person if it is within the persons's
5 reach, inspection, observation, or control. So
6 that the person could, if not overcome with
7 violence or prevented by fear, keep possession of
8 the property.

9 The State must also prove beyond a
10 reasonable doubt that the Defendant carried the
11 property away intending to permanently deprive the
12 owner of the property and to keep the property for
13 the defendant's own use. The slightest removal of
14 the property or complete possession, even for an
15 instant, by the Defendant is sufficient to show a
16 taking and carrying away of the property.
17 The taking and carrying away of the property must
18 have been done with violence or by putting the
19 owner of the property in fear of violence.

20 Finally, the State must prove beyond a
21 reasonable doubt that the Defendant was armed with
22 a deadly weapon or that the Defendant, either by
23 action or words, while using a representation of a
24 deadly weapon or object during the robbery. A
25 deadly weapon is any article, instrument, or

1 substance which is likely to cause death or great
2 bodily harm. Whether an instrument has been used
3 as a deadly weapon depends on the facts and
4 circumstances of each case. The following are
5 examples of instruments which may be considered
6 deadly weapons: A pistol, a shotgun, a rifle, a
7 dirk, a dagger, a knife, a slingshot, metal
8 knuckles, a razor, gasoline, a firebomb or Molotov
9 cocktail. A gun may be a deadly weapon even if it
10 is not operated.

11 These are simply evidentiary facts to
12 be considered by you, along with the other evidence
13 in the case, and it is for you the jury to give it
14 the effect, value, and weight you decide it should
15 have.

16 Ladies and gentlemen, if you find the
17 State has failed to prove that the Defendant was
18 armed with a deadly weapon, or representation of a
19 deadly weapon, or object, you may then consider
20 whether the State has proven beyond a reasonable
21 doubt that the Defendant committed robbery.
22 In order to prove robbery, the State must prove
23 beyond a reasonable doubt all of the elements that
24 I have just explained regarding armed robbery,
25 except that the Defendant was not armed with a

1 deadly weapon or the representation of a deadly
2 weapon or object. In order to prove robbery, the
3 State must prove beyond a reasonable doubt that the
4 Defendant took the personal property from the
5 person or presence of another without that person's
6 consent and carried it away.

7 Property is in the presence of a person
8 if it is within the person's reach, inspection,
9 observation, or control so that the person could,
10 if not overcome with violence or prevented by fear,
11 retain possession of the property. The State must
12 show that the defendant carried the property away
13 with the intent to permanently deprive the owner of
14 the property and to convert it to the Defendant's
15 own use. The slightest removal of the property or
16 complete removal or the complete possession of the
17 property, even for an instance by the Defendant, is
18 sufficient to show a taking and carrying away of
19 the property. The taking and carrying away of the
20 property must have been done with violence or by
21 putting the owner in fear of violence.

22 The Defendant is also charged with
23 possession of a weapon during the commission of or
24 the intent to commit a violent crime. The State
25 must prove beyond a reasonable doubt that the

1 Defendant was in possession of a firearm or visibly
2 displayed what appeared to be a firearm during the
3 commission of a violent crime. A firearm means any
4 machine gun, automatic rifle, revolver, pistol, or
5 any weapon which will, is designed to, or may be
6 readily converted to expel a projectile.

7 In order to find the Defendant guilty
8 of possession of a weapon during the commission of
9 a violent crime, you must first find the defendant
10 guilty of either committing a violent crime or
11 attempting to commit a violent crime. I instruct
12 you that armed robbery is a violent crime as
13 defined by South Carolina Code Annotated 16-1-60.
14 An issue in this case is the identification of the
15 Defendant as the person who committed the crime
16 charged. The State has the burden of proving
17 identity beyond a reasonable doubt. You must be
18 satisfied beyond a reasonable doubt of the accuracy
19 of the identification of the Defendant before you
20 may convict the Defendant. Identification
21 testimony is an expression or belief or impression
22 by a witness. You must determine the accuracy of
23 the identification of the Defendant. You must
24 consider the believability of each identification's
25 witness in the same way as any other witness. You

1 may consider whether the witness had an adequate
2 opportunity to observe the Defendant at the time of
3 the offense. This will be affected by things like
4 how long or short a time was available, how far or
5 close the witness was, lighting conditions, whether
6 the witness had the chance to see or know the
7 person in the past.

8 Once again, I instruct you the burden
9 of proof on the State extends to every element of
10 the crime charged, and this specifically includes
11 the burden of proving beyond a reasonable doubt the
12 identity of the defendant as the person who
13 committed the crime. If after examining the
14 testimony, you have a reasonable doubt as to the
15 accuracy of the identification, you must find the
16 Defendant not guilty.

17 There are two Indictments in this case
18 which allege two separate and distinct offenses.
19 They are Indictment 2013-GS-10-1496, which is armed
20 robbery, and 1497, which is possession of a weapon
21 during the commission of a violent crime. Each
22 Indictment charges a separate and distinct offense.
23 You must decide each indictment separately on the
24 evidence and the law applicable to it, uninfluenced
25 by your decision as to any other indictment. The

1 Defendant may be convicted or acquitted on any or
2 all of the offenses charged. You will be asked to
3 write a separate verdict of guilty or not guilty
4 for each Indictment.

5 Ladies and gentlemen, there are three
6 possible verdicts on one Indictment and two on the
7 other. I will go through these with you. There is
8 no significance whatsoever to the order in which I
9 state these potential verdicts. It is simply that
10 one must be stated first. And the verdict form
11 will go into the jury room with you so you don't
12 need to try to write this information down.

13 As to Indictment 2013-GS-10-1496, we
14 the jury by unanimous consent find the Defendant
15 guilty of armed robbery or, as to the lesser
16 included offense, guilty of robbery or not guilty.
17 And as to Indictment 1497, we the jury by unanimous
18 consent find the Defendant guilty of possession of
19 a firearm during the commission of a violent crime,
20 or not guilty. Again, there is no significance
21 whatever in the order of which I stated these
22 potential verdicts. It is simply that one must be
23 stated first.

24 Ladies and gentlemen, your verdict must
25 be a unanimous one, which means that all 12 of you

1 must agree in order to reach a verdict in this
2 case. Madame Forelady, when the jury has reached a
3 verdict, it is your responsibility to fill out the
4 verdict form, to sign and date the form, and also
5 knock on the door and advise the bailiff that the
6 jury has reached a unanimous verdict. At that time
7 we will receive the jury back into the courtroom
8 for the purpose of publishing those verdicts.

9 Also, if the jury has any questions
10 during deliberation, it is your responsibility to
11 write out the questions, to sign and date the note,
12 and likewise follow the same procedure and knock on
13 the door and advise the bailiff that the jury has a
14 question.

15 Ladies and gentlemen, if you have any
16 questions during the deliberation, please know that
17 there will be a delay in our response. We are not
18 ignoring you. There is a procedure that we must
19 follow in answering your question, so know, if
20 there is a question, there will be a delay, because
21 we are following that procedure.

22 Also Madame Forelady, in any note, any
23 numerical breakdown of the jury should not ever be
24 denoted, because the jury's deliberations are
25 private and so you should never in any note

1 indicate that.

2 Ladies and gentlemen, I'm going to ask
3 that you return to your jury room, but do not yet
4 begin your deliberations. I have some very brief
5 matters of law to take up with the attorneys that
6 may require further instruction or clarification of
7 an instruction; however, if there is no further
8 instruction, we will send in the notepads, the
9 evidence. At that time we will excuse the
10 alternate and you will be allowed to begin your
11 deliberations.

12 Your lunch is scheduled to be here at
13 11:30, in about ten minutes. If you need to get
14 some air once you have started, just let the
15 bailiffs know. They have the authority to take you
16 downstairs, but you can't deliberate while any of
17 your members are absent.

18 Thank you very much.

19 (Jury out, 11:21 a.m.)

20 THE COURT: Any exceptions from the
21 State, other than what the Court has already
22 entertained?

23 MR. LIETZOW: No, Your Honor.

24 THE COURT: Any exceptions from the
25 defense, other than what the Court has already

1 A JUROR: I can stay.

2 THE COURT: We will make you
3 comfortable and keep you in the multipurpose room
4 and entertain you.

5 A JUROR: Thank you.

6 THE COURT: I want to thank you so much
7 for your service.

8 A JUROR: Thank you.

9 THE COURT: Get the foreperson for me
10 too.

11 (Forelady in 11:31 a.m.)

12 THE COURT: Ma'am, this is a piece of
13 evidence, Exhibit Number 1, which is the video.
14 Normally we would have a laptop in the jury room
15 for you all to watch it. For whatever reason the
16 laptop that we use, IT has locked our ability to
17 load any kind of additional software onto it. So
18 if you all need to watch that video, let us know.
19 We will have to bring in another laptop for you to
20 use, but we will have to have someone in there with
21 you because it has other things on there.

22 The laptop that we generally use is
23 sanitized. It doesn't have any other programs on
24 it except Media Player. If you all need to watch
25 the video, knock on the door and let the bailiffs

1 know and he will have a bailiff and someone else
2 accompanied with the laptop that so that you can
3 view that video. Okay.

4 THE FOREPERSON: Thank you.

5 THE COURT: Thank you, ma'am.

6 The record should reflect that the jury began its
7 deliberations at 11:28.

8 Anything before we recess, from the
9 State?

10 MR. LIETZOW: No, ma'am.

11 THE COURT: From the defense?

12 MS. PROCTOR: No.

13 THE COURT: If you could stick around
14 until the lunch arrives and then I will let you
15 take a lunch break as well.

16 (There was a break in these
17 proceedings.)

18 THE COURT: Mr. Leitzow, I need you all
19 to show the bailiff how to pull that particular
20 disk up and how to play it so he can do it for the
21 jury. Okay? Have you pulled up the video for the
22 bailiff? Show them how to access it.

23 MR. LIETZOW: Yes, ma'am.

24 THE COURT: So when you all go into the
25 jury room, play each video. If the jury requests

1 that any of the videos be replayed, comply with
2 that request. Also, advise them they cannot
3 deliberate while you all are in there.

4 THE BAILIFF: Yes, ma'am.

5 THE COURT: Any exception from the
6 State?

7 MR. LIETZOW: Only thing I would ask,
8 if they have a particular video they want to watch,
9 do they need to watch all of the videos in
10 duration?

11 THE COURT: They want to watch all of
12 them. If they want to watch a particular one --
13 there is no way for the bailiffs to discern what
14 particular one they want to watch. What they will
15 do is they will play each one in sequence and by
16 that time the jury should be able to denote which
17 one they want to watch; if they want to see it
18 again, and then they can let the bailiff know they
19 want to see it again.

20 That's the only fair way to do it since
21 we do not have a clean laptop that works to send
22 back there with them. And I would suspect they
23 would have done it that way anyway because they
24 have no real reference to what the videos are. So
25 play each one of them and then if they want any of

1 them replayed, comply with that request as many
2 times as they ask. Make sure they're clear that
3 they are not to deliberate while you're in there.

4 MS. PROCTOR: Your Honor, I don't mean
5 to interrupt, but what I was going to say is, each
6 camera angle is 30 minutes. That's why we tried to
7 tell them to start at 24. From 24 -- nothing
8 happens in the first 24 --

9 THE COURT: Do you all have those
10 designations? You all did that on the record, but
11 do you have those designations for the bailiffs so
12 they know where to start it?

13 MS. PROCTOR: At 24 minutes, because
14 until then --

15 MR. LIETZOW: They're all
16 simultaneously timed.

17 THE COURT: Are you all clear?

18 THE BAILIFF: Yes, ma'am.

19 THE COURT: Any exceptions from the
20 State?

21 MR. LIETZOW: No.

22 THE COURT: From the defense?

23 MS. PROCTOR: No, Your Honor.

24 (There was a break in these
25 proceedings.)

1 THE COURT: State ready to proceed.

2 MR. LIETZOW: Yes, Your Honor.

3 THE COURT: Defense ready to proceed?

4 MS. PROCTOR: Yes, Your Honor.

5 THE COURT: Please bring in the jury.

6 (Jury in, 1:59 p.m.)

7 THE BAILIFF: All jurors are present.

8 THE COURT: Thank you. You may be

9 seated.

10 Madame Forelady, is it correct that the
11 jury has reached a verdict?

12 THE FOREPERSON: Yes, ma'am.

13 THE COURT: If you would give the
14 verdict form to the bailiff, please.

15 Sir, if you would stand for the
16 publication of the verdict.

17 THE CLERK: Court of General Sessions
18 for the Ninth Judicial Circuit, Indictment No.

19 2013-GS-1496: We, the jury, by unanimous consent
20 find the Defendant guilty of armed robbery. Signed
21 Foreperson, dated July 15, 2015.

22 As to Indictment No. 2013-GS-10-1497:
23 We, the jury, by unanimous consent find the
24 Defendant guilty of possession of a firearm during
25 the commission of a violent crime. Signed by the

1 Foreperson, July 15, 2015.

2 THE COURT: Is there any request to
3 poll the jury from the State?

4 MR. LIETZOW: No, Your Honor.

5 THE COURT: From the defense?

6 MS. PROCTOR: Yes, Your Honor.

7 THE COURT: Please proceed with
8 polling.

9 Ladies and gentlemen, please give the
10 clerk your attention as he asks you two questions.

11 THE CLERK: Ladies and gentlemen, when
12 I call your juror number, please raise your hand to
13 acknowledge. I will ask you two questions. Please
14 answer with a yes or no.

15 Juror No. 183, is this your verdict?

16 THE JUROR: Yes.

17 THE CLERK: Is this still your verdict?

18 THE JUROR: Yes.

19 THE CLERK: Juror No. 54?

20 THE JUROR: Yes.

21 THE CLERK: Is this still your verdict?

22 THE JUROR: Yes.

23 THE CLERK: Juror No. 356, is this your
24 verdict?

25 THE JUROR: Yes.

1 THE CLERK: Is this still your verdict?
2 THE JUROR: Yes.
3 THE CLERK: Juror No. 10, is this your
4 verdict?
5 THE JUROR: Yes.
6 THE CLERK: Is this still your verdict?
7 THE JUROR: Yes.
8 THE CLERK: Juror No. 246, is this your
9 verdict?
10 THE JUROR: Yes.
11 THE CLERK: Is this still your verdict?
12 THE JUROR: Yes.
13 THE CLERK: Juror No. 115, is this your
14 verdict?
15 THE JUROR: Yes.
16 THE CLERK: Is this still your verdict?
17 THE JUROR: Yes.
18 THE CLERK: Juror No. 210, is this your
19 verdict?
20 THE JUROR: Yes.
21 THE CLERK: Is this still your verdict?
22 THE JUROR: Yes.
23 THE CLERK: Juror No. 354, is this your
24 verdict?
25 THE JUROR: Yes.

1 THE CLERK: Is this still your verdict?
2 THE JUROR: Yes.
3 THE CLERK: Juror No. 328, is this your
4 verdict?
5 THE JUROR: Yes.
6 THE CLERK: Is this still your verdict?
7 THE JUROR: Yes.
8 THE CLERK: Juror No. 264, is this your
9 verdict?
10 THE JUROR: Yes.
11 THE CLERK: Is this still your verdict?
12 THE JUROR: Yes.
13 THE CLERK: Juror No. 206, is this your
14 verdict?
15 THE JUROR: Yes.
16 THE CLERK: Is this still your verdict?
17 THE JUROR: Yes.
18 THE CLERK: Juror No. 382, is this your
19 verdict?
20 THE JUROR: Yes.
21 THE CLERK: Is this still your verdict?
22 THE JUROR: Yes.
23 THE CLERK: Your Honor, the jury has
24 been polled and the verdict stands.
25 THE COURT: Ladies and gentlemen, we

1 thank you for your time and attention to this case.
2 Charleston County is one of the busiest circuits in
3 the state. We hold jury trials every week, with
4 the exception of holidays, and we hold four trial
5 courts every week just in the Circuit Court, which
6 necessitates the need for jury service. So I hope
7 you know how very valuable you are to us.

8 Charleston has one of the largest case
9 filings per capita in the nation at over 5,000
10 cases per judge. We have about 49 circuit judges
11 whose job it is to travel throughout the State and
12 hear both civil and criminal cases. Just to give
13 you some point of reference, the City of
14 Philadelphia has nine judges whose only job it is
15 to hear murder cases, versus South Carolina who has
16 49 judges throughout the state. We not only hear
17 civil cases, we hear criminal cases and we hear
18 appeals and we hear cases in a nonjury capacity and
19 we hear other motions and other things in a nonjury
20 capacity. But even with that, we still dispose of
21 cases more quickly than most states in the country
22 at less -- usually civil cases right at around
23 18 months, as well as criminal cases. So even with
24 that volume, we still work a little more
25 efficiently than other states.

1 We would not be able to do what we do
2 without your willingness to donate your time to us
3 and serve on a jury. I hope that you learned it's
4 nothing like Judge Judy, Judge Joe Brown, Judge
5 Mathis, People's Court. While those court shows
6 are entertaining, they are nothing like the real
7 process. They are what we call binding arbitration
8 and any of you could be judges in those cases.
9 It's just where two people agree to let a third
10 person resolve their disputes; however, they have
11 learned it's far more lucrative to let that take on
12 a courtroom proceeding. People find that more
13 interesting, and, again, it's very lucrative, as
14 you can tell with more and more shows developing.
15 People wouldn't be doing it unless they could make
16 a great deal of income from it. They are nothing
17 like the real process.

18 Our system is the only system of its
19 kind, where 12 ordinary people listen to the facts
20 of a case and determine what the facts are, apply a
21 very complex set of rules to the facts and render a
22 verdict. We thank you so very much for your
23 service. You are done for the week. If you need a
24 jury work excuse, you can get that on the first
25 floor of the courthouse on the circuit court side.

1 One side is family court and the other side is
2 circuit court. Any of the deputy clerks at those
3 windows can give you a work excuse; otherwise, we
4 will mail them to you along with the checks.

5 You are welcome to discuss the case if
6 you would like, but I would ask that you not do
7 that until after Friday, when the entire panel and
8 all the court's business for the week has
9 concluded. By the same token, if someone should
10 try to speak to you and it exceeds your comfort
11 level, please make us aware of it so we can take
12 the appropriate action to protect your privacy.
13 Lawyers will often contact you because they just
14 want feedback on how they can do their jobs better.
15 I'm going to sentence the Defendant shortly.

16 If you would like to remain for the
17 sentencing process, you're welcome to do that; just
18 let the bailiffs know and he'll bring you back into
19 the courtroom for that purpose.

20 I will hear post trial motions and
21 sentencing in a moment.

22 (Jury released.)

23 THE COURT: Any post trial motions from
24 the State?

25 MR. LIETZOW: Nothing further.

1 THE COURT: From the defense?

2 MS. PROCTOR: Yes, Your Honor. At this
3 time we will make a motion for a new trial and
4 renew all of our motions and objections during the
5 trial.

6 THE COURT: Okay. Would the State like
7 to respond?

8 MR. LIETZOW: Your Honor, we would just
9 ask you to uphold all of the rulings you've already
10 made and deny the defense's motion.

11 THE COURT: I have not heard whether
12 any evidence to support a jury's verdict -- the
13 verdict should be sustained and I have not heard
14 anything that would alter the Court's ruling in
15 this matter and I would incorporate those rulings
16 that were stated in this portion of the record --

17 (The proceedings were interrupted.)

18 THE COURT: -- as I have restated, for
19 this portion of the record. And, actually, it
20 really didn't come down to a credibility case, but
21 to some extent, Ms. Proctor argued things that
22 really weren't in the record regarding her client's
23 culpability. The State didn't object; no harm, no
24 foul, as far as I'm concerned. But by doing that,
25 you still allowed the jury to consider matters

1 without him actually having testified, and so they
2 had the benefit of that argument.

3 And so, in essence, they had the
4 ability to draw their own conclusions about
5 credibility of the two stories. And there was
6 direct testimony -- I think what was most
7 compelling, and always is for a jury, is the video.
8 It's objective, not subjective. It is what it is;
9 it speaks for itself. And they had the ability to
10 observe the video, to compare, to make comparisons
11 regarding the physical characteristics of the
12 Defendant, coupled with what was later found,
13 clothing and otherwise, consistent with the video
14 at his residence, as well as the thumbprint that
15 was found on the cash drawer.

16 And so there was direct and substantial
17 circumstantial evidence reasonably tending to prove
18 his guilt which was beyond just a suspicion. Of
19 course, the State does not have to prove his guilt
20 beyond every possible doubt. But there was more
21 than adequate evidence in the record to support the
22 jury's verdict and, therefore, the motion is
23 denied.

24 Do you have a sentencing sheet?

25 MR. LIETZOW: I do, Your Honor.

1 THE COURT: What's the range of penalty
2 on armed robbery, 10 to 30?

3 MR. LIETZOW: Yes, ma'am, violent, most
4 serious.

5 THE COURT: Most serious and violent.
6 And possession of a weapon is five?

7 MR. LIETZOW: Yes, ma'am.

8 THE COURT: Be glad to hear the State
9 on sentencing.

10 MR. LIETZOW: Thank you. May it please
11 the Court?

12 THE COURT: Yes, sir.

13 MR. LIETZOW: The State made a decision
14 at the beginning of this case and we decided not to
15 put certain evidence in. I think it's very
16 telling, particularly the Defendant gave a nearly
17 three-hour interview with Detective Michael Aiken
18 with the North Charleston Police Department. In
19 that interview, Mr. Tyus went all the way to the
20 very edge of the cliff of committing an armed
21 robbery, but didn't quite jump over. He admitted
22 to detectives that night that he was carrying a gun
23 in his pocket. He admitted to detectives that
24 night that he did in fact take money out of the
25 cash register. He admitted to detectives that he

1 knew it was wrong to steal and that he deserved the
2 punishment that he was going to get, he needed to
3 learn his lesson the hard way.

4 His first day in jail, he made a
5 ten-minute phone call to his mother in which he
6 reaffirmed to his mother that he was in possession
7 of a handgun that night, in fact, that he left the
8 house with a gun. Between the interview with
9 Detective Aiken and his mom, what I found
10 particularly troublesome was that he had been in
11 this restaurant before and he was very aware that
12 this restaurant had cameras in it. He knew the
13 restaurant would be closing around the time that
14 they did and, in his mind, the register would be
15 stuffed full of money. I would have argued, had
16 that come in, that he concealed his face because he
17 knew the cameras were there, but for purposes of
18 strategy, we decided not to put that evidence in.

19 Your Honor, this was a deliberately
20 planned armed robbery. Mr. Tyus advised detectives
21 that he didn't have money, couldn't pay -- couldn't
22 pay a ticket that he had gotten, couldn't get into
23 the Army and had to take matters into his own
24 hands, and there's a right way to do things and a
25 wrong way to do things, and this is absolutely the

1 wrong way to do things.

2 Your Honor, armed robbery, as you're
3 aware, carries 10 to 30 years. It is the State's
4 contention that the lower end of that sentencing
5 range is reserved for charges where one drug dealer
6 robs another drug dealer, and the first person to
7 call the police is the victim in that case.

8 What we have here, Your Honor, is an
9 individual specifically targeting a business near
10 their house and preying on two hard-working
11 immigrants, terrorizing them, going in with a gun
12 and stealing money that did not belong to him. The
13 fact that this was a business that Mr. Tyus had
14 essentially cased out is substantially aggravating
15 in my mind. As far as his criminal record, he has
16 possession of drug paraphernalia and he has
17 possession of marijuana.

18 THE COURT: He has no record.

19 MR. LIETZOW: So his record would not
20 indicate this level of violence. So the detectives
21 picked up on that and they tried to ask him why he
22 did it. As far as Your Honor knows, what I have
23 provided is the reasoning; however, he never
24 maintained he went inside the restaurant. He
25 always maintained that he just found the register,

1 and up to this point, he has shown absolutely no
2 remorse for the violent act. As such, the State
3 would ask Your Honor to sentence the Defendant in a
4 manner that would allow him to be rehabilitated,
5 but firmly punish him for preying on a business
6 like this in North Charleston, and we're
7 respectfully asking Your Honor for a 20-year prison
8 sentence.

9 Thank you.

10 THE COURT: You're welcome.

11 Does the defense wish to respond?

12 MS. PROCTOR: Yes, Your Honor, I would.
13 Your Honor, this happened two days before Kendall's
14 21st birthday. He was --

15 THE COURT: I'm sorry, repeat that for
16 me, please. I couldn't hear you.

17 MS. PROCTOR: I'm sorry. This was two
18 days before his 21st birthday. He was 20 years old
19 at the time. He is now 24. This happened three
20 years ago. Your Honor, as far as the restaurant, I
21 will say, if you were able to see the rest of the
22 tapes and all of the sequence of events, the person
23 that robbed the store did wait until everybody was
24 out. There were no customers in the store. The
25 store was getting ready to close, so there were no

1 other people in the restaurant.

2 He does have his GED, he does have some
3 college. When he was able to find work, he would
4 work at Banks Construction. He has a four-year-old
5 daughter. I think she was in here briefly the
6 other day. Your Honor, he's -- the three years
7 that he's been out, except for the simple
8 possession of marijuana, he has not been in any
9 trouble whatsoever.

10 I think this was -- he was down on his
11 luck, he was scared, he didn't know what to do, and
12 this is something that I think shocked him and
13 shocked his mom. He's a nice young man. This was
14 a horrible mistake he made, but I would ask that
15 you consider the minimum, ten years. That's still
16 a long time. He was only in jail I think 24 days
17 total before this -- before he bonded, so he will
18 still have to do almost eight-and-a-half to nine
19 years as a minimum sentence.

20 Court's indulgence. He would like to
21 address you.

22 THE COURT: Sure.

23 MS. PROCTOR: I would ask that you
24 consider the ten years.

25 THE DEFENDANT: I've been -- like she

1 said, that was -- that whole incident was a very
2 huge mistake. I've been working at Banks
3 Construction since September, a month before that
4 happened, up until -- up until today; they're still
5 holding my job at work, but it doesn't matter right
6 now. Ever since that incident, it just really
7 taught me that it's not the way to go at all.

8 I've been a hard-working individual. I
9 was up for a promotion at my job next week, where I
10 would be the youngest black foreman at Banks
11 Construction. I have a four-year-old daughter that
12 I want to get back to. I'm not sure how she's
13 going to grow up now. I just want to go and do my
14 time and go home.

15 THE COURT: Thank you, sir.

16 Yes, ma'am.

17 MS. PROCTOR: State your name.

18 MS. BUTLER: Shenicqua Butler.

19 THE COURT: Could you spell your first
20 name for me?

21 MS. BUTLER: S-H-E-N-I-C-Q-U-A.

22 THE COURT: Yes, ma'am.

23 MS. BUTLER: This is my little brother.
24 It is shocking. When I heard it, I didn't believe
25 it, because he's not that type of person. So I

1 know that, you know, he must have been going
2 through some things, because it's not his
3 character. I just really ask that you not sentence
4 him to a lot of time so he has time to be able to
5 rehabilitate himself and have a chance to come
6 back.

7 He works, he tries to do the right
8 things. He's made mistakes and I'm -- this is by
9 far the biggest. I'm still in shock. When I heard
10 it, I can't believe it. I didn't want to believe
11 that he would do it. That's all I want to say.

12 THE COURT: Thank you, ma'am. Any
13 other members of the family?

14 Yes, sir, tell us your name for the
15 record.

16 MR. LAMAR: Gregory Lamar.

17 I'm his uncle, I've been married to his
18 auntie for 16 years. I met him as a young man.
19 He's a great kid. He's really a good kid and he
20 comes from a good family. All of his family work,
21 they are good people and, you know, it breaks my
22 heart that I can't -- he's just a good kid.

23 THE COURT: Anything further, Ms.
24 Proctor?

25 MS. PROCTOR: No, Your Honor.

1 THE COURT: Yes, sir.

2 MR. PETERS: My name is Deacon Peters.

3 I'm a member --

4 THE COURT: You said Bethany Baptist?

5 MR. PETERS: Nazarene Baptist. I met
6 this gentleman through his mother, because his
7 mother attends my church and she is a God-fearing
8 person. And since this was going on, she asked for
9 prayer and she asks for -- she's going through a
10 great turmoil, and I've been sitting with her and
11 counselling her. And I met this gentleman about
12 two or three months ago. He was concerned, he was
13 taking care of his kids, trying to help his mother
14 get ready for him to go. And from that, I believe
15 he is a humble person. That's all I have to say.

16 THE COURT: Thank you, sir.

17 Anything further, Ms. Proctor.

18 MS. PROCTOR: No, Your Honor. Again, I
19 would just ask that you consider the minimum of ten
20 years.

21 THE COURT: I normally don't talk
22 during sentencing because I would rather that my
23 silence be misinterpreted than misquoted. I'm
24 going to make some observations just because I
25 think sometimes we do things and people don't

1 understand why we do them, which leads to
2 misunderstandings as well.

3 There are many things that the Court
4 takes into consideration in terms of sentencing.
5 It's not this Court's -- well, I take that back.
6 In some instances, it's the Court's sole job to
7 punish, period. But the Court has to take into
8 consideration many factors in terms of determining
9 both punishment and rehabilitation and
10 consequences. You-all don't think about it in this
11 sense, but the Court does. You look at it almost
12 on a scale. In other words, everything is not a
13 10. Everybody is not at the most culpable end of
14 the sentencing range. If that was the case, we
15 would put everybody in prison all the time and it
16 would be full and we'd never have enough tax
17 dollars to fund the institution. You have to weigh
18 out the factors of offenses.

19 I already knew going into this, and I
20 credit myself, right or wrong, of having a great
21 deal of discernment about people and what they're
22 capable of and their personalities. I already knew
23 that this was an aberrant act on his part. I
24 already knew it was outside of his personality,
25 just based on my ability to observe certain things,

1 and there are certain objective things, once you
2 have done this a long amount of time, that you can
3 discern about a person's personality, right or
4 wrong.

5 I already knew that he was desperate
6 and did this because desperate people make
7 desperate decisions, without advice or
8 consultation. I already knew that going into it.
9 So nothing that I have heard from his family,
10 frankly, surprises me, because I had already
11 gleaned that from my own observations, as well as
12 generally people do and commit acts of this type
13 who are really bent on criminal behavior; this is
14 not their first contact with the system. He would
15 have already had multiple contacts, maybe not an
16 armed robbery, maybe not a strong-armed robbery,
17 but he would have had some contact with the system
18 before now, other than a simple possession of
19 marijuana and a drug paraphernalia.

20 So in that regard and so that he
21 understands -- because I appreciate his comments.
22 Most people do not admit culpability. Most do not
23 acknowledge their actions, and I have to give him
24 some credit for that, because it tells me in
25 essence that he has some level of moral

1 responsibility and remorse regarding this incident.
2 I've also taken into consideration his age issue
3 and, as I've already indicated, his lack of
4 criminal history.

5 But I also have to take into concern
6 the fact that a weapon was used. I have to take
7 into concern that an innocent business was robbed;
8 even though unintentional, it still had intentional
9 effects, and I have to take into consideration the
10 effect of that behavior. Because while he may not
11 have had an intention to have committed -- or for
12 the consequences that flowed from that decision,
13 nonetheless, it did have that effect.

14 I'm also taking into consideration the
15 fact that he has not had any trouble, that he has
16 remained gainfully employed since this incident
17 happened, knowing that it was pending for three
18 years, and I am taking that into consideration as
19 well. And I appreciate both the candor of the
20 State and the candor of the defense in their
21 arguments to the Court regarding this matter.

22 As such, sir, if you would stand for
23 sentencing. You are sentenced to the State
24 Department of Corrections on 1497 -- 2013-1497,
25 which is possession of a weapon during the

1 commission of a violent crime, to five years, and
2 on the offence 2013-1496, armed robbery, you're
3 sentenced to the State Department of Corrections
4 for a period of 13 years. These sentences are
5 concurrent with one another. You will get credit
6 for any time that you've served to be calculated,
7 pursuant to 241345, Department of Corrections.

8 Thank you very much.

9 MS. PROCTOR: Thank you, Your Honor.

10 THE COURT: Have a good day.

11 We need to substitute a picture of the
12 gun and the ammunition. Can you do that or consent
13 to that? Will the defense consent to that? Do you
14 have any exception to us substituting a picture of
15 the gun and the ammunition for the purpose of the
16 appellate record?

17 MS. PROCTOR: No.

18 THE COURT: We just don't have any room
19 for it. The clerk's office will handle it for you.

20 (These proceedings were concluded at
21 2:25 p.m.)
22
23
24
25

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

vs.

KENDALL JEROME TYUS

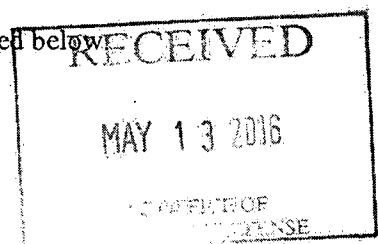
Defendant

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) Warrant Nos: 2012A1010202093;2012A1010202094
) Charge(s): Armed Robbery; Possession of Firearm
) During the Commission of a Violent Crime

)
)
) MOTION TO SUPPRESS FINGERPRINT
) EVIDENCE AND SEARCH WARRANTS

FILED
 2015 JUL 11 AM 8:43
 JULIE PRINSTRONG
 CLERK OF COURT
 BY [Signature]

Now comes Defendant by and through the undersigned attorney and moves to suppress all fingerprint evidence and all evidence obtained as a result of the search warrants executed in the above-referenced case because the affidavit in support of the search warrant lacked probable cause. The fingerprint evidence should be suppressed because it lacks reliability and the Crime Scene Investigator's investigation and proffered testimony fails to meet the Daubert standard for the admissibility of scientific evidence. Defendant further argues that the search warrants should be suppressed under Delaware v. Franks because the Magistrate's finding of probable cause rests entirely on the unreliable fingerprint evidence. In the alternative, under Delaware v. Franks, the Magistrate's determination of probable cause was based on the affiant's false statements. Additionally, the Crime Scene Technician who processed the scene's personnel files and investigation review documents are discoverable and relevant to Defendant's analysis of the fingerprint evidence and crime scene evidence. This motion is filed pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article 1 §10 of the South Carolina Constitution; S.C. Code Ann. 17-13-140 (2014); State v. Smith, 301 S.C. 371 (1990) and the relevant statutes and case law enumerated below.



I. FACTUAL AND PROCEDURAL BACKGROUND

On October 22, 2012, at approximately 7:15 PM to 7:28 PM, an unknown assailant whose face was masked by a white towel, bandana, or cloth entered the Under the Sea Korean restaurant located at 5060 Dorchester Road, Suite 280, North Charleston, South Carolina armed with a pistol, reached across the counter, opened the cash register drawer, removed the cash tray from the register drawer, and exited the restaurant. When the unknown assailant entered the restaurant, the restaurant owner, Hana Lee, who was standing at the counter immediately turned away from the unknown assailant, ran through the kitchen and back of the restaurant, and exited the premises through the back door of the restaurant. As Hana Lee ran through the kitchen and alerted her husband of the activity, Mrs. Lee's husband and co-owner, Sunny Lee, who was in the kitchen at the time of the incident, likewise exited the restaurant. The incident was captured on the restaurant's video surveillance tape.

Officers responded to the scene, conducted interviews with the owners, reviewed the surveillance tape, and requested crime scene investigation to respond and process the scene. Law enforcement discovered the cash tray that the unknown assailant removed from the register drawer outside of a neighboring business in the strip mall, suite number 210. Crime Scene Technician (CST) Lisa Kubicsko responded to and processed the scene. CST Kubicsko reviewed the surveillance footage, opined that the suspect was not wearing gloves, photographed the scene, swabbed for DNA, and processed the scene for latent prints. CST Kubicsko lifted either 7 or 8 latent print backer cards and collected 5 buccal swabs from the interior front door, the register drawer, the cash tray, and the countertop. Once back at Central, CST Kubicsko examined one print lifted from the cash

tray located in front of suite 210, labelled L1.1, and entered the print into South Carolina's Automated Fingerprint Identification System (SCAFIS or AFIS). CST Kubicsko or MPO Andrew Coker reviewed 9 or 10 automatically generated results on SCAFIS, and matched fingerprint L1.1 to Defendant's known standard. CST Kubicsko's "hit" was verified by MPO Andrew Coker and the information was provided to Detective Michael Aiken of the North Charleston Police Department.

According to Detective Mark Evans of the North Charleston Police Department's narrative, Detective Evans and Detective Aiken researched Defendant's address and made contact with Defendant at his home [REDACTED]. The detectives placed Defendant in custody. According to Detective Evans' narrative, on October 22, 2012, upon making contact with Defendant and "[d]ue to the nature of the crime and the fact that a female was also present inside the residence a protective sweep was conducted to secure the residence for search warrant." However, Detectives Evans and Aiken did not receive a valid search warrant, nor did they execute a search warrant of Defendant's residence until the day after the incident, October 23, 2012.

Detectives Aiken and Evans interrogated Defendant at headquarters and obtained a search warrant for Defendant's DNA and home on October 23, 2012. Crime Scene Investigation searched Defendant's residence, and seized a blue and white bandana; a pair of white Jordan sneakers; a black baseball cap; one blue jacket with blue and white stripes; 9 Winchester 9mm Luger bullets; a black Hi-Point firearm with magazine and 9 Winchester 9mm bullets; \$172.00 bills in US currency; 38 quarters; and \$31.00 bills in US currency. Because the Magistrate judge was in trial the week following the search warrant's execution, Detective Evans went on vacation, and due to unsuccessful attempts

to meet with the judge during the week of November 6, 2012 through November 9, 2012,

Crime Scene Investigation and Detective Evans made the search warrant return on November 13, 2012.

II. STANDARD

Under South Carolina's warrant statute:

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

S.C. Code Ann. § 17-13-140. The Fourth and Fourteenth Amendments of the United States Constitution and Article 1 §10 of the South Carolina Constitution require that a search warrant particularly describe the items to be seized and prohibit law enforcement from seizing items not listed in the search warrant. S.C. Code Ann. 17-13-140 (2014).

"Some deficiencies in search warrants are so substantial that they require exclusion of the evidence. State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)). "An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed." State v. Gore, 408 S.C. 237, 247, 758 S.E.2d 717, 722 (Ct. App. 2014), reh'g denied (June 19, 2014), cert. granted (Jan. 16, 2015) (citing State v. King, 349 S.C. 142, 149, 561 S.E.2d 640, 643 (Ct. App. 2002). "This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test." Id. (citing Jones, 342 S.C. at 126, 536 S.E.2d at 678). "The appellate court should give great deference to a magistrate's determination of

probable cause.” Id.

“The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause.” Id. (citing State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995)). “The magistrate should make a probable cause determination based on all of the information available to the magistrate when the warrant was issued.” Id. (citing State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996)). “In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate’s attention.” Id. (citing State v. Gentile, 373 S.C. 506, 513–14, 646 S.E.2d 171, 174 (Ct. App. 2007)).

“A magistrate may issue a warrant only upon a finding of probable cause.” State v. Davis, 354 S.C. 348, 355–56, 580 S.E.2d 778, 782 (Ct. App. 2003). “A probable cause determination requires the magistrate to analyze the totality of the circumstances, meaning he should ‘make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” Id. (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317 (1983); see State v. Johnson, 302 S.C. 243, 247–48, 395 S.E.2d 167, 169 (1990) (adopting the Gates totality-of-circumstances test); State v. Crane, 296 S.C. 336, 338–39, 372 S.E.2d 587, 588–89 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony); State v. Adams, 291 S.C. 132, 133–34, 352 S.E.2d 483, 485 (1987) (“A determination of probable cause depends upon the totality of the circumstances.”)).

III. SEARCH WARRANT RETURN AND MISSING TIME STAMP

South Carolina's warrant statute further provides:

Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

S.C. Code Ann. § 17-13-140 (2014). The procedure for accurately documenting search warrant issuance and execution provides that the Magistrate shall record the exact date and time of issuance:

Every judiciary official authorized to issue search warrants in this State shall keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant. The records shall be on a form prescribed by the Attorney General and reflect as to each warrant:
(1) Date and exact time of issuance.

S.C. Code Ann. § 17-13-141 (2014).

"Some deficiencies in search warrants are so substantial that they require exclusion of the evidence. State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)) (warrant issued on strength of officer's oath rather than sworn affidavit was defective and required suppression of the evidence seized). "However, failure to comply with inconsequential ministerial requirements of the statute does not require suppression in the absence of prejudice to the defendant." Id. (citing State v. Wise, 272 S.C. 384, 252 S.E.2d 294 (1979); State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992)). Failure to list all of the items seized on the return, or the failure to make a return in 10 days is a ministerial error, and does not require suppression unless the defendant was prejudiced by the error. Id. "Failure to observe the ten-day requirement for execution and return under section

17-13-140 does not necessarily void the warrant.” State v. Weaver, 361 S.C. 73, 79-80, 602 S.E.2d 786, 789 (Ct. App. 2004) State v. Wise, 272 S.C. 384, 386, 252 S.E.2d 294, 295 (1979) (holding the ten-day requirement was ministerial and the defendant failed to show he was prejudiced by the delay). “Because the statute’s return requirement is ministerial in nature, any purported noncompliance only provides grounds for exclusion upon a showing of prejudice.” Id. (citing State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995)). “In at least one case, this court has excluded evidence based on the provisions of section 17-13-140.” State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995).

In the present case, the search warrant for Defendant’s home was executed on October 22, 2012 and the return was signed on November 13, 2012—twenty one (21) days later. The search warrant for Defendant’s home was signed and dated by the Magistrate, but was no time stamped. Therefore, the deficiencies in the search warrant violate S.C. Code Ann. § 17-13-140 and -141 (2014).

a. PREJUDICE

“Error is harmless where it could not reasonably have affected the result of the trial.” State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). “Generally, appellate courts will not set aside convictions due to insubstantial error not affecting the result.” State v. Covert, 368 S.C. 188, 196, 628 S.E.2d 482, 487 (Ct. App. 2006) (citing State v. Davis, 364 S.C. 364, 409, 613 S.E.2d 760, 784 (Ct. App. 2005)).

Here, Defendant was prejudiced because the search warrants and evidence obtained as a result of the search warrants connect Defendant to the crime. Specifically, the search warrants that boast Defendant’s matched finger print connect Defendant to the cash tray

found outside of the building. The clothing, firearm, ammunition, currency, and change found at Defendant's residence as a result of the search warrant for Defendant's home further connect Defendant to the surveillance footage and description of items missing from the cash tray. Identity of the suspect is the essential issue in this case; without the search warrants, no evidence would identify Defendant as the unknown assailant who entered the restaurant and committed the armed robbery. Thus, Defendant was prejudiced by the defective search warrants and the errors were not harmless.

Moreover, not only was the return not signed until 21 days after execution of the search warrant, but the warrant was not time stamped, nor was its time catalogued in any law enforcement report. Therefore, no facts in evidence indicate what time law enforcement obtained and executed the search warrant and the investigation timeline is fatally flawed.

IV. DELAWARE V. FRANKS

a. DELAWARE V. FRANKS STANDARD

Law enforcement recklessly or intentionally included false information supporting the affidavit recklessly omitted exculpatory information from the affidavit, thus providing for suppression of the search warrants under Franks v. Delaware, 438 U.S. 154 (1978). See State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999).

Franks v. Delaware holds:

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the

affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155–56.

South Carolina's most recent case analyzing the Delaware v. Franks issue instructs:

Franks outlined a two-prong test for challenging the veracity of a search warrant affidavit. Franks, 438 U.S. at 155–56, 98 S. Ct. 2674. First, to mandate an evidentiary hearing, there must be “allegations of deliberate falsehood or of reckless disregard for the truth [as to statements included in the warrant affidavit], and those allegations must be accompanied by an offer of proof.” Id. at 171, 98 S. Ct. 2674. At the hearing, the accused has the burden of proving the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. at 156, 98 S. Ct. 2674; see State v. Jones, 342 S.C. 121, 127, 536 S.E.2d 675, 678 (2000) (holding a defendant is entitled to challenge misstatements in a warrant affidavit if the following criteria are met: “(1) the defendant’s attack is more than conclusory and is supported by more than a mere desire to cross-examine; (2) the defendant makes allegations of deliberate falsehood or of reckless disregard for the truth which are accompanied by an offer of proof; and, (3) the affiant has made the allegedly false or reckless statement”).

Second, if a deliberate falsehood or a reckless disregard for the truth has been established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause. State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003). If the court determines no probable cause exists after the false material is omitted from the analysis, “the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” Id. (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674); see Missouri, 337 S.C. at 553–54, 524 S.E.2d at 396–97 (adopting the two-prong Franks test).

“Under Franks v. Delaware, however, the court may not order suppression simply because the officer made a false statement in, or omitted key facts from, an affidavit supporting a search warrant.” State v. Robinson, 408 S.C. 268, 274, 758 S.E.2d 725, 728 (Ct. App. 2014), reh’g denied (June 18, 2014), cert. granted (Dec. 3, 2014) 438 U.S. 154, 155–56, 98 S. Ct. 2674, 2676, 57 L.Ed.2d 667, 672 (1978) (establishing the two-prong

test for challenging the veracity of a search warrant affidavit). The defendant must also demonstrate “those false statements or omissions were *material*, *i.e.*, rendered the affidavit unable to ‘support a probable cause finding.’ ” United States v. McKenzie-Gude, 671 F.3d 452, 462 (4th Cir.2011) (quoting United States v. Allen, 631 F.3d 164, 171 (4th Cir.2011)) (emphasis added).

b. OMISSION STANDARD

“To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge.” State v. Davis, 354 S.C. 348, 360; 580 S.E.2d 778, 784 (Ct. App. 2003). “There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause.” Id.

A party attempting to demonstrate information was intentionally or recklessly omitted from an affidavit bears a heavy burden of proof. Id. (citing United States v. Tate, 524 F.3d 449, 454 (4th Cir. 2008)). “[T]he omission must be ‘designed to mislead’ or must be made ‘in reckless disregard of whether [it] would mislead.’” Id. (citation omitted). “The defendant must also show that the omitted material was necessary to the finding of probable cause, *i.e.*, that the omitted material was such that its inclusion in the affidavit would defeat probable cause.” United States v. Shorter, 328 F.3d 167, 170 (4th Cir.2003) (citations and internal quotation marks omitted). “Upon making this two-part preliminary showing, a defendant is entitled to a hearing, at which he bears the burden of proving the allegations by a preponderance of the evidence.” Id. “If a Franks hearing is appropriate and an affiant’s material perjury or recklessness is established by a

preponderance of the evidence, the warrant 'must be voided' and evidence or testimony gathered pursuant to it must be excluded." Colkley, 899 F.2d at 300. State v. Lynch, 412 S.C. 156, 179-80, 771 S.E.2d 346, 358-59 (Ct. App. 2015), reh'g denied (May 6, 2015).

Here, as will be shown below, DNA and fingerprint evidence that excluded Defendant as the unknown assailant who was inside the restaurant at the time of the robbery was recklessly excluded from the affidavit.

a. FALSE INFORMATION

The search warrant was obtained based on false information. The affiant falsified material information or included false information in his probable cause calculus with reckless disregard to its truth or falsity. Detective Evans—the second investigating detective who interrogated Defendant—served as the affiant for the warrants. In his narrative, dated October 23, 2014 Detective Evans writes "Tyus explained that he did not remember going into the business but remembers exiting the business with the register and taking the money." This statement is false. During Defendant's interrogation, around time stamp 3:15 AM, Tyus clearly and directly states to Detective Evans, "I don't remember going in or coming out or nothing." The gravity of Detective Evans' falsification cannot be overstated; Defendant consistently and repeatedly denied his involvement in the armed robbery and never truly confesses to the criminal act of armed robbery. Defendant's statement to Detective Evans confirms his assertions. However, Detective Evans' false statement places Defendant in the restaurant, committing the act of larceny. Together with the surveillance video showing that the unknown assailant was armed, Detective Evans' false statement essentially works as a true confession.

~~Therefore, the search warrant should be suppressed based on Detective Evans' false~~
statement and reckless disregard for the falsity of his statement.

The State will contend that Detective Evans told Defendant during his interrogation that law enforcement was presently searching his home pursuant to the search warrant. Therefore, the State contends, Detective Evans' statements to Defendant precede Defendant's falsified statement and the Magistrate could not have made his probable cause determination based on Detective Evans' false statement. However, based on the record, this chronology is not certain. The search warrant was not time stamped, nor did any law enforcement officer note the time the search warrant was obtained. Further, Detective Evans' statements to Defendant during the interrogation were not made under oath and can be seen as an effective interrogation tool used in order to produce a confession. Ultimately, the probability that the search warrant could have been obtained based on Detective Evans' false statement meets the burden to invalidate and suppress the search warrant.

The affidavit further states that Defendant is 6'0" in height and weighs 160 pounds. These figures are incorrect. Defendant's booking report states that he is 5'10" in height and weighs 130 pounds.

Moreover, the search warrants state that probable cause was based on evidence of blood samples taken from the crime scene: "This evidence collected consists of blood samples that will be tested." However, no blood samples were found or collected at the scene. Further, Detective Evans, who served as the affiant for the search warrant and one of the investigating detectives and Detective Aiken, who served as the other investigating detective, were present at the crime scene and observed CST Kubiesko collect all the

--- evidence. They both knew that CST Kubicsko did not collect blood samples from the scene. Therefore, the Magistrate's probable cause determination was based on a false statement and false information and the search warrant should be suppressed.

b. RELIABILITY OF THE FINGERPRINT EVIDENCE

a. DAUBERT STANDARD FOR RELIABLE SCIENTIFIC EVIDENCE AND CST KUBICKO'S INVESTIGATION

South Carolina, Fourth Circuit Court of Appeals, and United States Supreme Court case law on the reliability of fingerprint evidence is scant.¹ Although some courts have touted fingerprinting as a sound method for making reliable identifications, fingerprint evidence is properly authenticated by applying the Daubert rules for scientific evidence:

The Federal Rules of Evidence provide that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

¹ Most South Carolina case law addressing fingerprint evidence reviews whether the placement and time of placement of the print is sufficient to link the defendant to the crime. However, the common procedure utilized by fingerprint technicians in South Carolina is as follows:

Marie Hodge, the automated fingerprint identification system (AFIS) examiner at the Sumter Police Department, was qualified as an expert in fingerprint identification. Hodge testified she ran seven fingerprints lifted from the vehicle through the AFIS but did not obtain an identification for any of the prints. After obtaining no hits, Hodge printed out the fingerprints of persons of interest from the AFIS and compared each set of prints “one-on-one” to the lifted fingerprints. According to Hodge, a side-by-side comparison of the prints showed that a right thumbprint found on the rear of the vehicle belonged to Pearson. Hodge later received a card containing Pearson's ink-rolled fingerprints from the Sheriff's Office and compared the prints on the card to the lifted thumbprint. Hodge testified the comparison “reaffirmed” that the thumbprint belonged to Pearson. On cross-examination, Hodge conceded that she was unable to “date” or “age” a fingerprint. She further testified that when left undisturbed, a fingerprint “can be there for quite some time.”

State v. Pearson, 410 S.C. 392, 396, 764 S.E.2d 706, 708-09 (Ct. App. 2014), reh'g denied (Nov. 21, 2014), cert. granted (Mar. 4, 2015).

The print that matches Defendant was discovered on the cash tray outside of the restaurant. Defendant's theory of the case is that Defendant touched the cash tray outside of the restaurant, but never entered the premises or committed the armed robbery. No fingerprint analysis places Defendant's prints inside the restaurant. Therefore, the fingerprint evidence is insufficient to link Defendant to the armed robbery.

testify thereto in the form of an opinion or otherwise...." Fed.R.Evid. 702.

The Supreme Court has made clear that it is the trial court's duty to play a gatekeeping function in deciding whether to admit expert testimony: "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In Daubert, the Court announced five factors that may be used in assessing the relevancy and reliability of expert testimony: (1) whether the particular scientific theory "can be (and has been) tested"; (2) whether the theory "has been subjected to peer review and publication"; (3) the "known or potential rate of error"; (4) the "existence and maintenance of standards controlling the technique's operation"; and (5) whether the technique has achieved "general acceptance" in the relevant scientific or expert community. Id. at 593-94, 113 S. Ct. 2786. Rather than providing a definitive or exhaustive list, Daubert merely illustrates the types of factors that will "bear on the inquiry." Id. As Daubert emphasized, the analysis must be "a flexible one." Id.; see also Kumho, 526 U.S. at 141-42, 119 S. Ct. 1167 (concluding that testing of reliability should be flexible and that Daubert's five factors neither necessarily nor exclusively apply to every expert). . . .

Although Daubert attempted to ensure that courts screen out "junk science," it also enabled the courts to entertain new and less conventional forms of expertise. As the Court explained, the addition of the new factors would put an end to the "wholesale exclusion [of expert testimony based on scientific innovations] under an uncompromising 'general acceptance' test." Daubert, 509 U.S. at 596, 113 S.Ct. 2786. . . .

The touchstones for admissibility under Daubert are two: reliability and relevancy. See id. at 589, 597, 113 S.Ct. 2786; see also Kumho, 526 U.S. at 152, 119 S.Ct. 1167 ("The objective of [Daubert's gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony.").

United States v. Crisp, 324 F.3d 261, 265-66 (4th Cir. 2003).² South Carolina law

provides:

[W]e find the evidence presented in the instant case does not satisfy the requisite reliability factors in Jones. As stated in Jones I, these reliability factors take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure

² "We agree that in most cases, absent novel challenges, fingerprint evidence is sufficiently reliable to satisfy Rule 702 and Daubert." United States v. John, 597 F.3d 263, 274 (5th Cir. 2010). Here, Defendant challenges the fingerprint evidence and the fingerprint examiner's qualifications and respectfully requests a hearing on these issues.

reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *Jones I*, 343 S.C. at 573, 541 S.E.2d at 819.

State v. Jones, 383 S.C. 535, 556, 681 S.E.2d 580, 591 (2009)

Even courts that have ultimately accepted fingerprint evidence have stated that “the principles underlying fingerprint identification have not attained the status of scientific law.” *Id.* The Supreme Court of the United States recently opined that whereas fingerprinting is a method utilized by law enforcement, “DNA identification is far superior.” *Maryland v. King*, 133 S.Ct. 1958, 1964 (1958). Fingerprint examination is unique to each case, and should be reviewed on an exacting case by case basis. While the Daubert standard provides the gate keeping function, the general acceptance rule from Frye was replaced by a more encompassing standard that the scientific evidence be “the product of reliable principles and methods.” “The government, of course, has the burden to put forward evidence ‘from which the court can determine that the proffered testimony is properly admissible’ under Daubert. *Md. Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir.1998).” *Id.*

The government must produce a record of testing on the reliability of fingerprint identification, including studies that establish the likelihood of finding that a partial or latent print taken from a crime scene will be a match for only one unique set of fingerprints in the world. *See Crisp*, 324 F.3d at 274 (Michael, J., dissenting) (citations omitted). Whereas science has determined that every person has a unique fingerprint, science cannot definitively endorse one or two fingerprint examiner’s wholesale opinions that they have discovered that unique, singular print at a crime scene. *See id.* (citation omitted) (“Specifically, with respect to forensic fingerprint examination, there have not

been any studies to establish how likely it is that partial prints taken from a crime scene will be a match for only one set of fingerprints in the world.”). The State also may show that the examiner passed proficiency tests and other educational standards in order to achieve sufficient skill. Id. According to Daubert, the State also must show that a known error rate must be demonstrated by reliable scientific studies, not by assumption, estimation, or overstatement of other fingerprint examiners. Id. Just like experts cannot testify to one hundred percent certainty in their findings, examiners and testifying experts cannot simply conclude that their examination error rate is zero or close to zero. Id. Finally, under Daubert, the expert must testify to universal standards governing application of the technique of fingerprinting. Indeed, fingerprinting does not utilize a minimum point comparison requirement and findings can differ widely based on the individual examiners methodology. Moreover, fingerprint examiners sometimes do not consistently follow safety checks that ensure reliability. Fingerprint examiners can choose to analyze 10 points or 15 and can find different portions of the print that do not match, yet still ultimately conclude a match. Further, each examiner chooses the number of possible matches automatically generated by AFIS to review and thus affirmatively limiting the number of known standards for comparison—whether they be 10 or 20 or 50 possible matches for comparison. Ultimately, although fingerprinting evidence has been accepted by the community of fingerprint examiners as reliable, the finger print evidence in a certain case and based on a certain examiner’s method may be phony. Daubert requires at least an exacting review of fingerprint evidence in each case.

CST Kubicko’s crime scene investigation was riddled with inaccuracies, which undermine her findings. Thus, the fingerprint evidence is unreliable and should be

suppressed. On the night of the incident, CST Kubicsko responded to the scene, photographed the scene, swabbed for DNA evidence, and dusted for latent fingerprints. Ultimately, CST Kubicsko chose one finger from one latent print card to compare against SCAFIS' known standards. After reviewing only 9 or 10 automatically generated samples from SCAFIS, CST Kubicsko determined the fingerprint matched Defendant. Supervisor crime scene agent MPO Andrew Coker reviewed CST Kubicsko's finding and memorialized his verification in a cursory, conclusory, and brief case report. CST Kubicsko and supervising crime scene agent MPO Al Hallman did not even analyze the remainder of the latent print examination until either October 30, 2012 or January 13, 2013—well over one week from the date of the incident and Defendant's arrest. MPO Al Hallman's verification report was similarly as cursory, conclusory, and brief as MPO Andrew Coker's verification report. Moreover, CST Kubicsko authored a total of 8 reports and narratives detailing her findings, all of which contain inaccuracies both within each report and amongst all reports. CST Kubicsko's reports and narratives do not even include her lists, cover sheets, summaries, photographs, and DNA investigation, which similarly contain inaccuracies and discrepancies. Thus, based on both individual discrepancies in findings and combined inaccuracies in CST Kubicsko's investigation, the totality of the fingerprint evidence lacks inherent reliability and should be suppressed.

In CST Kubicsko's first report, dated October 22, 2012, she finds that print L1.1 of finger #3 right middle finger is a positive match to Defendant. Print L1.1 is the only print CST Kubicsko chose for entry into SCAFIS and comparison with Defendant's known standard. CST Kubicsko's finding on Print L1.1 was the only finding sent to MPO Coker for review prior to Defendant's arrest. She details this finding on the cover sheet

ultimately used by the detectives in their probable cause determination for the search warrants. However, in the same cover sheet, she lists that finger #9 left ring finger also returned a positive hit on SCAFIS. Further, in the same cover sheet, she lists that finger #9 left ring finger returned a negative hit on SCAFIS. These diametrically opposed findings seriously undermine the reliability of CST Kubicsko's investigation and print match.

Further, the examiners did not label which fingers returned positive or negative hits, where the prints were lifted at the scene, and the number of the print card containing L1.1. Moreover, CST Kubicsko admitted that she did not photograph the item of evidence from which L1.1 was lifted. In fact, CST Kubicsko's pictures of the 5 DNA swabs and 4 out of 7 or 8 latent print cards utilize the same numbering system and at times overlap. Both systems for labelling and corresponding photographs are incomplete.

A list of some inaccuracies and deficiencies in the investigation is as follows:

- CST Kubicsko chose only 9 or 10 SCAFIS entries for which to compare one print from one finger against known standards.
- CST Kubicsko could not specify the location of the prints taken from the cash drawer—whether they came from the top, bottom, or sides.
- In her October 30, 2012 narrative, CST Kubicsko states that she made a total of 4 latent lifts corresponding to 4 pictured print cards, yet provides no corresponding "L" labels, finger numbers, finger descriptions, or results.

- In that same narrative, she states that she took a DNA swab of the countertop that has no label and no corresponding description. Elsewhere she labels this sample as 2, but omits all other details.
- In that same narrative, she labels L1.1 as matching Defendant and states that L1.1 was found on the cash drawer outside, but provides no corresponding picture or indication of finger or finger #.
- In that same narrative, she similarly labels L5 as coming from the bottom of the cash register drawer, but also states that L1 through L7 all came from the cash drawer, even though she also states that L1 through L4 came from the interior front door. She submitted no pictures of the print cards or description of the fingers or finger numbers.
- In CST Kubicko's report dated January 11, 2013, she provides finger descriptions that correspond to lifts L1.1 through L1.5, L3.1, and L4.1, but provides no print card descriptions or photos and no locations.
- In this report, she provides no finger descriptions for L2.1, L2.2, and L5 through 8.
- In this report she describes L1.1 through L1.4 as all belonging to the right index finger,
 - even though each separate lift from L1 came from a different finger,
 - and she states that finger #2, finger #4, and finger #5 are all the right index finger.

- She labels some findings “inconclusive for identification” or “insufficient for identification,” but does not explain the meaning of those findings and includes no other details or pictures of where the prints came from or their corresponding print cards.
- She identifies L2.1 as excluding Defendant, but never labels or photographs where the prints came from or their corresponding print cards.
- Even where CST Kubicsko provides photographs of the print cards, she documented her findings in a report only twice out of fifty five entries for a consistency rate of approximately 3.6%. Even then, her documentation was for the DNA swabs, and not the fingerprints.
- She documents the location of the prints in 23 out of 55 entries for a consistency rate of approximately 41.2%.
- She provides the finger number and/or finger description in 23 out of 55 entries for a consistency rate of approximately 41.2%.
- CST Kubicsko notes print L1.1, which is allegedly the right middle finger #3 that she matched to Defendant in her reports 17 times. Only 6 out of 17 times does CST Kubicsko consistently report her finding for a consistency rate of approximately 35%.
- She does not dust the key on the cash register drawer for prints.
- She does not test the bandana found at the scene for sweat, hair, skin, saliva, blood, or any other bodily fluids or DNA evidence.
- She never recovered a white towel, bandana, or cloth.

- No reviewing officer makes any findings or comments on CST Kubicsko's findings or investigation. Their verification reports merely consist of CST Kubicsko's findings that L1.1 matches Defendant (or does not match Defendant), the latent print examination is not complete, and an arrest has been made, and signatures of the reviewing examiner.
- The DNA evidence at the scene excludes Defendant.
- DNA items 3 and 4 were not even tested, nor does the report state whether they were insufficient for examination.

CST Kubicsko claims and the State will contend that her reports contained mere scrivener's errors. However, the sheer number of inaccuracies in her reports and in the investigation as a whole defeat that excuse, especially where CST Kubicsko's findings on the one fingerprint used to link Defendant to the crime are consistent only 35% of the time. Therefore, the fingerprint evidence and crime scene investigation should be deemed unreliable and suppressed.³

b. SUPPRESSION OF THE FINGERPRINT EVIDENCE AND SEARCH WARRANT

Not only should the fingerprint evidence be excluded based on unreliability, but the search warrant, which probable cause determination was based solely on the fingerprint evidence, should be excluded. Print L1.1 is the only print that CST Kubicsko ran through SCAFIS, compared to known standards, and matched to Defendant; print L1.1 is the only print that was used to form probable cause as to the unknown assailant's identity; and the location of print L1.1 is unknown. Considering the above listed

³ Should this Court deny Defendant's Motion, Defendant respectfully requests voir dire as to CST Kubicsko's fingerprint findings, expertise, and qualifications as an expert in fingerprint analysis.

inaccuracies and discrepancies, the fingerprint evidence rises to the level of a reckless falsehood and undermines the determination of probable cause under Delaware v. Franks.

c. GOOD FAITH EXCEPTION DEFENSE DOES NOT APPLY

“In South Carolina, the statutory warrant requirement is separate and distinct from the prohibition in the federal and state constitutions against unreasonable searches and seizures.” State v. Covert, 368 S.C. 188, 195, 628 S.E.2d 482, 486 (Ct. App. 2006) (citing S. C. Code Ann. 17-13-140 (2003); U.S. Const. amend. IV; S.C. Const. art. I, 10. “In fact, as the South Carolina Supreme Court has recognized, section 17-13-140 of the South Carolina Code actually imposes stricter warrant requirements than the constitutional provisions.” Id. (citing State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000)). Some deficiencies in search warrants are so substantial that they require exclusion of the evidence. State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995) (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)) (warrant issued on strength of officer’s oath rather than sworn affidavit was defective and required suppression of the evidence seized). South Carolina courts are “concerned with the State’s failure to comply with the simple and straightforward commands of the statute. The primary beneficiary of the search warrant statute is the person to be arrested or searched.” Id. (citing State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987)). “Accordingly, this Court looks very closely at violations of the statute, and will not hesitate to exclude the seized evidence when the circumstances so require.” Id.

Based on the above argued deficiencies, the search warrants in this case were not infected by the “necessary hazards” of obtaining a warrant, nor a straightforward failure to comply with the statutory warrant requirements. See State v. Covert, 368 S.C. 188,

196, 628 S.E.2d 482, 487 (Ct. App. 2006). Rather, the search warrants are invalidated by ramshackle law enforcement investigation, statutory violations, and constitutional deprivations. Based on all the combined errors of all law enforcement personnel and the possibility of prejudice to Defendant resulting from the investigation, the search warrants should be suppressed and the good faith exception should not apply.

V. CRIME SCENE TECHNICIAN FILE AND RELEVANT DOCUMENTS

a. PERSONNEL FILE, REVIEW, VONGOING INVESTIGATION INTO CST FINDINGS, AND RELEVANCY

Discovery procedure provides:

Where a defendant makes a threshold showing that the evidence he seeks is material within the meaning of *Brady* and Rule 5, the trial judge should conduct a hearing. *State v. Bryant*, 307 S.C. 458, 415 S.E.2d 806 (1992). Here, respondent made that showing. He presented evidence that defense experts examining proficiency tests from other labs have found errors that demonstrated flaws in the test lab's methodology. Further, he presented evidence that no DNA lab has a "zero error rate" on DNA proficiency exams. Having met this threshold requirement, the trial judge should have examined the material *in camera*.

State v. Proctor, 358 S.C. 417, 422, 595 S.E.2d 476, 478-79 (2004). In State v. Proctor, the defendant sought evidence of DNA lab and technician proficiency test results in order to question the accuracy of SLED's analysis and to derive impeachment evidence. See id. at 421, 595 S.E.2d at 478. Although the reviewing courts found overwhelming evidence of the defendant's guilt and ultimately upheld his convictions, the Supreme Court found that the defendant was entitled to a discovery hearing and argument as to the requested information's relevancy and propriety.

As to materiality and relevancy, "[t]he false statement [included in the affidavit] is necessary to the finding of probable cause because it bears directly on the veracity of

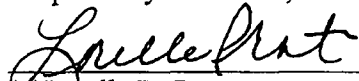
the person supplying the information, which is a crucial element of probable cause in the totality of the circumstances.” State v. Jones, 331 S.C. 228, 232, 500 S.E.2d 499, 502 (Ct. App. 1998) aff’d, 342 S.C. 121, 536 S.E.2d 675 (2000) (citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)). Probable cause for the search warrants was based wholly on CST Kubicsko’s finding that one print of one finger matched Defendant. Therefore, her findings and conclusions as to the identity of the suspect are the central issue of this case. As such, her body of work, credentials, training, experience, and results are subject to scrutiny and examination. Any documentation that her skills are sub par and a negative course of conduct has impacted the reliability of her investigations for the North Charleston Police Department are highly relevant to the accuracy of her findings in the present case and qualifications as an expert. Based on the exacting standards for reliability and admissibility cited above, CST Kubicsko’s radical findings enumerated above, and her deficiencies in DNA evidence collection and general crime scene processing, CST Kubicsko’s personnel file, performance evaluations, and investigative reports into her faulty findings are highly relevant in determining the admissibility of the fingerprint, DNA, and crime scene evidence in this case.

VI. CONCLUSION

Based on the above, all fingerprint evidence and all evidence obtained as a result of the search warrants executed in the above-referenced case should be suppressed because the affidavit in support of the search warrant lacked probable cause. The fingerprint evidence should be suppressed because it lacks reliability and the Crime Scene Investigator’s investigation and proffered testimony fails to meet the Daubert standard for the admissibility of scientific evidence. Defendant further argues that the

search warrants should be suppressed under Delaware v. Franks because the Magistrate's finding of probable cause rests entirely on the unreliable fingerprint evidence. In the alternative, under Delaware v. Franks, the Magistrate's determination of probable cause was based on the affiant's false statements. Additionally, the Crime Scene Technician who processed the scene's personnel files and investigation review documents are discoverable and relevant to Defendant's analysis of the fingerprint evidence and crime scene evidence.

Respectfully submitted,



/s/ Lorelle D. Proctor
Attorney for Defendant
Charleston County Public Defender's Office
101 Meeting Street, 5th Floor
Charleston, SC 29401
(843) 958-1850
Charleston, South Carolina
Dated: July 13, 2015

BY  JULIE J. ARMSTRONG
CLERK OF COURT

2015 JUL 15 AM 8:43

FILED

Report # & Date	Label	Print Card	Location	Examiner	Finger # & Description	Result
Report 1 October 22, 2012	L1.1			Kubiesko	#3 Right Middle Finger *simultaneous impressions	Positive ID to D
ID Wksht October 22, 2012	L1.1			Kubiesko	#9 (left ring finger)?	"C." Negative AFIS results
ID Wksht October 22, 2012	L1.1			Kubiesko	#3 (right middle finger) & #9 (left ring finger)?	"A." Positive AFIS results
ID Wksht October 22, 2012	L1.1			Kubiesko	#3 (right middle finger)?	"A." Positive AFIS results
Coversht October 22, 2012				Kubiesko *Coker		"Full latent examination not complete" "One latent entered into SCAFIS for possible suspect info at this time"
Coversht January 12, 2013				Kubiesko *Hallman		"Arrest made 10/23/12"
Narrative October 30, 2012		1-4 labelled "A total of four latent lifts were made (#1- #4)" DNA swab from right side of inner push bar labelled number one	Interior front door	Kubiesko		
Narrative October 30, 2012		DNA swab labelled number	Counter top	Kubiesko		"Insufficient for Identification"

		Two				
Narrative October 30, 2012	L1.1		Cash drawer (outside)	Kubiesko		Positive to D
Narrative October 30, 2012	L5		Bottom of cash drawer— Register	Kubiesko		
Narrative October 30, 2012	L1- L7		Cash drawer	Kubiesko		
Narrative October 30, 2012	L1- L4		Interior front door	Kubiesko		
Narrative October 30, 2012			Counter top	Kubiesko		"Insufficient for Identification"
Narrative October 30, 2012	L5		Bottom of cash drawer— Register	Kubiesko		
Narrative October 30, 2012	L1- L7		Cash drawer	Kubiesko		
Narrative October 30, 2012	L1.1		Cash drawer (outside)	Kubiesko		Positive to D
Report 2 January 11, 2013	L1.1			Kubiesko	"Previously Identified"	"Previously Identified"
Report 2 January 11, 2013	L1.2			Kubiesko	#2 Right Index Finger *simultaneous impressions	Positive ID to D
Report 2 January 11, 2013	L1.3			Kubiesko	#4 Right Index Finger *simultaneous impressions	Positive ID to D
Report 2 January 11, 2013	L1.4			Kubiesko	#5 Right Index Finger *simultaneous impressions	Positive ID to D

Report 2 January 11, 2013	L1.5			Kubiesko	#7 Left Index Finger	Positive ID to D
Report 2 January 11, 2013	L2.1			Kubiesko		D Excluded
Report 2 January 11, 2013	L2.2			Kubiesko		"Insufficient for Identification"
Report 2 January 11, 2013	L3.1			Kubiesko	Palma Print	"Inconclusive with ID"
Report 2 January 11, 2013	L4.1			Kubiesko	Second Joint	"Inconclusive with ID"
Report 2 January 11, 2013	L5			Kubiesko		"Insufficient for Identification"
Report 2 January 11, 2013	L6			Kubiesko		"Insufficient for Identification"
Report 2 January 11, 2013	L7			Kubiesko		"Insufficient for Identification"
Report 2 January 11, 2013	L8			Kubiesko		"Insufficient for Identification"
Report 3 July 6, 2015	L1.1			Kubiesko	"Previously Identified"	"Previously Identified"
Report 3 July 6, 2015	L1.2			Kubiesko	#2 Right Index Finger *simultaneous impressions	Positive ID to D
Report 3 July 6, 2015	L1.3			Kubiesko	#4 Right Ring Finger *simultaneous impressions	Positive ID to D
Report 3 July 6, 2015	L1.4			Kubiesko	#5 Right Little Finger *simultaneous impressions	Positive ID to D
Report 3 July 6, 2015	L1.5			Kubiesko	#7 Left Index Finger	Positive ID to D
Report 3	L2.1			Kubiesko		D Excluded

July 6, 2015						
Report 3 July 6, 2015	L2.2			Kubiesko		"Insufficient for Identification"
Report 3 July 6, 2015	L3.1			Kubiesko	Palm Print	"Inconclusive with D"
Report 3 July 6, 2015	L4.1			Kubiesko	Second Joint	"Inconclusive with D"
Report 3 July 6, 2015	L5			Kubiesko		"Insufficient for Identification"
Report 3 July 6, 2015	L6			Kubiesko		"Insufficient for Identification"
Report 3 July 6, 2015	L7			Kubiesko		"Insufficient for Identification"
Report 3 July 6, 2015	L8			Kubiesko		"Insufficient for Identification"
Report 3 Supp. July 6, 2015	L1.1		"Register Money Tray"	Kubiesko	#3 Right Middle Finger *Previously Identified	"Previously Identified"
Report 3 Supp. July 6, 2015	L1.2		"Register Money Tray"	Kubiesko	#2 Right Index Finger *simultaneous impressions	Positive ID to D
Report 3 Supp. July 6, 2015	L1.3		"Register Money Tray"	Kubiesko	#4 Right Ring Finger *simultaneous impressions	Positive ID to D
Report 3 Supp. July 6, 2015	L1.4		"Register Money Tray"	Kubiesko	#5 Right Middle Finger *simultaneous impressions	Positive ID to D
Report 3 Supp. July 6, 2015	L1.5		"Register Money Tray"	Kubiesko	#7 Left Index Finger Correct	Positive ID to D

2015						
Report 3 Supp. July 6, 2015	L2.1		"Interior Side Front Door"	Kubiesko	Correct	D Excluded
Report 3 Supp. July 6, 2015	L2.2		"Interior Side Front Door"	Kubiesko	Correct	"Insufficient for Identification"
Report 3 Supp. July 6, 2015	L3.1		"Register Money Tray"	Kubiesko	Palm Print Correct	"Inconclusive with D"
Report 3 Supp. July 6, 2015	L4.1		"Register Money Tray"	Kubiesko	Second Joint Correct	"Inconclusive with D"
Report 3 Supp. July 6, 2015	L5		"Bottom of Register Money Tray"	Kubiesko		"Insufficient for Identification"
Report 3 Supp. July 6, 2015	L6		"Interior Side Front Door"	Kubiesko	Correct	"Insufficient for Identification"
Report 3 Supp. July 6, 2015	L7		"Interior Side Front Door"	Kubiesko	Correct	"Insufficient for Identification"
Report 3 Supp. July 6, 2015	L8		"Interior Side Front Door"	Kubiesko	Correct	"Insufficient for Identification"
SLED Report June 9, 2015	#2	2	"Swabs from countertop "	Kubiesko Catherine Leisy		Excludes Defendant, Hana Lee, & Sunny Lee
SLED Report June 9, 2015	#5	5	"Swab from grip and slide of black Hi-Point firearms S/N P 120329	Kubiesko Catherine Leisy		Defendant is Contributor, but not eligible for CODIS entry

SLED Report June 9, 2015		#3 in photo		Kubicsko	*in photo, appears to be swab from bottom of cash register drawer	This sample was not tested
SLED Report June 9, 2015		#4 in photo		Kubicsko	*in photo, appears to be swab from bottom of cash register drawer	This sample was not tested

STATE OF SOUTH CAROLINA

**County of Charleston
City of North Charleston**

SEARCH WARRANT

Body
KENDALL JEROME TYUS II
B/M Date of Birth [REDACTED]
OCA # [REDACTED]

Date: October 23, 2012

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

AFFIDAVIT

Personally appeared before me, one Det. M. Aiken who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Property sought is a buccal swab from Kendall Jerome Tyus II who has a date of birth of [REDACTED] [REDACTED]

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED**

The person to be searched is Kendall Jerome Tyus II, a black male who has a date of birth of [REDACTED]. Kendall Jerome Tyus II is approximately six foot in height and weighs approximately 160 pounds. Kendall Jerome Tyus II has a listed address with the Department of Motor Vehicles of [REDACTED], North Charleston, South Carolina 29418. The suspect is currently incarcerated at the Al Cannon Detention Center. To get to the Al Cannon Detention Center one would travel south on Mall Drive approximately 0.2 miles then merge onto I-26 westbound. Travel approximately 0.9 miles then merge onto I-526 west bound and travel approximately 3.2 miles. Exit onto Leeds Avenue (exit 14) and turn left. Travel approximately 0.5 mile and Charleston County Detention Center will be on the right hand side.

**REASON FOR AFFIANTS BELIEF THAT THE PROPERTY SOUGHT
IS ON THE SUBJECT PREMISES**

On October 22, 2012, officers of North Charleston Police Department responded to 5060 Dorchester Road Suite 280 in reference to the business being robbed. Upon arrival, contact was made with both victims who informed responding officers that a black male subject entered the business armed with a firearm and jumped the counter. Upon jumping the counter, the subject was able to reach underneath the counter where he stole the cash register drawer. The subject then fled the business towards Scarsdale Avenue and was not apprehended. Crime Scene Technician Kubicko responded to the scene where latent prints were obtained from the scene to include the cash register drawer, which was located just outside the business. Video Surveillance was also obtained that documents the sequence of event and the description of the suspects. Upon arrival to the North Charleston City Hall, CST Kubicko was able to verify the prints from the cash register drawer through the Automated Fingerprint Identification System (AFIS). The prints lifted were verified to be that of Kendall Jerome Tyus II who has a date of birth of [REDACTED]. There is probable cause to believe Kendall Jerome Tyus II committed the armed robbery and left biological evidence of his involvement based upon these facts. This evidence collected consists of blood samples that will be tested. Affiant is informed and believes that material evidence of guilt will be found by obtaining a buccal swab from Kendall Jerome Tyus II to obtain his DNA profile which can be compared to evidence collected from the crime scene. The sample will be obtained by swabbing the inside of Kendall Jerome Tyus II's mouth with a sterile swab and a proper chain of custody will be maintained. Affiant is further informed and believes that Kendall Jerome Tyus II has been suspected of committing a serious crime and there is no other less obtrusive means to obtain the biological sample from him. Obtaining the sample will not threaten Kendall Jerome Tyus II's health or safety and poses no major intrusion upon his person. The community's high interest in fairly and accurately determining the guilt or innocence of Kendall Jerome Tyus II will be served by performing this requested procedure. For all these reasons, it is important that the DNA profile derived from the buccal swab collected from Kendall Jerome Tyus II be compared with the DNA profiles of other evidence collected in this case.

Sworn to and Subscribed before me this

23rd day of October 2012.

Signature of Judge

[Signature] (L.S.)
6:33pm

AFFIANT: [Signature]

2500 City Hall Lane North Charleston, SC 29406
(843) 740-2575

STATE OF SOUTH CAROLINA

County of Charleston
City of North Charleston

SEARCH WARRANT

OCA# 2012038159


North Charleston, SC 29418

Date: October 23, 2012

Detective M. Aiken

OCA# 2012038159

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

SEARCH WARRANT

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF NORTH CHARLESTON.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

**DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
 TO BE SEARCHED**

The place to be search is located at [REDACTED] This address is located in the City of North Charleston, County of Charleston. The residence is a single occupancy dwelling with grey in color vinyl siding and white trim. The windows to the residence have black in color shutters. The roof to the residence is black in color. The front door to the residence is covered by a small porch which is held up by a single white post. The doors to the residence consist of a white in color glass storm door and a black in color main door. To the left of the front door attached to the residence is a single car garage. The numeric's to the residence are centered above the garage door and are black in color on a white background. Directions to the place to be searched were obtained via MapQuest and are attached to this search warrant.

DESCRIPTION OF PROPERTY SOUGHT

The property being sought any firearms and ammunition. Any and all dark jackets with a light in color stripe or stripes. Blue jeans or pants consistent with video surveillance. A white in color shirt or mask. Property is to include U.S. Currency within the residence consistent with three hundred dollars.

This Search Warrant shall not be valid for more than ten days from date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to Issuing Judge / Magistrate within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of premises searched at the time of such search if practicable, and if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to prominent place on such premises.

North Charleston, S. C.
October 23 2012.

[Signature] (L.S.)
 Signature of Judge

OCA#: 2012038159

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

AFFIDAVIT

Personally appeared before me one Det M. Evans who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

SEE PREVIOUS PAGE

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)TO BE SEARCHED

SEE PREVIOUS PAGE

REASON FOR AFFIANTS BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On October 22, 2012, officers of North Charleston Police Department responded to 5060 Dorchester Road Suite 280 in reference to the business being robbed. Upon arrival, contact was made with both victims who informed responding officers that a black male subject entered the business armed with a firearm and jumped the counter. Upon jumping the counter, the subject was able to reach underneath the counter where he stole the cash register drawer. The subject then fled the business towards Scarsdale Avenue and was not apprehended. Crime Scene Technician Kubicko responded to the scene where latent prints were obtained from the scene to include the cash register drawer, which was located just outside the business. Video Surveillance was also obtained that documents the sequence of event and the description of the suspects. Upon arrival to the North Charleston City Hall, CST Kubicko was able to verify the prints from the cash register drawer through the Automated Fingerprint Identification System (AFIS). The prints lifted were verified to be that of Kendall Jerome Tyus Jr who has a date of birth of [REDACTED]. Contact was made with the victim who stated that the subject is not known to them and they do not have any person(s) working at the business by this name. On October 23, 2012, investigators with the North Charleston Police Department responded to [REDACTED] where the defendant was taken into custody. During the protective sweep of the residence US currency could be observed under the living room couch and a blue in color jacket with white stripe was observed, in plain view, in the defendant's closet. The defendant was developed as a suspect through the subsequent investigation and has a listed address at the residence to be searched that is also documented in the South Carolina Department of Motor Vehicles. Based on the facts and this officers experience it is believed that by executing this warrant further evidence of the crime will be obtain within this residence to assist in the investigation and prosecution of the defendant.

Sworn to and Subscribed before me:

This 23 day of October, 2012

Signature of Judge

(L.S.)

Affiant

Address: 2500 City Hall Blvd
North Charleston, SC 29418
Phone: (843) 740-2575

OCA# 2012038159

STATE OF SOUTH CAROLINA

SEARCH WARRANT

COUNTY OF CHARLESTON

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE
MUNICIPALITY OF NORTH CHARLESTON.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED
(SEE AFFADAVIT)

Now, therefore, you are hereby authorized to search the subject premises for the property described below and to seize such property if found:

DESCRIPTION OF PROPERTY
(SEE AFFADAVIT)

This Search Warrant shall not be valid for more than ten days from date of issuance. A written inventory of all property seized pursuant to this Search Warrant shall be made to the Issuing Magistrate within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of premises searched at the time of such search if practicable, and if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to prominent place on such premises.

Charleston, S.C.

October 23, 2012.


Signature of Judge (L.S.)

Agency: North Charleston Police Department
Officer ID/Name: Evans
Date: 10-22-2012

Assignment

Case Number: 2012038159

Narrative Title: Responding Detective

10-22-2012

I responded to 5060 Dorchester Rd. in reference to an armed robbery which had just occurred. Upon arrival I viewed the video while Det. Aiken and McDonald took written statements from the victims.

Crime scene was then directed on certain location both on the counter and on the door of where the suspect grabbed and or touched. This was completed in attempts to locate latent prints

A canvas of the area was conducted during which officer Perkins located the cash drawer and a blue in color bandana. These items were collected by crime scene. A check was also done of the local businesses for exterior cameras which may face the sidewalk. Two businesses were located, the cell phone store next to the business which was robbed and the old bar b que restaurant at the end of the building on the path of flight. Due to the time of day the videos could not be retrieved.

10-22-2012

I assisted CST Kubisko in retrieving the video for the business.

10-22-2012

Detectives returned to NCPD to review the evidence collected. It was at this time that CST Kubisko advised that she received a latent print hit for Kendall Tyus. Research was conducted on the subject and it was determined that he resided at [REDACTED]

10-22-2012

Detectives responded to this location and made contact with Tyus in the living room of the residence. While detaining Tyus I observed US currency sitting under the couch to the left of the living room. Due to the nature of the crime and the fact that a female was also present inside the residence a protective sweep was conducted to secure the residence for search warrant. During the protective sweep also in plain view was a jacket consistent with that worn during the commission of the crime.

10-23-2012

A search warrant for the residence was obtained from Judge Duffy. I returned to the residence and the search warrant was executed. Several items of evidence were located including a High Point 9MM from the attic, a blue jacket with white stripes from the bedroom closet, and us currency from several rooms inside the residence. See the return for a complete list of items taken during the execution of the search warrant.

10-23-2012

I returned to NCPD and assisted Det. Aiken in the interview of Tyus. See the recording for complete details from the interview. A summary of the statement is that he went to the store with the firearm. Tyus explained that he did not remember going into the business but remembers exiting the business with the register and taking the money.

Several attempts were made to make contact and meet with the judge to have the return signed. The following week after the execution of the warrant the judge advised that he was in trial and not available. I then went on vacation and was unable to meet with the judge. On the week of 11-5 through 11-9 I attempted to make contact with the judge during working hours and was unable to do so.

11-13-2012

I was able to make contact with Judge Duffy who agreed to meet with this detective. Judge Duffy was provided the return and signed it. A copy was then provided to the judge.

BOOKING REPORT

NORTH CHARLESTON SC0100800		DATE/TIME OF ARREST 10/23/2012 00:10:00		PLACE OF ARREST [REDACTED]		CASE NUMBER 2012038159	
DEPENDANT NAME (LAST, FIRST, MIDDLE) TYUS, KENDALL, JEROME				RACE AFRICAN MALE	SEX MALE	DATE OF BIRTH [REDACTED]	DOCKET NUMBER
AGE 21	ETH. NON-HISP	HEIGHT 510	WEIGHT 130	HAIR BLACK	EYES BROWN	SOCIAL SECURITY NUMBER [REDACTED]	VISIBLE SCARS AND MARKS
ADDRESS (NUMBER AND STREET) [REDACTED]				CITY N. CHARLESTON	STATE SC	ZIP CODE 29418-	RESIDENT STATE [REDACTED]
ALIAS				PLACE OF BIRTH SOUTH CAROLINA	DRIVER LICENSE NUMBER [REDACTED]		STATE SC
EMPLOYER OR OCCUPATION			NEXT OF KIN		ADDRESS (CITY AND STATE)		
BOOKING OFFICER'S NAME			NUMBER	ARRESTING OFFICER AIKEN, MICHAEL WAYNE	AGENCY NORTH CHARLESTON	NUMBER 208	
ARRESTEE ARMED ☒ YES ☐ NO WEAPON TYPE: HANDGUN				☐ S-HAULT ☐ R-HAULT		☒ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY	
JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED 2. ☐ REFERRED TO OTHER AUTHORITY				*J-This Jurisdiction, S-State, O-Out of State, U-Unknown			
ADDITIONAL CASE NUMBERS				MORE IN REMARKS			
IF HOLDING FOR ANOTHER AGENCY, CIRCLE CHARGE-A, B, C							
CHARGE I.D.		120		520			
CHARGE		ARMED ROBBERY (16-11-330)		POSS. OF FIREARM DURING COMMISSION			
STATUTE							
WARRANT NO.							
BOND AMOUNT							
BOND TYPE		GSC		GSC			
RET. DATE		10/23/2012		10/23/2012			
DISPOSITION							
		DAYS	AMOUNT	DAYS	AMOUNT	DAYS	AMOUNT
SENTENCE							
TIME SERVED							
GOOD TIME							
BALANCE							
PAID							
RECEIPT NUMBER							
CHARGE I.D.							
CHARGE							
STATUTE							
WARRANT NO.							
BOND AMOUNT							
BOND TYPE							
RET. DATE							
DISPOSITION							
		DAYS	AMOUNT	DAYS	AMOUNT	DAYS	AMOUNT
SENTENCE							
TIME SERVED							
GOOD TIME							
BALANCE							
PAID							
RECEIPT NUMBER							
RELEASE DATE	TIME	RECEIVED BY		NUMBER	AGENCY RELEASED TO		
SIGNATURE OF RECEIVING OFFICIAL X _____				LIST ANY REMARKS BELOW			
VICTIM _____							

§ 17-13-141. Records to be kept by judiciary officers authorized..., SC ST § 17-13-141

Code of Laws of South Carolina 1976 Annotated
Title 17. Criminal Procedures
Chapter 13. Arrest, Process, Searches and Seizures

Code 1976 § 17-13-141

§ 17-13-141. Records to be kept by judiciary officers authorized to issue search warrants; penalty.

Currentness

(A) Every judiciary official authorized to issue search warrants in this State shall keep a record along with a copy of the returned search warrant and supporting affidavit and documents for a period of three years from the date of issuance of each warrant. The records shall be on a form prescribed by the Attorney General and reflect as to each warrant:

(1) Date and exact time of issuance.

(2) Name of person to whom warrant issued.

(3) Name of person whose property is to be searched or, if unknown, description of person and address of property to be searched.

(4) Reason for issuing warrant.

(5) Description of article sought in the search.

(6) Date and time of return.

(B) Any person who alters or fails to keep for the prescribed period of time the records, warrants, and documents as provided for in subsection (a) shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine not to exceed one hundred dollars or by imprisonment not to exceed thirty days.

Credits

HISTORY: 1976 Act No. 454 §§ 1, 2.

Notes of Decisions (2)

COPYRIGHT (C) 2015 BY THE STATE OF SOUTH CAROLINA
Code 1976 § 17-13-141, SC ST § 17-13-141

**Mulbry, Reed 7/13/2015
For Educational Use Only**

§ 17-13-141. Records to be kept by judiciary officers authorized., SC ST § 17-13-141

Current through Acts 1 and 3 of the 2015 session.

End of Document

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CDD20121007790

WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2012038159

ARREST WARRANT NUMBER

2012A1010202093

DATE OF ARREST

October 23, 2012

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

10-25-2012

VERDICT

Guilty

Foreperson of Petit Jury

7-15-15

Date

INDICT

DOCKET NO. 2013GS1001496

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2013

THE STATE

vs.

KENDALL JEROME TYUS JR.
AKA KENDALL JEROME TYUS II

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

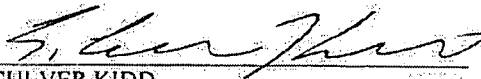
INDICTMENT

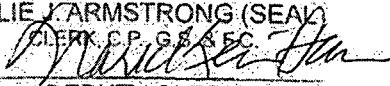
At a Court of General Sessions, convened on March 4, 2013 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about October 22, 2012, in Charleston County, South Carolina, the Defendant, KENDALL JEROME TYUS JR, AKA KENDALL JEROME TYUS II, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Sunny Lee with the intent to permanently deprive the victim of possession thereof; in violation of §16-11-330(A) of the South Carolina Code of Laws (1976) as amended;

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 CULVER KIDD
 ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
 JULIE ARMSTRONG (SEAL)
 CLERK CP, GS & EC
 By 
 DEPUTY CLERK

408
STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
STATE VS

KENDALL JEROME TYUS, JR

AKA: Kendall J Tyus

Race: Black Sex: M Age: 24

DOB [REDACTED] SS# [REDACTED]

Address [REDACTED]

City, State, Zip: North Charleston, SC 29418

DL# [REDACTED] SID# SC01786317

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or

☐ PLEADS

TO: **Armed Robbery**

In violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☒ MOST SERIOUS

☐ Mandatory GPS

☐ §17-25-45

(CSC w/minor 1st or Lewd Act)

The charge is ☒ As indicted, ☐ Lesser Included Offense,

☐ Defendant Waives Presentment to Grand Jury (def's initials)

The plea is ☒ Without Negotiations or Recommendation,

☐ Negotiated Sentence,

☐ Recommendation by the State

ATTEST

Chris Lietzow, Assistant Solicitor 100521 SC Bar #

Defendant

Attorney for Defendant 4581 SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 13 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-1497

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:

☐ Deferred

☐ Def. Waives Hearing

☐ Ordered

PTUP

Total: \$ plus 20% fee: \$

 days/hours Public Service Employment

Payment Terms:

Obtain GED ☐

☐ Set by SCDPPPS

Attend Voc. Rehab. Or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ Beginning

\$ Paid to Public Defender Fund

Other

☐ Appointed PD or appointed other counsel,

§47-12 requires \$500 be paid to Clerk

during probation

Recipient:

*Fine \$

§14-1-206 (Assessments 107.5%) \$

§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$

§56-5-2995 (DUI Assessment) \$12 \$

§56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§14-1-213 (Drug Court Surcharge) \$150 \$

§50-21-114 (BUI Breath Test Fee) \$50 \$

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ \$ 3.90

TOTAL \$ 133.90

Clerk of Court/Deputy Clerk: Jan Miller

Court Reporter: Debbie Lauder

Presiding Judge: [Signature]

Judge Code: 2128

ATTEST: TRUE 9/15/15

JULIE L ARMSTRONG (SEAL)

CLERK OF COURT

By [Signature]

DEPUTY CLERK

DOCKET NO. 2013GS1001497

WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2012038159

ARREST WARRANT NUMBER

2012A1010202094

DATE OF ARREST

October 23, 2012

AGTION OF GRAND JURY

KENDALL JEROME TYUS JR

DOB:

B/M

Indictment for

Possession Of A Firearm During Commission Of A Violent Crime

VERDICT

Guilty

Brian J. [Signature] 7-15-15
Foreperson of Petit Jury Date.

INDICT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

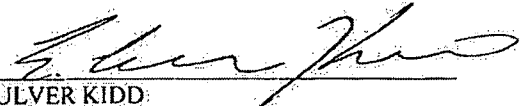
INDICTMENT

At a Court of General Sessions, convened on March 4, 2013 the Grand Jurors of Charleston County present upon their oath:

Possession Of A Firearm During Commission Of A Violent Crime

That in Charleston County, South Carolina, on or about October 22, 2012, the Defendant, KENDALL JEROME TYUS JR, did possess a firearm or visibly display what appeared to be a firearm during the commission, or attempted commission, of Armed Robbery, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 CULVER KIDD
 ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
 JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P., G.S. & F.C.
 By 
 DEPUTY CLERK

COUNTY OF CHARLESTON

STATE VS

KENDALL JEROME TYUS, JR

AKA: Kendall J Tyus

Race: Black Sex: M Age: 24

DOB [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: North Charleston, SC 29418

DL# [REDACTED] SID# SC01786317

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or☐ PLEADS

TO: Possession Of A Weapon During The Commission Of A Violent Crime

In violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lowd Act)The charge is ☒ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand JuryThe plea is ☒ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State

ATTEST

Chris Lietzow, Assistant Solicitor

100521
SC Bar #

Defendant

Attorney for Defendant

4581
SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$, provided that upon the service of days/months/years and or payment
of \$, plus costs and assessments as applicable*, the balance is suspended with probation for
months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which
are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2013-GS-10-1496☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred.☐ Def. Waives Hearing☐ Ordered.

PTUP

Total, \$ plus 20% fee: \$ days/hours Public Service EmploymentPayment Terms: Obtain GED ☐☐ Set by SCDPPPS Attend Voc. Rehab. Or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ Beginning \$ Paid to Public Defender FundOther: Recipient: *Fine: \$ §14-1-206 (Assessments 107.5%) \$ §14-1-211 (A)(1) (Conv. Surcharge) \$100 \$ 100.00§14-1-211 (A)(2) (DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ §56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ §14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§14-1-213 (Drug Court Surcharge) \$150 \$ §50-21-114 (BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ca \$ Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ \$ 3.90TOTAL: \$ 131.90Clerk of Court/Deputy Clerk. Court Reporter. Denise L. LauerPresiding Judge. Judge Code: 2128Sentence Date: 7/15/15

ATTEST: A TRUE COPY

JULIE ARMSTRONG (SEA)

CLERK OF COURT

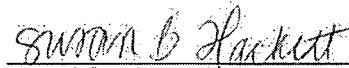
By

DEPUTY CLERK

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 19th day of August, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Susan B. Hackett

Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 19th day of August, 2016.