

1 **P R O C E E D I N G S**

2 The matter came on for motions hearing on
3 August 9th, 2012, before the Honorable Thomas Mulvahill, Judge
4 of the Boulder District Court, and the following proceedings
5 were had.

6 * * * *

7 THE COURT: 12 CR 222, People versus Michael Clark.
8 Could I have the appearances of counsel, please.

9 MR. BRACKLEY: Ryan Brackley and John Kellner for
10 the People. Also here at counsel table is Detective Chuck
11 Heidel of the Boulder Police Department.

12 Good morning, Your Honor.

13 THE COURT: Good morning.

14 MS. RING: Megan Ring and Nelissa Milfeld on behalf
15 of Michael Clark. Mr. Clark appears on bond this morning.

16 THE COURT: Good morning.

17 The matter is here for a motions hearing. We
18 previously agreed that this motions hearing, which is set for
19 the full day, would be to deal with suppression issues. I
20 think counsel had talked about the specific motions that they
21 wanted to address today.

22 MR. BRACKLEY: We had, Your Honor. And at the time
23 we had our discussion, we hadn't received the Court's orders
24 on a bunch of those motions, but those were kind of neither
25 here nor there for the purposes of this day. We talked about

1 the three statements motions --

2 THE COURT: Okay.

3 MR. BRACKLEY: -- so statements 1, 2 and 3. The two
4 motions for the objecting to in-court identification of the
5 Defendant from those two particular persons. We talked about
6 the motion to dismiss for violation of due process. And in
7 addition to the ones that the Court had already ruled on,
8 there's another one that the Court had not ruled on and I
9 believe that's the bad acts, the defense request of notice of
10 bad acts. I just summarized the title of that. I don't
11 believe the Court had ruled on it. I would imagine that we
12 would have time today to handle that.

13 The conversation that Ms. Ring and I just had was to
14 take up the -- the defense side of -- and perhaps argument in
15 the motion to dismiss for violation of due process because of
16 destruction and/or loss of evidence. And this was -- this was
17 my thought that I -- I am prepared to call a rebuttal witness
18 from the Colorado Bureau of Investigation on the value of the
19 gunshot residue test taken after a certain period of time,
20 approximately a number of hours.

21 THE COURT: After the discharge of a firearm?

22 MR. BRACKLEY: After the discharge of a firearm.

23 THE COURT: Okay.

24 MR. BRACKLEY: I believe that Ms. Ring is going to
25 call Detective Heidel and Sergeant Trujillo on her direct

1 portion of this motion. I -- it will be my position -- and I
2 don't want to argue it now, but I'm just not sure I'm going to
3 be calling the rebuttal witness. I don't think I'm going to
4 need one. So what I'm going to ask -- and that witness is
5 scheduled to be here at 1:30.

6 THE COURT: Your rebuttal witness?

7 MR. BRACKLEY: Right. So my idea is if we can do
8 this one first and we can call that witness off because he or
9 she is going to be in Arapahoe County testifying at trial if,
10 in fact, we don't need that witness. And I know that puts the
11 Court in a difficult position, but I think that it makes
12 sense.

13 THE COURT: Well, Ms. Ring, what do you think?

14 MS. RING: That's fine with me, Judge.

15 THE COURT: Okay. Let me ask you preliminarily, was
16 the GSR on the Defendant actually processed and were results
17 obtained?

18 MR. BRACKLEY: No. No, that's the -- the issue is
19 that the GSR on the Defendant, that kit --

20 THE COURT: Right.

21 MR. BRACKLEY: -- was lost or destroyed back in --
22 it was never submitted. The other kits which were -- if the
23 Court may remember --

24 THE COURT: Right. You located those after the
25 motion had been filed and --

1 MR. BRACKLEY: Right.

2 THE COURT: So, Ms. Ring, are you in agreement that
3 what we're talking about here is the GSR evidence that was
4 obtained from Mr. Clark and that kit, the result of the
5 swabbing was lost?

6 MS. RING: Yes. And I -- I guess -- that's what
7 we're talking about today, Judge.

8 THE COURT: Right.

9 MS. RING: The kits. The other two kits that were
10 noted in discovery as having been obtained back in 1994, which
11 were of the individuals Marty Grisham and his girlfriend who
12 was there when the murder happened --

13 THE COURT: Barbara Burger.

14 MS. RING: -- Barbara Burger, were located
15 subsequent to my filing the motion, and to my understanding,
16 had been submitted to CBI. And we don't have any indication,
17 at least I don't know that right now, about what CBI's
18 position about whether it was preserved in such a way that
19 those can be tested and what their position is going to be.
20 So I just want to make sure we're clear, until I hear some of
21 that I may be arguing there was another issue there.

22 THE COURT: Okay.

23 MS. RING: And then part of my motion also addressed
24 a photograph of the Carmex container.

25 THE COURT: Right. And those photographs were

1 subsequently located in --

2 MS. RING: So actually --

3 MR. BRACKLEY: Those were in discovery, but you just
4 can't really see them.

5 MS. RING: Right. So it turned out that we had at
6 least one photograph in the discovery that the -- I think
7 Mr. Brackley would agree with me that the nature of the
8 photograph and how fuzzy it was, you really couldn't tell what
9 it was. And I think Detective Heidel, because he is more
10 familiar with everything, was able to identify that that was
11 the photo that Officer Denig said he took. I mean, we are
12 going to --

13 THE COURT: Okay.

14 MS. RING: -- hear some testimony about that today
15 because I think that, based on the nature of the photograph, I
16 want to make sure I have the photograph that Officer Denig
17 said he took before he took that into evidence.

18 I got new discovery yesterday. I got some
19 photographs that I know Detective Heidel tried to have
20 enhanced so I can see if there was any better quality. I
21 think that I got a brand new photograph yesterday, but because
22 I got it yesterday and the nature of this discovery, I don't
23 know if it's brand new or whether it's another photograph that
24 I couldn't tell that I had.

25 I'm just letting you know that, Judge, because I'm

1 still concerned that I'm getting things that have been around
2 for a very long time, like -- and I appreciate the District
3 Attorney and Detective Heidel getting me things as they
4 uncover them, but, for instance, Mr. Kellner this morning said
5 they found copies of checks, which I believe are the checks my
6 client previously admitted to forging, that I don't have. So
7 it makes me really nervous about things that have clearly been
8 around since 1994.

9 And then I have got some reports this week from
10 January of 2012 that I'm getting now, which was part of the
11 reason I did the SDT for the Boulder Police Department file in
12 this case. I haven't had a discussion with Mr. Brackley or
13 Detective Heidel about how we deal with that, but I just want
14 to let the Court know I'm going to go through everything again
15 as closely as I can, but it is concerning to me that we're set
16 for trial in October on a case this old and I'm getting things
17 that I should have had a while ago.

18 MR. BRACKLEY: Judge, I understand all those points.
19 However, this is not -- the -- the checks for -- the
20 photographs of the checks, for instance, those aren't things
21 that we just discovered. Those are things that were mentioned
22 in discovery in various places. There is -- the property and
23 evidence sheets for those have been in discovery since day
24 one, as have reports about those items. Those were things
25 that I looked at and said, you know what, let's print these

1 out for us, and having done that, I made a copy for Ms. Ring.
2 I mean those are things that have been in discovery forever.
3 We're just printing them out.

4 And the additional photo that looks like it's a new
5 one, has been in discovery. It's a better quality photo we
6 did at the request of Ms. Ring. So these aren't things that
7 we're surprised by that we're turning them over two months
8 before. Those are things that have been mentioned in
9 discovery or are noted in discovery that as we prepare for
10 trial we're printing them out and putting them on paper. And
11 because we are doing it for ourselves, we are doing it for
12 counsel.

13 THE COURT: Well, the source of the image that you
14 are printing out, has a copy of the source been provided to
15 the Defendant?

16 MR. BRACKLEY: You mean, the actual -- well, they
17 are from negatives because it was back in 1994, so it's --
18 those old school negative things and I don't know that we
19 could.

20 THE COURT: Okay.

21 MR. BRACKLEY: But we have them in property and
22 evidence. But the actual, you know, property and evidence
23 notations and sheets, those have all been provided to counsel.

24 THE COURT: And the negatives are available for --

25 MR. BRACKLEY: They are.

1 THE COURT: -- review and copying, if the defense
2 wants to.

3 Okay. I mean, look, it would be -- we're still
4 two months out for trial. I don't have as grave a concern as
5 was related by Ms. Ring, but it would probably behoove the
6 prosecution to make sure that whatever information is in the
7 possession of the District Attorney and/or cooperating law
8 enforcement gets disclosed to, discovered to and made
9 available to the defense within the time constraints of
10 Rule 16, because I don't want to be sitting here 28, 29 days
11 before trial and have the defense just receiving information
12 because that, I think -- we've had enough conversation in this
13 case dating all the way back to the early part of the year,
14 that we really should not have discovery issues coming up
15 close to trial.

16 MR. BRACKLEY: I completely agree, Your Honor.

17 THE COURT: Okay. But my point when I initially
18 asked you, Ms. Ring, about whether or not the GSR -- or I
19 asked if the GSR results had been completed on the kit that
20 was obtained from Mr. Clark, I mean we're in a situation where
21 *Youngblood* is what applies. There needs to be bad faith shown
22 and that's the purpose for calling those witnesses.

23 MS. RING: (Counsel shakes head.)

24 THE COURT: Okay.

25 MR. BRACKLEY: And, Judge, I don't know that we

1 really have to show bad faith. I think that we have to show
2 apparent exculpability that was apparent at the time it was
3 destroyed.

4 THE COURT: If it's actually exculpatory and it's
5 known to be exculpatory at the time of the destruction, then
6 it's constitutionally material, and then there is -- the Court
7 can enter a sanction for that. But if it is not actually
8 exculpatory, if the exculpatory value is not known at the time
9 of the destruction, then what *Youngblood* requires and *Wyman*,
10 788 P.2d 1278, is that the criminal defendant has to show bad
11 faith on the part of the police; otherwise, it's not an undue
12 process violation. That's why I asked about whether or not we
13 knew what the GSR test results were from the swabs obtained
14 from Mr. Clark.

15 MR. BRACKLEY: Right.

16 THE COURT: So do you want to address the
17 Defendant's motion to dismiss violation of due process now?

18 MS. RING: So I think that's our -- in order to
19 accommodate Mr. Brackley's witness situation, we're agreeing
20 that we are going to go ahead and call the two witnesses that
21 we were planning on calling for this motion.

22 THE COURT: Okay.

23 MS. RING: And then that will put Mr. Brackley in a
24 position to decide whether or not he actually wants to bring
25 in the witnesses that are --

1 THE COURT: Okay.

2 MS. RING: -- in Arapahoe or wherever.

3 MR. BRACKLEY: And, of course, I could -- I could do
4 this motion on paper if the Court would prefer also.

5 THE COURT: No. We -- I think Ms. Ring has
6 witnesses queued up, so why don't we go ahead and take
7 testimony on that.

8 Ms. Ring.

9 MS. MILFELD: If we could call Sergeant Trujillo.

10 **THOMAS E. TRUJILLO,**
11 a witness herein, having been first duly sworn, was examined
12 and testified on his oath as follows:

13 THE COURT: Please have a seat.

14 THE WITNESS: Thank you.

15 THE COURT: Go ahead, Ms. Ring.

16 MS. MILFELD: Ms. Milfeld now.

17 THE COURT: I'm sorry. Ms. Milfeld.

18 **DIRECT EXAMINATION**

19 **BY MS. MILFELD:**

20 Q. We're just going to go to the meat of it, Detective
21 Trujillo. So during the interview of Mr. Clark at the jail,
22 you conducted a GSR test?

23 A. Actually, to back up, it wasn't at the jail, it was
24 actually at the Boulder Police Department.

25 Q. I'm sorry.

1 A. Just so we're clear where it was at.

2 Q. I'm sorry. At the police department during the
3 middle of the interview, you conducted a GSR test?

4 A. A GSR test was conducted on Mr. Clark.

5 Q. Yes. At that time you swabbed his hands and his
6 face as part of that?

7 A. I did not. Actually, the person that did the
8 swabbing was Detective, now Commander Weinheimer.

9 Q. Commander Weinheimer, who was with you at the
10 time --

11 A. Yes.

12 Q. -- he did the actual swabbing?

13 A. Yes. Yes.

14 Q. The reason why you did that test at the time was to
15 see if he had any gun residue that was on his face or on his
16 hands?

17 A. That's why you would do it, yes.

18 Q. And one of the possibilities is that from the
19 gunshot residue you can see -- is that if it showed that he
20 had residue, it could mean he shot a gun at the time?

21 A. That's part of it.

22 Q. Another possibility from the results of the test is
23 that Mr. Clark could have been in an area where a gun was
24 shot?

25 A. Yes.

1 Q. A third possibility is that he could have come into
2 contact with someone who shot a gun?

3 A. Absolutely.

4 Q. So doing the gunshot residue test, any of the
5 results are possible?

6 A. Yes.

7 Q. And when you did the test, obviously, at the time
8 you thought that it could have some evidentiary value?

9 A. Yes.

10 Q. It could show that Mr. Clark shot a gun the night
11 before?

12 A. No, that -- it's possible that there's stuff on him
13 we talked about in the interview, but the evidentiary value in
14 that gunshot residue test didn't have to do with collecting
15 the test, it was soliciting information from Mr. Clark.

16 Q. So at the time you were hoping, in doing the test,
17 that you would be able to get information from Mr. Clark?

18 A. Yes.

19 Q. You were hoping that he would provide more
20 information about his involvement in the murder?

21 A. Yes.

22 Q. You thought that maybe by doing the test, that he
23 would perhaps confess to the murder?

24 A. Yes.

25 Q. And so when you did this test and you swabbed him,

1 he didn't at the time confess to doing the murder?

2 A. Yes.

3 Q. He didn't tell you?

4 MR. BRACKLEY: Judge, I'm going to object to leading
5 questions.

6 THE COURT: Overruled.

7 Q. (By Ms. Milfeld) He didn't tell you, you know,
8 actually, I have more information to give you about my
9 involvement?

10 A. Yes.

11 Q. So besides the evidentiary value of him providing
12 information, your testimony today is that you didn't think the
13 test itself would show anything?

14 A. Correct.

15 Q. Why is that?

16 A. Because it had been almost 24 hours -- excuse me --
17 almost 48 hours since the time of the homicide. Gunshot
18 residue, from my training and experience, is that they are
19 little tiny particles, they are easily knocked off your hand,
20 face, clothing. I don't know what he was wearing that night.

21 Q. But they are easily disturbed?

22 A. If you wash your hands -- unfortunately, if you pee
23 on your hands you will change your -- change what the results
24 are. If you wash your hair, scrub your hair with your hands,
25 if you brush your hand, put your hands in your pocket, where

1 you brush your hands against anything, the particles are going
2 to disappear.

3 It's a good test right after a shooting occurred to
4 let somebody know if they are the shooter or they are in close
5 proximity or they shook hands with somebody that's the
6 shooter, but, again, after 48 hours I don't believe that test
7 was a valid test or evidence collection.

8 Q. Back in 1994, was there a policy about when you did
9 GSR tests?

10 A. I don't believe there's a Boulder Police Department
11 policy, no.

12 Q. But the way that you conducted the test is you
13 personally didn't think that they had any value after
14 48 hours?

15 A. I did not.

16 Q. So if you were going to do a test after 48 hours,
17 you were doing it for some other purpose other than to find
18 gunshot residue?

19 A. Yes.

20 Q. Who was responsible for taking the GSR kit after the
21 interview?

22 A. I've got to tell you, Detective Weinheimer directed
23 it. I do not know between the three of us, Detective
24 Weinheimer and myself, which one would have taken the kit.

25 Q. During the interview you watched them do the test?

1 A. Absolutely.

2 Q. But after that you didn't keep track of what
3 happened to it?

4 A. I did not. Um, I know the test -- I don't believe
5 the test was entered -- the kit. It's not a test, it's
6 actually a collection kit. It's the SEM stubs. I do not
7 believe it was entered into property and evidence.

8 Q. And why don't you believe that?

9 A. Again, because it wasn't collected as part of an
10 evidence collection. We collected -- or we went through the
11 motions of that kit to try to elicit more truthful testimony
12 from Mr. Clark.

13 Q. Did you discuss with the other detectives at the
14 interview that that was your plan?

15 A. I can't specifically say that, no.

16 Q. So you don't have any recollection today that before
17 you conducted the interview with Mr. Clark, you said, I want
18 to do this collection kit, but I don't think it's going to
19 show anything?

20 A. I can't specifically remember that. I know that we
21 took a break for about 50 minutes during the first part of the
22 interview. We took a break and came back and that was the
23 first thing we did after the break. Based on the way I have
24 worked with Detective Weiler and Weinheimer in the past, we
25 probably had a discussion about it, but I can't specifically

1 say, yes, we talked about that and said this.

2 Q. So you can't say today that the reason why it wasn't
3 logged into property and evidence was because Commander
4 Weinheimer thought, you know -- so you can't say today that
5 the reason why it wasn't logged into property and evidence was
6 because another detective didn't think it had evidentiary
7 value?

8 A. I can't specifically say what Detective Weinheimer
9 thought at the time. I can tell you the reason we collected
10 it at the time was for part of the interview.

11 Q. Normally in this type of investigation, who would
12 have been responsible for logging the kit into property and
13 evidence?

14 A. Normally it would have been either Detective
15 Weinheimer or myself as the case agent in charge.

16 Q. Because you were the lead detective at the time?

17 A. Correct, and --

18 Q. And you would have been in charge of doing that?

19 A. Correct.

20 Q. And so if after it was logged into property and
21 evidence at -- in 1994, how would you have sent the kit off to
22 CBI, if you would have done that?

23 A. If the kit would have been sent to CBI, either
24 myself or another detective would have written a letter,
25 filled out the paperwork, and had the kit transferred down to

1 CBI.

2 Q. In 1994, if the kit was given to CBI, how soon after
3 would you get results on the kit?

4 A. I've got to tell you, the SEM stuff was taking a
5 long time. It wasn't an automatic given, 24 hours, or
6 anything like that. It was taking months to get results back.

7 Q. So other than the fact that you're present for the
8 collection of the GSR with the other two detectives, you don't
9 know after that point what happened with the kit?

10 A. I do not specifically recall no gunshot residue,
11 GSR.

12 Q. So you are familiar with the guidelines that CBI
13 provides you with on collecting GSR?

14 A. Yes.

15 Q. And part of the guidelines talk about types of
16 evidence that you can collect?

17 A. Okay.

18 Q. Would you agree that's correct?

19 A. Yes.

20 Q. And it talks about collecting evidence from a victim
21 and how normally that isn't run in CBI, that isn't tested?

22 A. I believe so, yes.

23 Q. We already talked about how at the time in 1994 you
24 were the lead detective in this homicide investigation?

25 A. Yes.

1 Q. So you were in charge of arranging interviews?

2 A. As part of the duties, yes.

3 Q. You were in charge of looking over evidence?

4 A. Yes.

5 Q. In this particular case, the gunshot residue kit
6 taken from Mr. Grisham was kept?

7 A. Yes.

8 Q. So even though there's this policy in place that
9 says the gunshot residue of the victim has no value, you kept
10 that?

11 MR. BRACKLEY: Objection, Judge, as to the time
12 frame of this policy.

13 THE COURT: Yeah, can you clarify the question.

14 Q. (By Ms. Milfeld) At the time when you collected the
15 GSR kit from Marty Grisham --

16 A. Mm-hmm.

17 Q. -- was there a policy in place that said that the
18 residue taken from a victim would not have evidentiary value?

19 A. I don't believe there's a Boulder Police Department
20 policy that said that. That may be in something that CBI has.
21 I don't recall for sure that policy.

22 Q. But at the time your knowledge was that they
23 wouldn't test the collection kit from the victim?

24 A. I don't know that specifically, no.

25 Q. But you do know that's true today?

1 A. Yes.

2 Q. And you know that because CBI has sent you a
3 guideline form that talks about how it doesn't have any
4 evidentiary value?

5 A. I have seen that, yes.

6 Q. So at the time you collected the GSR collection kit
7 from Marty Grisham --

8 A. Mm-hmm.

9 Q. -- you also collected one from Barbara Burger?

10 A. One was collected, yes.

11 Q. And you kept those?

12 A. Yes.

13 Q. But you didn't keep Mr. Clark's GSR collection kit?

14 A. That would be correct.

15 Q. So if, as the lead detective at the time, after you
16 did the GSR collection kit, if you would have sent it off to
17 CBI and you would have obtained results that there was gunshot
18 residue on Mr. Clark, that, obviously, would have some value?

19 A. It would have told me that he had recently fired a
20 weapon, yes.

21 Q. And we talked about before all the other
22 possibilities of what could have happened?

23 A. Correct.

24 Q. How he could have been around a gun?

25 A. Absolutely.

1 Q. How he could have come into contact with someone
2 that shot a gun?

3 A. Yes.

4 Q. But the value of that information would be important
5 to the prosecution. That's something that they probably would
6 want?

7 A. I gotta tell you, yes, they would have -- they would
8 like to know, as everybody would like to know, if he had
9 gunshot residue on his hands.

10 Q. And certainly if the converse was true, if you had
11 sent the kit to CBI and it had come back and said that he
12 didn't have any gunshot residue, that would be information
13 that the defense would like?

14 A. Absolutely. I mean, that's why we're here today.

15 Q. Okay. And you just said "absolutely, that's why
16 we're here today" because --

17 A. Right.

18 Q. -- that could potentially be exculpatory information
19 potentially?

20 A. Potentially, yes, I guess.

21 Q. It could show that he hadn't shot a gun at all? I
22 mean, it could show?

23 A. It could, yes.

24 Q. It could show that he hadn't been around guns at
25 all?

1 A. It could, yes.

2 Q. And as lead detective you know that one of the
3 pieces of evidence in this case is that Mr. Clark had a gun at
4 the time?

5 A. We believe he did, yes.

6 Q. So it would show, perhaps, that he had maybe shot
7 that gun at the time?

8 A. Yes.

9 Q. And so what we're really talking about is that if
10 the results had been obtained and they had been disclosed, one
11 inculpatory, one exculpatory, it would have some kind of
12 value?

13 A. If, yes.

14 MS. MILFELD: No further questions.

15 THE COURT: Detective, if the GSR from the Defendant
16 were processed and it came back negative, no particles were
17 discovered from the hands and face of Mr. Clark, is it then
18 your conclusion that he could not have fired a gun?

19 THE WITNESS: Absolutely not. And, again, Judge,
20 it's based on the evidence -- the GSR stubs were collected 48
21 hours after the shooting -- not quite 48, I think that it was
22 shot in the evening, we did it in the afternoon, almost
23 48 hours afterwards. It is my conclusion that in that time
24 period those particles are gone. I understand that. I told
25 him that during the interview, the little particles and all

1 that as part of the interview process, as part of the evidence
2 collection process, those particles are going to be gone.

3 It doesn't mean that he didn't fire a gun two days
4 prior. It doesn't mean that he did. It was to try to elicit
5 information from him is all it was used for.

6 THE COURT: Okay. Mr. Brackley, cross-examination.

7 **CROSS-EXAMINATION**

8 **BY MR. BRACKLEY:**

9 Q. In fact, a lack of positive results in a GSR test
10 wouldn't mean that a person didn't fire a gun 40 minutes
11 earlier, correct?

12 A. Correct.

13 Q. Or four hours earlier?

14 A. Correct.

15 Q. 24 hours earlier or 48 hours earlier, correct?

16 A. Yes.

17 Q. The new policy that, um, Ms. --

18 MS. MILFELD: Milfeld.

19 Q. (By Mr. Brackley) -- Milfeld -- I'm sorry, I had
20 it -- that Ms. Milfeld had talked about, is based on
21 principles that a GSR test will have no value after six hours
22 of a gun being fired, correct?

23 A. Yes.

24 Q. Okay. When the GSR test was performed on Marty
25 Grisham, his hands had been bagged, correct?

1 A. Yes.

2 Q. And what's the purpose of that?

3 A. To preserve evidence. Again, to keep his hands from
4 being washed, the evidence to be knocked off. If the evidence
5 is knocked off, theoretically you could actually swab the
6 inside of the bag to collect the evidence. But the bottom
7 line with Marty Grisham is I know Marty Grisham was present
8 when the gun was fired.

9 Q. Okay. And for that reason CBI probably will balk --
10 b-a-l-k -- at testing the gunshot residue collected --
11 collecting the swabs, collected from Marty Grisham?

12 A. Yes.

13 Q. Okay. And as far as Barbara Burger is concerned,
14 um, any GSR test that was performed -- or kit that was
15 performed on her would have been within hours of her
16 presence --

17 A. Correct.

18 Q. -- at the scene of a shooting, correct?

19 A. Correct.

20 Q. Um, and she would have been in a situation
21 controlled by police officers?

22 A. She should have been in a controlled environment,
23 hands bagged, taken to the station for that test.

24 Q. Where they would have done a GSR test on her?

25 A. Yes.

1 Q. Do you know where Michael Clark was between the time
2 of Marty Grisham's murder and the time police officers first
3 laid eyes on him on November 3rd, 1994?

4 A. I do not.

5 Q. Do you know whether his hands had been bagged at all
6 prior to police officers first laying hands on him?

7 A. I do not.

8 Q. Do you know whether he took a shower?

9 A. No.

10 Q. Do you know whether he urinated, as you pointed out?

11 A. I don't know.

12 Q. Do you know whether he used his hands to eat a
13 sandwich?

14 A. No.

15 Q. Do you know whether he put on an article of clothing
16 which would have crossed over his hands?

17 A. I don't know.

18 Q. Do you know whether he had slept and put his hand
19 under his pillow?

20 THE COURT: I get it. I get it.

21 MR. BRACKLEY: That's my last one, because I can't
22 think of any more.

23 THE COURT: Oh, I bet.

24 MR. BRACKLEY: If I could, I would keep going.

25 A. To answer the question, no.

1 Q. (By Mr. Brackley) Do you know any of those things?

2 A. No.

3 Q. So when we talked about swabbing Mr. -- by the way,
4 for the record, let's talk about the date and time of the
5 actual homicide.

6 A. Okay.

7 Q. When was it?

8 A. It was November 1st, it was in the evening. I got
9 called about 10:00. I believe it was 8:30.

10 Q. And what was the date and time of the point when
11 police officers first laid eyes on Michael Clark?

12 A. Mr. Clark was contacted two days later on
13 November 3rd. It was in the afternoon around 4:00'ish. And
14 actually it was a little before that because that -- I think
15 we started the interview at 4:05.

16 Q. So a little less than 48 hours?

17 A. Yes.

18 Q. Now you agreed --

19 THE COURT: Well, he had been contacted by police
20 before he got brought to the police department, right?

21 THE WITNESS: Right. He was initially contacted,
22 but as soon as he was contacted, he was brought to the police
23 department. I believe our interview started at 16:05, about
24 4:05. So it was about -- probably about 3:00 or so, 3:30. I
25 don't have those exact times, and they are in the reports, but

1 I don't have them.

2 THE COURT: Okay.

3 Q. (By Mr. Brackley) You agreed with Ms. Milfeld that
4 you would do a GSR test to determine whether or not someone
5 had fired a gun, correct?

6 A. Yes.

7 Q. But why did you do it in this case?

8 A. Again, on this case it's part of the interview
9 process. We are trying to make -- I was trying to make
10 Mr. Clark think that we have good evidence against him because
11 I had already listened to almost two hours of interview with
12 him. There was some problems with that interview, as far as I
13 was concerned. We are trying to get him past that to tell us
14 what we believe is the truth of the matter.

15 Q. So any value to performing the GSR test on Mr. Clark
16 would have been testimonial, for lack of a better word,
17 correct?

18 A. Yes.

19 Q. Was this interview recorded?

20 A. Yes, it was.

21 Q. And does that recording still exist today?

22 A. Yes.

23 Q. You have listened to that this morning, parts of it?

24 A. I have listened to it over the last couple days,
25 yes.

1 Q. And it's also in transcript form?

2 A. Yes.

3 Q. And you have seen the transcript?

4 A. I have.

5 Q. And that's a fair and accurate representation of the
6 actual interview that was done with Mr. Clark way back when?

7 A. It wasn't that long ago, but, yes.

8 Q. Would there have been any expectation in your mind
9 as lead detective that you would actually find results of
10 forensic value in taking GSR from Mr. Clark?

11 A. Absolutely not.

12 Q. And why is that?

13 A. Again, there's a lot of variables in there. It had
14 been almost 48 hours. I can go back to the exact time, but
15 almost 48 hours. His hands weren't preserved in any way.
16 They weren't bagged. I didn't know what had occurred in those
17 48 hours. The -- the little tiny specks that are transient,
18 they get knocked off, they get washed off, they get brushed
19 off. I would not expect any results from that at all.

20 Q. Okay. And based on CBI's new policies, which you
21 know to be based on historical results and historical value of
22 GSR, CBI would not test the GSR kit that was taken after
23 six hours even on a suspect?

24 A. Correct.

25 MR. BRACKLEY: Thank you. No further questions.

1 THE COURT: Well, Detective, am I understanding you?
2 The purpose in discussing the GSR test with Mr. Clark was
3 primarily for psychological impact on Mr. Clark, kind of like
4 the way a polygraph test would be offered?

5 THE WITNESS: Absolutely.

6 THE COURT: Ms. Milfeld, redirect?

7 MS. MILFELD: Thank you.

8 **REDIRECT EXAMINATION**

9 **BY MS. MILFELD:**

10 Q. We've talked a lot about GSR and whether it has
11 value or no value, but the reality is you are not an expert in
12 GSR?

13 A. I'm not.

14 Q. You rely on information you receive from other
15 government agencies like CBI?

16 A. Yes.

17 Q. In order to determine when to do the collection kit?

18 A. Yes.

19 Q. When they will test the collection kit?

20 A. Yes.

21 Q. Meaning of results?

22 A. Yes.

23 Q. So when you talk about how it has no value over
24 six hours, and that was a question that Mr. Brackley asked
25 you, that's information that you are relying on from another

1 source?

2 A. Absolutely.

3 Q. You don't know what the basis or the science behind
4 that is?

5 A. I have not reviewed any scientific papers on that,
6 no.

7 Q. You don't know what the reason is why they say you
8 shouldn't do it after six hours?

9 A. No.

10 Q. So when you talk about the small particles and how
11 they could be brushed off in many different ways, you just
12 know that because you have received that information from CBI?

13 A. From CBI and other books I have read, yes.

14 Q. But you, yourself, don't know what the science
15 behind that is or why those types of particles would disappear
16 after a certain amount of time?

17 A. I'm not a scientist, no.

18 Q. Mr. Brackley talked about the timing between the
19 murder and when Mr. Clark was interviewed at the police
20 department. During that time a search was conducted of
21 Mr. Clark's house?

22 A. Yes.

23 Q. And part of that search included looking at the
24 areas that he had control over in that townhome?

25 A. Yes.

1 Q. At that time there wasn't any effort made to find
2 clothing that he wore on the night of November 1st?

3 A. No.

4 Q. The reason why I'm asking you that is because you
5 know now, through information that you received from CBI, that
6 it can be important in finding clothing that a suspect might
7 have worn if he shot a gun?

8 MR. BRACKLEY: Judge, I would argue beyond the scope
9 of the motion.

10 THE COURT: Yeah.

11 MR. BRACKLEY: And the cross-examination.

12 THE COURT: So where is this going? How is this
13 relevant to what we're talking about?

14 MS. MILFELD: Part of the issue that we're
15 discussing today is the destruction of evidence and the fact
16 that the police kept the GSR collection kits from Barbara
17 Burger and Marty Grisham and they didn't keep it from
18 Mr. Clark. One of the pieces of that evidence they didn't
19 collect was his clothing and --

20 MR. BRACKLEY: Not subject to the motion, Judge.

21 THE COURT: I mean, yeah, how does all that pertain
22 to the motion?

23 MS. MILFELD: I'll move on.

24 THE COURT: Okay. I'll sustain the objection.

25 MS. MILFELD: No further questions.

1 THE COURT: Okay. Any recross? Hearing none...

2 MR. BRACKLEY: No.

3 THE COURT: You can step down, Detective.

4 THE WITNESS: Thank you.

5 THE COURT: Defense's next witness.

6 MS. RING: I think that I mentioned just to Sergeant
7 Trujillo earlier this morning, we still have him under
8 subpoena. We were calling this out of order to deal with this
9 motion, so unfortunately Sergeant Trujillo is not free to
10 leave yet.

11 THE COURT: Okay. Next witness regarding the motion
12 to dismiss?

13 MS. RING: Detective Heidel, please.

14 THE COURT: All right. Detective, would you step
15 forward, please.

16 DETECTIVE HEIDEL: Yes.

17 **CHUCK HEIDEL,**
18 a witness herein, having been first duly sworn, was examined
19 and testified on his oath as follows:

20 THE COURT: Please have a seat.

21 Go ahead, Ms. Ring.

22 MS. RING: Thank you.

23 **DIRECT EXAMINATION**

24 **BY MS. RING:**

25 Q. Detective Heidel, you are now presently the lead

1 detective on this case?

2 A. Yes.

3 Q. So basically you are in charge from the Boulder
4 Police Department's perspective of the investigation into
5 Marty Grisham's murder?

6 A. Yes.

7 Q. Okay. And you took over that investigation about
8 two or three years ago?

9 A. Yeah. Yes.

10 Q. And I think at a prior hearing you have already told
11 us that one of the first things you did is try to organize the
12 Boulder Police Department's case file for this investigation?

13 A. That's correct.

14 Q. Okay. And you wanted to make sure that you had all
15 of the documents generated by the police department related to
16 this investigation?

17 A. Correct.

18 Q. You tried to organize all of those documents?

19 A. Correct.

20 Q. Make sure you had everything in one place?

21 A. Correct.

22 Q. And in doing that, you did not find any
23 documentation about what happened to the GSR kit collected
24 from Michael Clark?

25 A. That's correct.

1 Q. So you just heard Sergeant Trujillo testify about
2 him not knowing what happened to that GSR kit, right?

3 A. Correct.

4 Q. And at that time you would agree, as lead detective
5 now, that it would have been Sergeant Trujillo's
6 responsibility at the time to know where all of the evidence
7 collected in the investigation, where it was?

8 A. Yeah.

9 Q. Okay.

10 A. I think that's fair.

11 Q. And it's your job now to know where all the evidence
12 that's been collected, even since 1994, where that is?

13 A. Correct.

14 Q. And having gone through the entire file and all of
15 the documents, you feel confident today that the Boulder
16 Police Department does not have that GSR kit that was taken
17 from Michael Clark in 1994?

18 A. Yes.

19 Q. You looked for it?

20 A. Yes.

21 Q. Is it fair that you also tried to find out what
22 happened to it?

23 A. Yes.

24 Q. Okay. And from everything you have reviewed and
25 everybody in your department you've talked to, you can't tell

1 us today what happened to the GSR kit collected from Michael
2 Clark?

3 A. That's correct.

4 Q. Okay. There isn't anything to document whether
5 there was a decision made to destroy it?

6 A. No.

7 Q. There is nothing to document whether or not it
8 actually somehow went to CBI, even though Sergeant Trujillo
9 doesn't remember that?

10 A. That's correct.

11 Q. Okay. There is nothing to document that there was a
12 specific decision made by the Boulder Police Department in
13 1994 to dispose of that GSR kit?

14 A. There is no documentation, no, there's not.

15 Q. Okay. Is it fair to say that there is not a Boulder
16 Police Department procedure that would allow or support
17 getting rid of something like a GSR kit that was taken from a
18 suspect in a homicide case?

19 A. A policy -- I'm sorry -- regarding just getting rid
20 of evidence?

21 Q. I think that's what I'm asking you, yeah.

22 A. Well, there is on the property and evidence side.
23 Once things are submitted to the -- as evidence, then there is
24 a policy that governs that. As far as the collection of it
25 and then before it gets there, I'm not aware of a specific

1 policy regarding that.

2 Q. Okay. And you would agree with me as a very senior
3 veteran police officer, that the best practice, whether or not
4 you think something has evidentiary value or not, is if you
5 collect something, you put it in property and evidence and --
6 whether you decide to test it or not. But as the officer
7 involved in doing the investigation, the best practice is to
8 put that into property and evidence?

9 A. Well, I wasn't there back then, but we wouldn't be
10 here right now, I guess, if that was done. So in that sense,
11 I guess that it would be good.

12 MS. RING: Okay. Nothing further.

13 THE COURT: All right. Cross-examination?

14 MR. BRACKLEY: I have none, Your Honor.

15 THE COURT: All right. You may step down,
16 Detective.

17 THE WITNESS: Thanks.

18 THE COURT: Any further witnesses from the defense
19 at this time?

20 MS. RING: No, Judge.

21 THE COURT: I would find, based on the testimony
22 that's been presented, that the GSR kit obtained from Michael
23 Clark at the time it was collected and disposed of, in
24 whatever method that happened, that kit and the evidence that
25 would have resulted from that kit did not have -- it was not

1 actually exculpatory and it was not known to be exculpatory at
2 the time of the destruction or disposition of the GSR kit.

3 The best that can be said about that is that it is
4 potentially exculpatory. And to quote *Arizona v. Youngblood*,
5 109 Supreme Court 333, United States Supreme Court from 1988,
6 potentially exculpatory evidence is evidentiary material of
7 which no more can be said than it could have been subjected to
8 test, the results of which might have exonerated the
9 Defendant. And, frankly, that characterization may even be a
10 little strong here because of the timing of the collection of
11 the GSR relative to the believed time that the shooting
12 occurred and the passage of time diminishing the likelihood
13 that GSR particles could be collected.

14 So it is then incumbent on the Defendant to show
15 that the destruction of the GSR kit or the failure to preserve
16 that potentially useful evidence was done in bad faith on the
17 part of the police. So I'm going to ask counsel to address
18 that in their argument only with respect to the bad faith
19 element.

20 On behalf of the Defendant.

21 MS. RING: Judge, I think that the Court wouldn't
22 disagree with me that, you know, asking defense to show bad
23 faith on the part of the police department is a very, very
24 difficult burden to overcome. The likelihood that a police
25 officer is going to come in here and say I did this and I did

1 this so that the evidence wouldn't be available, or I did this
2 and would testify on -- in some way that would show that they
3 were acting in bad faith, I think that's very unlikely to ever
4 happen. So what the Court should be looking at is the
5 circumstances surrounding what happened to the evidence to try
6 to determine whether those circumstances would indicate bad
7 faith.

8 Certainly asking Detective Heidel to say that his
9 sergeant, Trujillo, acted in bad faith back in 1994 when that
10 GSR kit essentially disappeared is also not something that I
11 would expect Detective Heidel to say. But it is very, very
12 difficult, I would suggest, for the Court to imagine why that
13 GSR kit disappeared.

14 There was no downside if, indeed, Sergeant Trujillo
15 simply took the GSR kit to try to influence my client or
16 coerce my client into confessing, to simply say, but we did
17 collect this, this is a homicide investigation, this is not
18 some -- we can't collect every piece of evidence because it's
19 not that important and we don't do that in every case. This
20 was a high profile, unresolved homicide where Mr. Clark, my
21 client, was clearly a suspect at the time when they took the
22 GSR kit. They spent a lot of time interviewing him, they
23 spent a lot of time looking for him, they searched his
24 apartment, et cetera.

25 So why that GSR kit didn't go to property and

1 evidence, whether it got tested or not tested, doesn't make
2 any sense. And Detective Heidel told you there's nothing to
3 document what happened. There was no officer that said we
4 made this decision that -- because there was no value, we
5 decided to throw it away. There was no decision -- nobody got
6 up here and said, you know what, actually there was a property
7 and evidence sheet, it got logged in, but there was a decision
8 that it didn't have any exculpatory or inculpatory value. We
9 decided not to test it and so therefore we didn't see any
10 reason to keep it in property and evidence. There is no
11 explanation of what happened to the GSR kit, whether it got
12 thrown in the trash, whether a more commanding officer said we
13 don't need to keep this, there's nothing.

14 And what I would suggest to the Court is that based
15 on the nature of who we're talking about, what the expectation
16 is about what kind of testimony we would get from the agency
17 that's investigating the homicide, where the officer who
18 testified from 1994, and many of the officers are still
19 members of the police department, that the only explanation is
20 that it was in bad faith. That it was taken and it was --
21 if this -- there's no GSR on this kit, then that really hurts
22 our -- what we're saying, which is that Michael Clark had this
23 gun recently and that he fired and shot this gun recently.
24 And even if there wasn't a lot of GSR or there is just trace
25 GSR, him not having any GSR on him hurts our case, so we're

1 going to get rid of it, and that's bad faith. And I don't
2 think there's any other logical explanation for where this GSR
3 kit went.

4 I would also suggest that although the science has
5 evolved now and there was a discussion about the policies in
6 1994 versus the policies now, that back in 1994 the science
7 was not as clear, that GSR was routinely argued about and the
8 discussions about when it was relevant and how quickly you had
9 to do a GSR collection for it to be relevant, we're talking
10 about 1994, what people were thinking in 1994, not what CBI is
11 saying now about six hours or what those collections are.

12 THE COURT: Okay. Thank you.

13 Mr. Brackley, on behalf of the People.

14 MR. BRACKLEY: Just very briefly. Ms. Ring started
15 with a rhetorical question about, um, why -- how could the
16 Court expect the agency who used bad faith to come in and
17 actually testify about bad faith. I respond to that with
18 another rhetorical kind of point and that being that we all
19 know from sitting here today and day out, whether it's a
20 motions hearing or trials, that sometimes there is a very thin
21 line between bad faith and bad decisions. A thin line between
22 bad faith and things that we regret. And both of the officers
23 testified quite candidly -- and that I think this Court has
24 to -- should reject this notion that, of course, it's bad
25 faith because they are not admitting to it, but has to make a

1 credibility determination, having watched Detective
2 Sergeant -- Detective Sergeant Trujillo, having watched
3 Detective Heidel testify, this Court should make the
4 determination that they are credible because they both
5 admitted it would have been better practice, of course, we
6 would have wanted to have that test because, of course, we
7 would have wanted to preserve everything. But if it was a bad
8 decision, they owned that, and they owned it in this Court.
9 If it was a dopey decision, they are going to have to own that
10 in front of a jury. But there is absolutely no inference at
11 all that it was a bad faith decision, which is to say, this is
12 evidence that is going to clear Michael Clark, let's throw it
13 away before we have to test it. And the reason for that --
14 and Ms. Ring talked about the circumstances -- rather than
15 just presume that since the agency -- then they are obviously
16 using bad faith.

17 Look at the circumstances. They kept the test of
18 the person who had his hands bagged, they kept the test of the
19 person who was in a controlled situation within minutes of the
20 homicide, was controlled by police officers until that GSR kit
21 was taken. But the one who was out of custody, who was out on
22 his own, who may have showered, urinated, all those other
23 things, they didn't keep that test because they didn't do it
24 as a scientific test. They did it as an interview technique
25 and an interview that was recorded on video, on audio. An

1 interview that was transcribed. The value of all of that
2 still exists today. And it's -- and it's readily apparent and
3 it's readily available for this jury or for the Court.

4 But even when they first set eyes on him and talked
5 to him for 15 minutes or 2 hours and they take a break, they
6 don't bag his hands in the beginning because they know it has
7 no value. They talked to him. He doesn't make any
8 inculpatory statements. They step out and they go back in and
9 they try this GSR ruse. It wasn't done for any scientific
10 value, for any forensic evidentiary value. It was a mere
11 prop. And it is a bad decision, no doubt, and they are going
12 to own that in front of the jury. I'm not looking forward to
13 it, but that's what's going to happen. Does it mandate
14 dismissal? Absolutely not.

15 THE COURT: Okay. Well, I mean on some level I
16 agree with the argument put forward by Ms. Ring, but on the
17 other hand, you know, Detective Trujillo provides a rational
18 and a law enforcement reasoning for the introduction and use
19 of the GSR kit with the Defendant, and that is as a
20 psychological tool. That was the value to the detective at
21 the time that it was used with Mr. Clark. And it was apparent
22 from the testimony of Detective Trujillo that law enforcement
23 believed at the time that they swabbed Mr. Clark that the
24 actual evidence collection and analysis would have virtually
25 no value to their investigation because of the passage of time

1 and the manner in which GSR can be dispersed or dislodged or
2 lost over the passage of time, whether it's from washing hands
3 or brushing hands or similar transference of the GSR
4 particles.

5 And I would be more concerned if law enforcement in
6 a circumstance like this came in and said I don't know, we
7 took it and I don't know what happened to it. Here, Detective
8 Trujillo explains and, frankly, I find it credible that at the
9 time and under the circumstances that they were interviewing
10 Mr. Clark they thought that they needed to employ another
11 tactic to hopefully shake him from what to that point in time
12 had been his steadfast denial of any involvement in or
13 knowledge of the shooting of Marty Grisham. And Detective
14 Trujillo's explanation convinces me that the police attach no
15 evidentiary significance to the swabs or what would come from
16 the swabs, and that makes sense to me why it would not have
17 been retained by police.

18 Everybody agrees that it would have been a better
19 practice to retain the GSR swabs from Mr. Clark, but to find
20 that it was bad faith on the part of police when they fail to
21 do so, I cannot. And I -- and while I understand the line
22 that Mr. Brackley was describing, the line between bad faith
23 and bad decisions or bad faith and regret, frankly, I don't
24 see that this conduct by Detective Trujillo and his two
25 associates gets really that close to the line.

1 The logic is not best practices, but certainly
2 understandable under the circumstances. And I would find that
3 based on the state of the evidence that the police did not act
4 in bad faith when they failed to preserve the potentially
5 useful and potentially exculpatory evidence of the GSR
6 swabbings from Michael Clark.

7 Accordingly, I find that there is no due process
8 violation and the motion to dismiss or for other sanctions in
9 the alternative is therefore denied.

10 MR. BRACKLEY: Judge, kind of a record on this
11 particular motion. I had spoke -- I talked with Carol Crowe,
12 who was the CBI agent who may be the one that tests the kit
13 for Barbara Burger, they are trying to decide what kind of
14 resources they have. She told me yesterday, as per policy of
15 CBI, they will not be testing the test on Marty Grisham
16 insofar as he was a gunshot victim. They would expect it, but
17 who knows. They will be testing the kit as to Barbara Burger.
18 Obviously, I'm going to have to get that done ASAP, but I just
19 wanted to put the defense on notice that they are not going to
20 be doing the one on Marty Grisham. If they wanted to arrange
21 for their own testing of that, that's fine, but CBI will not
22 be doing that as per their policy which is annoying to us as
23 policy, but that's their policy.

24 THE COURT: Well, probably annoying to the defense
25 as well. All right.

1 What motion did the parties want to take up next?

2 MR. KELLNER: Judge, we can proceed with the motions
3 to suppress statements.

4 THE COURT: All right. Do you want to take them in
5 numerical order?

6 MR. KELLNER: I think that's a good idea, Judge.

7 THE COURT: Does that make sense to the defense?

8 MS. RING: Yes.

9 THE COURT: The record should reflect that I have
10 received from the prosecution a response to the motion to
11 suppress statements, one, which had as attachments,
12 Attachment A, the written *Miranda* advisement form;
13 Attachment B, an audio recording of the interview with
14 detectives on November 3rd, 1994 given by the Defendant; and
15 then an Attachment C, a written transcript of the Defendant's
16 interview on November 3rd, 1994.

17 I had reviewed all of those documents and recordings
18 prior to the motions hearing to date in anticipation that they
19 would be verified as true and accurate for purposes of this
20 hearing.

21 I'm assuming, Ms. Ring, on behalf of the Defendant,
22 that procedure is okay with you?

23 MS. RING: Absolutely.

24 THE COURT: Let me point out one thing. In the
25 recordings that I got for this Exhibit 1, Exhibit --

1 Attachment B, the recording does not -- the recordings that I
2 received do not contain the full verbiage that's contained in
3 the transcript. In other words, the transcript has additional
4 questions and answers that begin on page 79 of the transcript
5 and go all the way into page 85. So on page 79 of that
6 transcript, tape 3, side 1, ends after the paragraph that
7 starts, And Tuesday night Marty Grisham, a guy whose checks
8 you stole..., that paragraph is on tape 3, side 1, and then it
9 ends. And then tape 3, side 2, doesn't begin until the
10 transcript picks up at page 85, where there's a notation in
11 brackets, "End of side 5." So I don't have the recording of
12 the interview from that section on page 79 through most of
13 page 85. I have reviewed the transcript, but I didn't get the
14 actual recording.

15 I don't think that prevents us from going forward.
16 I just want you to know what I had and what I didn't have.

17 MR. BRACKLEY: Your Honor, I'll look into that
18 today. Our sort of issue is that we just made copy after copy
19 after copy so that we can make attachments, and I don't listen
20 to the actual attachment versus the other copies. And I --
21 I -- thin line between bad decision and I should have done it,
22 of course, but --

23 THE COURT: Well --

24 MR. BRACKLEY: -- I apologize for that.

25 THE COURT: -- I just --

1 MR. BRACKLEY: I just imagine it's there because of
2 the transcript. We'll get it.

3 THE COURT: And I'll be happy to listen to it once
4 the recording is made available.

5 All right. With respect to the motion to suppress
6 statements 1, do you want to call your first witness,
7 Mr. Kellner?

8 MR. BRACKLEY: Your Honor, can I step out and call
9 CBI so no one shows up here at 1:30?

10 THE COURT: That's fine.

11 MR. KELLNER: Your Honor, the People call Detective
12 Weiler.

13 THE COURT: Would you step forward, please, sir.

14 **CURT WEILER,**

15 a witness herein, having been first duly sworn, was examined
16 and testified on his oath as follows:

17 THE COURT: Please have a seat.

18 Go ahead, Mr. Kellner.

19 MR. KELLNER: Thank you, Judge.

20 **DIRECT EXAMINATION**

21 **BY MR. KELLNER:**

22 Q. Good morning, Detective. Can you please state your
23 name and spell your last name for us.

24 A. Curt Weiler, last name is W-e-i-l-e-r.

25 Q. And, Detective Weiler, what do you do for a living?

1 A. I work at the Boulder Police Department.

2 Q. How long have you worked for the Boulder Police
3 Department?

4 A. This is year 30.

5 Q. When did you start working for the Boulder Police
6 Department?

7 A. 1983.

8 Q. And were you employed by the Boulder Police
9 Department then in November of 1994?

10 A. That's correct.

11 Q. What unit were you assigned to in November of 1994?

12 A. I was a narcotics investigator.

13 Q. And although you were a narcotics investigator, were
14 you also assigned on November 3rd, 1994 to locate Michael
15 Clark?

16 A. Yes.

17 Q. Okay. And what was the purpose of trying to locate
18 Michael Clark on November 3rd?

19 A. He was a person of interest in a homicide
20 investigation, and we also had probable cause at the time to
21 arrest him for a check issue.

22 Q. When you say you had probable cause, did you have an
23 arrest warrant for Michael Clark?

24 A. I think that the arrest warrant was completed later
25 that same day, but in talking to the detective who was doing

1 the forgery investigation, he let us know that morning at our
2 morning briefing that he felt that there was probable cause to
3 move forward at the time and he was going to complete the
4 warrant that day. I'm not sure when he completed the
5 affidavit.

6 Q. So November 3rd, 1994, you are a narcotics
7 investigator. You are trying to locate him. Where did you
8 try to locate Michael Clark?

9 A. We were looking at previous residences. Um, we were
10 able to locate some information on some possible vehicles he
11 might be driving, and that information was shared with all of
12 our patrol officers. And -- and one of our patrol officers
13 actually found one of those cars that was -- I believe it was
14 a '67 Ford Mustang, and that was our big lead that day.

15 Q. Once you had that location of the Mustang, what did
16 you do?

17 A. We set up surveillance to watch the car and
18 hopefully contact Mr. Clark.

19 Q. Did you ultimately then make contact with Mr. Clark?

20 A. That's correct.

21 Q. Tell the judge about your initial encounter, when
22 you approached Michael Clark the first time.

23 A. Um, we set up a surveillance van next to his
24 Mustang, and I was in that van. We had a couple other
25 narcotics detectives that were in a support vehicle a little

1 further away, but I had, um, a visual on a staircase where we
2 thought that the apartment was where he might be. And then
3 actually we were parked right next to the driver's side of the
4 Mustang, so we knew whoever would come out to the car, I would
5 have a chance to both look at the person and whoever opened
6 the locked car would lead us to believe that was Mr. Clark.

7 Q. And did you ultimately identify and contact
8 Mr. Clark?

9 A. That's correct.

10 Q. Okay. When you approached him as a narcotics
11 investigator, what were you wearing?

12 A. Street clothes. I was not in uniform. So, yeah,
13 just plain clothes, I guess, I would refer to it as.

14 Q. I assume you carry a weapon as well, though?

15 A. That's correct.

16 Q. And is that concealed?

17 A. Yes.

18 Q. When you approached Michael Clark for the first
19 time, did you identify yourself?

20 A. That's correct. It was a very quick contact, just
21 as he was trying to open the door, I slid open the van door
22 and jumped out and pushed him up against his car and told him
23 Boulder police and that he was under arrest, not allowing him
24 to turn around -- around. And the reason for that concern was
25 that previous to our surveillance, um, Corey Weinheimer had

1 talked to Sergeant Wire of the marine recruiting station and
2 shared information with us that Mr. Clark had a 9-millimeter
3 handgun in his possession a few days prior to that.

4 Q. So the purpose of exactly then for pushing him up
5 against the car was to what?

6 A. Not allow him to move, not allow him to make any
7 motion to -- and to keep him there until the other support
8 people were there to help me put him in cuffs.

9 Q. And you checked him for weapons there as we know?

10 A. Yes, that was then.

11 Q. All right. So when you initially then approached
12 him, you identified yourself. You put him in cuffs. What did
13 you do next?

14 A. Um, I started a conversation with him because I -- I
15 knew our ultimate goal was to be able to have a conversation
16 with him in regards to not only the check case, but our -- to
17 further our investigation into the homicide of Mr. Grisham.

18 Q. Was this inside his apartment or the place where he
19 was staying or was this outside still?

20 A. We started outside right at the car. And, um,
21 seeing it was November 3rd and I believe that it was a cold,
22 snowy day that day and, um -- I asked Michael if he would be
23 more comfortable talking inside and he said he was. So, um,
24 we went to the apartment and we entered, and at that point he
25 was very cooperative with us. So we were able to unhandcuff

1 him and -- and I sat at the kitchen --

2 Q. I'm sorry. You were able to un --

3 A. Unhandcuff him once he got into the apartment. Once
4 we felt secure that, um, we had control of him.

5 Q. And how many officers are present at this time?

6 A. Myself and two others, Rich Denig and Pat Wyton.

7 Q. Now before you asked him any questions, did you
8 advise him of his *Miranda* rights?

9 A. That's correct, um, I did. And I actually completed
10 three documents while we were in the apartment. The first was
11 a written advisement of rights form completed that day, read
12 him his rights, um, I signed, Detective Denig signed off on
13 that and so did Mr. Clark. And then following that we did two
14 consent to search pieces of paperwork for -- we asked to
15 search the common areas in the apartment where Mr. Clark had,
16 um, access and then also his vehicle.

17 MR. KELLNER: Your Honor, can I approach the
18 witness?

19 THE COURT: Yes.

20 Q. (By Mr. Kellner) I'm handing the witness People's
21 Exhibit 1 for identification. I have shown it to defense
22 counsel.

23 Detective, what is that?

24 A. That's a copy of the form that I filled out that day
25 in 1994.

1 Q. And that's the advisement of rights form you had
2 referred to?

3 A. That's correct.

4 Q. There's some handwriting on this document. Is that
5 your handwriting at the top?

6 A. Yes, it is.

7 Q. Okay. And there's also some signatures towards the
8 bottom. Whose signatures are those?

9 A. Um, myself, Detective Denig and Mr. Clark.

10 Q. And what specific right did you advise Mr. Clark of?

11 A. Just as the form states, um, that, um -- and I'm --
12 I read them that day as I read them all the time. You have
13 the right to remain silent, make no statement. If I choose to
14 make no statement, the interview will be ended immediately. I
15 understand that any statement made to me or made to law
16 enforcement officers can and will be used against me in court.
17 I understand that I have the right to consult with a lawyer of
18 my choice now or at any time during this questioning.

19 If I choose to speak to a lawyer, this interview
20 will be stopped until I am able to speak to that lawyer. And
21 then the last one is, I understand that if I cannot afford to
22 hire a lawyer, the Court will appoint a lawyer for me without
23 cost. If I choose to speak with a court-appointed lawyer,
24 this interview will be stopped until I am able to speak with a
25 lawyer.

1 Q. Did Mr. Clark indicate that he understood the rights
2 as you explained them to him?

3 A. Yeah. There's a series of three questions with yes
4 or no check marks, and the first one is, Do you understand
5 each of the rights -- above rights and, yes, is checked. Do
6 you understand that any of the above-mentioned rights can be
7 exercised now or at any time during the interview? That was
8 also checked. And then the last question is, Understanding
9 the above rights, do you choose to voluntarily waive your
10 rights and make a statement or answer questions? And
11 that's -- that was also checked yes.

12 Q. And after checking those three boxes, he
13 subsequently signed this form as well?

14 A. That's correct.

15 MR. KELLNER: Judge, I would ask to admit People's
16 Exhibit 1.

17 THE COURT: Any objection or voir dire?

18 MS. MILFELD: No objection.

19 THE COURT: One will be admitted.

20 (People's Exhibit 1 was admitted into evidence by
21 agreement of the parties.)

22 Q. (By Mr. Kellner) So he just agreed to waive his
23 rights and speak to you. Did you begin --

24 THE COURT: Mr. Kellner, can you verify for me as an
25 officer of the Court that Exhibit 1, that the detective has,

1 and has been admitted, is the same as attachment A to the
2 People's response to the Defendant's motion to suppress
3 statement 1?

4 MR. KELLNER: I can, Judge.

5 THE COURT: Okay.

6 MR. KELLNER: It is the same.

7 THE COURT: Thanks. Okay.

8 Q. (By Mr. Kellner) I'm sorry, after he had agreed to
9 waive his rights to speak with you -- did you immediately
10 then begin questioning him at that residence?

11 A. No, I really wanted to use our time at the residence
12 just to really kind of lay the foundation for a more in-depth
13 interview back at the police department.

14 Q. What do you mean by lay a foundation?

15 A. Um, can you repeat the question?

16 Q. Sure. You said just now that you wanted to use that
17 time at the apartment to sort of lay a foundation for more
18 in-depth questioning. What did you mean by lay a foundation?

19 A. I wanted to build a rapport with Mr. Clark and let
20 him know that we were there for the check case, but there were
21 other things that we wanted to talk to him, and that there
22 would be other detectives that would also want to talk to him
23 that weren't with us in the apartment. And to facilitate us
24 all being together at the same time, um , the plan was to go
25 back to the police department and do our interview there.

1 Q. Were you also concerned that in the time you had
2 begun your surveillance, that perhaps new information had come
3 to light?

4 A. That's correct. Um, being a narcotics officer, um,
5 detective at the time, I knew that there were several other
6 detectives that were working different portions of this
7 investigation. And in our time out during this surveillance I
8 was not in contact with those detectives to know what new
9 information they might have uncovered that might have helped
10 us with our interview. So I wanted to bring him back --
11 Mr. Clark back to the department and have everybody meet
12 together to get up to, um -- up to that moment's information
13 to help us with the interview at that time.

14 Q. And according to People's Exhibit 1, the advisement
15 of rights, you began advising him of his rights at 2:48 p.m.?

16 A. That's right.

17 Q. Okay. Once you completed the search of the
18 residence, where did you take Mr. Clark?

19 A. He was, um, I'm sure, again secured with handcuffs
20 and then transported to the police department by Detective
21 Denig and -- D-e-n-i-g -- and Wyton.

22 Q. And then did you also go to the police department as
23 well?

24 A. That's correct.

25 Q. And once you arrived at the police department, did

1 you take custody of Mr. Clark again?

2 A. I'm sure he was, as our normal practice at the time,
3 um, I think put in our interview room. And then at that point
4 the detectives that were involved in the investigation back at
5 the police department and I met. And so at that point
6 Detectives Trujillo, Weinheimer and I, after we were all
7 briefed and ready to go, then we started our interview a
8 little bit later.

9 Q. Can you describe the interview room for the judge,
10 please.

11 A. I think it's 8-by-13. It's the same interview room
12 now that it was then. It's inside the detective bureau.
13 There's one door inside. There's a small table and some
14 chairs.

15 Q. Once you went into the interview room to begin
16 questioning Mr. Clark, um, was he still cuffed at that time?

17 A. Probably until he got into the room and then at that
18 point he was uncuffed. That's our practice. Once he's been
19 in the room, he's already been searched. We know that he
20 doesn't have any weapons or anything else on him. Then we
21 would allow him to sit in the room not restrained, but we
22 would have an officer outside the door and the door is usually
23 kept open until we start the interview.

24 Q. And so you just testified that in addition to
25 yourself, Detective Sergeant Trujillo and now Commander Corey

1 Weinheimer, then I believe just the detective -- they were in
2 the interview room as well?

3 A. That's correct.

4 Q. So there's three detectives and Mr. Clark?

5 A. Right.

6 Q. Were all of you seated around the table?

7 A. That's correct.

8 Q. And do you recall what Detective Trujillo and
9 Detective Weinheimer were wearing?

10 A. I do not, but I know they weren't in uniform. So
11 I'm sure Tom was probably in a shirt and a tie, and I would
12 assume the same for Corey Weinheimer.

13 Q. Now why did you actually have all three of you in
14 the interview room at one time?

15 A. I think part of it was that I had started to develop
16 a rapport with Mr. Clark and, um, so I knew some of the
17 information. Detective Trujillo was the case agent in it. He
18 was probably the one who was most knowledgeable of all aspects
19 of the investigation. And Detective Weinheimer, the -- was
20 working fraud and forgery cases at that time, and I think that
21 he was in for that piece, too.

22 So we each had different pieces. And this whole
23 investigation is very fluid in the first few days, a lot of
24 things are happening. And even though we would brief
25 frequently during those first few days of investigation, it

1 was good to have those people there to have the best ability
2 to ask the right questions.

3 Q. Back in November of 1994, did you have closed
4 circuit televisions that would broadcast what was happening in
5 the interview room into another area of the detective's office
6 space?

7 A. Not at the time; we do now.

8 Q. Is there kind of two-way glass in the interview
9 room?

10 A. There is not.

11 Q. So safe to say unless you were in the interview
12 room, you wouldn't really know what was happening?

13 A. Right. That's why I think that we went a little bit
14 heavier on people being in there, because we knew that this
15 was probably our single chance to have that interview.

16 Q. But you mentioned that Detective Trujillo and
17 Detective Weinheimer, they were detectives, so they were in
18 plain clothes. Would they have also had weapons, side arms as
19 well?

20 A. Yes.

21 Q. And at any point during your interview with
22 Mr. Clark, um, did any of you pull your weapons out?

23 A. No.

24 Q. Now before you began questioning Mr. Clark at the
25 police department, did you again refer back to the advisement

1 of rights?

2 A. Right. I wanted to start the record of the
3 interview to really acknowledge kind of the groundwork that we
4 did out of the apartment, so that's why I took some time to
5 explain that, yes, you know, we completed an advisement of
6 rights and this is a continuation of that. Now we were going
7 to ask you some questions, and told him that he was being
8 recorded. And that was really just to protect everybody so we
9 would have a record of what was said by everybody.

10 Q. Did you again inform Mr. Clark that he could not
11 answer your questions if he were so inclined?

12 A. I think that I went to great lengths to explain
13 that, because what I wanted to do is -- even if they were
14 pieces that he was uncomfortable with answering the question
15 or a question, I did not want him to feel that it was about
16 all or nothing. You know, I wanted to keep that door open to
17 try to get whatever information that we could out of that
18 interview, so we spent a long time talking about that.

19 Q. What time did you start this interview?

20 A. A little bit after 4:00.

21 Q. And did you advise Mr. Clark that if he wanted to
22 take a break, he could request to have a break?

23 A. That's correct, pretty much right at the front end.

24 Q. Did you take a break at some point during this
25 interview?

1 A. We actually went for about two hours, so I think a
2 little bit after 6:00 we took a break, and that break actually
3 lasted about an hour.

4 Q. Do you know what Mr. Clark did during that break?

5 A. Um, I'm sure we let him use the restroom, you know,
6 get up, stretch a little bit. And then at that time, too, the
7 detectives would get back together, strategize again for what
8 was going to come next based on what we'd heard so far in the
9 interview. And then get to check on the investigation that
10 was occurring outside of that room, see if there was nothing
11 else that anybody could help us with.

12 Q. And ultimately what time did you conclude your
13 interview?

14 A. About 8:00. We came back in session from about 7:00
15 to 8:00.

16 Q. Detective Weiler, you said you were trying to build
17 a rapport with Mr. Clark. Would you describe for the judge
18 your overall demeanor during this interview.

19 A. I mean, it was conversational throughout. There
20 were a few times where I would push Mr. Clark for answers and
21 so would the other detectives. Um, but I don't think it was
22 done in any other way that, you know -- our intent was not to
23 stop the conversation, our intent was to keep the conversation
24 going and to get whatever information we could during that
25 meeting.

1 Q. Throughout this interview did you make any threats
2 or promises to Mr. Clark?

3 A. I did not.

4 Q. And did Mr. Clark ask you questions as well?

5 A. Um, yeah. There was information that went back and
6 forth. And I told Mr. Clark, too, that the piece of
7 information that we were giving him were a -- was a part of
8 the investigation, but we were not going to share everything
9 with him. You know, so we were, you know, really trying to
10 elicit his cooperation as much as we could, but we also let
11 him know that we weren't giving him everything that we had at
12 that time. And part of that was just kind of a, um -- an
13 interviewing tool to hopefully put maybe some doubt in his
14 mind for -- in regards to how much information that we had.

15 Q. At any point did Mr. Clark request an attorney or to
16 stop the interview or decline answering your questions?

17 A. Never.

18 Q. Now the person that I have been calling Mr. Clark --
19 I know it was 17-odd years ago, you spoke to him in the
20 interview room, but do you recognize him in court today?

21 A. I do.

22 Q. And can you identify him by some clothing that he is
23 wearing?

24 A. Sitting at the defense table, gray pants, tennis
25 shoes and brown shirt with stripes.

1 MR. KELLNER: May I have a moment, Judge?

2 THE COURT: The record will reflect identification
3 of the Defendant.

4 MR. KELLNER: Thank you.

5 Q. (By Mr. Kellner) You mentioned that the interview
6 was recorded. Have you had an opportunity to listen to the
7 recording of that interview?

8 A. Yes, I have.

9 MR. KELLNER: May I approach, Judge?

10 THE COURT: Yes.

11 Q. (By Mr. Kellner) I'm going to approach with two
12 exhibits. Detective, can you take a look at People's
13 Exhibit 2, please. What is that?

14 A. Um, a CD or DVD. It's actually a copy of the
15 interview that I listened to this morning in the DA's office.

16 Q. Um, Detective, did you actually review that CD prior
17 to coming into court today?

18 A. Yes, I listened to it in its entirety a few times
19 and -- and the information that's the same.

20 Q. And did you initial that CD as well?

21 A. And dated it today.

22 Q. Okay. Is it a fair and accurate depiction of that
23 interview you had with Michael Clark as well as Detective
24 Sergeant Trujillo and Detective Weinheimer?

25 A. That's correct.

1 Q. Back in 1994?

2 A. That's correct.

3 MR. KELLNER: Judge, I would ask to admit People's
4 Exhibit 2.

5 THE COURT: Any objection or voir dire?

6 MS. MILFELD: No objection, Judge.

7 THE COURT: Two will be admitted.

8 (People's Exhibit 2 was admitted into evidence by
9 agreement of the parties.)

10 Q. (By Mr. Kellner) Detective, please turn to People's
11 Exhibit 3. Do you recognize that document?

12 A. Yes, I do.

13 Q. And how do you recognize it?

14 A. Um, it's a similar copy to one that I've been
15 reading for the last week or two to refresh myself on this
16 case.

17 Q. Can you just flip to the end page and tell us how
18 many pages there are in there?

19 A. A lot, um, 88.

20 Q. Eighty-eight pages. Is that People's Exhibit 3,
21 that document, is that a fair and accurate transcript of the
22 recording, the interview with Michael Clark on November 3rd,
23 1994?

24 A. Yes, it is.

25 MR. KELLNER: Judge, I would ask to admit People's

1 Exhibit 2 and 3 and have them -- actually use them in lieu of
2 B and C, because I, frankly, can't vouch for --

3 THE COURT: Pages 79 to 85 of the transcript?

4 MR. KELLNER: Yes, sir.

5 THE COURT: Okay. Exhibit 2 will be admitted. Any
6 objection to 3?

7 MS. MILFELD: No objection.

8 THE COURT: Exhibit 3 will be admitted and they will
9 be received as part of the record to be considered in lieu of
10 Attachment B and Attachment C.

11 Anything else?

12 (People's Exhibits 2 and 3 were admitted into
13 evidence by agreement of the parties.)

14 MR. KELLNER: No further questions.

15 THE COURT: Cross-examination?

16 MS. MILFELD: Judge, perhaps we could take a break
17 since it's 10:30.

18 THE COURT: Why?

19 MS. MILFELD: Because I really need to use the
20 restroom.

21 THE COURT: I'm sorry, I didn't --

22 MS. MILFELD: Put me on the spot.

23 THE COURT: I'm sorry, I didn't mean to put you on
24 the spot. We'll take a recess. Why don't we recess until
25 10:45. And I'm going to take Exhibit 2 and compare it to

1 Exhibit 3 over the break. So if you would give me both 2 and
2 3, please, Detective. We'll be in recess until 10:45.

3 (Whereupon, the morning recess was taken.)

4 THE COURT: All right. We are back on the record in
5 12 CR 222. The Defendant and counsel are present.

6 Detective, I'll remind you, you are still under
7 oath.

8 Cross-examination, Ms. Milfeld.

9 **CROSS-EXAMINATION**

10 **BY MS. MILFELD:**

11 Q. Detective Weiler, you talked about how you located
12 Mr. Clark through the Ford Mustang?

13 A. Correct.

14 Q. At the time you contacted the DMV to see if there
15 were any cars registered to him?

16 A. Right.

17 Q. When the DMV contacted you, they said we only found
18 one car and that was a 1967 red Ford Mustang?

19 A. Um, I believe that they gave me information on two
20 and, um -- that's what I recall.

21 Q. The car that you believed that he was driving at the
22 time was a 1967 Ford red Mustang, so that's the car that you
23 were really looking for to --

24 MR. KELLNER: Objection, Your Honor, object to the
25 relevance as to this line of questioning related to the

1 suppression of the statement.

2 THE COURT: Why is it relevant?

3 MS. MILFELD: I'll move on, Judge.

4 THE COURT: Okay. The objection is sustained.

5 Q. (By Ms. Milfeld) You talked about how when you went
6 to the Gunbarrel residence that you were in a marked van, or
7 was it an unmarked van?

8 A. Not a marked van, it was one of our surveillance
9 vans for the narcotics unit. So it was just basically a van
10 with darkly tinted windows.

11 Q. Do you remember at the time who was with you in the
12 van?

13 A. I was by myself.

14 Q. When did the other officers arrive at the area?

15 A. We deployed as a three-person team. The other two
16 detectives were in their vehicle a little further away. I was
17 in the van next to Mr. Clark's vehicle.

18 Q. And to clarify, the other two detectives that were
19 with you, the -- deployed at the same time were Detective
20 Matthews and Wyton?

21 A. Denig and Wyton.

22 Q. So Matthews was not there at all at the time?

23 A. Not that I'm aware of. He may have been, but he
24 didn't play any role.

25 Q. Where were Denig and Matthews in relation to your

1 van?

2 A. Um, all I know is that they were close.

3 Q. So you didn't actually know where they were
4 physically located?

5 A. I do not.

6 Q. You were the first person who saw someone come out
7 of the townhome?

8 A. Correct.

9 Q. You then relay that information to the other
10 detectives that were there?

11 A. And I remember this pretty distinctly because a
12 person came out of an upper level apartment. And the way
13 those apartments were set up, there was a breezeway in
14 between, so there was open sky behind, so I could look through
15 and -- and see his silhouette. And just based by some
16 physical descriptors, I told him, I think this is Clark coming
17 down the stairs.

18 Q. You told Mr. Kellner earlier that you were parked
19 next to the Mustang?

20 A. Yeah, on the driver's side.

21 Q. Where were you parked in relation to the townhome
22 itself?

23 A. I was lined up right to look up the central
24 staircase.

25 Q. You said that after you saw who you believed to be

1 Mr. Clark come out, that you then rushed towards him as he
2 opened the door?

3 A. Not correct. Um, what I said is I was probably
4 about 90 percent sure it was Mr. Clark when I saw him, but I
5 was about 95 percent sure when he went to the door and started
6 opening it with a key.

7 Q. When he opened the car door, you then rushed towards
8 him?

9 A. Um, like I said, I was parked right next to it. I
10 slid open the sliding glass (sic) door and I was 2' away from
11 him, and at that point I just pushed him up against his car.

12 Q. Could you describe how you pushed him?

13 A. Quickly.

14 Q. With both hands?

15 A. With authority. No, one hand and my shoulder
16 because I had a gun in my other hand.

17 Q. And the reason why you did that is because you had
18 received information that Mr. Clark might be in possession of
19 a handgun?

20 A. Correct.

21 Q. So you were concerned at that time that he could
22 have been armed?

23 A. Right.

24 Q. Which is why you pushed him up against the car?

25 A. Right.

1 Q. So you wanted to make sure that you would control
2 the situation?

3 A. Right.

4 Q. How long did you hold him against the car before he
5 was actually handcuffed?

6 A. Um, I'd say it was probably -- well, I guess I don't
7 know. It was a short period of time, because what our plan
8 was when we were set up there was that I wanted to give my
9 support team some information when I first thought it was
10 Mr. Clark. And then as he was at the door opening it, I knew
11 I only had a very short period of time to catch him before he
12 opened the door and I wanted to pin him up against the car.
13 So the other detectives were there within seconds.

14 Q. So after you pushed him against the car, Detective
15 Denig and -- Denig and Wyton arrive there extremely quickly?

16 A. Right.

17 Q. Within seconds they were there right next to you?

18 A. Right.

19 Q. At that point did either of the detectives put their
20 hands on Mr. Clark?

21 A. I would assume they did, because I was not in a
22 position to cuff Mr. Clark with a gun in my hand.

23 Q. So one of two detectives cuffed him, you just don't
24 remember which one?

25 A. Right.

1 Q. You talked about how you identified yourself as a
2 police officer when you were --

3 A. Right.

4 Q. -- were there. And you also talked about how part
5 of the plan was that you would try to get his cooperation
6 early?

7 A. Right.

8 Q. You wanted to lay the foundation for a more formal
9 interview at the police department?

10 A. Correct.

11 Q. At the time you told him specifically that you would
12 be asking for his cooperation?

13 A. Right.

14 Q. Throughout your interview with him, it would be fair
15 to say that Mr. Clark was cooperative?

16 A. Right.

17 Q. He was respectful?

18 A. Yes.

19 Q. He was polite?

20 A. Yes.

21 Q. When you pinned him up against the car, he didn't
22 fight back?

23 A. Correct.

24 Q. He didn't struggle with you?

25 A. Right.

1 Q. When one of the detectives actually handcuffed him,
2 he put his arms immediately behind his back?

3 A. Um, I don't remember specifically, but I know that
4 there was no struggle. There was no further confrontation.
5 It went smoothly.

6 Q. And part of him being cooperative was he never
7 raised his voice when you talked to him?

8 A. Correct.

9 Q. He never yelled at you?

10 A. Correct.

11 Q. When you went inside of the townhome, how was he
12 escorted inside there?

13 A. Um, I'm sure we had people behind him and in front
14 of him going up the stairs. And then once we got into the
15 apartment and he was continuing to be cooperative, then we
16 were able to unhandcuff him, and that's when we sat at the
17 table.

18 Q. So all three of you were escorting him into the
19 townhome together?

20 A. Right.

21 Q. You said that you executed the written advisement at
22 the dining room table and that all of you were sitting down
23 around it. Do you remember the positioning of how you were
24 seated?

25 A. I do not.

1 Q. Do you remember at what point he was unhandcuffed?

2 A. Not specifically.

3 Q. But you do remember him being unhandcuffed at some
4 point?

5 A. Correct. Both because he was being cooperative
6 and -- my hope was that we would get his signature on the
7 forms.

8 Q. So you believe that the unhandcuffing happened
9 before he signed the *Miranda* waiver?

10 A. Absolutely.

11 Q. How was it determined that you would all sit at the
12 dining room table? Was that a plan or something that happened
13 spur of the moment?

14 A. When we opened the door and I saw the table, it
15 looked like a great place to both -- have him sit, which helps
16 us control him, and then gives us a place to actually fill out
17 the document and have a quick conversation.

18 Q. So you wanted to be in a position where if something
19 were to happen, that you could react quickly --

20 A. Right.

21 Q. -- right? That's what you mean by you wanted to be
22 in a place where you could control him?

23 A. And somebody being seated helps us control them.

24 Q. You talked about how you -- whenever you execute a
25 *Miranda* waiver, you always read it?

1 A. Right.

2 Q. Do you have an independent memory of actually
3 reading that to Mr. Clark?

4 A. I do not.

5 Q. That conversation that you had with him in the
6 townhome was not recorded?

7 A. Correct.

8 Q. The only conversation that was recorded was the one
9 that took place later at the police department?

10 A. Right.

11 Q. When you spoke to Mr. Clark in between the time when
12 you identified yourself and the time you sat down at the
13 dining room table, he didn't make any statements?

14 A. No.

15 Q. He didn't ask you any questions at that point?

16 A. No.

17 Q. You talked about how you were present when Mr. Clark
18 signed the written advisement. Did he give you any other
19 indication, other than his signature, that he understood the
20 rights?

21 A. I'm sure there was conversation. I don't remember
22 the specifics.

23 Q. So you don't remember if he, for example, nodded his
24 head or said out loud, Yes, I understand?

25 A. That's correct.

1 Q. When you read the form, did Mr. Clark ask you any
2 questions about the advisement?

3 A. Not that I recall.

4 Q. You don't recall him making any sort of comments
5 after you were reading the form?

6 A. Hm-hmm.

7 Q. Besides you reading the *Miranda* advisement, or what
8 you thought that you had read, you never at any point told him
9 outside of that time that he didn't have to talk to you?

10 A. I guess that was part of the conversation in -- in
11 providing the advisement, so it was there so there would not
12 be a reason to repeat it.

13 Q. But you didn't, for example, tell him at any other
14 time throughout your contact that he didn't have to answer
15 your questions?

16 A. When we got to the police department, that's when I
17 went -- when we were on the record and when we were doing the
18 recorded conversation later. That's when I went over some of
19 those things with him again to have that in the recording.

20 Q. To be clear, when you were at the police department
21 with him -- we are going to jump forward -- you didn't
22 actually re-read the advisement?

23 A. I did not.

24 Q. You just said to Mr. Clark, we went over this
25 before; is that correct?

1 A. Maybe words somewhat similar to that, but I did -- I
2 did not re-read it.

3 Q. Going back to when you were at the townhome, you
4 also went over two consent to search forms with him?

5 A. Correct.

6 Q. When you went over those forms with him, do you
7 remember if you read those to him or you just handed them to
8 him and let him read them?

9 A. I read them to him.

10 Q. Do you remember actually reading them to him, or
11 that was your typical practice?

12 A. That was my typical practice.

13 Q. So you don't have any sort of independent memory
14 that you read that to him?

15 A. No, but based on this type of case and the
16 importance of it, I would not have done anything other than
17 use the forms as a guide to make sure I covered all the bases.

18 Q. When you went over the consent to search forms with
19 him, he didn't ask you any questions?

20 A. Did not.

21 Q. He didn't make any statements?

22 A. Did not.

23 Q. You actually performed the search of the apartment?

24 MR. KELLNER: Objection, Your Honor. This is
25 outside the scope of the motion as well. The issues regarding

1 consent to search and the search of the apartment were not
2 raised by the defense.

3 THE COURT: Why is this relevant?

4 MS. MILFELD: Judge, it's unclear whether or not --
5 where Mr. Clark, one, was when they conducted the search,
6 which is the questions I was going to ask him.

7 THE COURT: Okay. I'll overrule the objection.

8 Q. (By Ms. Milfeld) When you conducted the search of
9 the apartment, where was Mr. Clark?

10 A. In the apartment.

11 Q. Was he still at the dining room table?

12 A. I would assume that's where we kept him. And as for
13 who did the search, I don't remember specifically, but I'm
14 sure we would have kept one or two people with him and whoever
15 was left probably did the search.

16 Q. So --

17 A. But I don't have an independent recollection of
18 that.

19 Q. So you don't have any memory of where Mr. Clark was
20 at that time --

21 A. Um, I --

22 Q. -- during the search of the apartment?

23 A. I do not.

24 Q. You don't know how many officers or detectives were
25 with him?

1 A. My recollection is that it was myself, Denig and
2 Wyton. Sergeant Matthews may have been there. I do not have
3 a specific recollection of that.

4 Q. That search was performed, though, while Mr. Clark
5 was in the townhome?

6 A. That's correct.

7 Q. When you performed the search of the car, do you
8 remember where Mr. Clark was?

9 A. I do not.

10 Q. He -- is your memory that he would have been in the
11 townhome at the time?

12 A. Um, at that point he may have been outside sitting
13 in Denig and Wyton's vehicle just because the car was outside.
14 So having a small group of officers, we might have moved as a
15 group outside to do that search and have him secured inside
16 the car --

17 Q. You don't remember --

18 A. -- our car.

19 Q. Excuse me. You don't remember Mr. Clark making any
20 statements during that time either?

21 A. No.

22 Q. You don't remember him making any response to the
23 fact that you were searching his townhome?

24 A. Other than the consent that he gave us that allowed
25 us to do both.

1 Q. So other than the consent, he didn't say anything?

2 A. That's my recollection.

3 Q. You talked about how you didn't actually take
4 Mr. Clark to the police department. At what time did you
5 arrive there?

6 A. The police department? I don't know specifically,
7 but I know it was after the search was completed at the
8 apartment we got Mr. Clark in the car, in the detective car,
9 to transport him, and the search of Mr. Clark's car. So then
10 I think at some point after that we all travelled to the
11 police department.

12 Q. And "we all" meaning you and the other two
13 detectives?

14 A. Right, and Mr. Clark.

15 Q. But you weren't with Mr. Clark physically in that
16 car?

17 A. I was not. I think that I was driving the van back
18 to the police department.

19 Q. You said that when you arrived at the police
20 department, Mr. Clark was already in the interview room?

21 A. Um, and, again, not a specific recollection, but
22 whenever we would bring somebody to the police department and
23 we were going to have them be someplace secure, that's where
24 we would normally leave them.

25 Q. But you don't have any memory of how Mr. Clark got

1 into the room?

2 A. No, because I really was not involved in the
3 transportation of Mr. Clark to the police department.

4 Q. You talked about how in the interview room the door
5 is usually open?

6 A. When we're using it as a room to basically stage
7 somebody, that way we could have somebody outside to make sure
8 that the person stays in the room and that nothing is going on
9 in the room that we should be aware of. When the door is
10 closed is when we are doing an interview or doing the
11 interview.

12 Q. So when you actually started the tape recorder, the
13 door was closed?

14 A. Um, yes, that would be our practice.

15 Q. How were you and the other two detectives seated in
16 relation to Mr. Clark?

17 A. I don't recall that. I'm sure I was at the table,
18 and I'm not sure if Trujillo or -- or Weinheimer was right
19 next to me or not. It's a small table. I don't think that we
20 all could have been around the table, so somebody might have
21 set back a -- just a little bit.

22 Q. How big is the room?

23 A. I think that it's like 8-by-13.

24 Q. So it's fairly small to have four people in there?

25 A. Um, well, it's 8-by-13. We were there for

1 three hours it seemed -- I think we were all focused on the
2 work that needed to happen, so we didn't really pay attention
3 to that.

4 Q. But it's a small room, 8-by-13 is a small room?

5 A. I have been in smaller; I have been in bigger.

6 Q. Fair enough. Your recollection was that Mr. Clark
7 was probably handcuffed?

8 A. Until he was in the room, until he was actually put
9 in the room. And then at that point, again, it would be our
10 standard practice to, um, allow that person to not be cuffed
11 in the room. And everything to that point is Mr. Clark has
12 been cooperative, we have been talking to him. We are still
13 trying to develop that relationship as much as we can in
14 regards to developing our conversation with him that we know
15 is going to come. So if he's cooperative, then we are
16 definitely going to take the cuffs off him. We've had people
17 who have been uncooperative in the room that we have not
18 uncuffed and that's not the case with Mr. Clark.

19 Q. So part of the strategy going into the interview was
20 that you wanted to build a rapport with Mr. Clark?

21 A. Correct.

22 Q. You wanted to -- for him to trust you?

23 A. I wanted to have a conversation with him, and
24 anything that I could do to help facilitate that was something
25 that I was going to do.

1 Q. You wanted him to open up to you during that
2 interview?

3 A. Correct.

4 Q. When -- before you went into the interview room, you
5 met with the other two detectives to talk about generally your
6 strategy going in?

7 A. And not only that, but what had been occurring in
8 regards to the investigation while I've been away from the
9 police department. So if there's any new news, um -- an
10 example of that was exactly, um, what, um, Corey Weinheimer,
11 when he sent us information that Sergeant Wire had seen
12 Mr. Clark with a gun before. That information was relayed to
13 us because they knew that we were there and they wanted us to
14 have that. So just like that little bit of information, we
15 wanted to make sure that we were as up-to-date as we could be
16 whatever the current, um, information we had in the timeline
17 of the investigation.

18 Q. You wanted to make sure all of you were prepared
19 going in?

20 A. Correct.

21 Q. You wanted to be on the same page with everyone
22 else?

23 A. Right.

24 Q. When you were questioning Mr. Clark, it would be
25 fair to say that at times you pushed him?

1 A. True.

2 Q. You wanted him to give you information about his
3 involvement in the murder?

4 A. I think my -- my goal during the whole investigation
5 was for him to tell us the truth.

6 Q. So in getting him to tell the truth, you wanted him
7 to tell about whether he was involved or not involved at all?

8 A. I wanted to get whatever information he was willing
9 to share with me.

10 Q. When you were questioning him, you started off by
11 asking him about the forging of the checks?

12 A. Right. We thought that was a -- a pretty good place
13 to start because at this particular point we were sure where
14 we were at and we knew that we had probable cause to make the
15 arrest.

16 Q. And he admitted to you right away that he was the
17 one that forged the checks?

18 A. Yes.

19 Q. There was no hesitation?

20 A. Right.

21 Q. Throughout the rest of the interview, after you
22 talked about the checks, the focus was questions surrounding
23 the homicide?

24 A. Right.

25 Q. For the next three-odd hours, you asked questions

1 about, for example, where he was the night of the murder?

2 A. Right.

3 Q. Whether or not he owned a gun?

4 A. Right.

5 Q. You also talked before how you asked targeted
6 questions. You asked questions specifically about any sort of
7 physical evidence that there was?

8 A. I guess I'm not following your question.

9 Q. That's okay. It was not a very articulate question.

10 Um, you asked him questions about his conversations
11 with Sergeant Wire?

12 A. Right.

13 Q. You asked him specific questions about him showing
14 the gun to Sergeant Wire?

15 A. Right.

16 Q. So you were asking him those questions in hopes that
17 he would give you information?

18 A. That's correct.

19 Q. And -- I'm sorry -- go ahead.

20 A. And -- and Corey Weinheimer is the one that probably
21 focused the most on those questions just because he was, um,
22 the one most knowledgeable because he had that conversation
23 with the sergeant. So -- I mean you said I asked those
24 questions, I don't know specifically if I did, but as a
25 group -- I mean that -- those -- that was part of our inquiry,

1 absolutely.

2 Q. And as a group you all took turns asking him
3 questions, right?

4 A. Yes.

5 Q. And you asked him questions about areas each of you
6 were very knowledgeable about?

7 A. Yes.

8 Q. You said going in that each of you had your own role
9 in the interview?

10 A. A little bit. And then we also had to be flexible
11 based on what Mr. Clark was giving back to us.

12 Q. And as you said before, your goal in this whole
13 interview was for him to get you to tell you the truth?

14 A. Was for me to get him to tell the truth.

15 Q. Did I say --

16 A. You asked if I was going to tell the truth, I think.

17 Q. Well, hopefully you would tell the truth as well.

18 A. I did.

19 Q. Okay. And in getting him to tell the truth, you
20 wanted him to tell you basically whether or not he was
21 involved in the murder?

22 A. Um, yes. Again, I wanted to get to the truth of the
23 matter as much as we could and whatever information he could
24 provide to help us get to that.

25 Q. And through your three hours of targeting questions,

1 he didn't ever confess to the murder?

2 A. Correct.

3 Q. He never admitted that he was involved in any way
4 with the murder?

5 A. Correct.

6 Q. In fact, he told you that he has no idea what
7 happened?

8 A. Correct.

9 Q. Going back to when you took this 50-minute break, do
10 you remember where Mr. Clark was during that time?

11 A. I'm sure just as we did with the recess before just
12 now, I think that people had to go to the bathroom. I think
13 people did that. And then he would be returned back to the
14 room and, again, door left open, somebody there to keep an eye
15 on him.

16 I don't remember specifically, um, where Trujillo
17 and Weinheimer and I met. I know that I had a conversation
18 with other detectives. I know that I had a conversation with
19 those detectives. I know that I had conversations with my
20 supervisor at the time to say this is where we -- this is
21 where we're at, what do you guys think? Are there any other
22 questions, you know, any other angles you want us to try to
23 pursue? So, really, it was again another chance to put our
24 heads together and then try to come back in and try one more
25 time.

1 Q. During the break, you don't remember if Mr. Clark
2 made any statements?

3 A. Um, I don't think there was anybody for him to make
4 a statement to.

5 Q. You believe that he was left alone in the room?

6 A. That would be my recollection, but, again, I was
7 there the entire time. I was aware and I know that we would
8 have had somebody there to make sure that we stayed there.

9 Q. Before you took the break Mr. Clark indicated that
10 he needed to use the restroom?

11 A. Right.

12 Q. Do you remember who took him to the bathroom?

13 A. Do not.

14 Q. Going back to the start of the interview with
15 Mr. Clark, was there any conversation that took place in the
16 interview room before it was turned on?

17 A. No.

18 Q. Mr. Clark didn't make any statements before then?

19 A. No.

20 Q. After the tape recorder was turned off, Mr. Clark
21 didn't make any statements after that?

22 A. No.

23 Q. Did you know about Mr. Clark's prior involvement
24 with police at this point?

25 A. Yes, I did.

1 Q. What was your understanding of that?

2 A. Um, there was an issue with a stolen motorcycle, and
3 I'm not sure how soon ahead, maybe a month or three weeks
4 ahead. And I knew of that because that's how we got the
5 booking photo that we used to help identify him. And then,
6 um, the other piece that I was aware of was just the check
7 component.

8 Q. Now your understanding was that Mr. Clark had only
9 been involved with the police that one prior time with the
10 motorcycle incident?

11 A. That's what I knew.

12 Q. And you knew that at the time Mr. Clark was 19?

13 A. Right.

14 Q. So he was young?

15 A. Yeah.

16 Q. And he -- because he only had one minimal -- one
17 involvement with the police and the motorcycle incident, he
18 had very minimal prior involvement with the police?

19 A. I would agree.

20 Q. And during the interview when you are talking to
21 him, he does indicate to you that he is scared?

22 A. Right.

23 Q. That he is scared about what's going on?

24 A. Right.

25 Q. He is really nervous because he has never taken part

1 in such an interview before?

2 A. Right.

3 MS. MILFELD: No further questions.

4 THE COURT: Do you know, Detective, was he
5 interviewed as part of that motorcycle-related incident?

6 THE WITNESS: I don't know that.

7 THE COURT: Okay. Redirect, Mr. Kellner?

8 MR. KELLNER: Thank you, Judge.

9 **REDIRECT EXAMINATION**

10 **BY MR. KELLNER:**

11 Q. Um, Detective, um, Ms. Milfeld asked you a question
12 about whether or not you pushed Mr. Clark during the
13 interview. I just want to clarify. You're not talking about
14 physical pushing, correct?

15 A. That's correct. I was verbally asking questions.

16 Q. At any point other than to transport Mr. Clark,
17 throughout the interview, um, or when you were present, did
18 somebody lay physical hands on him?

19 A. No, he was cooperative the whole time. There was
20 never a concern. And -- and I think that's part of -- we were
21 happy that was the case because it allowed us to talk to
22 Mr. Clark more.

23 MR. KELLNER: Thank you.

24 THE COURT: Recross?

25 MS. MILFELD: No, Judge.

1 THE COURT: All right. You can step down.

2 THE WITNESS: Thanks.

3 THE COURT: People's next witness.

4 MR. KELLNER: Your Honor, the People call Detective
5 Heidel.

6 THE COURT: Detective, would you step forward. I'll
7 remind you, sir, that you are still under oath.

8 THE WITNESS: Yes.

9 THE COURT: Go ahead, Mr. Kellner.

10 **DIRECT EXAMINATION**

11 **BY MR. KELLNER:**

12 Q. Detective Heidel, are you familiar with the arrest
13 of Michael Clark related to the motorcycle theft?

14 A. Yes.

15 Q. Can you tell the judge when that took place,
16 approximately?

17 A. Approximately in September of 1994, about three or
18 four weeks, I think, before the murder.

19 Q. And who was the officer involved with the arrest of
20 Michael Clark?

21 A. Now Sergeant Yamaguchi, at the time Officer
22 Yamaguchi, was out there that night as a patrol officer.

23 Q. Can you give the judge a brief background on the
24 arrest, the basis for that arrest?

25 A. Sure. Um, Officer Yamaguchi was on patrol that

1 night. I remember it was dark out and there was a motorcycle
2 that he tried to stop. The motorcycle ran from him. Um, once
3 he put his overhead lights on, it was a female on the back of
4 the motorcycle that turned out later to be, um, Ms. Grisham.
5 And, um, he dumped -- back behind what's now Marshall's, so
6 that would be 27th Street there, I believe, and then he took
7 off running. That's about when I pulled up. I may have been
8 involved with grabbing him and, um, bringing him back to --
9 to, um -- to Officer Yamaguchi.

10 Q. Have you read Officer Yamaguchi's reports based on
11 this arrest?

12 A. Yes, I have.

13 Q. Do you know whether or not, um, Mr. Clark was
14 questioned in relation to this theft of the motorcycle?

15 A. Yes, he was. He was questioned by Officer Yamaguchi
16 out at the jail that night.

17 MR. KELLNER: May I have a moment?

18 No further questions. Thanks.

19 THE COURT: At the jail, Detective, was he
20 mirandized by Officer Yamaguchi or someone else?

21 THE WITNESS: Well, I don't know if he was
22 mirandized, but he agreed to talk with Officer Yamaguchi. I'm
23 not -- I'm not -- I can't remember off the top of my head how
24 the beginning of the conversation took place.

25 THE COURT: Do you have any recollection as to

1 whether or not Mr. Clark was advised that he did not have to
2 speak with law enforcement?

3 THE WITNESS: I don't without referring to Officer
4 Yamaguchi's report. I believe that he was advised and he
5 waived his rights, but I don't know that for sure.

6 THE COURT: Okay. Cross-examination.

7 **CROSS-EXAMINATION**

8 **BY MS. RING:**

9 Q. Detective Heidel, you didn't do a report -- you
10 didn't author a report related to the investigation we're
11 talking about with the stolen motorcycle?

12 A. No, I did not. I was just a --

13 Q. Okay.

14 A. -- a support officer, I guess --

15 Q. Okay.

16 A. -- backup officer.

17 Q. Okay. And so it was Officer Yamaguchi who would
18 have done a report about the -- the arrest of -- and any
19 interview of Michael Clark?

20 A. That's correct.

21 Q. Okay. You do know as lead investigator of this
22 entire case that there isn't any information that indicates
23 that Michael Clark was arrested at any time prior to being
24 arrested by Officer Yamaguchi related to the motorcycle?

25 A. Related to the motorcycle? Do you mean any arrest

1 at all or --

2 Q. I mean any arrest at all.

3 A. Yes, I -- there is information.

4 Q. And what are the other arrests other than that?

5 A. A shoplifting.

6 Q. Okay.

7 A. And I -- I -- I don't believe there are police
8 reports, but they are -- they are either probation reports or
9 they are court reports referring to the arrest for
10 shoplifting --

11 Q. Okay.

12 A. -- yeah.

13 Q. I don't remember the discovery page, sorry. Okay.
14 And the shoplifting case you're talking about would have been
15 a relatively minor case in terms of either, not a felony level
16 theft?

17 A. No, I don't believe it was a felony.

18 Q. Okay. And what you recall from reading Officer
19 Yamaguchi's report from the arrest of Michael Clark in the
20 motorcycle incident is that Officer Yamaguchi did attempt to
21 interview Mr. Clark when he was at the jail?

22 A. That's correct.

23 Q. Okay. And you weren't present for that interview?

24 A. I was not.

25 MS. RING: Okay. Thank you.

1 THE COURT: Redirect, Mr. Kellner?

2 REDIRECT EXAMINATION

3 BY MR. KELLNER:

4 Q. Detective Heidel, if I showed you, um, Agent
5 Yamaguchi's report, would that help refresh your recollection
6 as to whether or not Mr. Clark was advised of his *Miranda*
7 rights prior to questioning by Officer Yamaguchi?

8 A. Yes, definitely.

9 MR. KELLNER: Judge, may I approach the witness?

10 THE COURT: Yes. Do you want to show Ms. Ring what
11 you are going to show to Detective Heidel?

12 Q. (By Mr. Kellner) I'm showing Detective Heidel the
13 electronic copy of Officer Yamaguchi's report.

14 THE COURT: I think that it's Heidel.

15 MR. KELLNER: Correct.

16 A. I'm actually -- I'm not sure this is actually
17 Officer Yamaguchi's report. I'm looking for his reference. I
18 see -- actually, I see where Officer Yamaguchi is talking with
19 him at the jail, but I'm having a hard time finding the exact
20 spot where he advised him of his rights.

21 MR. KELLNER: Your Honor, if I can approach the
22 witness and direct him to a specific paragraph?

23 THE COURT: Yeah.

24 Q. (By Mr. Kellner) Put your glasses on?

25 A. Yeah. Yes.

1 Q. Is your memory refreshed as to whether or not
2 Officer Yamaguchi read Mr. Clark his *Miranda* rights?

3 A. Yes. At about midnight that night at the Boulder
4 County Jail and he indicates that Mr. Clark waived his rights.

5 MR. KELLNER: Thank you. No further questions.

6 THE COURT: Okay. Any further cross-examination?

7 MS. RING: No, Judge.

8 THE COURT: All right. You can step down,
9 Detective.

10 Any further witnesses on behalf of the People?

11 MR. KELLNER: Yes, Your Honor. The People call
12 Detective Rich Denig.

13 **RICH DENIG,**

14 a witness herein, having been first duly sworn, was examined
15 and testified on his oath as follows:

16 THE COURT: Please have a seat.

17 Go ahead, Mr. Kellner.

18 **DIRECT EXAMINATION:**

19 **BY MR. KELLNER:**

20 Q. Detective Denig, will you please state your name and
21 spell your last name for the record.

22 A. It's Rich Denig, D-e-n-i-g.

23 Q. And I see you brought some papers in with you. Can
24 you make sure to turn them over and not refer to them --

25 A. Okay.

1 Q. -- unless you need to, of course.

2 Detective Denig, how are you employed?

3 A. I'm a police officer with the city of Boulder.

4 Q. How long have you been a police officer with the
5 city of Boulder?

6 A. Um, it's my 25th year.

7 Q. So you were employed by the Boulder Police
8 Department in November of 1994?

9 A. Yes, I was.

10 Q. And I think with Detective Weiler were you assigned
11 to try to locate Michael Clark?

12 A. Yes.

13 Q. On November 3rd, 1994?

14 A. Yes, I was.

15 Q. At the time on November 3rd, 1994, were you also
16 assigned to the narcotics unit?

17 A. Yes, I was.

18 Q. So how would you have been dressed when you were
19 trying to locate him on November 3rd?

20 A. We were just in plain clothes.

21 Q. Were you present when Detective Weiler advised
22 Mr. Clark of his *Miranda* rights?

23 A. Yes.

24 Q. And, in fact, you actually signed that document as
25 well?

1 A. I did co-sign it.

2 Q. Yes. And did you witness Mr. Clark acknowledge his
3 understanding of those rights and agree to speak to
4 detectives?

5 A. Yes.

6 Q. Did you also witness him sign that particular
7 advisement of rights as well?

8 A. Yes.

9 Q. Now you and Detective Weiler didn't question
10 Mr. Clark while, um, at the residence that he was staying at;
11 is that correct?

12 A. Um, at the -- at the point of arrest?

13 Q. Yes.

14 A. No.

15 Q. Did you, in fact, transport Mr. Clark to the Boulder
16 Police Department?

17 A. I did in -- myself and Detective Wyton did, yes,
18 from Gunbarrel.

19 Q. When you transported Mr. Clark to the Boulder Police
20 Department, how did you do that?

21 A. We were -- I was driving a plain unmarked car. I
22 don't recall exactly which car we had out that day, but they
23 were all cars that -- all narcotics cars.

24 Q. Would Mr. Clark have been, I'm assuming, handcuffed
25 at the time that he was transported to the police department?

1 A. Yes.

2 Q. And was there anyone else present with you when you
3 transported him to the police department?

4 A. Yes.

5 Q. Who was that?

6 A. Detective Pat Wyton.

7 Q. Now as you were driving Michael Clark to the police
8 department, did you ask him any questions?

9 A. No.

10 Q. And do you recall if he made any spontaneous
11 statements to you?

12 A. I don't recall any.

13 Q. Approximately how long is the drive from where you
14 arrested him back to the police department?

15 A. I would estimate about 10 minutes, maybe 15 at the
16 most.

17 Q. When you saw Detective Weiler advise Mr. Clark of
18 his rights, at any point did you see him make any sort of
19 threats or promises to Mr. Clark?

20 A. No, I did not.

21 Q. And while you were transporting Mr. Clark when he
22 was in your custody back to the police department, did you at
23 any point make any sort of threats or promises or statements
24 to him?

25 A. No.

1 MR. KELLNER: No questions, thank you.

2 THE COURT: All right. Cross-examination,

3 Ms. Milfeld?

4 **CROSS-EXAMINATION**

5 **BY MS. MILFELD:**

6 Q. When did you arrive at the address?

7 A. I got notified about 2:00 by Detective Weiler that

8 the patrol officer had located the vehicle. So we --

9 Detective Weiler and I went out there about 2:00.

10 Q. You two drove out in the same patrol car?

11 A. I don't recall if we were in the same car or not.

12 Q. Do you remember where you parked in relation to the

13 other -- Detective Weiler that was there?

14 A. Detective Weiler got in a position so you can -- he

15 could see the apartment where we thought Michael Clark might

16 be associated with. Detective Wyton arrived and we got in the

17 same vehicle, I believe, to keep an eye on the car.

18 Q. You remained in your patrol car?

19 A. Wasn't a patrol car.

20 Q. Or you remained --

21 A. Plain car.

22 Q. You remained in the plain car until Mr. Clark came

23 out of the townhome?

24 A. Yes.

25 Q. Who handcuffed Mr. Clark?

1 A. I do not recall.

2 Q. The first person that approached Mr. Clark was
3 Detective Weiler?

4 A. Yes.

5 Q. He was the one that pushed Mr. Clark against the
6 car?

7 A. I don't recall that he pushed him against the car,
8 but he made the contact at the time of the arrest, the initial
9 contact.

10 Q. How soon after when he made the initial contact did
11 you get to that point?

12 A. As he was exiting the apartment and heading toward
13 the car, as he got to his vehicle, we drove up to that point
14 so we could be right there because we knew that Detective
15 Weiler was going to be, obviously, first to make contact and
16 we wanted to be close by.

17 Q. So you put yourself closer to the red Mustang, you
18 drove close to it?

19 A. At the time that he came out?

20 Q. Yes.

21 A. Yes.

22 Q. After Detective Weiler made contact with Mr. Clark,
23 where were you in relation to Mr. Clark at that time?

24 A. I don't recall exactly where my positioning was.

25 Q. When Mr. Clark was taken inside of the townhome, do

1 you remember how you were positioned in relation to him?

2 A. I do not.

3 Q. Did you ever touch Mr. Clark from the time when
4 Detective Weiler made the initial contact to when he was
5 brought inside the house?

6 A. I probably had some contact because I searched his
7 backpack and his wallet at the time of the arrest he was
8 carrying. He was handcuffed at some point prior to going in
9 the apartment or once we were in the apartment. I don't
10 recall exactly the time of that.

11 Q. When?

12 A. I -- I couldn't tell you.

13 Q. I'm sorry?

14 A. I don't know if I unhandcuffed him or not.

15 Q. So you don't remember at what point he was
16 unhandcuffed inside the house?

17 A. No.

18 Q. But your belief was that he was unhandcuffed at some
19 point?

20 A. Yes.

21 Q. When you searched Mr. Clark's backpack, did you do
22 that in front of him?

23 A. I don't recall exactly where he was at the time.

24 Q. But you don't remember Mr. Clark making any
25 statements with regards to your search of his backpack?

1 A. He made -- he consent -- well, actually, the
2 backpack, um, and his wallet we searched incident to arrest.
3 The consent was later for the apartment.

4 Q. So you did that as soon as you got into the
5 townhome?

6 A. I don't recall if the backpack and his wallet were
7 checked at the car or the townhome.

8 Q. Throughout your entire contact with Mr. Clark, he
9 was cooperative?

10 A. As I recall, yes.

11 Q. So your memory is that he was polite during your
12 encounter with him?

13 A. I don't remember any actions by him otherwise, no.

14 Q. You don't remember that you had any problems with
15 him, though?

16 A. No.

17 Q. Because that would stick out in your memory?

18 A. Um, a long time ago, but probably, yes.

19 Q. From the time that you transported him from the
20 townhome to the police station, you said before that he didn't
21 make any statements?

22 A. No.

23 Q. You didn't make any small talk with him at that
24 time?

25 A. No, not that I recall.

1 Q. When you got to the police department, do you
2 remember where you took him?

3 A. I could not say for sure.

4 Q. You don't remember how he got into the interview
5 room?

6 A. We would have escorted him to the interview room.
7 Our police department was physically set up differently at
8 that time, so we would have escorted him to wherever we
9 were -- they wanted him taken until he responded.

10 Q. Besides you observing Detective Weiler go over the
11 *Miranda* advisement with him, he didn't go over that at any
12 other time in front of you?

13 A. He did just at the apartment.

14 Q. But he was just given that one *Miranda* advisement?

15 A. That -- that I was witness for.

16 MS. MILFELD: Judge, I have questions now relating
17 to the destruction of evidence motion in regards to the Carmex
18 container at this time. Before the Court ruled on it, we had
19 subpoenaed Detective Denig to ask him about the Carmex
20 container, the condition it was found. As Ms. Ring already
21 talked about before, the pictures that we have are blurry. I
22 mean we couldn't even tell when we initially got discovery
23 what it was. So I have about 5 to 10 minutes worth of
24 questions that I can ask now as opposed to trying to recall
25 him later.

1 THE COURT: Well --

2 MR. KELLNER: Judge, the pictures are the pictures.
3 They are all in discovery. They are all turned over.

4 THE COURT: Yeah. I mean is there some other basis
5 to believe that there was destruction of evidence?

6 MS. MILFELD: So, Judge, I had also filed the motion
7 for -- to suppress evidence based on probable cause, but the
8 Court ruled on it and that was the buccal swab motion.

9 THE COURT: Right.

10 MS. MILFELD: So that I think we have a right to
11 make a record under *People v. District Court* and ask him
12 questions surrounding that, because part of the issue is that
13 in the actual affidavit there's no information about how the
14 Carmex container relates to the actual crime.

15 THE COURT: It's related both in time of discovery
16 and proximity to the shooting of the victim and that was a
17 finding that I made when I denied your motion.

18 MS. MILFELD: But I think that the testimony that he
19 had provided the Court would provide clarity in the fact that
20 he found it at 8:00 the next morning. How there were other
21 officers and detectives that were present at the time, upwards
22 of 10 people. How they searched the entire area, they didn't
23 find it. And, also, I think that his testimony would be
24 important in providing the fact of where exactly it was
25 located underneath the stairwell, where that is in relation to

1 the apartment, where that is in relation to other areas in
2 that same complex.

3 MR. BRACKLEY: Judge, that's outside of the four
4 corners of the Detective Denig --

5 THE COURT: Affidavit.

6 MR. BRACKLEY: Officer Denig can make himself
7 available for the defense to interview, should he wish to do
8 that. But it's not proper to do it in the context of a
9 motion, which has already been --

10 THE COURT: I can't consider anything outside the
11 four corners of the affidavit, so the request to examine this
12 detective on that issue related to your motion to suppress is
13 going to be denied. And also as to the destruction of
14 evidence motion, I'm not following why that line of
15 questioning would be helpful to the Court.

16 MS. MILFELD: Well, I think that the Court, first of
17 all, should reconsider its ruling on the four corners.

18 THE COURT: Denied.

19 MS. MILFELD: And I guess now would be an
20 appropriate time for me to make a record, but the affidavit
21 and the warrant just discusses that Detective Denig found the
22 Carmex container underneath the lowest stair. That he found
23 it at 8:00 a.m. There's no information in the affidavit which
24 is required for probable cause to show how the Carmex
25 container was linked to the actual crime. There is no theory

1 put forward by any of the detectives or the prosecution in
2 their motion how the Carmex container was used.

3 THE COURT: We are not -- we are not switching gears
4 from litigating the motion to suppress statements, one, to a
5 request to reconsider the denial of your motion to suppress.
6 You want to file a motion to reconsider with your argument or
7 record therein, I'll take a look at it, but the fact of the
8 matter is I'm not taking it up right now. And to the extent
9 that you want to go outside of the direct examination and the
10 relevant testimony that pertains to the motion to suppress
11 statements, one, I'm going to sustain the objection.

12 MS. MILFELD: Well, Judge, at a later time I would
13 request that I could make a record pursuant --

14 THE COURT: You can submit a record in writing by
15 8:00 tomorrow morning and I'll take a look at it.

16 MS. MILFELD: No further questions.

17 THE COURT: Okay. On behalf of the People,
18 Mr. Kellner?

19 MR. KELLNER: Nothing further, Judge. Thank you.

20 THE COURT: Detective, you can step down.

21 THE WITNESS: Okay.

22 THE COURT: People have any further witnesses?

23 MR. KELLNER: No, Your Honor.

24 THE COURT: All right. Does the defense have any
25 evidence to present?

1 MS. MILFELD: Judge, at this time the defense is
2 going to call Detective Trujillo.

3 THE COURT: Okay. Detective, would you step
4 forward, please. Thank you, Ms. Ring.

5 Detective, I'll remind you, you are still under
6 oath.

7 THE WITNESS: Yes, sir.

8 **DIRECT EXAMINATION**

9 **BY MS. MILFELD:**

10 Q. So, Detective, you were not present for the actual
11 arrest of Mr. Clark?

12 A. No, I was not.

13 Q. The first time that you came into contact with him
14 was at the police department during the interview?

15 A. Yes.

16 Q. At the time, you have already talked about this
17 before, but you were the lead detective in the homicide
18 investigation?

19 A. Yes.

20 Q. As lead detective one of your jobs was to take part
21 in interviewing all of the main witnesses in the case?

22 A. To make sure -- to make sure they get interviewed.
23 I'm not -- I don't involve myself in doing every one of them,
24 no.

25 Q. Certainly you wanted to be involved in anyone who's

1 considered a suspect in the case?

2 A. Yes.

3 Q. And that's why you wanted to be present for the
4 interview of Mr. Clark?

5 A. Yes.

6 Q. Before the interview took place, you and the other
7 detectives met to talk about strategy during the interview?

8 A. I don't specifically remember that, but in practice
9 that's what we would do.

10 Q. So in practice before the interview of someone who
11 might be considered a suspect, you would meet to talk about
12 what to do during the interview?

13 A. Yes.

14 Q. And it would be your practice to talk about sort of
15 what role each of you would play in the interview?

16 A. Um, more focus on strategy, but, yes.

17 Q. So, specifically, maybe what kind of questions you
18 would ask?

19 A. Right.

20 Q. Who would be in charge of different topics in the
21 interview?

22 A. Yes.

23 Q. At the time you thought that Mr. Clark might be
24 involved in some way in the murder of Martin Grisham?

25 A. Yes.

1 Q. He was a suspect at that point?

2 A. Yes.

3 Q. The interview that took place was tape-recorded?

4 A. Yes, it was.

5 Q. And you already talked about before how it was
6 transcribed?

7 A. Yes.

8 Q. And you would agree with us that the transcript
9 gives us the most accurate information of what was said in the
10 interview?

11 A. The accurate -- transcript is accurate, yes.

12 Q. At what point did you arrive for the interview of
13 Mr. Clark?

14 A. I believe I was present for the whole thing, for --
15 for the start of the interview at the police department.

16 Q. Was he already in the interview room when you came
17 into the room?

18 A. Yes.

19 Q. Do you know if he was left alone for any period of
20 time?

21 A. I do not know that.

22 Q. You don't have any direct knowledge of any
23 statements that were made before you entered the room?

24 A. No, not to Mr. Clark.

25 Q. As soon as you entered the room -- let me back up.

1 How long after you entered the room did the tape
2 recorder get turned on?

3 A. I don't know. I mean that would have been -- in
4 practice he walks in, you get ready to start an interview, you
5 turn on the tape recorder, you announce your name, who's
6 present and date it and that stuff.

7 Q. Do you remember how the detectives were seated in
8 relation to Mr. Clark?

9 A. I do not.

10 Q. But you remember that the room was a standard
11 interview room?

12 A. It's the same interview room we have currently, yes.

13 Q. And it's windowless?

14 A. Yes.

15 Q. It only has one exit/entry point?

16 A. Correct.

17 Q. Was Mr. Clark handcuffed during the interview?

18 A. I don't believe so.

19 Q. You believe that he was unhandcuffed the entire
20 time?

21 A. Yes.

22 Q. Do you remember whether Mr. Clark was seated or
23 standing during the interview?

24 A. I know that he was seated. In fact, he was seated
25 in the chair that would face north with his back to the south

1 wall of the interview room.

2 Q. You don't remember him at any point getting up
3 during the interview besides -- besides going to the bathroom?

4 A. During the break, I don't.

5 Q. During the break do you remember who took him to the
6 bathroom?

7 A. I do not.

8 Q. You are not aware of any statements that Mr. Clark
9 made during that break?

10 A. No, if they weren't on tape. The tape was shut off.
11 I don't know about statements.

12 Q. So that 50-minute period between there, obviously,
13 wasn't tape-recorded?

14 A. Correct.

15 Q. How were you dressed that day?

16 A. Probably the same way I'm dressed today. Maybe not
17 a suit, but at least a suit jacket and/or, um, a shirt and
18 tie.

19 Q. So the way you are dressed today is --

20 A. Business.

21 Q. Business?

22 A. Yes.

23 Q. You weren't in uniform at the time?

24 A. No.

25 Q. Did you have your sidearm with you?

1 A. Yes.

2 Q. As the lead investigator at the time, you knew
3 Mr. Clark's background with regards to his involvement with
4 the police?

5 A. I knew some of the pieces, yes.

6 Q. Some of the pieces that you knew was that he, for
7 the most part, had pretty minimal involvement with the police
8 at that time?

9 A. I knew the two incidents.

10 Q. The two incidents that you are talking about are the
11 shoplifting incident and the motorcycle incident?

12 A. No, the motorcycle and the theft, the theft of the
13 checks and forgery of the checks.

14 Q. So you were only aware that he had ever been
15 questioned formally by the police once before?

16 A. I don't know that for sure, no.

17 Q. So you -- you don't know about his prior involvement
18 with the police?

19 MR. BRACKLEY: Judge, at this point I'm going to
20 object to the relevance of what this detective or officer at
21 that time knew. It's been established before this Court what
22 contacts the Defendant had with the police and that's what's
23 most relevant. What he knew is not relevant.

24 THE COURT: I'll overrule the objection to the
25 extent that this detective had different information or

1 knowledge and they inform the Court, but he's clearly
2 indicating he doesn't know so...

3 Q. (By Ms. Milfeld) That's okay. Mr. Clark at the
4 time was 19?

5 A. Yes.

6 Q. He had graduated -- or he had -- he was in school
7 some kind of schooling at the time?

8 A. Yes.

9 Q. When you were asking questions during the interview,
10 you wanted to find out whether or not Mr. Clark was involved
11 in the murder?

12 A. Yes.

13 Q. That was your whole focus, the reason why you were
14 there?

15 A. Yes.

16 Q. That's why you spent over three hours questioning
17 him?

18 A. Yes.

19 Q. Because you wanted him to -- you wanted to get more
20 information directly from Mr. Clark?

21 A. Correct.

22 Q. You knew at the time, as an experienced detective,
23 that this could be your only shot in interviewing him?

24 A. Yes.

25 Q. So it would be fair to say that you went hard after

1 Mr. Clark during that interview?

2 A. Yes.

3 Q. You pushed him to try to give you more information?

4 A. We asked him multiple questions, yes.

5 Q. And to prevent, um, Mr. Kellner from asking, you
6 didn't physically push him, right?

7 A. No, we did not physically push him.

8 Q. You asked him questions about, for example, where he
9 was the night of the murder?

10 A. Correct.

11 Q. You asked him questions about his involvement or
12 whether or not he had any guns?

13 A. Yes.

14 Q. And throughout your entire questions, Mr. Clark
15 didn't confess to you?

16 A. He did not.

17 Q. He never admitted that he had any involvement in the
18 murder?

19 A. He did not.

20 Q. In fact, he told you, I don't have any involvement?

21 A. Yes.

22 Q. Besides the one break that you took, you did not
23 take any other breaks that you are aware of?

24 A. No.

25 Q. During that time, did you offer him anything to eat?

1 A. I don't specifically remember that, no.

2 Q. You didn't offer him anything to drink as well?

3 A. No, I don't remember that.

4 Q. Earlier you talked about, when we were discussing
5 the GSR evidence, that you wanted to use the GSR collection
6 kit as a psychological tool in a way?

7 A. Yes.

8 Q. You didn't think that it had any value, but you were
9 hoping that by doing it that Mr. Clark would give you
10 information?

11 A. Yes.

12 Q. When you were bagging his hands, you told him that
13 you could look at electrons under microscopes and it would be
14 able to tell whether he has fired any sort of gun?

15 A. Didn't bag his hands. When we were collecting the
16 evidence, as it were, yes, I did explain that to him.

17 Q. You told him all these details in hopes that he
18 would tell you information about whether or not he had shot a
19 gun?

20 A. Yes.

21 Q. Specifically, whether or not he shot the gun that
22 killed Mr. Grisham.

23 A. Correct.

24 Q. When you were using the psychological tool, he
25 didn't confess to you at that point?

1 A. No, he did not.

2 MS. MILFELD: No further questions.

3 THE COURT: Cross-examination?

4 MR. BRACKLEY: None, Your Honor. Thank you.

5 THE COURT: You can step down.

6 THE WITNESS: Am I dismissed, Your Honor?

7 THE COURT: I don't know about that. Can he be
8 excused?

9 MR. BRACKLEY: Certainly, from our perspective.

10 MS. RING: Yes.

11 THE COURT: Yeah, you're excused. Thank you.

12 THE WITNESS: Thank you, Judge.

13 THE COURT: All right. Does the Defendant have
14 further witnesses on the motion to suppress statements 1?

15 MS. MILFELD: May we have a minute, Judge?

16 THE COURT: Sure.

17 MS. MILFELD: Judge, we don't have any more
18 witnesses.

19 THE COURT: All right. Do the People have any
20 witnesses in rebuttal?

21 MR. KELLNER: No, Your Honor.

22 THE COURT: I'll hear argument on the motion to
23 suppress statements 1. Ms. Milfeld.

24 MS. RING: Judge, certainly it's up to Your Honor --

25 THE COURT: I'm sorry, Ms. Ring.

1 MS. RING: No, it's not me, but we had discussed
2 earlier whether the Court was okay with just trying to get
3 through all -- as much testimony as possible to make sure that
4 we get through all the witnesses. There's a witness here with
5 the FBI and a witness from ATF who's flown in from DC. So our
6 thought is if we could get through testimony and then do
7 argument at the end of the day.

8 THE COURT: Okay. And I'm going to have to break.
9 I have a lunch meeting at noon, so I'm going to break right
10 then, but that's fine, I'll hear argument on each motion at
11 the end of the day.

12 Do you want to at least start with another witness
13 now?

14 MR. BRACKLEY: Yeah. If we go to 12:00, we could
15 probably make a lot of great progress. And this next witness
16 will be for statements 2 and 3.

17 THE COURT: Okay.

18 **JONATHAN GRUSING,**
19 a witness herein, having been first duly sworn, was examined
20 and testified on his oath as follows:

21 THE COURT: All right. Please have a seat.

22 Go ahead, Mr. Kellner.

23 MR. KELLNER: Thank you, Judge.

24 **DIRECT EXAMINATION**

25 **BY MR. KELLNER:**

1 Q. Agent Grusing, can you state your name and spell it
2 for us.

3 A. Jonathan Grusing, G-r-u-s-i-n-g.

4 Q. How are you employed, sir?

5 A. I'm a special agent with the FBI here in Denver.

6 THE COURT: What's the special for?

7 THE WITNESS: I still haven't found that out after
8 16 years.

9 Q. (By Mr. Kellner) How many years of being a special
10 agent then?

11 A. Coming up on 16 years.

12 Q. Can you give the judge just a brief sort of
13 thumbnail sketch of your career as a special agent?

14 A. I worked terrorism my first two years, and for the
15 last 14 I have been on the violent crime squad, and for that
16 we handle fugitives, kidnappings, bank robberies, et cetera.

17 Q. As part of your duties with the FBI, did you become
18 involved in the investigation related to Marty Grisham's
19 murder here in Boulder?

20 A. Yes, I did.

21 Q. How did you become involved in that investigation?

22 A. Detective Chuck Heidel requested FBI assistance
23 around May of 2010. He sought to speak with the behavioral
24 analysis unit and I am the conduit between local police
25 departments, sheriffs' offices, and the behavioral analysis

1 unit in Quantico.

2 Q. So you agreed to help Detective Heidel with the
3 investigation?

4 A. Yes.

5 Q. Did you as part of that --

6 THE COURT: It's Heidel.

7 MR. KELLNER: Am I saying it wrong? Sorry.

8 Q. (By Mr. Kellner) The detective -- the lead
9 detective assigned in this case, you agreed to help him,
10 correct?

11 A. Yes.

12 Q. Okay. Did you also agree to contact Mr. Clark as
13 part of helping out the Boulder Police Department?

14 A. Yes.

15 Q. When did you first contact Michael Clark?

16 A. At his place of employment in April of 2011.

17 Q. Was that April 15th?

18 A. Yes.

19 Q. Before contacting Michael Clark on April 15th, did
20 you come up with a plan or an approach of how you would
21 initiate this contact with Mr. Clark?

22 A. Yes.

23 Q. And what was that plan?

24 A. Um, in consulting with Detective Heidel and his
25 sergeant, I also brought ATF Agent Chris Amon with me when we

1 found out the investigation involved handguns and their
2 movements through different people. We devised a plan to
3 approach Mr. Clark on his story of what happened with the
4 handgun we were looking to find.

5 Q. So April 15th, where did you actually make contact
6 with Mr. Clark?

7 A. We contacted him at his office in the Big -- Big
8 Horn Ace Hardware store in Silverthorn, Colorado.

9 Q. Did Mr. Clark know that you and Agent Amon were
10 going to show up?

11 A. We don't think that he did, no.

12 Q. So tell the judge how your first initial encounter
13 with him went down.

14 A. Myself and Agent Amon identified ourselves and said
15 we would like to speak with him, and we told him -- he asked
16 us to sit down. I believe he brought in a chair from another
17 office. He has a fairly small office there. And we told him
18 that -- I mean, we were trying to get to the bottom of a story
19 in regards to some handguns. We told him about the ABC
20 Pawnshop that was on Colfax where a friend of his, named Dion,
21 purchased the gun. Eventually told Mr. Clark that we had
22 spoken with Dion Moore and that I had a story from Mr. Moore,
23 but I wanted to see if that story meshed with what Mr. Clark
24 remembered.

25 Q. When you showed up at the Ace Hardware, how were you

1 dressed?

2 A. Casually. Polo shirt and probably Carhart pants,
3 something like that.

4 Q. Was Agent Amon dressed similarly to you?

5 A. Yes.

6 Q. So you carry around a sidearm typically or a weapon?

7 A. I do.

8 Q. And is that concealed or is it visible?

9 A. Concealed.

10 Q. And at the time you contacted Mr. Clark, was it
11 concealed as well?

12 A. Of course.

13 Q. And can the same thing be said about Special Agent
14 Amon?

15 A. Yes.

16 Q. Where specifically inside the Ace Hardware store did
17 you meet with Mr. Clark?

18 A. We didn't know where his office was, so we asked at
19 the front desk if Michael Clark worked there. They directed
20 us to the rear of the store, another customer service counter,
21 and the person at the customer service counter directed us to
22 his office which is in the rear of the Ace Hardware store.

23 Q. So you actually sat down and talked to him inside
24 Mr. Clark's office?

25 A. Yes.

1 Q. Okay. And how would you describe that room?

2 A. Pretty small. It did have a window you could see
3 out into the hallway and -- a large window and then a door,
4 his desk and a couple of chairs.

5 Q. When you sat down to speak to him, before sitting
6 down to speak to him, did you close the door or was the door
7 open?

8 A. I believe we -- yes, we closed the door, because
9 people were walking up and down the hallway.

10 Q. And was that at his request or was that an action
11 you took independently?

12 A. I don't know. Probably an action we just took
13 because we didn't think that anyone around should hear the
14 nature of our conversation.

15 Q. Well, why did you decide to first approach him at
16 his place of business as opposed to some other place?

17 A. Well, we knew that he would probably be at work,
18 that's probably the primary factor. The other is we did not
19 want to approach him at his residence as he probably wouldn't
20 feel free to talk there.

21 Q. So when you sat down with Mr. Clark and you told him
22 why you were there, did you advise him of *Miranda* rights at
23 any time?

24 A. No, we did not.

25 Q. How would you describe your overall demeanor and

1 tone of voice when talking to Mr. Clark?

2 A. Just like I'm talking to you today. We hoped to
3 develop a relationship with Mr. Clark. We could talk to him
4 multiple times, if needed, to get to the bottom of what
5 happened to the weapon that he possessed during the time of
6 the homicide.

7 Q. And how would you describe Agent Amon's demeanor and
8 tone of voice?

9 A. The same.

10 Q. Now the person we had been talking about, Michael
11 Clark, do you see him here in the courtroom today?

12 A. Yes, I do.

13 Q. Can you identify him by some article of clothing he
14 is wearing?

15 A. Sitting at the defense table with a brown collared
16 shirt and grey colored pants.

17 MR. KELLNER: If the record could reflect that he
18 has identified the Defendant.

19 THE COURT: The record will so reflect.

20 Q. (By Mr. Kellner) Approximately how long was your
21 meeting with Michael Clark on April 15th?

22 A. It was around an hour.

23 Q. And once you had introduced yourself and told him
24 the nature of your investigation, did he agree to speak with
25 you as well?

1 A. Yes.

2 Q. Okay. What would you have done if he just declined
3 to talk to you at all at this point?

4 A. We would have left and called Agent Heidel --
5 Officer -- Detective Heidel -- I'm sorry.

6 Q. Well, what would you have done if during your
7 interview he had just walked out or left the office?

8 A. We would have watched him leave and then left the
9 Ace Hardware store.

10 Q. Was this meeting recorded as well, the interview?

11 A. Yes, Agent Amon recorded it.

12 Q. And have you had an opportunity to listen to the
13 recording?

14 A. Yes, I have.

15 Q. And have you also had an opportunity to review a
16 transcript of the recorded interview?

17 A. Yes.

18 MR. KELLNER: Judge, can I approach the witness?

19 THE COURT: Yes.

20 Q. (By Mr. Kellner) I'm handing the witness People's
21 Exhibit 4 and 5 for identification.

22 Agent Grusing, do you recognize People's Exhibit 4
23 and 5?

24 A. I do.

25 Q. And what are they respectively?

1 A. Agent 4 (sic) is a CD of the audio recording and
2 Agent 5 (sic) is the written transcript of the recording.

3 THE COURT: Agent 4 and Agent 5?

4 THE WITNESS: Did I say that? Say, Detective
5 Heidel, get up over there.

6 MR. KELLNER: It happens to the best of us.

7 A. Exhibit 4 is a CD and the audio recording, and
8 Exhibit 5 is the typed out transcript of the recording.

9 Q. (By Mr. Kellner) And specifically how do you
10 recognize the CD, People's Exhibit 4?

11 A. The CD has my initials and date on it.

12 Q. And is that CD recording a fair and accurate
13 depiction of the actual interview you had with Mr. Clark on
14 April 15th?

15 A. Yes, it is.

16 MR. KELLNER: I ask to admit People's Exhibit 4.

17 THE COURT: Objection or voir dire?

18 MS. RING: No objection.

19 THE COURT: Exhibit 4 will be admitted.

20 (People's Exhibit 4 was admitted into evidence by
21 agreement of the parties.)

22 Q. (By Mr. Kellner) And with respect to People's
23 Exhibit 5, is that a fair and accurate representation or
24 actual -- fair and accurate transcript of the recording of the
25 interview?

1 A. Yes, it is.

2 MR. KELLNER: I move to admit People's Exhibit 5.

3 THE COURT: Objection or voir dire?

4 MS. RING: No objection.

5 THE COURT: 5 will be admitted.

6 (People's Exhibit 5 was admitted into evidence by
7 agreement of the parties.)

8 THE COURT: Can counsel confirm for me that
9 Exhibit 4 is the same as Attachment A that was attached to the
10 response to the motion to suppress 2, and that Exhibit 5 is
11 the same as Attachment B that was attached to the same
12 response?

13 MR. KELLNER: I can, Your Honor, it is the same.

14 THE COURT: Is that okay with you, Ms. Ring?

15 MS. RING: It is, Judge.

16 THE COURT: All right.

17 Q. (By Mr. Kellner) Agent Grusing, during your
18 interview with Mr. Clark, did he ever interrupt you or take a
19 break during your questioning?

20 A. He took a phone call and then he also made a phone
21 call, but that didn't interrupt our conversation.

22 Q. So he just went about taking care of some of his
23 work business at the same time that you were present?

24 A. I don't know if it was work or personal.

25 Q. Did he ask you questions as well during the

1 interview?

2 A. Yes, he did.

3 Q. And how was the interview ultimately concluded?

4 A. I -- to the best of my recollection, he said that he
5 needed to go meet someone for lunch, possibly his wife.

6 Q. And once --

7 A. Once he said that, we left and we told him that we
8 would probably be contacting him again in the future. And I
9 gave him my business card in case he had any questions and he
10 could contact me.

11 MR. KELLNER: Judge, at this time I'm going to
12 transitional questions related to the motion to suppress
13 statement 3.

14 THE COURT: Three, okay.

15 Q. (By Mr. Kellner) After you had met with Mr. Clark
16 at the Ace Hardware store on April 15th, did you form a plan
17 to try to contact him a second time?

18 A. Yes.

19 Q. Okay. Did you actually contact Mr. Clark to set up
20 a second meeting?

21 A. Yes, we did.

22 Q. How did that take place?

23 A. Um, myself and Detective Heidel, Agent Amon, and I
24 believe the prosecutor, Brackley, were present at
25 Safe Streets -- it's the Rocky Mountain Safe Streets Task

1 Force for the unemployed in Denver, and we spoke of a plan for
2 a next interview to follow up on some of the things that
3 Mr. Clark could not remember. I called Mr. Clark and asked
4 him if he would be willing to meet with us a second time.

5 Q. Did Mr. Clark indicate that he was willing to do so?

6 A. Yes.

7 Q. And how did you set up the actual meeting location
8 and time?

9 A. I don't remember if I did it with just one phone
10 call or two, but I know that he agreed to meet with us at the
11 police department in Frisco. I don't know the area, so
12 Detective Heidel had suggested that as the only one, I think,
13 that had a conference table and was available.

14 Q. And you told Mr. Clark that the meeting location was
15 going to be the Frisco Police Department prior to the
16 interview?

17 A. That's correct.

18 Q. Did he express any sort of objection about going
19 there?

20 A. No.

21 Q. Did you pick up Mr. Clark and bring him to the
22 police department?

23 A. I did not.

24 Q. Did he come on his own?

25 A. Yes.

1 Q. Now specifically where inside the Frisco Police
2 Department did you meet with Mr. Clark?

3 A. I believe it's the city of Frisco building. And you
4 can actually enter the police department when you go into the
5 left through a door, but we did not go inside that entrance to
6 the police department. To the right as you enter into their
7 town building there's a large conference room, so we met at --
8 we met inside that conference room.

9 Q. So in actuality you met somewhere very close to the
10 Frisco Police Department, but not actually inside?

11 A. Not inside their office space, correct.

12 Q. And who was present during the second interview on
13 April 20th?

14 A. Um, Mr. Clark, myself and Agent Amon.

15 Q. How would you describe your overall tone and
16 demeanor in the second interview?

17 A. We talked with Mr. Clark about how he moved to the
18 area, you know, just small talk for the first five minutes or
19 so, and it was a very similar tone as the first interview we
20 had with Mr. Clark.

21 Q. When did Detective Heidel come into the interview
22 room?

23 A. Probably after about 45 minutes. I think the
24 interview lasted around an hour, maybe 50 minutes. For the
25 last 5 or 10 minutes I would say.

1 Q. So for the large majority of the interview it was
2 Mr. Clark, yourself and Agent Amon?

3 A. That's correct.

4 Q. Now during this second interview, did you ultimately
5 confront Mr. Clark about his involvement in Marty Grisham's
6 murder?

7 A. Yes, I did.

8 Q. Safe to say that your questions were more directed
9 at this point?

10 A. Yes.

11 Q. Approximately how long was this interview on
12 April 20th?

13 A. I believe it was right at an hour.

14 Q. How did the interview ultimately conclude?

15 A. When myself and Agent Amon confronted him on
16 possibly being involved in the homicide, Mr. Clark said he
17 needed to get back to work. It was about at that point that I
18 brought in -- or I told Detective Heidel, um -- I actually met
19 him in the hall. As I was coming out of the room, Detective
20 Heidel was walking towards the room. I brought him in.
21 Detective Heidel introduced himself. He spoke with Mr. Clark
22 for a little while. Mr. Clark again said he needed to go to
23 work. And the -- Detective Heidel shook hands with him and
24 Mr. Clark went to work -- or I don't know that he went to
25 work, he said he needed to go to work.

1 Q. So this interview on April 20th was ultimately
2 concluded by Mr. Clark?

3 A. That's correct.

4 Q. Tell the judge a little bit more about what this
5 conference room looked like.

6 A. It probably sat about 12 people, it was a large
7 table, and I don't remember exactly where I sat. Agent Amon
8 and I got there early just to get the feel of the room. So I
9 can't remember where I sat before or after, but we just sat in
10 the room with Mr. Clark and spoke until I got up to go get
11 Detective Heidel.

12 Detective Heidel and Mr. Clark were just standing at
13 the end talking with each other. And after he left we all
14 three, myself, Agent Amon and Detective Heidel, sat down and
15 discussed the interview.

16 Q. Was the interview on April 20th recorded as well?

17 A. Yes.

18 Q. Have you had an opportunity to review the CD that
19 contains the recording of that interview?

20 A. I have.

21 Q. Are you aware of whether or not that recording was
22 also transcribed?

23 A. Yes, it was.

24 MR. KELLNER: Judge, may I approach?

25 THE COURT: Yes.

1 Q. (By Mr. Kellner) I'm handing the witness People's
2 Exhibit 6 and 7.

3 Agent Grusing, can you tell us what People's
4 Exhibit 6 and 7 are?

5 A. I'll try to get it right this time.

6 Agent 6 (sic) is a CD of the audio recording that
7 occurred on April 20th.

8 Q. Exhibit 6?

9 THE COURT: Is it Special Agent 6 or just Exhibit?

10 THE WITNESS: I said CD that time, I'm pretty sure.

11 THE COURT: No, actually you said Agent 6.

12 THE WITNESS: Did I say "Agent"?

13 THE COURT: You said Agent 6.

14 THE WITNESS: I don't know how that got in my brain.

15 It is a CD of an audio recording that occurred on
16 April 20th, 2011.

17 Q. (By Mr. Kellner) And People's Exhibit -- the
18 transcript there, do you recognize that as well?

19 A. I do.

20 Q. And how do you recognize that transcript?

21 A. I have personally reviewed it and it is a typed
22 transcript of the recording.

23 Q. Okay. What number exhibit is that?

24 A. That is Exhibit 7.

25 Q. People's Exhibit 6 and 7, are those fair and

1 accurate representations of the first -- the recording of the
2 interview that you had with Mr. Clark on April 20th, and is
3 the transcript a fair and accurate depiction of that
4 recording?

5 A. Yes.

6 MR. KELLNER: Judge, I would ask to admit People's
7 Exhibit 6 and 7.

8 THE COURT: Any objection or voir dire?

9 MS. RING: No objection.

10 THE COURT: 6 and 7 will be admitted.

11 (People's Exhibit 6 and 7 were admitted into
12 evidence by agreement of the parties.)

13 THE COURT: I need to take the noon recess. We'll
14 be in recess until 1:30.

15 Agent Grusing, if you could be back -- I'm sorry --
16 Special Agent Grusing, if you could be back on the witness
17 stand at 1:30 sharp, we'll continue with your direct
18 examination. Over the break I'm going to have some questions
19 for you if counsel doesn't ask you about some of the
20 conversation that is had with Mr. Clark that's on pages 35 and
21 36 of Exhibit 7. So if you would just take a look at that
22 over the break and then we'll continue with your examination
23 at 1:30.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: All right. Thanks.

(Whereupon, the noon recess was taken.)

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

2 The afternoon session commenced on August 9th, 2012,
3 before the Honorable Thomas Mulvahill, Judge of the Boulder
4 District Court, and the following proceedings were had.

5 * * * *

6 THE COURT: 12 CR 222, People versus Michael Clark.
7 Mr. Clark appears with his counsel. The prosecution is here.
8 When we recessed at noon Mr. Kellner was in the middle of his
9 direct examination of Special Agent Grusing.

10 I'll remind you you're still under oath.

11 And you may continue with your direct examination.

12 MR. KELLNER: Thank you, Judge.

13 Q. (By Mr. Kellner) Special Agent Grusing, um, when
14 you had these various conversations with Mr. Clark, at any
15 point did he ask for an attorney or bring up reference to an
16 attorney?

17 A. When we called him in between the two interviews, he
18 asked me over the phone if he should have an attorney present.

19 Q. How did you respond?

20 A. I told him that's his decision.

21 Q. And you say in "between the two interviews." Are
22 you talking about a conversation you had with Mr. Clark in
23 order to set up the April 20th interview?

24 A. That's correct.

25 Q. And did Mr. Clark actually show up with an attorney?

1 A. No, he did not.

2 Q. At any point during any of your conversations -- any
3 other conversations, did he mention an attorney?

4 A. He did not.

5 Q. I would like to clarify whether or not if you are
6 aware of the recording that has been presented to the Court,
7 if that encompasses all contacts that you had with Mr. Clark
8 on April 20th?

9 A. Yes.

10 Q. And I guess a better way of asking that is, was
11 there a conversation before you started the recorder or after
12 the recorder with Mr. Clark?

13 A. No. To my recollection, Agent Amon handled the
14 recording and he had the recording device. He did a preamble
15 before each recording and that was before we met with
16 Mr. Clark, and then he turned off the device after Mr. Clark
17 had left the interview.

18 Q. So there was no chitchat with Mr. Clark before you
19 actually went into the interview room?

20 A. No.

21 Q. Okay. And there wasn't a conversation with him out
22 in the parking lot after he had left?

23 A. That's correct.

24 Q. I would like to focus a little on Detective Heidel's
25 involvement in the second interview on April 20th.

1 Approximately when throughout the course of that
2 interview did Detective Heidel come in and join the three of
3 you?

4 A. Towards the end of the interview Mr. Clark had
5 expressed that he needed to get back to work. That's why I
6 left the room, to go see if I could at least introduce
7 Detective Heidel to Mr. Clark. And I recall Mr. Clark and
8 Detective Heidel shaking hands. There was a conversation
9 while both were standing near the door. I can't imagine their
10 total conversation lasting more than a couple of minutes.

11 Q. With respect to Detective Heidel's tone and
12 demeanor, how would you characterize his interactions with
13 Mr. Clark?

14 A. He was very direct with Mr. Clark and told him that,
15 um -- well, I can't remember exactly what Detective Heidel
16 told him, but he was direct with his belief that Mr. Clark was
17 involved in the homicide of Marty Grisham.

18 Q. When you say he was "very direct," was he yelling or
19 screaming at Mr. Clark?

20 A. He was not screaming or yelling, no.

21 MR. KELLNER: No further questions.

22 THE COURT: Cross-examination, Ms. Ring?

23 MS. RING: Thank you.

24 **CROSS-EXAMINATION**

25 **BY MS. RING:**

1 Q. Agent, you -- actually, "Special Agent" is just too
2 long -- you actually did some reports to document what you did
3 as part of your assistance investigating Marty Grisham's
4 homicide, correct?

5 A. Yes.

6 MS. RING: Okay. And, Judge, if I could approach?

7 THE COURT: Yes.

8 Q. (By Ms. Ring) Specifically, you did two what I
9 would describe as very short reports, they are each a
10 paragraph, which basically document the fact you interviewed,
11 um, my client, Michael Clark, on April 20th and April 15th.

12 So does that report that I'm showing you now look --

13 A. Yes, that's the one from April 20th.

14 Q. Right. And it says April 20th on the bottom and has
15 your name. And I'm assuming those are your initials at the
16 bottom?

17 A. Yes.

18 Q. Okay. And I'm showing you another page, which is
19 discovery page 1016, and that's another paragraph that
20 documents that you interviewed Michael Clark on the April 15th
21 interview?

22 A. That's correct.

23 Q. Okay. You would agree that the -- with me that
24 neither one of the reports discusses the fact that you had a
25 telephone contact with Michael Clark to set up the April 20th

1 interview?

2 A. That's correct.

3 Q. Okay. And assuming that I have all of the reports
4 that you did to document what you did in this investigation,
5 you did not generate a report that gives any information about
6 those telephone conversations with Michael Clark?

7 A. I did not generate a report.

8 Q. Okay. So any information that you're telling us
9 today about your telephone conversation with Michael Clark is
10 just based on your memory of that conversation?

11 A. That's right.

12 Q. Okay. And that wasn't recorded, the telephone
13 conversation?

14 A. Not to my knowledge. I did not record it. I don't
15 remember if Agent Amon recorded it or not. I don't believe he
16 did.

17 Q. And I think you told us that there was at least one
18 phone call, there might have been two phone calls, to set up
19 the April 20th interview?

20 A. To the best of my recollection, there was one, but I
21 don't remember at this point if I specifically told him at the
22 police department during that first one or if I had to call
23 him back to say police department. I -- I called him from the
24 Safe Street Task Force to see if he was willing to talk to us
25 again.

1 Q. Okay.

2 A. And I don't remember there if I said the location or
3 if I had to call him back to set the location.

4 Q. Okay. And you're referring to a place called the
5 Safe Street --

6 A. Task Force.

7 Q. -- Task Force?

8 A. Yes.

9 Q. Which is in Denver?

10 A. Yes.

11 Q. That's where your office is located?

12 A. That's correct.

13 Q. Okay. And that's where you, ATF Agent Amon, Ryan
14 Brackley and Detective Heidel all met after the April 15th
15 interview?

16 A. Yes.

17 Q. And that's during that powwow you all decided to try
18 to contact Mr. Clark for an additional interview?

19 A. Yes.

20 Q. You made the phone call that same time when you all
21 had met?

22 A. Yes.

23 Q. And so the reason you're telling me you are not sure
24 that you -- you're telling me today that you did not record
25 the phone call?

1 A. Correct.

2 Q. But that Agent Amon was present when you made the
3 phone call?

4 A. Yes.

5 Q. So you are not 100 percent clear whether or not
6 Agent Amon recorded the phone call?

7 A. I'm pretty certain he didn't, but Agent Amon handled
8 all the recording for the investigation.

9 Q. Okay. So I think you told us that Agent Amon is the
10 one that had the recorder on him for the April 15th interview
11 of Michael Clark?

12 A. Yes.

13 Q. And the April 20th of Michael Clark?

14 A. Yes.

15 Q. Okay. You indicated to Mr. Kellner that the way you
16 got involved in this case was because you're basically the
17 liaison between any local law enforcement and them wanting the
18 FBI involved in a case?

19 A. In a case like this, yes.

20 Q. Okay. And you didn't know Detective Heidel or have
21 any interaction with the case prior to that contact in 2009?

22 A. That's correct.

23 Q. Okay. When you are first putting in contact with
24 Detective Heidel, at that point is it your understanding that
25 the focus of the investigation is on Michael Clark as a

1 suspect?

2 A. No.

3 Q. Okay. So that happens after your review of the
4 discovery and further discussions with Detective Heidel?

5 A. Yes.

6 Q. To kind of refocus the investigation on Michael
7 Clark?

8 A. Yes.

9 Q. Okay. You told us on direct examination -- what I
10 heard you say was that you were the person who brings Agent --
11 ATF Agent Amon into this investigation?

12 A. Yes.

13 Q. Okay. And you talked in direct about Dion Moore?

14 A. Yes.

15 Q. Okay. And that you knew from your review of this
16 discovery that Dion Moore was a friend of Michael Clark's in
17 that time frame of 1994 when Marty Grisham was murdered?

18 A. That's right.

19 Q. Okay. And your ruse for your interview of Michael
20 Clark, the first interview, is to talk about Dion Moore?

21 A. Yes.

22 Q. And guns?

23 A. Yeah. I mean, yeah, we spoke about what Dion Moore
24 told us to him.

25 Q. And is Agent Amon from the ATF brought in because of

1 his prior dealings with Dion Moore or that had nothing to do
2 with it?

3 A. He was brought in primarily to assist myself and
4 Boulder in tracing this gun the best we could. We were also
5 aware that ATF did have an investigation at one time on the
6 ABC Pawnshop where the -- where, you know, the gun was
7 purchased.

8 Q. And was Agent Amon specifically involved in that ABC
9 Pawnshop investigation?

10 A. Not initially, no.

11 Q. Okay. The first time you meet Michael Clark is when
12 you go to Big Horn Hardware to interview him?

13 A. Yes.

14 Q. That interview you didn't try to set up with
15 Mr. Clark ahead of time?

16 A. No, I did not.

17 Q. Okay. And, actually, part of the whole plan of how
18 to interview Mr. Clark was really just to show up at his work
19 place unannounced?

20 A. Yes.

21 Q. And I think you told us that you actually chose his
22 work place as opposed to his home, or something like that,
23 because you thought that it was more likely that he might talk
24 to you if you showed up at his place of work?

25 A. Yes, I felt that he would be more free to talk

1 there.

2 Q. Okay. You had been able, prior to showing up at his
3 place of work on April 15th, to get a pretty good idea of what
4 Michael Clark's schedule was?

5 A. Yes.

6 Q. When he was at work typically?

7 A. Yes.

8 Q. So you were fairly certain that he was going to be
9 at work that day?

10 A. We had a good idea, yes.

11 Q. Okay. Mr. Kellner asked you what you were wearing
12 when you interviewed Michael Clark on April 15th, right?

13 A. Right.

14 Q. And you talked about wearing what you thought was a
15 polo shirt and Carhart pants?

16 A. That's what I normally wear, so that's my best
17 guess.

18 Q. Okay. And were you dressed all in black?

19 A. No.

20 Q. No. So when the people at Big Horn Hardware are
21 talking about the guys who show up in black, and you guys say
22 you are dressed in black, you just have a black shirt on?

23 A. I just had a black shirt on, yes. It was like a
24 Nike or Under Armor polo shirt.

25 Q. And Agent Amon also had a black shirt on?

1 A. I don't recall what he was wearing.

2 Q. Um, you also mentioned that you had your sidearm on
3 you?

4 A. Yes.

5 Q. But you indicated that it would have been somewhere
6 where someone couldn't see you had the sidearm?

7 A. That's correct.

8 Q. So can you explain how when you have a polo shirt on
9 you can have your sidearm on you and it's not visible?

10 A. We wear them untucked, so we have to make sure they
11 are ironed properly, the untucked shirt.

12 MS. RING: Can I, Judge, please?

13 THE COURT: It's your cross-examination.

14 Q. (By Ms. Ring) Sorry, go on.

15 A. The untucked shirt will cover my handcuffs, my
16 badge, my weapon, and my cell phone even.

17 Q. And how does one iron their shirt properly so that
18 you can't see those things?

19 A. So it looks professional.

20 Q. The things you learn.

21 MR. BRACKLEY: I (sic) can demonstrate, but I can't.

22 Q. (By Ms. Ring) When you and ATF Agent Amon show up
23 at Big Horn Hardware, you -- I'm assuming you have to go to a
24 front area to request Michael Clark?

25 A. Yes.

1 Q. Okay. And do you announce yourself as law
2 enforcement when you do that?

3 A. No, I don't believe we did.

4 Q. Okay. What's your best recollection of what you
5 would have told the individual that you meet at Big Horn
6 Hardware about who you are and why you need to talk to Michael
7 Clark?

8 A. Just -- I don't remember what I said, but most
9 likely it was, Can we speak with Michael Clark, and they would
10 direct us towards the back. And at the back I said, Can we
11 speak with Michael Clark, again.

12 Q. And your -- you were present when Agent Amon started
13 the recording?

14 A. Yes.

15 Q. So you heard him do what you called the preamble?

16 A. Yes.

17 Q. Okay. And that was prior to you walking into Big
18 Horn Hardware?

19 A. Yes.

20 Q. Earlier this morning when you weren't present in the
21 courtroom we were talking about Michael Clark and his
22 experience with law enforcement.

23 When you interview Michael Clark on August -- on
24 April 15th of 2011, you know that Michael Clark hasn't had any
25 police contact since November of 1994?

1 A. Yes.

2 Q. Prior to the April 15th interview of Michael Clark,
3 um, it's fair to say that you discuss with Detective Heidel
4 what your approach to that interview is going to be?

5 A. Yes.

6 Q. Okay. But Detective Heidel wasn't present up in
7 Silverthorn when you and Agent Amon actually did the
8 interview?

9 A. No, I don't think he was.

10 Q. Okay. During the interview of Michael Clark on
11 April 15th, 2011, you show him a number of photographs?

12 A. Yes.

13 Q. Did you maintain those photographs?

14 A. Yes, I think that I still have them.

15 Q. Okay. Does that mean you have them in your own
16 file?

17 A. Yes.

18 Q. Okay. But you haven't provided those to Detective
19 Heidel or the Boulder Police Department?

20 A. I think those were photos given to me by Detective
21 Heidel.

22 Q. Okay. But you believe you maintain the copies that
23 you used and actually showed Michael Clark during that
24 interview?

25 A. Yes. Correct. Yes.

1 Q. Okay. And I'm sure, pursuant to Rule 16, that you
2 are going to be happy to provide those to Detective Heidel so
3 I can get those as soon as possible?

4 A. Of course.

5 Q. Thank you. And it's fair to say, as best you know
6 as we sit here right now, that all of the photos you used are
7 in your file and you still have them?

8 A. Yes.

9 Q. In terms of when you show up to interview Michael
10 Clark, you don't know enough about his work schedule to know
11 whether it's a good time of day or bad time of day to be
12 contacting him at work?

13 A. I don't know.

14 Q. Okay. And you said the interview happened in
15 Michael Clark's office at his place of work?

16 A. Yes.

17 Q. And you were brought back to his office or he came
18 out to meet you?

19 A. I believe we were brought back to his office.

20 Q. Okay.

21 A. Well, I don't recall.

22 Q. Okay. And, again, you would agree with me that
23 basically almost that entire interview is focused on your
24 talking about being concerned about finding a gun as it
25 relates to ABC Pawnshop and Dion Moore, and this gun being

1 involved in possible other crimes, not the Marty Grisham
2 homicide?

3 A. That's correct.

4 Q. Okay. And, of course, that's not true, because the
5 reason you're interviewing Michael Clark is to try to find out
6 about the gun that was involved in Marty Grisham's homicide?

7 A. That was our end goal, yes.

8 Q. So you would agree with me that the first interview
9 of -- April 15th interview was fairly friendly throughout?

10 A. Yes.

11 Q. Okay. You didn't have to push, and I don't mean
12 physically push, you weren't --

13 A. Confrontation.

14 Q. Thank you. You weren't confrontational with
15 Mr. Clark during that interview?

16 A. I was not.

17 Q. Okay. And he was cooperative during that interview?

18 A. Yes, he was.

19 Q. And at the end of the interview you said, you know,
20 we may need to follow up on some questions, we may need to
21 meet with you again, and he provided you with his phone
22 number?

23 A. That's right.

24 Q. But at that point in time you hadn't brought up the
25 Marty Grisham homicide at all?

1 A. No, I don't think we did in that interview.

2 Q. And in that interview what you are indicating to
3 Michael Clark is he's not in any trouble or being investigated
4 for any crime at that point?

5 A. Yeah, we don't tell him anything about that
6 investigation.

7 Q. Right. But even in terms of the investigation that
8 you tell him you are involved in, which is ABC Pawnshop and
9 the Russians and gun running, you are not saying that you
10 believe Mr. Clark is involved in any of that?

11 A. That's correct.

12 Q. Is it fair to say that you're the one who makes the
13 phone call to Michael Clark to set up the second interview,
14 because you think that you have set up -- you have established
15 some kind of rapport with Mr. Clark during the first
16 interview?

17 A. Yes.

18 Q. So you were describing to Mr. Kellner where exactly
19 the interview on April 20th happens. It happens in Frisco?

20 A. Yes.

21 Q. And what I understood you to say is you had asked
22 Michael Clark to meet you at the Frisco police station?

23 A. Yes.

24 Q. But that the Frisco police station isn't a separate
25 building, it's part of the city and county -- or city

1 building?

2 A. I believe so, yeah. I think that there's another
3 entity at least as you walk in the door and straight in front
4 of you. There's an entry door and then to the left is where
5 you would go into the police station.

6 Q. And when you are describing the room where you
7 actually interviewed Michael Clark, do you go through that
8 area where it's clearly the Frisco Police Department or it's
9 before you get there?

10 A. No. There's a foyer and you can choose police
11 department to the left, some -- some agency in front and then
12 a conference room to your right, and we meet in the conference
13 room to the right of the foyer.

14 Q. And Detective Heidel has set all of that up ahead of
15 time?

16 A. Yes.

17 Q. And you and Agent Amon and Detective Heidel get
18 there before Michael Clark is supposed to get there so you can
19 be prepared and know where you are all going to be sitting and
20 interviewing him?

21 A. That's right.

22 Q. Okay. Did that room -- or do you know if there was
23 any capability at the Frisco police station to do a videotaped
24 interview?

25 A. We didn't know of any capability there.

1 Q. Okay.

2 A. No.

3 Q. And, again, you were present when Agent Amon started
4 the recorder for that interview as well?

5 A. Yes.

6 Q. And both cases, in the April 15th and April 20th
7 interview, Michael Clark was not told that his interview was
8 being recorded?

9 A. That's correct.

10 Q. And, in fact, it was designed so that he wouldn't
11 know that it was being recorded?

12 A. Yes.

13 Q. You talk about bringing Detective Heidel down at
14 the -- towards the end of the interview, going out to get
15 Detective Heidel. Um, was that planned out previously, that
16 depending on how the interview went, you would go get
17 Detective Heidel at some point and bring him in?

18 A. I don't know if we planned that out or not. I mean
19 I -- I knew Detective Heidel would want a chance to speak with
20 Mr. Clark. That's why I left the room, to go get him.

21 Q. Was it set up so that Detective Heidel was able to
22 hear the interview of Michael Clark while it was going on
23 prior to him entering the room?

24 A. No, it wasn't.

25 Q. You had set up for Michael Clark to meet you there

1 and -- I'm sorry if you told Mr. Kellner this and I missed it,
2 but do you actually go out to the parking lot to meet
3 Mr. Clark to bring him back to this room?

4 How does Mr. Clark actually get to the room where
5 you do the interview?

6 A. Agent Amon and I were standing in the foyer and he
7 walked in the doors and we met him in the foyer.

8 Q. So is it fair that you've had this powwow down at
9 your office down in Denver, and that the second interview you
10 have discussed is going to be a little different than the
11 first interview in terms of how confrontational you're
12 expecting it to be?

13 A. Yes.

14 Q. So there's definitely a plan that rather than the
15 first interview where you don't confront Michael Clark about
16 Marty Grisham's murder, that you are going to go there, to
17 that subject in this interview?

18 A. That's right.

19 Q. And depending on Michael Clark's response, you are
20 going to basically go after Mr. Clark in terms of trying to
21 determine whether he was involved in Marty Grisham's homicide?

22 A. Yes.

23 Q. And get him to acknowledge some kind of involvement
24 in that?

25 A. That's right.

1 Q. So as part of that, you would agree with me that
2 Michael Clark never makes any admissions during either
3 interview?

4 A. That's correct.

5 Q. And, in fact, in confronting Mr. Clark about Marty
6 Grisham's homicide, either you or Agent Amon actually tell him
7 some things that aren't true to try to get him to confess?

8 A. That's right.

9 Q. You tell him things like you know that the gun that
10 he had -- that you know that he had when he was with the
11 marine recruiter, et cetera, that he had gotten from Dion
12 Moore, that you all know that that's the gun that killed Marty
13 Grisham?

14 A. Yes.

15 Q. And you say that, you know, ballistics have improved
16 over time so that you can determine those types of things?

17 A. Right.

18 Q. Okay. And none of those things are true?

19 A. Correct.

20 Q. You tell him that you guys really aren't
21 investigating the homicide because only local agents do that,
22 so you are really not there investigating the homicide, you're
23 really investigating the gun?

24 A. Yes.

25 Q. Okay. And that's not true?

1 A. That's partly true.

2 Q. Okay. Well --

3 A. We were investigating the gun part while assisting
4 with the homicide.

5 Q. Okay. And you certainly investigate homicides?

6 A. I have in the past, yes.

7 Q. And you're meeting with Michael Clark because you're
8 assisting the Boulder Police Department in investigating Marty
9 Grisham's homicide?

10 A. Yes, that's correct.

11 Q. Otherwise, you wouldn't be talking to Michael Clark?

12 A. Correct.

13 Q. You tell Michael Clark that, you know, that crime
14 happened a long time ago, that he's lived a good life, he has
15 family, he has kids. You know, if he just comes clean, he is
16 not going to spend the rest of his life in prison?

17 A. We told him that would help his chances, yes.

18 Q. Well, you told him, you know, if he helped out, this
19 isn't the kind of thing that you spend the rest of your life
20 in prison?

21 A. Correct.

22 Q. And you didn't have any authority to tell him
23 whether he told you that he killed Marty Grisham or gave
24 someone the gun, what his sentence would be?

25 A. That's correct.

1 Q. And you knew very well that the investigation was a
2 first-degree murder investigation?

3 A. Yes.

4 Q. And you know that in the state of Colorado
5 first-degree murder carries life in prison without parole?

6 A. Right.

7 Q. You told Michael Clark that, you know, if he said
8 what he did and confessed to Marty Grisham's murder and, you
9 know, he would save everybody a lot of money, he would save
10 the prosecutors time, and that would definitely help him out
11 in terms of what would happen to him?

12 A. Yes.

13 Q. I'm not sure if it was you or Agent Amon that said
14 something about finding DNA on the bullets even if the bullets
15 were cleaned or --

16 A. I believe that was Agent Amon.

17 Q. Okay. But that was something that really wasn't
18 true and couldn't be proven about DNA on bullets, and you
19 didn't have any DNA off the bullets?

20 A. Not to the best of my knowledge.

21 Q. Well, in you -- you get pretty prepared before you
22 involve yourself in an investigation or interrogation, right?

23 A. Right.

24 Q. So those types of lies were designed to try to get
25 Michael Clark to confess to Marty Grisham's murder?

1 A. Yes.

2 Q. Okay. So you describe this room as having one large
3 table that you think roughly you could sit around 12 people
4 around it?

5 A. Ten to 12, yes.

6 Q. Okay. And windows or no windows?

7 A. Windows, I believe.

8 Q. Okay. Door shut?

9 A. Yes.

10 Q. Okay. And is it fair to say that you tried to
11 structure it so that the three of you are toward one end of
12 the table?

13 A. Yes.

14 Q. Okay. So that you and Agent Amon are sitting
15 relatively close to Michael Clark?

16 A. Right.

17 Q. And was one of you sitting so that you were between
18 the door and Michael Clark?

19 A. I don't remember at this point. If it was, it
20 wasn't intentional, because we had told him ahead of time we
21 needed just to perform this on his lunch hour so he could get
22 back to work. So blocking his entry or exit to a door was not
23 our intent.

24 Q. Well, if Michael Clark had confessed to Marty
25 Grisham's murder, or actually confessed to being involved in

1 it at all, you know, you wouldn't have let him leave?

2 MR. KELLNER: Objection, Your Honor.

3 THE COURT: The objection is?

4 MR. KELLNER: Relevance.

5 MS. RING: Judge, I believe there were a line of
6 questions asked about why they didn't mirandize him, and
7 April 15th, that if he wanted to leave, what they would have
8 done, et cetera. So I think that based on that line of
9 questioning --

10 THE COURT: I think the problem is that it calls for
11 speculation. It's relevant, but the way the question is
12 phrased, it's speculative, but I'll allow the question.

13 A. If --

14 THE COURT: If you can answer it.

15 A. Yes, I have been involved in interrogations like
16 this, interviews where we have not mirandized someone, whether
17 it's for a violent crime or whatever, and they have to be free
18 to leave. Even if Michael had confessed to the homicide, he
19 would have been free to leave.

20 Q. (By Ms. Ring) And is it fair to say that you can't
21 tell us today exactly where the three of you were sitting at
22 that table?

23 A. That's correct.

24 Q. When you were going out to get Detective Heidel, is
25 it fair to say that at that point you want to give Detective

1 Heidel a shot at trying to get Michael to confess?

2 A. I didn't believe Michael would confess at that
3 point. I just wanted to give Detective Heidel a chance to
4 introduce himself to Mr. Clark and tell him the reason for the
5 investigation, because I had been the one acting on Detective
6 Heidel's behalf this whole time.

7 Q. So what you are telling me is you felt by the time
8 you stand up to go get Detective Heidel, you feel like you
9 have done everything that you can in the interview to get
10 Michael to make some kind of confession or admission and it's
11 not going to get any further at that point, in your opinion?

12 A. In my opinion, yes.

13 Q. Okay. But since Detective Heidel, it's really his
14 investigation, the appropriate thing to do is go get him, let
15 him know what's happened and let him come in and decide what
16 to do next?

17 A. That's right.

18 Q. Okay. So did you have the opportunity to -- prior
19 to Detective Heidel coming into the room, to explain to him
20 what had happened so far?

21 A. If I did, it was within 5 to 10 seconds, because as
22 I got out the door and maybe took 10 steps in the foyer, he
23 was walking towards us maybe to see what happened and maybe to
24 tell us that it's time for Michael to go back to work. I
25 don't know. We never have discussed that. But I told him

1 that I wanted him to get a chance to speak with Mr. Clark, and
2 then he was back in the room.

3 Q. Then Detective Heidel --

4 A. Detective Heidel was in the room.

5 Q. Okay.

6 A. Yes.

7 Q. And you told us on direct that you recall Detective
8 Heidel -- that that happened, although relatively quickly, and
9 Detective Heidel shaking Michael Clark's hand and introducing
10 himself?

11 A. Correct.

12 Q. Okay. And so does that mean that -- is it your
13 recollection when you got up and left the room, you closed the
14 door or the door remained open, or do you know?

15 A. I don't know.

16 Q. Okay. You told us on direct that your recollection
17 is that Michael Clark is standing up when Detective Heidel
18 comes in, they shake hands, and they are both standing at that
19 point?

20 A. That's what I recall, yes.

21 Q. Okay. And so during that last part of the interview
22 when Detective Heidel is going after Michael Clark, are they
23 both standing during that part?

24 A. To the best of my recollection, yes.

25 Q. Okay. Prior to that, when it's just you and Agent

1 Amon in the room, does -- is that entire interview conducted
2 while you are all sitting down?

3 A. Yes.

4 Q. Okay. And it's your recollection that when Michael
5 Clark first asks if he can go back to work, it's when
6 Detective Heidel is in the room and they are both standing up
7 talking to each other?

8 A. Yes, it was around that time.

9 Q. Okay. And you would agree with me that the first
10 time Michael Clark asks if he can go back to work, that he
11 continues to be questioned for some time after he says, I want
12 to go back to work now?

13 A. For a few minutes, yes.

14 MS. RING: Judge, and Mr. Brackley and Mr. Kellner,
15 I would ask for about five questions about when Agent Grusing
16 was there for Michael Clark's arrest so I can make a clean
17 record that there aren't any statements, which I don't believe
18 there are based on discovery, but I would like the opportunity
19 just to make that record since Agent Grusing is on the stand.

20 THE COURT: Go ahead.

21 MS. RING: Thank you.

22 Q. (By Ms. Ring) You were present when Michael Clark
23 was arrested --

24 A. Yes.

25 Q. -- at his -- actually in the driveway of his daycare

1 provider?

2 A. That's correct.

3 Q. Okay. And that's correct you were the one that
4 actually took Michael Clark into custody?

5 A. I believe so.

6 Q. Okay. And during that time Michael Clark didn't
7 make any statements related to the investigation?

8 A. He did not.

9 MS. RING: Okay. Nothing further.

10 THE COURT: Okay. Detective Grusing, let me ask you
11 a couple of questions. Do you have Exhibit 7 up there?
12 That's the transcript from the April 20th interview --

13 THE WITNESS: Yes, I do.

14 THE COURT: -- at the Frisco Police Department. Can
15 you go to page 33. And in this transcript you identified with
16 the letter C, so on page 33 at line 15, you see that
17 statement?

18 THE WITNESS: Yes.

19 THE COURT: Tell me the context of what was going on
20 when you made those remarks.

21 THE WITNESS: That was when I was just about to
22 leave and go get Detective Heidel.

23 THE COURT: Okay. You asked the question, Do you
24 need to go right now? Why did you do that at that point in
25 time?

1 THE WITNESS: I wanted to be cognizant of when
2 Mr. Clark wanted to -- needed to get back to work.

3 THE COURT: Okay. And he starts to say, I'm
4 gonna... Was there any more to his response or his statement
5 at that point in time?

6 THE WITNESS: Not that I remember.

7 THE COURT: Okay. You say can you give me five
8 minutes, and there's a pause in the recording. But did he
9 give any other response, verbal or non-verbal, that you can
10 recall?

11 THE WITNESS: Not that I recall.

12 THE COURT: Okay. You testified on
13 cross-examination that you had a conversation with Mr. Clark
14 about meeting him at noon so he could talk to you during his
15 lunch hour and then get back to work.

16 THE WITNESS: That's right.

17 THE COURT: Is that part of the conversation that
18 you had during the telephone call that you made from Safe
19 Streets?

20 THE WITNESS: Yes.

21 THE COURT: Okay. Was there any more to the context
22 of that conversation?

23 THE WITNESS: No, it was just a short conversation.

24 THE COURT: Okay. Can you turn to page 34, at line
25 5. That's about 57 minutes into this recording. You say,

1 He's sick, Chuck?

2 THE WITNESS: Yes.

3 THE COURT: Is that the point in time where
4 Detective Heidel is coming into the room?

5 THE WITNESS: Yes.

6 THE COURT: Who was sick?

7 THE WITNESS: Mr. Clark. He did not shake our hands
8 at the start of the interview. He said that he was sick and
9 didn't want us to get contaminated. So that's why I told
10 Detective Heidel that he's sick and he probably wouldn't want
11 to shake Detective Heidel's hand.

12 THE COURT: But he did shake Detective Heidel's
13 hand?

14 THE WITNESS: I believe so, yes.

15 THE COURT: Okay. On page 35, so at line 7, "A" is
16 Mr. Clark. He says, Can I go back to work now, and then on
17 line 11 you say, Yeah. Do you see that?

18 THE WITNESS: Yes.

19 THE COURT: Your response that's noted at 9-11, does
20 that relate to the question on line 7?

21 THE WITNESS: So is "D" Detective Heidel then? Or
22 should that be "A"?

23 THE COURT: No, "D" is Detective Heidel, yes.

24 THE WITNESS: Because it confuses me because it
25 says, I was living out of my car. Well, I know that's not

1 Detective Heidel.

2 THE COURT: Well --

3 THE WITNESS: That's why I'm wondering if the "yeah"
4 is related to, I was living out of my car, or, Can I go back
5 to work now.

6 THE COURT: Well, that's what I'm asking you. Do
7 you know?

8 THE WITNESS: I don't know. With -- if that's
9 Detective Heidel saying that he is living out of his car, then
10 I wouldn't be responding, Yeah. But if that is the Defendant,
11 then I could be saying, yeah, you were living out of the --
12 your car at that time.

13 THE COURT: Well, at the bottom of page 34, starting
14 at line 41, is where Detective Heidel starts to --

15 THE WITNESS: Correct.

16 THE COURT: -- starts to talk with Mr. Clark, and it
17 continues over into the first five lines of page 35.

18 THE WITNESS: Yes.

19 THE COURT: And there's two different ways to read
20 the interaction between lines 7 to 11. The Defendant's
21 statement at line 7 is answered by you at line 11. That's one
22 way to read it. Or line 9 is Detective Heidel finishing his
23 statement to the Defendant and it simply over ran --

24 THE WITNESS: That's right. I haven't listened
25 specifically to that part just to determine whether I'm

1 answering Mr. Clark's question or not.

2 THE COURT: Okay. At the top of page 36, line 1, it
3 says, Hey, Michael, hang out a second here.

4 Do you see where I'm --

5 THE WITNESS: Yes.

6 THE COURT: And that's going to be Agent Amon
7 talking. What's happening at that point?

8 THE WITNESS: Looks like on -- at the bottom of
9 line 35 -- at the bottom of page 35, line 43, Mr. Clark says,
10 I'm going back to work. And that is Agent Amon's response to
11 Mr. Clark's request or statement that he needs to get back to
12 work, saying, Hang on a second, that he wanted to ask another
13 question or make a statement. You know, I could read on.

14 THE COURT: And where was -- when Mr. Clark says,
15 I'm going back to work, the bottom of page 35, and then he
16 starts to say something at the top of page 36, and where is
17 Mr. Clark positioned? What's he doing? What's his body
18 posture and his body attitude, if you can recall?

19 THE WITNESS: He is standing and -- he and Detective
20 Heidel really both near the door, and I don't recall if the
21 door was opened or closed at this point.

22 THE COURT: Is Mr. Clark trying to walk out of the
23 room?

24 THE WITNESS: I believe he is just still standing
25 there, he and Detective Heidel, really close to each other,

1 maybe three feet away, but he is making no attempt to leave,
2 but he has now said that -- he said, I'm going back to work.

3 THE COURT: Okay. Redirect from the People?

4 MR. KELLNER: Nothing from the People. Thank you.

5 THE COURT: Okay. Any follow-up questions from the
6 defense?

7 MS. RING: No, Judge.

8 THE COURT: Agent, you can step down.

9 Can he be excused?

10 MR. BRACKLEY: Yes, Your Honor, he may. Thank you.

11 MS. RING: Yes.

12 THE COURT: All right. You are excused. Thank you.

13 THE WITNESS: Thanks, Your Honor.

14 THE COURT: Do the People have any other witnesses
15 with respect to the motion to suppress statements 2 or 3?

16 MR. KELLNER: No, Judge, thank you.

17 THE COURT: All right. Does the defense have any
18 evidence to present with respect to the motion to suppress
19 statements 2 or 3?

20 MS. RING: We do. We would call Agent Amon.

21 THE COURT: Okay. Would you step forward, please.

22 **CHRISTOPHER AMON,**

23 a witness herein, having been first duly sworn, was examined
24 and testified on his oath as follows:

25 THE COURT: Please have a seat. Go ahead, Ms. Ring.

1 MS. RING: Thank you.

2 **DIRECT EXAMINATION**

3 **BY MS. RING:**

4 Q. Agent Amon, it's our understanding that you got
5 involved in the investigation of Marty Grisham's death because
6 Agent Grusing contacted you and asked you to participate; is
7 that what you remember?

8 A. That's correct.

9 Q. Okay. And you were -- you actually did a couple of
10 different interviews in this case?

11 A. Yes.

12 Q. And you did some work on trying to trace a gun that
13 was supposedly -- that my client, Michael Clark, possessed at
14 one point in time?

15 A. Yes.

16 Q. Okay. And you also were involved in two interviews
17 of my client?

18 A. Yes.

19 Q. Okay. And in both of those interviews you were
20 present with Special Agent Grusing?

21 A. I was.

22 Q. And in both of those interviews you had a recording
23 device on you and you were responsible for making sure those
24 interviews got recorded?

25 A. Yes.

1 Q. Okay. You didn't write any reports related to
2 anything you did in this case?

3 A. Some things I did in this case. In this case the
4 recording was turned over to -- it was transcribed.

5 Q. But you did follow up in writing with some of the
6 investigation that you did in this case?

7 A. Yes.

8 Q. And make no reports?

9 A. Correct.

10 Q. Okay. When you did the reports, did you give those
11 reports to Special Agent Grusing or did you give those reports
12 directly to the Boulder Police Department?

13 MR. KELLNER: Objection, Your Honor.

14 MS. RING: I don't have anything, Chris. I don't
15 have them.

16 MR. KELLNER: So we'll give them to you.

17 THE COURT: Okay. Hold on. What's the objection?

18 MR. KELLNER: Relevance.

19 THE COURT: Well, that's a good objection, except
20 she has a better point about whether or not there is discovery
21 out there that hasn't been disclosed. So I'm going to allow
22 her to ask the questions of this witness and then we're going
23 to have a conversation about how serious I am about the People
24 meeting their obligations under Rule 16, which I think we need
25 to have. So I understand the objection. It's technically a

1 valid objection, but it's overruled.

2 MS. RING: Well, Judge, here is my problem. I'm
3 trying to cross-examine a witness who now has reports that I
4 don't have. And I don't know if he has them with him, but if
5 he does, I would like copies of them now, but I think that I
6 have to make that part of the record. Agent Amon, I think
7 that he was flown in from DC, so it's not like I want to ask
8 for any kind of continuance to examine him, but if he has the
9 reports now, I would like them.

10 THE COURT: You want to talk with your witness for a
11 minute?

12 MR. BRACKLEY: I will, Judge. I mean, I'm looking
13 at joint reports and I think that -- these may be them, but I
14 think that we should talk about it.

15 THE COURT: So let's -- we'll go off the record for
16 five minutes.

17 Agent, if you want to step down with whatever you
18 want there and talk to the District Attorney, see if the issue
19 can be resolved. Then we'll go back on the record.

20 (Whereupon, a brief discussion was had off the
21 record.)

22 THE COURT: All right. While we were off the
23 record, Agent Amon delivered to the parties a copy of his
24 report that was contained in the folder that he has with him
25 today.

1 Does that resolve your concerns about Agent Amon and
2 his report, Ms. Ring?

3 MS. RING: Well, it's a report related to his
4 interview with my client's sister, dated October 25th, 2011.
5 So if that's the only report that he did as part of his
6 investigation...

7 THE COURT: Okay. Is that it?

8 THE WITNESS: Yes.

9 THE COURT: Okay. You can continue with your
10 examination.

11 MS. RING: Thank you.

12 Q. (By Ms. Ring) So just to clarify for the record,
13 you did not do any report that documents your interactions
14 with Michael Clark on April 15th of 2011?

15 A. No. I turned over a CD copy of the interview.

16 Q. Okay. And the same goes for the interview from
17 April 20th of 2011?

18 A. Yes.

19 Q. Prior to the interview on April 15th of 2011, did
20 you review all the discovery in this case?

21 A. Some of the discovery in this case, yes.

22 Q. Okay. And that discovery was provided to you by
23 Agent Grusing?

24 A. I believe Detective Heidel.

25 Q. Okay. So you had met Detective Heidel prior to

1 interviewing Michael Clark on April 15th of 2011?

2 A. Yes.

3 Q. Okay. You hadn't met Michael Clark prior to that?

4 A. No.

5 Q. Okay. And you would agree with me that the content
6 of the interview of Michael Clark on April 15th, 2011 revolved
7 around your supposed investigation of guns related to ABC
8 Pawnshop?

9 A. Yes.

10 Q. Okay. Did you review the transcript of the
11 interview from April 15th prior to testifying today?

12 A. Briefly, yes.

13 Q. Okay. And the transcript of the interview from
14 April 20th as well?

15 A. Yes.

16 Q. Okay. So you would agree with me that in the
17 April 15th interview the Marty Grisham homicide wasn't
18 discussed in that first interview?

19 A. In the April 15th?

20 Q. Right.

21 A. Yes, it may have been alluded to. I think that
22 Mr. Clark may have said, I was in some trouble back then, and
23 went on to discuss a check fraud case.

24 Q. Right. But you -- neither you nor Special Agent
25 Grusing brought up your involvement in Marty Grisham's

1 homicide investigation?

2 A. In that interview, no, not that I remember.

3 Q. Okay. And you, being an ATF agent, being part of
4 that interview would give credibility to the idea that why you
5 are really there is to follow up on this gun issue and ABC
6 Pawnshop?

7 A. The gun issue in general is. Part of that is ABC
8 Pawnshop.

9 Q. Right. And the person you used to talk to Michael
10 Clark about this so that it makes some sense is this guy, Dion
11 Moore?

12 A. Correct.

13 Q. And you were familiar with Dion Moore prior to the
14 interview of Michael Clark?

15 A. Yes.

16 Q. Okay. And were you familiar with him because you
17 had investigated him prior or just from reading the
18 investigation in this case?

19 A. Reading the investigation in this case.

20 Q. Okay. So you hadn't been involved separately in any
21 investigation of Dion Moore?

22 A. No.

23 Q. Do you recall what you were wearing when you showed
24 up at Big Horn Hardware to interview Michael Clark on
25 April 15th, 2011?

1 A. I remember I was wearing jeans. I don't remember
2 what kind of top I was wearing.

3 Q. Okay. Did you have your sidearm with you?

4 A. Yes.

5 Q. Was it visible?

6 A. No.

7 Q. Had you ironed your shirt properly?

8 A. No, probably not.

9 MS. RING: Can we bring Agent Grusing back about
10 that, how that works?

11 THE COURT: No.

12 MS. RING: All right, Judge.

13 Q. (By Ms. Ring) You don't recall what shirt you had
14 on?

15 A. No.

16 Q. Do you recall when you were first at -- going into
17 Big -- Big Horn Hardware and asking to meet with Michael
18 Clark, that one of the employees there talked about the men in
19 black being there?

20 A. No.

21 Q. Okay. So do you recall why it was determined that
22 you would be responsible for having the recording device on
23 you during the interviews?

24 A. Just I had a good recorder at the time. I had one
25 of the newer Olympus digital recorders. That was why.

1 Q. Is it fair that Special Agent Grusing was kind of
2 the lead during the interrogation of Michael Clark in terms of
3 who was kind of responsible for which direction the interview
4 was going?

5 A. Yes.

6 Q. Would you agree with me that Michael Clark was
7 cooperative during the April 15th, 2011, interview?

8 A. Yes.

9 Q. During that first interview, you're really just
10 looking for information about the gun, right?

11 A. Correct.

12 Q. And that's your goal out of that interview is to see
13 if you can get Michael Clark to tell you anything about where
14 that gun might be?

15 A. Or whoever else the interview would lead to.

16 Q. Okay. But you don't push that interview beyond
17 talking about the gun?

18 A. Right. Yes.

19 Q. And you would agree with me that the second
20 interview on April 20th, 2011 was more focused on trying to
21 get Michael Clark to make any admissions related to Marty
22 Grisham's murder?

23 A. It was. It was still to talk about follow-up on the
24 issues that he discussed in the first interview and then if it
25 led that way, yes.

1 Q. Okay. But the tone of the second interview was
2 very -- ended up being very different than the tone of the
3 first interview?

4 A. Towards the end of the second interview, yes.

5 Q. Okay. And although the premises of the first
6 interview, the ruse about being interested in ABC Pawnshop and
7 the gun, the types of outright lies that were told in the
8 second interview weren't told in the first interview?

9 A. Um, outright lies? I don't know what you are
10 referring to exactly.

11 Q. Telling Mr. Clark that the ballistics had improved
12 so much that you could tell that the gun that Michael Clark
13 had back in 1994 was the gun that was used to kill Marty
14 Grisham.

15 A. Different tactics were used in the second interview,
16 yes.

17 Q. Okay. I mean you would agree with me that's not
18 true?

19 A. What's not true? Sorry.

20 Q. There aren't any ballistics available that allow you
21 to say that the gun that supposedly my client had back in 1994
22 was the gun that killed Marty Grisham?

23 A. There is now, yes. There is certain ways certain
24 firearms are fired for -- they have been tested at the
25 factory. The gun in this case was not. It was a

1 Bryco-Jennings, which is a cheaper firearm. But now there's
2 certain, um -- to get too much into it -- but name brand
3 manufacturers that will fire them at the factory and take a
4 shell casing so you can compare it against shell casings
5 recorded at the scene, but in this case, no.

6 Q. So what you told Michael Clark was not true?

7 A. It was not true about that gun, yes.

8 Q. Okay. There were other things that were told to
9 Michael Clark during that interview that were not true to try
10 to get him to confess?

11 A. Correct.

12 MS. RING: Judge, again, I'm in the situation where
13 at the last hearing, at the preliminary hearing Special Agent
14 Grusing, I believe, told us that if anybody had a conversation
15 with the -- I'm going to my impeachment motion, and I know
16 that you don't like doing this, Your Honor, but I have a
17 witness here from D.C. who's telling me he has one report in
18 his file. If you recall the preliminary hearing, and I know
19 it's been a while ago, that Dion Moore, when he is interviewed
20 prior to these interviews in April of 2011, at some point in
21 time had an Arizona drug prosecution going on. Agent Grusing
22 told us that he didn't know if Agent Amon had had any
23 discussions with the prosecutor in Arizona about those charges
24 being dismissed for Mr. Moore cooperating in this case.

25 THE COURT: Okay.

1 MS. RING: So I would like a little leeway to follow
2 up on that line of questioning.

3 THE COURT: As it pertains to the finding of
4 probable cause?

5 MS. RING: No, as it pertains to whether I have all
6 the impeachment information I should have, which is if Dion
7 Moore got any deals for assisting in this investigation,
8 including anything related to that Arizona prosecution or
9 anything else, I should have that.

10 MR. BRACKLEY: Judge, I would just limit the inquiry
11 to whether Dion Moore asked for anything or whether he was
12 actually given anything.

13 THE COURT: Well, or offered anything.

14 MR. BRACKLEY: Of course.

15 THE COURT: Okay. All right. I'll allow some
16 questions along that line.

17 Q. (By Ms. Ring) Do you understand what I'm getting
18 at?

19 A. Yes.

20 Q. Okay. So we've talked about Dion Moore being
21 involved in the Marty Grisham homicide investigation. And so
22 the question is, in your interactions with Dion Moore, did you
23 offer Dion Moore anything in terms of his being willing to
24 cooperate in this investigation?

25 A. No, no promises were made to Mr. Moore.

1 Q. Okay. Did you have any conversations with the
2 prosecution or anybody related to that prosecution in Arizona,
3 involving Mr. Moore related to this case?

4 MR. BRACKLEY: Again, Judge, I would limit that to
5 conversations related to helping him or offering assistance.
6 If he had conversations to, Hey, what happened, what's this
7 about, that's one thing.

8 THE COURT: Well, I think that's -- I think that's
9 the context of the question, at least as I understood it.

10 MS. RING: If I wasn't clear, that's what I want to
11 know.

12 THE COURT: Okay. Do you understand what the
13 question is?

14 THE WITNESS: I do.

15 THE COURT: Okay.

16 THE WITNESS: I think that Arizona is not correct on
17 that. It's Nevada. Is that what you are referring to? Are
18 we on the wrong sheet?

19 THE COURT: The Dion Moore drug case.

20 THE WITNESS: Yes. I don't recall. It's Reno,
21 Nevada.

22 Q. (By Ms. Ring) Okay. So did you talk to any law
23 enforcement or anyone in Reno, Nevada, about Dion Moore's case
24 in relation to his involvement and cooperation in this case?

25 A. Yes.

1 Q. And what was that conversation?

2 A. I spoke with the deputy District Attorney briefly in
3 Washoe County, Nevada, and just explained to her that
4 Mr. Moore was a witness and assisting the ATF. That was it.
5 And then after that, I never received any call backs from that
6 District Attorney.

7 Q. Okay. And you made that call at Mr. Moore's
8 request?

9 A. Yes.

10 Q. Okay. So Mr. Moore had asked you whether you would
11 let the prosecutor in Nevada know that he was cooperating in
12 your investigation?

13 A. Correct.

14 Q. In this investigation?

15 A. Yes.

16 Q. Okay. And you didn't do a report to document that?

17 A. No.

18 Q. Um, there's also discussion in this interview you
19 had with Michael Moore (sic) about Dion Moore and guns -- the
20 number of guns that he was buying from ABC Pawnshop, that
21 those guns were going to Chicago and had been, um, traced to a
22 number of different crimes.

23 Did you have any discussions with Dion Moore about
24 his being prosecuted or not prosecuted for those crimes?

25 A. No, I believe that the statute of limitations had

1 run on most of those crimes that he spoke about in the
2 interview.

3 Q. Are you aware of anybody else from your agency
4 making Mr. Moore any promises based on his cooperation in this
5 case related to any other of Mr. Moore's involvement in guns?

6 A. No.

7 MS. RING: I think that's all I have, Judge.

8 THE COURT: Okay. Cross-examination?

9 MR. BRACKLEY: Judge, I have a couple questions.

10 THE COURT: Sure.

11 **CROSS-EXAMINATION**

12 **BY MR. BRACKLEY:**

13 Q. Just to clarify, Agent Amon, what's the relationship
14 between this business, ABC Pawn, and Dion Moore and the gun
15 that you were looking for, um, that Michael Clark had
16 possessed back in 1994?

17 A. ABC Pawn was the location in Aurora, Colorado, that
18 was known for a high amount of crime guns. It's firearms that
19 are bought and subsequently recovered in crimes in a short
20 period of time. The firearm in this investigation came from
21 that location.

22 MR. BRACKLEY: Thank you. No further questions.

23 THE COURT: Any redirect? Agent Amon, you can step
24 down.

25 Can this witness be excused?

1 MS. RING: Yes, Judge.

2 THE COURT: You are excused.

3 THE WITNESS: Thank you.

4 THE COURT: Any further witnesses on behalf of the
5 defense?

6 MS. RING: No.

7 THE COURT: Regarding the motion to suppress
8 statements 2 or 3?

9 MS. RING: No, Judge.

10 THE COURT: All right. Any rebuttal evidence from
11 the People?

12 MR. KELLNER: No, Your Honor.

13 THE COURT: All right. Seems like now would be a
14 good time to take arguments on all the motions to suppress
15 statements 1, 2 and 3. Does that fit with counsel's
16 expectation?

17 Okay. With respect to the motion to suppress
18 statement 1, which involved the interview of Mr. Clark on
19 November 2nd, 1994, at the Boulder Police Department, argument
20 on behalf of the Defendant, Ms. Milfeld. I think this was
21 yours.

22 MS. MILFELD: Yes, Judge.

23 THE COURT: I don't care who makes the argument
24 so...

25 MS. MILFELD: We'll tag team that.

1 THE COURT: Maybe.

2 MS. MILFELD: Judge, initially I'd just like you to
3 know that we heard testimony from multiple officers about
4 their contact with Mr. Clark. When Mr. Clark was arrested at
5 his car, all the detectives' recollection is that he didn't
6 make any statements from the time in which he was handcuffed
7 to the time in which he was mirandized. We also heard
8 testimony that from the transport of Mr. Clark from his
9 townhome to the police department, he didn't make any
10 statements.

11 A third period of time that the officers discussed
12 is when there was a 50-minute break in the interview when
13 Mr. Clark used the restroom and during that time the recorder
14 was off and he didn't make any statement.

15 THE COURT: Yeah, 50. Fifty minutes.

16 MS. MILFELD: I think that's what I said.

17 THE COURT: Okay.

18 MS. MILFELD: But during that time he didn't make
19 any statements. And certainly our expectation is that at
20 trial none of those statements would come in. There -- none
21 of those statements exist. Obviously, we don't know the
22 context of when and which of those statements were made when
23 he -- if there are any at all.

24 THE COURT: Okay.

25 MS. MILFELD: So I just want to put that on the

1 record.

2 Looking at the statements that we have, which are
3 part of the transcript, I think what's important for the Court
4 to note for the voluntariness of the statements is that
5 Mr. Clark was arrested outside of his townhome at about 2:38
6 in the afternoon. The last time that he makes statements is
7 about 19:00 hours, close to 8:00. So there's a period of time
8 of about five-and-a-half hours that he's with detectives, with
9 experienced detectives, and a significant portion of that time
10 is when he is in a closed interview room with three
11 experienced detectives being actively questioned.

12 We heard testimony from Detective Trujillo as well
13 as Detective Weiler that they targeted questions to Mr. Clark,
14 that the focus of the investigation -- the focus of the
15 interview was whether or not Mr. Clark was involved. As
16 Detective Weiler stated, he wanted to get to the truth of what
17 had happened.

18 Detective Trujillo talked about how he even employed
19 what he called a psychological tool, which was the GSR
20 collection kit, that he used that in order to get Mr. Clark to
21 confess. What we do know at the time is that Mr. Clark was
22 19 years old. He had minimal experience with police officers.
23 We know that he had been interviewed prior as part of the
24 motorcycle incident. We don't know, really, anything about
25 the theft or shoplifting incident, but we do know at that time

1 that he was in a position where he'd likely not been
2 interviewed for this length of period and, obviously, for such
3 a serious case.

4 So under *People v. Medina*, the Court should look at
5 all these factors in determining whether or not Mr. Clark made
6 voluntary statements at the time. And I think certainly the
7 length of the time, the fact that there were three officers
8 taking turns asking him very specific questions, that they are
9 directly accusing him of being involved in the murder goes
10 into play in why the Court should not find Mr. Clark made
11 voluntary statements.

12 THE COURT: Okay. And you rest on the record with
13 respect to the voluntary waiver of *Miranda* rights -- of his
14 *Miranda* rights?

15 MS. MILFELD: Yes, Judge.

16 THE COURT: Do you want to make any argument on
17 that?

18 MS. MILFELD: No.

19 THE COURT: Any response from the People,
20 Mr. Kellner?

21 MR. KELLNER: Judge, I won't belabor the points I
22 made in my motion, but I would cite to one additional case
23 that I did not reference in my motion. It's a Colorado Court
24 of Appeals case, *People v. Zamora*. The citation is
25 940 P.2d 939. And I'm going to quote from the very short part

1 at page 942, which states, most courts have recognized that
2 ruses are sometimes necessary elements of police work and have
3 held that deception, standing alone, does not validate
4 consent. It is one factor to be considered in assessing the
5 totality of the circumstances.

6 You know, clearly the detectives employed various
7 methods and tools to try to elicit truthful information from
8 Mr. Clark, but that fact alone or even combined with the other
9 facts that we know, um, does not in the totality of the
10 circumstances rise to the level that his statements were
11 involuntary.

12 And, Judge, that -- I think the record, as you can
13 read the transcript and also listen to the audiotape, really
14 indicates that for the most part it was in a conversational
15 tone. Of course, there were some pointed questions asked, as
16 to be expected during the interview of the suspect in a
17 serious case. But relying or focusing on the fact that
18 Mr. Clark was a 19-year-old man at the time, that alone,
19 Judge, does not shift the balance when you look at the
20 totality in this case. Here is a young man who has had police
21 contact and notably, Judge, just one month prior, one month
22 prior where he was arrested on another felony case, booked
23 into jail, read his *Miranda* rights, questioned undoubtably in
24 a room very similar to the one in which he was questioned
25 before.

1 You know, I focused Your Honor on some questions
2 regarding the fact that there were three individuals in that
3 room and that fact, Judge, I think the -- is pretty obvious
4 why there were three people there. There were, frankly,
5 multiple chefs involved in trying to cook this thing together
6 and it's not like it is now, today, where someone can sit in
7 another room and feed questions back to the individual.

8 So just looking at the fact that there are three
9 people in there really shouldn't carry or shift the totality
10 of the circumstances such that these are involuntary or even
11 demonstrate that his will was overborne. I think if you look
12 at the statements Mr. Clark did make, it's pretty clear that
13 his will wasn't overborne, he maintained that he had nothing
14 to do with it.

15 THE COURT: Okay. Thank you.

16 Well, with respect to the *Miranda* issue, clearly
17 Mr. Clark was in custody at the point in time he was
18 physically contacted by Detective Weiler. That's not in
19 dispute and, clearly, Mr. Clark was subjected to
20 interrogation. So it's incumbent upon the People to show by a
21 preponderance of the evidence that the Defendant was advised
22 of his rights pursuant to *Miranda*, and that he provided a
23 knowing and voluntary relinquishment of his *Miranda* rights.

24 The Court needs to consider the totality of the
25 circumstances, but to determine whether or not there's a valid

1 waiver there's really no -- two components. First, that valid
2 waiver needs to be voluntary; that is, it needs to be a free
3 and deliberate choice by Mr. Clark rather than being as a
4 result of intimidation, coercion or deception. And, further,
5 that waiver needs to be knowing and intelligent; that is,
6 Mr. Clark needs to be fully aware of the nature of the rights
7 that he's abandoned and the consequences of his decision to
8 abandon them.

9 Here, People's Exhibit 1 is a copy of the *Miranda*
10 advisement form that was used with Mr. Clark. And it
11 evidences a clear explanation of the rights that he has. And
12 the testimony from Detective Weiler is that he read those
13 rights to Mr. Clark verbatim, and Mr. Clark not only appeared
14 to understand the rights, but indicated on the form at the
15 first question that he understood the rights, and then asked a
16 second time, Mr. Clark indicated on the form that he
17 understood that any of the rights could be exercised now or at
18 any time during the interview. He then provided the
19 signature.

20 And then below that signature there is a further
21 line that says, Understanding the above rights, do you choose
22 to voluntarily waive your rights and make a statement or
23 answer questions? Yes is checked and, again, Mr. Clark has
24 signed that form.

25 Significantly, that advisement occurs at 2:48 p.m.

1 The Defendant -- there's a search of his apartment and his car
2 and then the Defendant is transported to the Boulder Police
3 Department where at 4:05, so approximately a minute and -- I'm
4 sorry -- an hour and 17 minutes later he is now in an
5 interview room with Detective Weiler and other law enforcement
6 officers. And as evidenced by the recording, which is
7 Exhibit 2 and the transcript, which is Exhibit 3, Detective
8 Weiler again almost immediately points out to Mr. Clark that
9 he had been advised of his rights and reminds him that that's
10 back at his apartment, and Mr. Clark confirms that.

11 The detective tells him -- and this is at the top of
12 page 2 for Exhibit 3, you know, the detective says, Just like
13 I explained to you before, you know, you can choose not to
14 answer any specific questions that you don't want to. And,
15 like I said, we are not going to have to drag something out of
16 you that you don't want to talk about.

17 He goes on, farther on in the next paragraph,
18 saying, If you have any questions or if you are uncomfortable
19 with anything or if you want to take a break, let us know and
20 we'll do all that stuff. Okay. Does that make sense to you?
21 And the Defendant answers, Yes, sir. So clearly the Defendant
22 is reminded of and acknowledges his *Miranda* rights that were
23 provided in written form and I would find under the totality
24 of the circumstances that the Defendant did exercise a
25 knowing, intelligent and voluntary waiver of his rights

1 pursuant to *Miranda*.

2 With respect to the voluntariness of the statements
3 themselves, the recording, which is Exhibit 2, is quite
4 telling as to the tone and nature of the interview. There's
5 no question that it occurs at the Boulder Police Department in
6 an interview room, and there are multiple law enforcement
7 officers there. But the factors that -- that -- let me back
8 up one step.

9 With respect to voluntariness of statements, the
10 burden of proof is on the prosecution to show by a
11 preponderance of the evidence that the Defendant's statement
12 was voluntary. The Court needs to consider the totality of
13 the circumstances. A statement is voluntary as long as some
14 form of coercive police activity does not play a significant
15 role in inducing the statement from the Defendant.

16 Another way of saying that is the statement is
17 voluntary if it's not extracted by any sort of threats or
18 violence nor obtained by any direct or implied promises,
19 however slight. And there are a number of factors that the
20 Colorado Supreme Court and *People v. Jennings*, 808 P.2d 830,
21 directs the trial court to look at. A number of the factors,
22 as I consider them here, weigh in favor of finding that the
23 Defendant's statements back in 1994 were voluntary.

24 First of all, he had been given *Miranda* warnings.
25 He indicated he understood them and he did waive them, not

1 only on the form, but then again when he was at the Boulder
2 Police Department.

3 He was told that he could take a break if he needed
4 to. He was told that he didn't need to answer any questions.
5 As to whether there were any overt or implied threats or
6 promises, the only minimally implied promise occurred at
7 page 69 of the transcript, which is Exhibit 3. There was a
8 discussion about offering to bring the District Attorney in,
9 but there the officers were clear to indicate that they didn't
10 have the authority and they could not make any promises to
11 Mr. Clark, only that they could provide a District Attorney
12 who might be able to talk to Mr. Clark about that sort of
13 thing. But it never went any further than that, and certainly
14 a District Attorney was never called in to the interview.

15 The method and style employed by the interrogators
16 in questioning the Defendant. It was a fair characterization
17 to say that it was conversational. It was an open question
18 and answer. There were narrative answers primarily of the
19 Defendant. He did ask questions at several places during the
20 interrogation and those questions were answered.

21 The volume and tone of the officers' questions and
22 comments to the Defendant were, I would say, measured and calm
23 and respectful. There were no raised voices. There was no
24 yelling. It's clearly no threats and really no pressure
25 applied to the Defendant beyond some repeat questions to which

1 the Defendant continually responded in a consistent manner.
2 And then some pushing, as was testified to by a couple of the
3 detectives, but the pushing that I reviewed, that I see in the
4 recording and on the transcript is nothing that I could find
5 to be coercive or overcoming the Defendant's free will and
6 voluntary choice to speak with investigators. So for those
7 reasons I will find -- I should back up a little bit.

8 With respect to the length of the interrogation,
9 there was -- so the interview started at 4:05 at the police
10 department. At 6:07 the interviewers and Mr. Clark took a
11 break so everyone could use the bathroom. The break was for a
12 period of 50 minutes. Well, actually, 48 minutes. They came
13 back at 6:55 and continued with the interrogation. That's
14 significant. To the extent that the defense is arguing this
15 was a five-and-a-half or six-hour ordeal for Mr. Clark, it's
16 true that he was in custody for that period of time and with
17 police present throughout, but the fact of the matter is that
18 the total interrogation time was less than three hours. And
19 the first two hours were then interrupted by about a 50-minute
20 break and then the last 50 to 60 minutes or so were after the
21 bathroom break.

22 So under all the circumstances, I do find that the
23 Defendant's statements were voluntary. They were not the
24 result of any threats or violence or implied or expressed
25 promises. So the motion to suppress statement 1 is denied.

1 Turning to the motion to suppress statement 2,
2 argument on the behalf of the Defendant, Ms. Ring.

3 MS. RING: Thank you, Judge.

4 Judge, I essentially stand on the record and our
5 motion as to our motion to suppress statements as to the
6 April 15th, 2011, interview. So if the Court wants to hear
7 from the prosecution and make a ruling on that one first, or
8 do you want me to do both 2 and 3?

9 THE COURT: Let's do -- for ease of my process, if
10 we could just stick to 2. Do the People need to make any
11 response?

12 MR. KELLNER: No, Judge.

13 THE COURT: Okay. So in this circumstance, the
14 interview on April 15th, 2011, the Court needs to consider
15 whether or not the Defendant was in custody at the time of the
16 interview with officers. I mean, I think that clearly there
17 was an interrogation that took place, but the determination of
18 whether or not the Defendant was in custody needs to take into
19 account several different factors, including the time, place,
20 and purpose of the encounter, the persons present during the
21 interrogation, the words spoken by the officers to the
22 Defendant, their voice and general demeanor, the length and
23 mood of the interrogation, whether any limitation of movement
24 was placed on the Defendant, the officers' response to any
25 questions asked by the Defendant. And the ultimate question

1 is whether a reasonable person in Mr. Clark's position would
2 have believed that he was restrained to the extent consistent
3 of a formal arrest.

4 Here the interview took place in the Defendant's
5 office, at his work place, midday, during the Defendant's work
6 hours. They were in the private office with the door closed,
7 but there was a window that apparently faced out into the
8 hallway. There were other workers in the vicinity, which is
9 the reason that the door was closed. It was the Defendant
10 with Agents Grusing and Amon. The tone of the interview and
11 the words spoken by the officer, it was very non-accusatory;
12 in fact, the officers even went to the extent of trying to
13 reassure the Defendant that he was not the target or he was
14 not in trouble. It was conversational, it was a friendly
15 tone. They exhibited a calm demeanor, as did Mr. Clark. The
16 length of the interrogation was less than an hour,
17 approximately 53 minutes, and I would characterize it
18 throughout as a cordial conversation. There wasn't any
19 limitation of movement placed on Mr. Clark.

20 It is significant to note that during the interview
21 Mr. Clark took a personal call on his cell phone and then a
22 short time later made a call. From a review of the recording
23 and transcript, it sounds like he was calling back the person
24 that had called him initially, but there wasn't any
25 restrictions placed on those activities for Mr. Clark. He did

1 ask questions of the officers at various points in time and
2 they answered his questions. So when I look at all the
3 circumstances, it is apparent that Mr. Clark was not in
4 custody at the time that he was interviewed at the Big Horn
5 Ace Hardware and therefore *Miranda* warnings were not required.

6 With respect to the voluntariness of the Defendant's
7 statements, the analysis that I stated earlier in ruling on
8 the motion to suppress statement 1 applies to this
9 circumstance as well. There is no indication from either of
10 the agents that there was any undue pressure or force or
11 coercion. There were no promises, no threats. There was no
12 coercive police conduct that would have come anywhere near
13 overcoming Mr. Clark's ability to make a free and voluntary
14 choice about whether or not to speak to law enforcement.

15 I mean the fact of the matter is they presented to
16 him as needing and wanting his help. He responded to them in
17 a manner that indicated that he was trying to be helpful, at
18 least to a certain extent. There's nothing from the evidence
19 here that indicates that his statements were anything but
20 voluntary. So the motion to suppress statements 2, that's the
21 interview on April 15th, 2011, will be denied.

22 So let's take up the motion to suppress statement 3,
23 and I had anticipated that would be the most discussed, at
24 least in terms of argument. Ms. Ring.

25 MS. RING: Judge, the District Attorney's response

1 to our motion, I think, asks the Court to find that Michael
2 Clark was never in custody. It's certainly clear that my
3 client was never mirandized, and I don't think anybody here is
4 going to argue that my client was not interrogated, that the
5 purpose of that interview was an interrogation. So since it
6 was an interrogation and he wasn't mirandized, I think that
7 the focus of the issue is whether or not he was in custody at
8 any point during the April 20th interview and then that I
9 think the Court also, of course, has to make findings about
10 the voluntariness of my client's statement.

11 I would suggest to the Court that the totality of
12 the circumstances and whether a reasonable person would have
13 felt that his freedom of movement was deprived to the level
14 necessary to acquire a *Miranda* advisement, that that issue
15 needs -- the Court, I would suggest, needs to look at the
16 facts and take into account what happened on April 15th,
17 because I would submit to the Court that actually Agent
18 Grusing, Detective Heidel and Amon were very, very smart about
19 why they went to my client's place of work on April 15th for
20 that first interview, because they had my client in a place
21 where he wasn't expecting them to show up, where it would be
22 odd for him to get up and leave out of his place of work,
23 where he certainly wouldn't want to make a scene at his place
24 of work by trying to get them out of there.

25 And that you then put my client in a position when

1 you call him up and say that, We want to talk to you again,
2 about where do you want to have that conversation. And if you
3 are Mr. Clark, you certainly don't want those individuals
4 coming back to your place of work and you certainly don't want
5 those individuals coming to your home. So when the officers
6 suggest that we can set up this interview at the Frisco Police
7 Department, if you are Mr. Clark, that sounds better than the
8 other choices of where that interview might happen.

9 I would also suggest that from Agent Grusing's
10 testimony, that the nature of how they are trying to approach
11 Mr. Clark and get him to talk to them is they are being very
12 careful about trying to create a situation where they don't
13 have to mirandize him. So certainly we have seen officers
14 saying, You know what, every time I interrogate somebody, it's
15 my procedure to be on the safe side in case that person feels
16 like they are in custody or the Court finds that, based on the
17 totality of the circumstances there, that we go ahead and we
18 mirandize that person. But we know, based on the way this was
19 all set up, the ruse about the gun from the first conversation
20 on April 15th leading up to now we are going to go after the
21 homicide piece of this, that they are trying to start this out
22 as a friendly conversation. They were trying to get Mr. Clark
23 to be concerned about where this is going and they are trying
24 to put him in a specific situation, and that all of this was
25 very calculated on the part of the police.

1 I understand that the law is looking at what my
2 client feels at the time he's being interrogated, but I would
3 suggest to you a reasonable person, based on all of this
4 happening, that it does meet the requirements of Colorado case
5 law and *Miranda* that my client should have been mirandized for
6 the interview on April 20th of 2011.

7 I know, based on the Court's questioning of Agent
8 Grusing, that the Court may disagree with me that he should
9 have been mirandized at the outset of that interview, but to
10 look at how that interview progressed, that there's clearly a
11 time during the interview where it appears Mr. Clark wants out
12 of that room. And I would submit to the Court that when the
13 Court was questioning Agent Grusing about his memory of what's
14 going on, starting with the bottom of page 34 of the
15 transcript onto page 35, that what I heard the Court suggest,
16 which I think is the common sense reading of the transcript of
17 the interview, is that Detective Heidel is going on describing
18 what Mr. Clark has said is his situation back in 1994. That
19 it's 15 years ago, I was 20 years old, I didn't have
20 anything -- but that's all Detective Heidel talking. And so
21 that it makes sense that Detective Heidel's still talking and
22 that Michael Clark says on line 7 of page 36, Can I go back to
23 work now, we know from Agent Grusing, he's standing up at this
24 point, that --

25 THE COURT: Page 35. Okay.

1 MS. RING: Page 35. And that that interview goes on
2 for quite a while. And the way you read that interview is
3 they are doing everything that they can to keep him in that
4 room, to try to keep him talking. And he stood up and said he
5 wants to go and that -- and at that point if the Court doesn't
6 agree with me that it wasn't warranted earlier, that at that
7 point, because he is still being interrogated, he isn't free
8 to leave. It meets the totality of the circumstances required
9 for a reasonable person in Mr. Clark's position at that point.
10 And I do think that all of the lead up to that point in time
11 is important in the Court making the appropriate
12 determination.

13 THE COURT: Okay. Do you want to make a later
14 argument on voluntariness or stand on the record? I
15 understand if I find that he is in custody and there was no
16 *Miranda* warning given, then any statements made after that
17 point would be excluded, but it is certainly possible that a
18 circumstance starts out as noncustodial and then transitions
19 into custodial. And so for the noncustodial portion, did you
20 want to make -- do you want to make any argument on
21 voluntariness or stand on the record?

22 MS. RING: Just briefly, Judge. I think the Court
23 is clear about my concerns in terms of -- and, again, I guess
24 starting with the ruse and I guess Mr. Kellner's argument
25 about the ruse. And I'm not talking the voluntariness of the

1 statements on April 15th, but that I think that continues.
2 And that I think you heard from both Agent Grusing -- and the
3 Court was well aware from reading the transcripts -- there
4 were a number of, you know, outright lies that were told to
5 Mr. Clark to try to get him to make certain statements and
6 behave in certain ways. So that's my added record, just
7 standing on the record.

8 THE COURT: Okay. And I would -- just because I
9 don't want the prosecution to go back through an analysis of a
10 ruse and the case law under *Zamora*, because I think that's an
11 accurate statement of the law. To the extent that there are
12 falsities or untruths or a ruse being used, it's but one
13 factor to consider in the -- in the totality of the
14 circumstances. It does not by itself render an otherwise
15 voluntary statement involuntary, it is simply one factor.

16 Now with respect to the custody issue on the
17 April 20th, 2011, statements from Mr. Clark. Mr. Kellner.

18 MR. KELLNER: Judge, first, I would like to address
19 that this wasn't actually in the Frisco Police Department, it
20 was in a public meeting place which is in the same building.
21 But it's actually very significant, Judge, because when you
22 think about whether or not someone is going through the
23 security at the front door of a police department back to an
24 interview or interrogation room, and then if someone says, Can
25 I go back to work, and you say, Hey, hold on a minute, you

1 know, that's -- I think that presents a totally different
2 analysis than what we're looking at here, which is a public
3 meeting place where -- with a door that led to the foyer that
4 leads to the parking lot.

5 But with having said that, Judge, the People's
6 position is that at the point where he says, Can I go back to
7 work now, if you listen to the audio, I think that it's
8 obvious that Detective Heidel is still speaking over it as he
9 says, you know, I was living out of my car. He was saying,
10 "I," that was referring to Mr. Clark. And in response to the
11 Defendant's question of, Can I go back to work now, Special
12 Agent Grusing says, Yeah.

13 As this sort of progresses, you heard testimony that
14 they were standing. He's basically, the People's position, is
15 exercising his right to leave at this point. He is making
16 progress towards the door and no one is physically restraining
17 him. And I would argue, Judge, that his freedom of action is
18 not limited in a significant way during a police
19 interrogation. In fact, just a few lines down after he says,
20 Can I go back to work now, Special Agent Grusing says, Yeah.
21 He says, I'm going back to work now.

22 So you heard testimony from Special Agent Grusing.
23 And a simple review of the audio and the time on the audio CD,
24 Judge, will show you that from this point that Detective
25 Heidel comes in, it's just about a minute between when he

1 actually does, in fact, leave. So he says, Can I go back to
2 work now, I'm going back to work now, and then, in fact, does
3 leave that room.

4 THE COURT: Okay. Regarding the issue of custody,
5 I'm going to examine this in two different stages, because I
6 think that that's the way that the interview itself breaks
7 down, the first stage being the interview of Mr. Clark by
8 Agents Grusing and Amon that encompass the first 57 minutes of
9 the interrogation. And I would agree with Ms. Ring there is
10 no question that it's an interrogation. I don't hear the
11 People arguing otherwise. But, again, you know, custody is an
12 objective assessment in whether a reasonable person in the
13 Defendant's circumstances would have their liberty constrained
14 to the point associated with formal arrest.

15 There are a number of factors that the Court should
16 consider, and for this first stage of the interrogation the
17 time, place and purpose of the encounter. It is significant
18 that it is in a meeting room that is outside of the police
19 department. I'm not -- I can't tell if it's a public meeting
20 or conference room, because it sounds like there's -- the
21 agents described it as being another city office that was in
22 the same building that the police department is housed in, but
23 it's clear that the conference room is not in the police
24 department. It's significant that in setting up the meeting
25 Agent Grusing had asked, not told or directed, but asked the

1 Defendant if he would meet them at the Frisco Police
2 Department.

3 The Defendant, again, being cognizant of his rights,
4 that he has asked if he needed to bring an attorney, and the
5 answer from Agent Grusing was, That's your choice.

6 Significantly, the Defendant appeared at that Frisco municipal
7 building on his own without an attorney. He drove himself.
8 And for the first 57 minutes of that interview he is talking
9 to the same two agents that he talked with back on April 15th,
10 2011.

11 The tone of the meeting is conversational. I would
12 describe it as cordial and professional. I would describe
13 each of the agents' voice and general demeanor as being calm
14 and friendly. For the first 57 minutes I would find that
15 there were no limitations placed on the movement of the
16 Defendant. He did pose questions to the officers, they were
17 answered in the context of the conversation.

18 And it's significant that at about -- I have a
19 notation that at 44:35 in the interview one of the agents even
20 says to Mr. Clark, We have to get you back to work. At
21 approximately 56 minutes into the interview, shortly before
22 Agent Heidel arrives , Agent Grusing even says to Mr. Clark at
23 that point, I'll be right back. I have to do something.
24 We'll let you go here in just a second. Do you need to go
25 right now? And Mr. Clark starts to say, I'm gonna... and then

1 Agent Grusing says, Can you give me five minutes, and there is
2 a pause in the recording. It's not reflected in the
3 transcript, but there's a pause in the recording. And then
4 the conversation picks up between Mr. Clark and Agent Amon
5 for, you know, less than a minute, probably more like
6 30 seconds. And it's back and forth where Agent Amon is, you
7 know, we've heard the term "pushing." I think that Agent Amon
8 is trying to push the Defendant, but not unreasonably so.

9 I would find that certainly up until the 57th minute
10 of the interview that Mr. Clark was not in custody. That a
11 reasonable person under his circumstances, even considering
12 the circumstances of the interview five days earlier, would
13 not believe they were having -- that they were being
14 restrained or they were having their freedom restricted to the
15 extent that they didn't feel that they were free to leave or
16 they would have reasonably believed that they were being
17 detained consistent with the level of an arrest.

18 With respect to the voluntariness of the statements
19 that the Defendant makes up until that point in time, again, I
20 would find, based on the factors that I stated earlier, that
21 Defendant's statements up to that point in time were not
22 extracted by any sort of threats or violence. They weren't
23 obtained by any direct or implied promise. It is true that
24 the officers employed a couple different interrogation
25 techniques. We've used the term "ruse." The examination by

1 Ms. Ring brought out several of the different false statements
2 that the interrogators made to the Defendant, but in the
3 totality of the circumstances and the big picture, they would
4 have had a de minimus impact on any reasonable person being
5 interrogated.

6 And it's significant, and the case law makes the
7 distinction that the -- those false statements weren't
8 calculated to produce an untrue statement from Mr. Clark.
9 They were an interrogation technique that they were hoping
10 would shift -- flip him to that point, a steadfast position,
11 that he didn't know anything about the homicide of Marty
12 Grisham.

13 So for all of the statements made by the Defendant
14 on April 10th, 2011 up to the 57th minute I would find that he
15 was not in custody and the statements were voluntarily made.

16 At the 57th minute Detective Heidel comes into the
17 room. There has been to that point no indication from the
18 Defendant that he needs or wants to leave. It is clear from
19 the recording, not as clear from the transcript, that
20 Detective Heidel's presentation to the Defendant is -- is much
21 more pointed, it is confrontational and it is accusatory, and
22 it is a different tone than had been employed by Agents
23 Grusing and Amon in the first 57 minutes of the interview.

24 In addressing the question of custody after the 57th
25 minute, in the transcript at page 35, line 7, the Defendant

1 does say, Can I go back to work now? And I asked Agent
2 Grusing about the context of his answer on line 11 where he
3 says, Yeah. I'm not sure that his answer on cross-examination
4 illuminated my understanding any better, but as I listened to
5 the recording, what it sounded like to me was that Detective
6 Heidel, starting at the bottom of page 34 where he says, I
7 don't care if it's insulting or not, you killed a man in cold
8 blood, you killed a man in cold blood, goes on for a paragraph
9 and towards the end of the paragraph he's saying, I was at a
10 bad spot, I was house surfing, I didn't have any place to
11 live. And he continues on with that statement to say, I was
12 living -- living out of my car. And so I would find that
13 Agent Grusing's response to -- Agent Grusing's statement of,
14 Yeah, on line 11 is made in response to the Defendant's
15 question on line 7, Can I go to work now? And there is
16 testimony from Agent Grusing that the Defendant then began to
17 get up and to try to leave, and there is clearly further
18 conversation at that point between the Defendant and the
19 officers.

20 It is approximately a minute in length between when
21 the Defendant says, Can I go to work now, and then there is a
22 flurry of conversation back and forth. At one point in the
23 transcript at that time, bottom of page 35, the Defendant at
24 line 43 says, I'm going back to work, and Agent Grusing said,
25 That's a bad decision, Michael, but it's your decision,

1 clearly indicating to the Defendant or any reasonable person
2 that he is going to be allowed to go back to work.

3 Agent Amon says, Hey, Michael, hang out here a
4 second. And the Defendant starts to make a statement and the
5 only thing the transcript that the Court had got was, I'm
6 going, which doesn't make -- without the full context of the
7 statement, I don't know what he was trying to say. But
8 clearly officers continued talking to him as he is standing
9 near the door and within a minute he is -- he is allowed to
10 leave the room.

11 What would a reasonable person think facing the
12 circumstances that Mr. Clark was in? Clearly the heat had
13 been turned up by investigators. If it wasn't clear before
14 the 57th minute, it was clear after the 57th minute that they
15 were, in fact, accusing him of committing the homicide. But
16 several times that the Defendant says, Can I go to work now,
17 I'm going back to work, he's told by investigators in very
18 plain language, Yeah, you can go back to work now; you want to
19 go back to work, it's a bad decision, but it's your decision.
20 And within a minute he is allowed to leave the room and the
21 interrogation ends.

22 I would find that under all those circumstances that
23 a reasonable person in the circumstances of Mr. Clark would
24 not have believed that they were not free to leave or that
25 their freedom of movement had been constrained in any

1 significant degree.

2 No doubt the tone of the interview changed. No
3 doubt it became clear to Mr. Clark that he was now the target
4 or the subject of their investigation, but he is told in
5 fairly clear terms by the investigators that he is going to be
6 allowed to go back to work and that he can leave to go back to
7 work. And those, along with the other circumstances, and
8 particularly the way he had been treated earlier in this
9 interview and back on April 15th, I think would lead a
10 reasonable person to believe that he was not under arrest or
11 not facing the functional equivalent of arrest, so the motion
12 to suppress statements 3 is denied.

13 Did counsel want to take up the two motions
14 objected -- well, why don't we take a recess for 20 minutes.
15 We'll reconvene at 3:35. I'm assuming you want to take up the
16 other two motions.

17 MR. BRACKLEY: Yeah. I think that we have three or
18 four more, no testimony, and I think we'll be done quickly.

19 (Whereupon, a brief recess was taken.)

20 THE COURT: All right. We're back on the record in
21 12 CR 222. Defendant and counsel are present.

22 Other motions the parties wanted to take up?

23 MR. BRACKLEY: Judge, I just wanted to just follow
24 up on one point. And I -- I certainly don't feel it was off
25 by the fact I assisted Ms. Ring in bringing Agent Amon here,

1 any discovery issues, I take that very seriously. And -- I
2 mean, we're doing the best that we can and we are going to get
3 it done, I hope. I can tell the -- this Court that there has
4 never been a lull in the discovery process in this case, that
5 discovery is constantly going back and forth. Well, it's
6 constantly going towards the Public Defender because we're
7 constantly looking for it.

8 I can make excuses up and down on why I didn't have
9 that one page document from Agent Amon. I'm not going to.
10 I'm simply going to say we are going to get it done. You can
11 still give me that tough talk, perhaps I need it.

12 THE COURT: I think that I said a little
13 conversation.

14 MR. BRACKLEY: But I -- I mean I -- I think about it
15 all the time, about getting this stuff done. I didn't get
16 that piece of paper. I would like to think that I would have,
17 but, you know, I'm not looking to be absolved from it. I'm
18 just telling the Court we are going to get it done and we're
19 working hard on it.

20 THE COURT: Okay. On that point, you know, Rule 16
21 has time limitations, discovery obligations. I have issued
22 some orders to make other discovery obligations and then, of
23 course, *Brady v. Maryland* overlays all of that.

24 I don't doubt the sincerity of the District
25 Attorney's position. I don't doubt this has been somewhat of

1 a challenge, not only to make sure that all information from
2 an investigation that started in 1994 is available to the
3 defense, but also coordinating with other agents, particularly
4 other federal agents, I know sometimes can be a challenge.

5 Here is the thing. I'm going to enforce Rule 16,
6 and to the extent that there's a violation, then I'm going to
7 need to weigh what the prejudice is to Mr. Clark. And I'm
8 going to take that very seriously because this is a
9 first-degree murder case. And what I said earlier, I meant.
10 I don't want to be here 29, 28, 27 days before trial, or even
11 closer than that, finding out that there was information out
12 there that hadn't been disclosed to the defense, because this
13 case has been charged long enough ago. This trial has been
14 set for a sufficient period of time that all of that
15 information should be able to be disclosed and turned over.

16 And, again, I don't doubt the sincerity of
17 Mr. Brackley or his office or the Boulder Police Department,
18 but the fact of the matter is that it has to get done or
19 there's going to be consequences by way of sanctions. What
20 that is, I don't know. I hope that we don't come to that.

21 You know, everybody wants me to hold everybody's
22 feet to the fire when it comes to discovery and disclosures
23 and being fair, and in a case like this, I will and I have to.
24 So having said that, you know, the Amon issue, it's probably
25 illustrative of something that Ms. Ring was concerned about.

1 It was something that was able to be resolved today. I
2 appreciate the way counsel was able to work cooperatively, but
3 I also understand that as we get closer to trial, that may not
4 solve whatever the issue is.

5 MR. BRACKLEY: Your Honor, that's why I raised it,
6 because I wanted you to tell us that you are going to take it
7 seriously, because we always need to hear it. And I'm telling
8 you, I just -- we're working hard to get it done. We're not
9 looking to make excuses.

10 THE COURT: Okay.

11 MR. BRACKLEY: I own -- I own this issue today and
12 every other page of discovery. I'm going to own it until this
13 case is over.

14 THE COURT: Okay. Ms. Ring, did you want to...

15 MS. RING: You know, Judge, I guess my concern is
16 that -- I don't doubt what Mr. Brackley is saying. My concern
17 is that I'm worried about what's happening logistically in
18 terms of why I don't have things. You know, if -- if I'm
19 Agent Grusing and I have a file that has documents in it that
20 are part of this investigation, I don't understand how that
21 entire file isn't copied and given to the District Attorney,
22 which meant I would have had the photos. And maybe I have the
23 photos somewhere else, but I ought to have the copy of the
24 photos that Agent Grusing used in his interview.

25 And I'm having a hard time believing that's the only

1 piece of paper that Agent Amon has. I know that's what he
2 said, but then he tells me about some conversation that he had
3 with a prosecutor in Nevada. And the reason I thought it was
4 in Arizona is because Agent Grusing documents a conversation
5 that he had with a prosecutor in Arizona that talks about an
6 e-mail that says it's attached that I don't have.

7 Now I don't think that actually Detective Heidel had
8 the report that Amon had today. I don't think that Detective
9 Heidel has the rest of Agent Grusing's file, I don't think
10 Detective Heidel has the e-mail that Agent Grusing references
11 on page 1019 of our discovery, but I don't know how else to
12 get it and I need -- you know, I need to have it.

13 The other thing that I don't understand how it's
14 happening -- I'm glad I got it, but I got reports on
15 August 1st that have report dates of January 5th of 2012.
16 Now, sure, that's in time, but there's no reason for it when
17 I'm talking about close to 5,000 pages of discovery. I want
18 it now. And so, you know, I've worked with Detective Heidel
19 for a really long time and he is a really organized guy, it
20 has been my experience.

21 And so, Judge, I'm making this record because if
22 something happens later, I think that I need to let you know
23 what I've been dealing with and --

24 THE COURT: If there's -- there's nothing that I can
25 do or that I should do today.

1 MS. RING: Right.

2 THE COURT: What I would anticipate is that if there
3 is a discovery issue in the future, probably one of the first
4 things that you are going to say to me, Ms. Ring, is, Remember
5 when I told you back on August 9th, Judge, about all of these
6 issues and I -- you know, what -- the way that federal agents
7 deal with their reports and their disclosures and the timing
8 of that is, to at least some limited experience, different
9 than the way that state agents and state prosecutors deal with
10 it. I'm not sure if that explains what happened with the
11 information Detective -- or Agent Grusing and Agent Amon had.
12 All I can tell you, Ms. Ring, is that if there's a violation,
13 I will take it seriously. I will give it a meaningful
14 analysis. If a sanction is warranted, I will not hesitate to
15 enter the sanction, and that's all I can tell you today.

16 And I -- you know, I mean, I suppose what has been
17 left unsaid is that it really would make sense for the
18 prosecution to recheck and double-check to make sure that
19 everything has been located and disclosed or made available.

20 MR. BRACKLEY: That's fine, Judge, and that's why
21 those pages from January were discovered, because I went
22 through page-by-page. And I did -- I discovered it and that's
23 something that we do as we prepare for trial. It's not
24 something that I did earlier this summer, because I was
25 preparing for something else, but it's something that I'm

1 doing --

2 THE COURT: Okay.

3 MR. BRACKLEY: -- to prepare for trial.

4 THE COURT: Okay.

5 MR. BRACKLEY: I wish I could have done it earlier,
6 but I didn't.

7 THE COURT: Okay.

8 All right. There are statement -- we have another
9 motions hearing date set for September 5th at 9:00, but we do
10 have a little bit of time today. What other motions did
11 counsel want to take up today as opposed to on September 5th?

12 MR. BRACKLEY: Judge, what I was thinking for today
13 is there are those two identification motions.

14 THE COURT: Okay.

15 MR. BRACKLEY: Um, there's also the motion for
16 disclosure of prior bad acts, which I think is something that
17 we can probably take up. I didn't see that the Court had
18 ruled on that one. We had essentially said that we would
19 follow Rule 16.

20 THE COURT: I thought that I -- I should have ruled
21 on it previously. So it's a motion for disclosure of prior
22 bad acts.

23 MR. BRACKLEY: Yeah. Yes.

24 THE COURT: Give me just a minute. Okay. So the
25 motion for disclosure of prior bad acts evidence was filed on

1 June 21st, 2012. On June 26th, 2012, it was granted by Judge
2 Whalen.

3 MR. BRACKLEY: Okay.

4 THE COURT: I was covering for her and she was
5 covering for me.

6 MR. BRACKLEY: I don't have -- I'll find that.

7 THE COURT: So it was granted. We can make a copy
8 for you now as it's a simple handwritten "Granted."

9 MR. BRACKLEY: Okay. So essentially it's the two
10 in-court ID motions. And then the People's motion, um, where
11 we were essentially asking for a notice of alternate suspect.

12 THE COURT: The motion in limine.

13 MR. BRACKLEY: Yeah, which may have been -- I don't
14 know if we called it a motion in limine, but it may have been.
15 I think that I -- I had stated it in terms of they haven't yet
16 given us their defenses, but should they -- should a defense
17 be alternate suspect, we would ask for notice pursuant to
18 it -- case law on that. I don't know if --

19 THE COURT: Are we talking -- so I have the motion
20 in limine exclusion of improper opportunity or motive,
21 evidence allegations at trial, which I analyzed as sort of an
22 alternate suspect motion in limine.

23 MR. BRACKLEY: Right.

24 THE COURT: Okay.

25 MR. BRACKLEY: So that one and then the two ID

1 motions, which leaves us -- the only ones left from my reading
2 here, and unless I'm missing something, would be the People's
3 807 motion and the People's *res gestae* motion.

4 THE COURT: And that's what I have.

5 MR. BRACKLEY: And I will state as to those,
6 certainly I'm not going to argue them, but I did ask for the
7 Court to rule on the papers, the offer of proof that we had
8 given as to those. I know the Court's response could be you
9 act at your own peril if you show up without witnesses at the
10 hearing, but I would ask the Court to rule on paper. If the
11 Court doesn't wish to do that, you can tell us.

12 THE COURT: Well, what I had anticipated is that I
13 would take it up on September 5th and hear any argument or
14 listen to any evidence from either side. If you want to
15 proceed by offer of proof as to the admissibility of Marty
16 Grisham's statements under 807, I'll give Ms. Ring a chance to
17 think about that and respond on September 5th. We can also
18 discuss the *res gestae* on September 5th.

19 So, Ms. Ring, are you prepared to argue the motion
20 in limine, the exclusion of improper opportunity and/or motive
21 evidence allegations at trial.

22 MS. RING: Well, the way I read their motion, Judge,
23 is that they're not aware of any viable alternative suspects,
24 although I would think that they would agree with me that at
25 one time they certainly believed that, and they may still,

1 that Kristen Grisham had something to do or may have had
2 something to do with her father's murder. And they certainly
3 investigated Loren Grisham as possibly having something to do
4 with his father's murder. And, of course, the discovery
5 indicates that Loren seems to have had a tight enough alibi
6 that he wouldn't have actually been the shooter, but certainly
7 in some other way with his sister or some other way he could
8 have been responsible.

9 So I -- it certainly seems to me, based on the
10 discovery, that those two individuals, there's clearly a nexus
11 and, in fact, the police actually suspected them. And what I
12 see the District Attorney's motion is saying if there was some
13 other individual out there who -- not those people -- who
14 clearly the prosecution -- the police suspected, or the
15 prosecution, at various times over the investigation, that we
16 would need to provide notice as to people other than those
17 individuals that the police clearly suspected as part of their
18 investigation. If that's the case, we'll comply with that.

19 THE COURT: Well, that's not actually how I read
20 their motion. What I think they are saying is they don't want
21 you trying to introduce alternate suspect evidence unless
22 there is also some evidence that they committed an act
23 directly connected to the crime.

24 MR. BRACKLEY: Not necessarily a contact connected
25 to the crime, but they have a nexus to the crime. For

1 instance, you know, if -- if -- and it's ultimately the
2 Court's discretion. If they were to list these five alternate
3 suspects and if Loren was one of them, I might make an effort
4 to say, well, clearly he was far out of town and it could not
5 have been him. The Court may disagree and say they can play
6 Loren as an alternate suspect. The same with Kristen, who
7 also had an alibi, but the Court may say they can use her as
8 an alternate suspect. But, sure, if there are other people,
9 um, we would ask for notice so that we then can question
10 whether or not there is a nexus to the crime from those folks.

11 MS. RING: I'm sorry, Mr. Brackley has confused me
12 more. You know, I'm suggesting that I think that clearly
13 there is a nexus with Loren and Kristen Grisham, but if they
14 are wanting me to file a motion and make that offer of
15 proof --

16 MR. BRACKLEY: I'll accept that offer of proof, but
17 as to those two.

18 THE COURT: Okay.

19 MR. BRACKLEY: You know, I may file a motion saying
20 I disagree with that. I don't know that. I will, frankly --
21 but I'll accept it as to those two. So I guess what I'm
22 asking for is whether there are other alternate suspects which
23 the defense intends to proffer. And I think that pursuant to
24 these cases the Court can require the Defendant to -- prior to
25 trial so that the People can have an opportunity to -- to ask

1 them to establish that nexus, asking the Defendant to disclose
2 any other alternate suspects they maybe feel that they wish to
3 present at trial.

4 THE COURT: What's the Defendant's position on the
5 request for notice of any alternate suspects other than Loren
6 or Kristen Grisham?

7 MS. RING: Well, Judge, I certainly agree for us to
8 introduce any evidence of an alternative suspect, we have to
9 meet the case law as cited and to establish the nexus. You
10 know, the issue then becomes at what point do we have to
11 establish that, at what point do we have to provide notice?
12 And I think we're certainly not in a position where -- based
13 on Rule 16, where we would have to provide any of that.

14 THE COURT: I agree.

15 MS. RING: So, you know, that's -- that's my concern
16 about when we really would be required to do that. Although I
17 certainly understand the case law and what we would need to
18 have to be -- the hurdles that we would have to be able to
19 meet in order for the Court to allow us to introduce that
20 evidence.

21 MR. BRACKLEY: And, Judge, I prefaced my motion or
22 at least my oral comments today so that -- you know, the
23 motion was somewhat premature, but I wanted to put it out
24 there so when that Rule 16 deadline was upon us, which it is
25 not yet, but the Court can say, Now if you are going to be

1 doing it, be prepared to -- to give notice of it to establish
2 that nexus. I don't think that nexus gets to be established,
3 you know, on the defense case.

4 THE COURT: Do you have some authority for the
5 proposition that it has to be made under the nature of defense
6 disclosure that's required under Rule 16 or the Court has some
7 specific authority to require it prior to trial?

8 MR. BRACKLEY: Judge, only that the cases that I
9 cited in my motions state that there should be a pretrial
10 determination. So what I'm asking for is a pretrial
11 determination at the earliest possible convenience so we could
12 actually use resources to rebut it before we're all sitting
13 here in front of a jury. And I have -- I guess I'm going to
14 tell the Court, I have never gone into a case where the
15 defense was denial i.e. identification where it did not get
16 the opportunity to have a hearing on these things based on
17 this case law.

18 THE COURT: Well, and the circumstances where I have
19 had it come up at hearing has occurred literally in the middle
20 of trial outside the presence of the jury.

21 MR. BRACKLEY: I'm asking for one earlier, that's my
22 practice. And, fortunately, I've -- it's always worked that
23 way for me at the discretion of the particular judge. I mean,
24 trial by surprise benefits nobody.

25 THE COURT: So what are you suggesting for a

1 deadline, 30 days?

2 MR. BRACKLEY: Thirty days seems fair because we
3 still have that final day, we have that hearing day where we
4 could address this.

5 THE COURT: I'm going to take that under advisement.
6 I'm going to do some further research --

7 MR. BRACKLEY: Thank you, Judge.

8 THE COURT: -- and figure out what -- what will be
9 appropriate.

10 MR. BRACKLEY: So -- thank you. I think that leaves
11 us with just two motions for today.

12 MS. RING: My motion to suppress in-court
13 identification.

14 THE COURT: Yeah. The motion objecting to in-court
15 identification of the Defendant, one related to the witness
16 David Berring, the other related to the witness Tanya Jerome.
17 Why don't we take up the David Berring motion first.

18 MS. RING: So, Judge, I would submit that since the
19 case law supports that a one-on-one show-up is unduly
20 suggestive and that certainly that's what it would amount to
21 in the courtroom, but it's actually not my burden, it would be
22 their burden to show that either David Berring or Tanya Jerome
23 could make an independent identification of my client at the
24 trial.

25 I think that I was clear in my motion that both --

1 you know, you are asking for separate, Judge, but I think that
2 they are the same issue because both individuals were shown
3 photo lineups, so they have actually seen a photograph of my
4 client, weren't able to identify him. And so, if anything,
5 that just makes it more likely that any in-court
6 identification would be suggestive based on their prior
7 viewing of my client. And then they couldn't identify him in
8 that situation, which I would have been arguing was
9 suggestive, but I don't even get there because they couldn't
10 make the identification at that point. So I don't see how the
11 District Attorney gets past that and will be able to ask that
12 either one of the witnesses be able to identify Mr. Clark in a
13 trial setting.

14 THE COURT: Okay. Mr. Kellner.

15 MR. KELLNER: Judge, a little background on Tanya
16 Jerome first. I'm not sure if the Court is aware, but during
17 the initial investigation shortly after the shooting,
18 Ms. Jerome was, I believe, a resident or tenant in that area
19 of the apartment complex. And, um, she was shown or she told
20 police that someone suspicious looking brushed up against her
21 or near her as she was walking around the apartment complex
22 and she was shown a photo lineup, including the Defendant.
23 She did not pick the Defendant out of the lineup. In fact,
24 the police ultimately did identify the individual that, um,
25 she saw in the apartment complex and it was another tenant

1 there as well.

2 So --

3 THE COURT: Okay.

4 MR. KELLNER: So --

5 THE COURT: So she is not going to be testifying at
6 trial that it was this Defendant that she bumped into?

7 MR. KELLNER: No. No, Your Honor.

8 THE COURT: Okay. So the issue with respect to
9 Ms. Jerome is moot.

10 MR. KELLNER: People don't intend to call her,
11 Judge.

12 THE COURT: Okay. How about with respect to
13 Mr. Berring?

14 MR. KELLNER: With respect to Mr. Berring, Judge, I
15 think this is an interesting reversal in the case law, because
16 what she is asking for is for you to find that a photo lineup,
17 I guess, of -- where he picked out no one, or at least not the
18 Defendant, is somehow unnecessarily suggestive; in fact,
19 probably would be the exact opposite of that given that he
20 didn't pick out the accused.

21 But I think that the appropriate response, Your
22 Honor, is that if David Berring came into court here and
23 identified the accused in court, that that would be a subject
24 that's, frankly, more appropriate for cross-examination. And
25 in all honestly, Judge, probably wouldn't be something that

1 the People would want to do, but I don't believe that their
2 motion has actually presented any sort of basis for a claim of
3 relief that you can give them at this point.

4 I mean, if he comes into the court and says, Oh,
5 yeah, you know, I couldn't pick out this guy a long time ago
6 but now there he is sitting right there, um, I think Ms. Ring
7 or Ms. Milfeld will be perfectly within their rights to
8 cross-examine the heck out of him on how that came about, but
9 it's not proper to at this point say that someone can't
10 identify someone in court.

11 And the last thing that I would say, Your Honor, is
12 that an in-court identification is not equivalent to a
13 one-on-one show-up. And I saw no case law supported or
14 offered on that point. And I think Your Honor's experience in
15 seeing what a courtroom looks like, certainly there's a lot
16 more people than just a one-on-one show-up.

17 THE COURT: Well, they cite to *Walker* and that
18 authority. Let me -- give me a minute.

19 MR. KELLNER: As my co-counsel is telling me,
20 there's many ways to go about presenting in-court
21 identification of an individual. You know, if, for example,
22 the prosecutor conducting the direct examination of
23 Mr. Berring says, Is this the man who you saw, and directs the
24 attention of a witness towards the Defendant, that would
25 certainly be more suggestive than not. But if you simply ask

1 the witness on the stand whether or not the person that they
2 saw in the past is in the courtroom, that's not necessarily
3 unduly suggestive.

4 THE COURT: Well, I think that it -- it depends,
5 too, on whether or not there's a sufficient foundation laid
6 for the witness to make the identification.

7 MR. KELLNER: I suppose ultimately, Judge, the
8 People's position, if this is an issue, that's more
9 appropriately brought up at trial and dealt with on
10 cross-examination should the Court allow an in-court
11 identification.

12 THE COURT: Okay. Well, I think that the resolution
13 of the motion with respect to Mr. -- well, did you want to
14 respond, Ms. Ring?

15 MS. RING: I do briefly, Judge. I completely
16 disagree with Mr. Kellner. And I have actually filed the
17 motion multiple times and Mr. Brackley has told you what
18 happened to him. I have never actually had a DA stand up and
19 say they disagree with me, but my client's going to be sitting
20 at a table with me at the defense table. David Berring has
21 been interviewed, he knows why he is coming to testify, and
22 he's seen a photo of my client in the photo lineup. So all of
23 those things add up to it is suggestive.

24 And the idea that if he had picked my client's photo
25 out, I would have had the opportunity to have a hearing and

1 bring Mr. Berring in, to argue about whether there was any
2 independent basis for his identification, but because he is
3 going to come in at trial and he didn't pick my client out,
4 but he saw my client's photo, I don't get to have that
5 hearing. I'm having a really hard time with that analysis.

6 THE COURT: Well, I think that the key is there's
7 going to be an independent basis. I mean, that's the
8 foundation that I was talking about earlier, there has to be
9 some showing that the witness would be able to make an
10 identification based on observations made other than during
11 some unnecessarily suggestive identification procedure,
12 whether that's the lineup that he was shown or whether that's
13 the in-court process.

14 I think that it's premature to preclude the
15 prosecution from asking Mr. Berring if he can make an
16 identification at trial. But at the same time I would say
17 that if Mr. Berring testifies before there's any attempt to
18 ask him if he can identify a person that he saw, the People
19 are going to have to establish that there's an independent
20 basis for that. Maybe it requires a hearing outside the
21 presence of the jury. And, frankly, if he can establish that
22 independent basis, Ms. Ring, then I think that the People are
23 entitled to ask him if he can make the identification. And if
24 he does, then the remedy for that is cross-examination on, you
25 know, his observations and his conclusion 17 years later.

1 MS. RING: And, Judge, I don't disagree with you,
2 but then that's why I filed the motion, right. So if I want
3 to suppress any kind of identification as being unduly
4 suggestive, I file a motion. And in some instances -- for
5 instance, if it's a photo lineup, it may be my burden to show
6 that it was unduly suggestive, and then the District Attorney
7 would have to show that there's an independent basis. And in
8 those instances I usually put on the police officer and then
9 the District Attorney puts on their lay witness. So I filed
10 this motion, there's no witness to put on, really. I guess
11 that I can put on Detective Heidel to talk about the view of
12 the photo lineup, but what I'm saying is going to be
13 suggestive, which I think that I have heard the Court agree
14 with me, is the identification of -- by Mr. Berring without
15 showing the independent basis. And so then if they -- if the
16 District Attorney thinks that they can show the independent
17 basis, they either should have brought Mr. Berring here today,
18 because it was their suggestion we deal with the motion today
19 and they can show that, or we bring him here on September 6th
20 so we're not -- I know ahead of time whether I should be
21 impeaching Mr. Berring on all kinds of other things rather
22 than having to do that all of a sudden at trial. I mean this
23 is typically something we do well ahead of trial.

24 MR. BRACKLEY: Judge, may I --

25 THE COURT: Sure.

1 MR. BRACKLEY: I understand the point. I -- I
2 just -- I don't think we're at this point yet. We're going --
3 we're -- we can't litigate a suggestive identification that
4 hasn't yet happened. And I'm not saying that we should wait
5 for it to happen and then litigate whether --

6 THE COURT: Right, we can't.

7 MR. BRACKLEY: -- you give the jury a curative
8 instruction. But if we decided -- and this is a very, very
9 big if, if we decided that it was the best practice to ask
10 this witness whether he can look around the courtroom and
11 recognize the Defendant from some date 17 or 18 years ago, at
12 this point, I believe, if we decided to do that, I -- I would
13 think that we would have already laid out some type of an
14 independent basis to do so.

15 And if Ms. Ring at this point feels like there is
16 going to be a suggestive lineup or -- I mean, a suggestive
17 identification procedure, then because it is in-court and we
18 have not laid out that independent source hearing, I would
19 assume that there would be a motion at this time, but we
20 haven't gotten there yet.

21 All that the People's response is basically to say
22 that we should not be precluded from getting to at least that
23 point at this point, because there's nothing to litigate right
24 now. He was shown six photos. He didn't pick anyone out or
25 he didn't pick out the right person or anyone out, I don't

1 remember, but we're not at that point.

2 THE COURT: And on that point I have to agree. I
3 mean I'm not going to preclude the prosecution from having
4 Mr. Berring attempt to identify the Defendant, if they can
5 show an independent basis. And so let's do this. If you
6 intend to do that at trial, then I would expect notice to
7 opposing counsel and me as soon as possible so that we can
8 take up the issue outside of the presence of the jury. And it
9 may be a situation where in your direct examination you start
10 laying out those issues, and you get to the point where you
11 think that you are comfortable asking him to identify, then
12 ask to approach and we'll excuse the jury.

13 MR. BRACKLEY: Right.

14 MS. RING: But, Judge, here is the problem. I mean
15 the problem with that situation is if we're ever doing that,
16 my client is not in the courtroom, right. When we're laying
17 an independent basis from a lay witness, I have my client out
18 of the courtroom because they shouldn't be looking at my
19 client in the independent basis. The witness is on the stand
20 with my client sitting right here. I mean, that's why we --
21 part of the reason we do this pretrial. We certainly can't
22 have Mr. Berring testifying and my client out of the courtroom
23 while the jury is here.

24 THE COURT: That's not what I was suggesting.

25 MR. BRACKLEY: I -- I agree with you, it's not what

1 you were suggesting. That's what I wanted to say.

2 THE COURT: I mean, give me the context of who
3 Mr. Berring is. Is this a neighbor from 17 years ago who
4 makes identification?

5 MR. BRACKLEY: No, Mr. Berring was a, um -- a person
6 who was standing on a street corner and Dion Moore -- and
7 according to the testimony -- or the allegation of Dion Moore,
8 Michael Clark drove up in a car and asked Mr. Berring if he
9 would buy a gun for them. Dion Moore and Mr. Berring went
10 into the gun shop to buy the gun and Mr. Berring went on his
11 way with, you know -- with a little -- some money in his
12 pocket. He'll say, you know, he remembers the name Dion and
13 the Chicago connection and all of that, but doesn't remember
14 anything else about who he was with. So I really believe this
15 is kind of an academic conversation, because it's one of those
16 things where it would be at our peril, perhaps, to be foolish
17 enough to say, Mr. Berring, look around the courtroom and try
18 to pick someone out. But I just don't want to be precluded
19 from that possibility at this point. That's why we're
20 objecting to the motion now.

21 We are not at the point --

22 THE COURT: You're objecting to their objection.

23 MR. BRACKLEY: Right.

24 THE COURT: Is the --

25 MS. RING: Judge, let me just add that David Berring

1 is transient and lives in Florida. And my understanding is
2 they had to have local law enforcement find Mr. Berring under
3 a bush for them. So he is not a witness that I have any
4 logical access to, that I can do any kind of investigation to
5 determine anything before he's here. And I don't even have
6 any way to really try to find him.

7 THE COURT: Okay.

8 MR. BRACKLEY: That makes him a witness who is not a
9 logical likelihood that we would ask to look around the
10 courtroom and look for this kid he saw 17 years ago, but we're
11 not at this point, that's what I'm saying.

12 THE COURT: If Mr. Berring appears to testify at
13 trial, then we'll, outside the presence of the jury and with
14 the Defendant out of the courtroom, ask Mr. Berring for
15 whatever independent basis he has to make an identification.
16 But unless you can get him here on September 5th to do that,
17 I'm willing to do it during the course of the trial, it will
18 take, you know, some time, but it will be worthwhile, I think.

19 You want to try to get him here on September 5th or
20 not?

21 MR. BRACKLEY: I will try. You know, depending on
22 how the bushes beat out between now and then.

23 THE COURT: Okay. I mean I think, Ms. Ring, I
24 understand your point.

25 MR. BRACKLEY: No, Your Honor, not -- I thought that

1 you were talking to -- the Thursday or something before the
2 trial started. I don't see how we can get him here on
3 September 5th.

4 THE COURT: Okay.

5 MR. BRACKLEY: Frankly, I don't think it's worth the
6 time based on my sense of what we are going to be asking him.

7 THE COURT: Well, if you know that you are not
8 asking him for in-court identification, then.

9 MR. BRACKLEY: We'll let Ms. Ring know.

10 THE COURT: Yeah, and then the objection is moot.
11 If you think that you are going to ask him to identify the
12 Defendant in court, then we need to take care of that
13 pretrial, whether that's Monday morning or Tuesday morning,
14 some other time during the initial phase of the trial.

15 Frankly, the week before the October 9th trial date
16 is a motions week for me, so if he is here on Thursday or
17 Friday prior to trial, we can even take up the issue at that
18 time, but if he is not, then we'll take it up during trial
19 outside the presence of the jury and without Mr. Clark in the
20 courtroom.

21 MR. BRACKLEY: Thank you, Judge.

22 THE COURT: Ms. Ring, does that -- I know you wanted
23 me to preclude them completely, but does that procedure make
24 some sense to you?

25 MS. RING: It does.

1 THE COURT: All right. Make sure I make notes so
2 that I can remember what I just said. So we'll use that
3 procedure with Mr. Berring.

4 With respect to the motion regarding Tanya Jerome,
5 I'll deny it as moot. The District Attorney has indicated
6 they are not going to call Ms. Jerome as a witness.

7 MR. BRACKLEY: That's correct.

8 THE COURT: Okay. Anything else at this time?

9 MR. BRACKLEY: No, Your Honor. I'll just kind of
10 update the Court. I believe that we are up-to-date with
11 expert discovery, except for the GSR that we talked about this
12 morning. We're going to make -- first of all, I will say that
13 we'll make all physical evidence available for inspection and
14 we'll accommodate Ms. Ring in a way that -- where I will not
15 be there watching that. We've been doing that lately. We'll
16 be there. We won't horn in on that process.

17 We are going to make the ballistic evidence
18 available for the Defendant to take and give to their own
19 independent examiner, so you will see a motion as to that
20 effect.

21 THE COURT: Okay. Is this a procedure that counsel
22 is going to agree upon?

23 MR. BRACKLEY: It will -- it will be agreed upon
24 before you see the motion.

25 THE COURT: Okay.

1 MR. BRACKLEY: But the motion will essentially be
2 the order as to who takes possession when -- and when we get
3 it back. But I don't know, frankly, if that will necessitate
4 another kind of rebuttal scenario. But I don't know, but
5 we'll jump on that as soon as possible, but that I think we're
6 there for expert discovery, but for --

7 THE COURT: Okay. Let me just say this. If the
8 procedure for independent testing by the Defendant cannot be
9 agreed upon, let me know right away. We'll get you on the
10 docket and get a hearing so that whatever needs to be done can
11 get done expeditiously.

12 MR. BRACKLEY: It will be agreed upon.

13 THE COURT: Okay. Anything else on behalf of the
14 People?

15 MR. BRACKLEY: No, Your Honor. Thank you for the
16 full day today.

17 THE COURT: Anything else on behalf of the
18 Defendant?

19 MS. RING: No, thank you.

20 THE COURT: All right. Then we'll be in recess.

21 Mr. Clark, bond is continued until September 5th at
22 9:00. Be back in this courtroom. We'll see you then.

23 THE DEFENDANT: Yes, Your Honor.

24 (Proceedings concluded.)

25

1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 30th day of August, 2012.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
22
23
24
25

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for hearing on September 5,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

1 I N D E X

2 WITNESSES FOR THE PLAINTIFF: PAGE

3	BARBARA SWIDER,	
	Direct Examination by Mr. Brackley	7
4	Cross-Examination by Ms. Ring	21
	Redirect Examination by Mr. Brackley	37
5		
	KIRK MAGILL,	
6	Direct Examination by Mr. Brackley	39
	Cross-Examination by Ms. Milfeld	46
7		
	BARBARA LENNON,	
8	Direct Examination by Mr. Brackley	53
	Cross-Examination by Ms. Ring	64
9	Redirect Examination by Mr. Brackley	77

10

11 EXHIBITS FOR THE PLAINTIFF: OFFERED ADMITTED

12	1 - Arrest Warrant	135
	2 - Transcript	136

13

14

15

16

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25 REPORTER'S CERTIFICATE * * * * * 154

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

2 THE COURT: This is 12CR222, People versus Michael
3 Clark. Could I have appearance of counsel please?

4 MR. BRACKLEY: Ryan Brackley and John Kellner for
5 the People, Your Honor. Detective Heidel is not here. We
6 expect him.

7 THE COURT: Okay.

8 MS. RING: Megan Ring and Nelissa Milfeld
9 appearing on behalf of Michael Clark. He appears on bond.

10 THE COURT: Good morning everyone.

11 Matter is here for the motions hearing. This is
12 the second motions hearing. We've taken care of I believe
13 all of the evidentiary motions, or at least the suppression
14 type motions. I think there are three outstanding motions
15 and then an additional issue we need to take up today. But
16 let me know what you think.

17 So I've got the notice to introduce statements of
18 Marty Grisham through Rule 807.

19 MR. BRACKLEY: Correct.

20 THE COURT: Got the People's motion in limine re
21 res gestae evidence for which there was a request for
22 clarification and then a clarification made.

23 Got the People's notice of intent to admit res
24 gestae evidence regarding the motorcycle theft. That was
25 Friday August 31, 2012.

1 And then we've got the People's motion for
2 discovery regarding experts. I withheld ruling on that so I
3 could hear from the defense.

4 Then if we have some time left today, and I
5 anticipate we will, we should take up the issue about the
6 jury selection process.

7 So are there other issues that we need to take up?
8 Did I miss anything?

9 MR. BRACKLEY: No, Your Honor.

10 THE COURT: Ms. Ring?

11 MS. RING: I don't believe so.

12 THE COURT: Okay. Where do you want to start?

13 MR. BRACKLEY: Judge, perhaps with witnesses for
14 the 807 motion. And one of them is walking in the door now,
15 so I'm going to have Ms. French -- I had -- the People's 807
16 motion had included statements to Marty Grisham from three
17 different individuals, Ms. Barbara Lennon, Ms. Barbara --
18 then Barbara Burger now Barbara Swider, Mr. Kirk Magill and
19 Ms. Marla Ankenman.

20 I told Ms. Ring this morning that I was going to
21 withdraw the notice as to Ms. Marla Ankenman. The reason
22 why I informed her of that is because I saw her sitting
23 outside pursuant to a defense subpoena. And I just wanted
24 to give them the option of letting her go if they were not
25 in fact going to call her. So I believe that's happened at

1 this point.

2 THE COURT: Well, you said statements to Marty
3 Grisham.

4 MR. BRACKLEY: I'm sorry, statements of Marty
5 Grisham. I'm sorry. I misspoke.

6 THE COURT: Marla Ankenman is listed under
7 paragraph --

8 MR. BRACKLEY: 3.

9 THE COURT: -- 18b in the People's motion. And
10 you are withdrawing the motion -- the request to introduce
11 Marty Grisham's statements to her?

12 MR. BRACKLEY: Yes, Your Honor.

13 THE COURT: All right.

14 MS. RING: Based on Mr. Brackley telling me that
15 this morning, I just released her from our subpoena.

16 THE COURT: All right. Then she can be released.
17 Thank you.

18 We still have the admissibility of statements made
19 to three other people?

20 MR. BRACKLEY: Right. Ms. Burger, Ms. Lennon and
21 Mr. Magill.

22 THE COURT: Right.

23 MR. BRACKLEY: And I am prepared to go forward
24 with witnesses, although of course if Your Honor requires
25 that. I provided transcripts which I believe are

1 representative perhaps word for word give or take of what
2 those witnesses would testify to. I think we should -- the
3 issues are fairly straight forward, and I think we can do
4 this on the People's offer of proof.

5 THE COURT: Well, I guess that's your choice
6 because ultimately what I'm going to have to determine -- if
7 the statements are non-testimonial I'm going to have to
8 determine if there's circumstantial guarantees of
9 trustworthiness. I'm certainly willing to do that based on
10 these submitted documents. But whether that's sufficient or
11 not I don't know yet.

12 MR. BRACKLEY: And I'm going to just tell the
13 Court I'm going to call the witnesses.

14 THE COURT: That's fine.

15 MR. BRACKLEY: I think those witnesses to some
16 extent will give the Court some cross-over context to the
17 People's res gestae motion. I think --

18 THE COURT: All right. Where do you want start or
19 who do you want to start with?

20 MR. BRACKLEY: Ms. Barbara Swider.

21 THE COURT: All right. Would you come on forward
22 please, ma'am? Come on all the way up here to the witness
23 area.

24 BARBARA SWIDER,
25 called as a witness on behalf of the People, having been

1 first duly sworn, was examined and testified as follows:

2 THE COURT: Please have a seat. I'm going to ask
3 you to do a couple things. If you would pull that
4 microphone a little bit closer to your mouth. And then it
5 seems like you may be a little bit soft spoken, so I'm going
6 to ask you to try and remember to keep your voice up if you
7 would.

8 THE WITNESS: Okay.

9 THE COURT: All right. Mr. Brackley.

10 MR. BRACKLEY: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. BRACKLEY:

13 Q Can you state your name and spell your last name?

14 A My name is Barbara Swider, S-W-I-D-E-R.

15 Q Were you back in 1994 known as Barbara Burger?

16 A I was.

17 Q And that was a married name at the time?

18 A That's correct.

19 Q Are you currently employed?

20 A Yes.

21 Q By whom and what do you do?

22 A I'm with Xcel Energy. I work in the credit and
23 collections department.

24 Q For how long?

25 A In two weeks it will be 32 years.

1 Q Do you currently live in Colorado?

2 A I do.

3 Q Did you know Mr. Marty Grisham?

4 A I did.

5 Q How did you know Marty Grisham?

6 A I originally met him through a divorce seminar.

7 He was a counselor or facilitator. And then later I became
8 more intimate with him.

9 Q And was -- were you a participant in the divorce
10 seminar?

11 A Yes.

12 Q And that would explain the Burger to Swider?

13 A Yes.

14 Q Okay. How long did you know Marty Grisham for?

15 A It would be exactly two months. The seminar
16 started on August 31st, and he died on November 1st.

17 Q And how long into your relationship with Marty
18 Grisham in all respects did you and he become intimate?

19 A The intimacy was probably the last month. The
20 first month was more just at the seminar.

21 Q Would you characterize it as a relationship with
22 Marty Grisham at that time?

23 A Yes.

24 Q You two were becoming serious?

25 A Yes.

1 Q Would you characterize it as boyfriend/girlfriend
2 for instance?

3 A Yes.

4 Q Do you recall the evening of November 1, 1994?

5 A Yes.

6 Q Did you go to Marty Grisham's home that evening
7 for dinner?

8 A Yes.

9 Q Prior to going to Marty Grisham's home for dinner
10 that night did you have a telephone call with him in the
11 afternoon around 3:00 or 4:00 p.m.?

12 A I did.

13 Q And did you have conversations with Marty Grisham
14 while at dinner --

15 A Yes.

16 Q -- that night?

17 A Yes.

18 Q Was it typical for you and Marty Grisham to have
19 conversations about his personal life?

20 A Yes.

21 Q And would you also talk with him about your
22 personal life?

23 A Absolutely.

24 Q Would he talk about his children?

25 A Yes.

1 Q Would he talk about his job?

2 A Yes.

3 Q Would he talk about his sort of hopes, ambitions
4 for the future?

5 A Definitely.

6 Q And you would share those same things with him?

7 A Yes.

8 Q So let's talk about -- let's talk first about the
9 telephone call with Marty Grisham in the afternoon of
10 November 1, 1994. Do you recall where he was calling you
11 from?

12 A Not exactly. I would assume from work.

13 Q And this is before the days of cell phones and
14 such; correct?

15 A Correct.

16 Q What kind of work did Marty Grisham do?

17 A I'm pretty sure he was in IT at that time. It was
18 computer oriented. That was the beginning days of computers
19 and things. And I remember him thinking that I'm not so
20 sure this is -- everybody is eventually going to have a
21 personal computer or not. So I find it interesting that
22 we're in this day and age. But as far as specifics I don't
23 know.

24 Q Okay. Did he work for the City of Boulder?

25 A Yes.

1 Q Did you have a conversation with him at that time
2 about dinner plans that night?

3 A The plans were already made. It's unclear to me
4 if we said -- I mean, we were going to keep the dinner
5 plans. Whether we actually talked about that or not I'm
6 not -- I'm unclear.

7 Q What were those plans?

8 A I believe it was supposed to be dinner at
9 7:00 with his daughter Kristen at his apartment.

10 Q Had you ever met his daughter Kristen up to that
11 point?

12 A No. There were a few other -- I think two times
13 that he tried to arrange for us to meet, and she either
14 didn't show up or cancelled or something. I never met her.

15 Q So in this telephone call with Marty did you talk
16 about something having to do with his checks or his bank
17 account?

18 A Yes, the phone conversation at about 3:30,
19 definitely.

20 Q And can you tell the Court how that conversation
21 began from what you recollect sitting here today?

22 A I had called him and left him a message. When he
23 returned my call his opening line was something like I'm
24 okay, I love you -- no. I love you, I'm okay, but I don't
25 believe my kids are. Something's up.

1 Q And what else did he say?

2 A I believe that's when he just talked about the
3 credit union had called him, notified -- asking if he had
4 called the credit union to verify a balance. And he said
5 no, he didn't call, but that while he had them on the phone
6 he couldn't find some checks. So we probably just talked
7 about that.

8 Q Did he tell you about how the credit union had
9 attempt -- had told him that they had attempted to verify
10 the caller's identity?

11 A I don't remember that now, but I believe that's in
12 the transcript that yes, they had -- they tried two
13 different means of verification.

14 Q So when you say in the transcript, you and I had
15 looked at a transcript together; correct?

16 A Yes.

17 Q And that was a transcript from a November 2, 1994
18 conversation you had with the police?

19 A Correct.

20 Q And to be sure, you had a -- you talked to the
21 police the night that Marty Grisham was murdered?

22 A Correct.

23 Q And you talked to the police the next day?

24 A Yes.

25 Q And you talked to the police at least one other

1 time?

2 A Yes.

3 Q Referring to the conversation that you had with
4 the police on November 2, 1994, do you remember telling them
5 that Marty Grisham had told you that --

6 MS. RING: Judge, I think Mr. Brackley is trying
7 to refresh recollection, but I'm not sure he's doing it.

8 THE COURT: I think he's trying to shortcut it and
9 lay a foundation. And for purposes of this hearing I'll
10 allow it.

11 MR. BRACKLEY: Exactly, Judge. And I'm going to
12 inform the Court at trial one of the things that you are
13 going to hear a lot of and we're going to lay the foundation
14 for that without the shortcuts is 13-10-201 (sic).

15 But I'm going to rely on kind of a combined offer
16 of proof as to the transcript which Your Honor has, and also
17 the witness' testimony as to why she's unable to testify as
18 to that today. I'm going to get to that right now.

19 THE COURT: Okay. I understand.

20 Q (By Mr. Brackley) Do you remember telling -- do
21 you remember Marty Grisham telling you that he was told by
22 the folks from the credit union that someone had called to
23 check on the balance and had given a wrong address, the
24 address listed on his checks was an old address from Arvada,
25 and they gave that, and then the credit union had asked for

1 further verification?

2 A Yes, that's correct.

3 Q And that when the credit union had asked for a
4 further verification the person purporting to be Marty
5 Grisham hung up?

6 A Yes.

7 Q And do you remember Marty Grisham telling you --
8 and I think your testimony is that you actually remember him
9 while he was on the phone with them discovering that he was
10 in fact missing some checks?

11 A Yes.

12 Q What was Marty Grisham's demeanor during this
13 conversation as he was talking to you?

14 A As I remember during that conversation I believe
15 he would have been calm and just sort of process oriented.
16 This happened, I have to deal with it, we'll take these
17 steps.

18 There might have been thought about, you know,
19 saddened that he thought his children might have stolen from
20 him again, but calm.

21 Q Was Marty Grisham someone with a -- who normally
22 had a calm demeanor?

23 A I believe the Marty Grisham I knew, yes.

24 Q Was he someone who often talked about his kids
25 with some level of sadness, frustration, but also hope?

1 A Definitely hope. Always hope. I mean, moving
2 forward, yes.

3 Q But at this time did -- was it your sense from
4 your conversation with Marty Grisham that he thought perhaps
5 his kids were the ones who stole his checks?

6 A Yes.

7 Q So what happened after this conversation?

8 A Logistically I think I went to pick him up. And
9 then in the transcript, which I don't remember the actual
10 addresses of the places, his office was one building, he was
11 someplace else. I went to pick him up, and we may have made
12 a stop at his office, and then we went to the police
13 department.

14 Q Do you recall going to the police department as
15 you sit here today?

16 A Yes.

17 Q And do you recall the purpose of going to the
18 police department?

19 A He wanted to file a report of stolen checks.

20 Q And after the police department did you go to
21 Marty's condo here in Boulder?

22 A Yes, after we stopped at a grocery store.

23 Q Do you recall once back at the condo having a
24 conversation with Marty about Kristen not showing up for
25 dinner that night?

1 A Yes.

2 Q Tell us about that.

3 A I believe when we got back to his condo he checked
4 his answering machine. And there was a call from Kristen,
5 just simple, hi dad, I'm home -- I don't know if she said
6 she's home, call -- for Marty to call her, no details.

7 Q And how did Marty react to that answering machine
8 message?

9 A I think he was a little surprised in a way. He
10 says well, she's not giving me any information saying if
11 she's coming or not. And she knows at this time on the
12 answering machine, she knows I'm at work, why didn't she
13 call me at work.

14 Q And is this one of those old school answering
15 machines that you press the button and you could hear it --

16 A Yes.

17 Q -- from a tape?

18 So what happened? What was your response to Marty
19 Grisham when he said that?

20 A Well, maybe something is going on or, you know,
21 maybe consider she's only 19 years old. And what
22 19-year-old wants to spend time with her parents. I know I
23 didn't when I was that age. It was the farthest thing from
24 me. I ran away from home. And so, you know, cut her some
25 slack, or if you need to talk to her go call her.

1 Q And what was Marty's demeanor during this
2 particular conversation?

3 A I think disappointment.

4 Q Do you recall talking further about the checks and
5 Marty's children that evening?

6 A I recall talking further about Marty's children.
7 I'm not certain about the checks.

8 Q Do you recall Marty talking to you about whether
9 or not he was going to talk to Kristen that night about the
10 checks if she came for dinner?

11 A I don't recall that.

12 Q Do you -- again referring to the same conversation
13 with the police on November 2, 1994, do you recall Marty
14 saying if Kristen shows up, you know, we're just going to
15 play it cool and wait and see, hopefully by the end of the
16 week all these checks will have come through and we'll see
17 where they were cashed and who cashed them?

18 A If that's what it says there, that I believe is
19 truth.

20 Q Do you not recall?

21 A I do not.

22 Q As you sit here today -- and would that be by the
23 passage of time?

24 A Absolutely.

25 Q So did you have dinner with Marty that night?

1 A Yes.

2 Q What kind of things did you talk about with Marty
3 Grisham that night?

4 A I think we sort of processed this idea that
5 Kristen wasn't coming, that some checks were stolen. And
6 then at some point I think it was probably me who said, you
7 know, we need to change the subject here or it's time to
8 work on dinner and let's move on.

9 And I don't remember if he was doing some work
10 on -- I'm pretty sure I cooked the dinner and we had dinner.
11 And I just remember sitting at the table and just nice
12 conversation.

13 Marty was very hopeful. He was looking forward.
14 He was going to retire soon. This was November -- well,
15 beginning of November, so we were talking about Christmas.
16 It's one of my favorite times.

17 And I distinctly remember him coming out with a
18 handful of CD's saying oh, you'll have to hear these at
19 Christmastime, this one is my favorite, and just about the
20 future.

21 Q Do you remember Marty talking about his
22 relationship with his children as it related to the future?

23 A Not at that time.

24 Q Did you ever talk with Marty Grisham about his
25 son, his relationship with his son in the past versus the

1 present into the future?

2 A Marty would say things, yes.

3 Q Do you recall him that night saying something to
4 the effect of, you know, I thought the horror was over?

5 A Yes.

6 Q Tell us about that.

7 A As far as I can remember either Marty was a harsh
8 parent, or I don't know exactly what the problems were
9 between him and his children, but it sounded like there were
10 hard times, there were difficult times.

11 And it sounded like in the time that I knew him,
12 the brief time that I even spoke with him about his children
13 it had turned around, things were getting better or were
14 better already, you know, that they were growing up, they
15 were moving on.

16 And the horror I think he referred to was he spoke
17 of there was a time when he had to lock up CD's or checks,
18 and he said I don't want to do that again. I don't want to
19 live like that.

20 Q Did he talk about his son Loren kind of moving
21 forward and being in school and --

22 A Absolutely, yes. He was -- I think he was very
23 proud of that.

24 Q What did he say about that?

25 THE COURT: Did this happen that night, this

1 conversation? Because I'm losing track.

2 THE WITNESS: I think not -- or parts of it might
3 have.

4 I think he was proud that Loren was back in
5 school.

6 Q (By Mr. Brackley) Well, let me try to focus you.
7 That night did he show you some stuff on his computer
8 related to Loren?

9 A Yes.

10 Q And that would be stuff that Loren did in the
11 past?

12 A As far as I know, yes.

13 Q And then did he also talk about Loren being in
14 school and appreciating nature and --

15 A Yes.

16 Q -- changing of the leaves and such?

17 A Yes.

18 Q On that night?

19 A Yes.

20 Q Tell us about that. Put it into context for us.

21 A Well, I guess maybe he was trying to do a compare
22 and contrast. It's like well, look at this, this was the
23 past, this was awful. But yet, you know, when I saw him or
24 this phone call that he had, he was appreciating the
25 changing of the leaves.

1 I believe Marty thought for his son to even notice
2 that difference was huge, you know, that in the past he
3 might not be concerned with that. And Marty was an outdoors
4 person, so I think it's a -- it was great that Loren noticed
5 something in nature.

6 Q Did you know from conversations with Marty where
7 Loren was on or about November 1, 1994?

8 A Yes.

9 Q Where was he?

10 A I believe he was in school in Glenwood Springs. I
11 don't know what school.

12 MR. BRACKLEY: I have no further questions, Your
13 Honor.

14 THE COURT: Okay. Cross-examination.

15 MS. RING: Thank you.

16 THE COURT: Ms. Ring.

17 CROSS-EXAMINATION

18 BY MS. RING:

19 Q Ms. Swider?

20 A Yes.

21 Q Okay. Ms. Swider, you and I have never met?

22 A No.

23 Q Okay. But do you recall meeting with
24 investigators from the Public Defender's Office who was
25 coming out to interview you about this upcoming motions

1 hearing?

2 A Yes.

3 Q And when you met with the investigators from my
4 office, they didn't show you copies of transcripts from your
5 prior interviews?

6 A No.

7 Q And they didn't show you copies, at least not
8 initially, of prior police reports where you had made
9 statements about the events in 1994?

10 A No, that's correct.

11 Q Okay. And we're now talking about something that
12 happened roughly 18 years ago?

13 A Yes.

14 Q Okay. And is it fair to say that over the past 18
15 years it's not something you've gone over in detail all the
16 time?

17 A That's correct.

18 Q And that at least when you first interviewed with
19 the investigators from my office you didn't have a clear
20 recollection of a lot of the things that you had said and
21 what happened back in 1994?

22 A Yes.

23 Q Okay. It sounds like subsequent to that meeting
24 you met with Mr. Brackley and maybe other people from the
25 District Attorney's Office after you met with the public

1 defender investigators?

2 A Yes.

3 Q And as part of your meeting with them, the people
4 from the District Attorney's Office actually showed you the
5 transcripts of those interviews from 1994?

6 A Yes.

7 Q Okay. And reviewing that information did help you
8 remember some of the details of what happened when you were
9 dating Marty and the night that Marty was killed?

10 A Yes.

11 Q So it's fair that your memory today because you
12 met with the district attorney and reviewed those
13 transcripts about those events is better than let's say when
14 you first met with my investigators from the Public
15 Defender's Office?

16 A I believe so.

17 Q Okay. And even having reviewed those transcripts
18 there's still some things that aren't absolutely clear in
19 your memory?

20 A That's correct.

21 Q Okay. But you'd agree that what's in those
22 transcripts is probably the best -- the most accurate
23 information about what you remembered from those events?

24 A Yes.

25 Q Okay. Mr. Brackley started out asking you about

1 your relationship with Marty Grisham and how long you had
2 known him. So it's my understanding prior to this divorce
3 seminar you didn't know Marty Grisham?

4 A That's correct.

5 Q Okay. And initially when you meet him in the
6 divorce seminar Marty Grisham's already gone through this
7 seminar because of his own divorce?

8 A That's correct.

9 Q And he's now got more kind of a facilitator lead
10 role in that group?

11 A Yes.

12 Q Okay. And I think what you told Mr. Brackley is
13 basically since the seminar starts in on August 31st?

14 A (Witness nods head.)

15 Q Right?

16 A Yes. That's a date I do remember.

17 Q I also meant that the court reporter sitting in
18 front of you is taking all this down. So when you nod your
19 head yes, it actually -- you have to verbalize your answers.
20 Thank you.

21 That from basically August 31st until toward the
22 end of September that was how you knew Marty was as he was
23 the facilitator in your group?

24 A That's correct.

25 Q And then heading into October is when you and

1 Marty start to realize there's some kind of spark between
2 the two of you?

3 A Yes.

4 Q And it's through the month of October that you
5 start dating Marty and your relationship starts to develop?

6 A Yes.

7 Q Okay. And would you agree with me that, you know,
8 we're talking about things surrounding November 1st of 1994
9 that you and Marty are in that kind of that new happy
10 relationship phase?

11 A Yes.

12 Q Okay. You don't know each other very well
13 actually?

14 A That's correct.

15 Q But you're getting to know each other?

16 A Yes.

17 Q You're talking to each other a lot?

18 A Yes.

19 Q But really finding out about each other?

20 A Yes.

21 Q At that time you have your own apartment?

22 A Yes.

23 Q So even though you're spending time with Marty
24 you're not living together?

25 A No, we are not.

1 Q Okay. And actually in the month of October Marty
2 is gone I think it's at least two weekends away on trips he
3 had previously planned?

4 A I believe that's correct.

5 Q Okay. And so that would have been two weekends in
6 October that you're not spending time with Marty because I
7 think one he was on a bike trip out past Glenwood Springs?

8 A Yes.

9 Q Right?

10 And then there's the weekend where he was away
11 because Kristen was supposed to be taking care of the cat.
12 Does that ring a bell?

13 A Yes. Whether that was the same weekend that he
14 was in Grand Junction on the bike trip I don't know.

15 Q Okay. In trying to refresh your memory do you
16 remember that the weekend that he was on the bike trip to
17 Grand Junction you actually were going in and checking on
18 the cat?

19 A Yes.

20 Q And does it make sense in your memory that if you
21 were seeing Marty on October 31st, which was Halloween, you
22 had dinner together and spent the night together on
23 October 31st?

24 A October 31st was the night before?

25 Q Right.

1 A I don't know that we spent dinner together. I
2 know we spent that night at my apartment.

3 Q Okay.

4 A I was in school then. I believe I was coming from
5 school that night, so I don't believe we had dinner.

6 Q Okay. But you do recall that Marty spent the
7 night at your house on October 31st?

8 A Correct.

9 Q Okay. And does it make sense in terms of thinking
10 about your memory that it was the weekend before that he was
11 in Grand Junction, and you would have been at his apartment
12 taking care of the cat and looking after the newspapers?

13 A It could have been the weekend before. I don't --
14 I don't recall.

15 Q Okay. Is it fair to say that you remember there's
16 a difference in the weekend where you were going to Marty's
17 apartment and looking after the cat?

18 MR. BRACKLEY: Judge, I would object to -- I would
19 object to this. It's not relevant for the purposes of this
20 hearing.

21 THE COURT: I'll overrule that.

22 Q (By Ms. Ring) That there was a weekend in the
23 latter part of October where you actually went and took care
24 of Marty's cat while he was away in Grand Junction?

25 A That's correct.

1 Q And that there was another weekend earlier in
2 October where it was Kristen who was really responsible for
3 taking care of Marty's cat while he was away?

4 A I'm not sure.

5 Q Okay. Staying on the topic of the nature of your
6 and Marty's relationship, initially because you met in the
7 divorce seminar you and Marty were a bit careful about when
8 to make your relationship public?

9 A Correct.

10 Q It was a little touchy that you two had met in the
11 seminar where Marty was the facilitator?

12 A That's correct.

13 Q So it wasn't until towards the end of October
14 where you and Marty were starting to telling friends
15 publicly about your relationship?

16 A I believe part of the reason we held off was like
17 just two people coming together you might think you might
18 have a relationship, but given a couple days or a week or
19 two it may fall apart immediately. You know, if you go out
20 on a date once or twice and you're interested, it continues.
21 If you're not, it ends.

22 I think Marty and I were smart enough to know that
23 maybe we wouldn't be together, so let's just wait and see
24 and wait and see. And the fact that he was a facilitator
25 and I was a participant.

1 So as it became more intimate and we were more
2 sure of ourselves we did open up to people. And that's when
3 Marty also dropped out of the seminar.

4 Q And that thinking that you were in that space
5 where it was okay to feel like this relationship might go
6 somewhere, that happened towards the end of October?

7 A Yes.

8 Q Okay. We talked about Kristen Grisham, his
9 daughter, supposedly coming over for dinner. I think you
10 already told the judge you never met Kristen, his daughter?

11 A That's correct.

12 Q You never met Loren, his son?

13 A That's correct.

14 Q You hadn't met his ex-wife?

15 A That's correct.

16 Q Okay. Marty didn't have a ton of other family,
17 extended family?

18 A True.

19 Q But you hadn't met any extended family members?

20 A No.

21 Q Okay. You were in the midst of a divorce, but it
22 wasn't quite final yet?

23 A That's correct.

24 Q And your soon to be at that point ex-husband
25 didn't know about your relationship with Marty?

1 A That's correct. The divorce was finalized on
2 November 4th. It was already final in our minds. It was
3 just the last piece of paper.

4 Q Mr. Brackley asked you about Kristen not ending up
5 showing up for dinner that night on November 1st; right?

6 A Yes.

7 Q And your recollection is, excuse me, that part of
8 your response to Marty was that's really not that odd for a
9 19-year-old girl?

10 A That's what I thought. I don't have children. I
11 was basing it on what I was like as a child.

12 Q And you knew that Marty had a previous long-term
13 girlfriend subsequent to his divorce?

14 A Yes.

15 Q And that Marty's children had known that
16 girlfriend?

17 A I believe so.

18 Q And that you were kind of another -- a newer
19 relationship?

20 A Correct.

21 Q You also told Mr. Brackley that when you and Marty
22 got back to his apartment November 1st and he listened to
23 the answering machine and heard the message from Kristen
24 Grisham, I believe you told us that the message -- you knew
25 from the answering machine that the message came in at about

1 4:00 that afternoon?

2 A Yes.

3 Q And that Marty made a comment about why would she
4 call me at home at 4:00 in the afternoon?

5 A Yes.

6 Q Now, Mr. Brackley asked you about the events that
7 happened on November 1, 1994. And I think you told us that
8 you went and picked up Marty at work?

9 A Correct.

10 Q At some point you went to the police station?

11 A Yes.

12 Q Okay. Do you remember telling police that Marty
13 had a 4:00 appointment with like a psychologist or a
14 psychiatrist named Nina?

15 A Yes.

16 Q Okay. And that appointment would have been on
17 November 1st of 1994?

18 A Yes.

19 Q Okay. And from talking to Marty later that
20 evening it was your belief that Marty had gone to that
21 appointment?

22 A I thought he said he was going to keep it.

23 Q Do you remember Marty telling you about talking to
24 Nina about whether or not to confront Kristen about the
25 checks, and that Nina the psychologist suggested that he not

1 do that right away?

2 A I believe that's what was said, yes.

3 Q Okay. And so based on that conversation it
4 sounded like Marty had met with Nina that day, kept that
5 4:00 appointment?

6 A Yes.

7 Q And so based on your understanding of that, if
8 Kristen then called Marty at work at 4:00 in the afternoon
9 he wouldn't have been there?

10 A Correct. I don't know if Kristen would have known
11 where he was at 4:00.

12 Q Right. But if Kristen had called Marty's office
13 at 4:00, based on what you know about his appointment with
14 Nina he wouldn't have been in his office to answer the
15 phone?

16 A Correct.

17 Q Mr. Brackley asked you several questions about
18 Marty talking to you about the check -- the checks with his
19 credit union account and how he discovered that?

20 A Yes.

21 Q Okay. I want to go back to the night of
22 October 31st when you told me you believe that Marty met you
23 at your house after you had gotten home from class?

24 A Yes.

25 Q Okay. Do you recall when Marty got over to your

1 house about trying to write some checks that night and a
2 book of checks was missing?

3 A I don't recall that now. I believe it's in the
4 transcript.

5 Q Okay. And when you read it in the transcript it
6 made sense to you?

7 A Yes.

8 Q And although Marty on the night of October 31st
9 mentioned that he noticed a book of checks missing that
10 night, is it fair that your -- what Marty was telling you is
11 not until he got the call from the credit union on the 1st
12 did it really click to him that maybe somebody actually
13 stole those checks?

14 A I believe that's true.

15 Q Okay. And when he's talking to you on
16 November 1st of 1994 he doesn't know who stole those checks?

17 A That's correct.

18 Q I think you told Mr. Brackley there was this
19 discussion about not confronting Kristen if she came to
20 dinner that night; right?

21 A Correct.

22 Q And waiting a couple days to see when the checks
23 cleared if that gave Marty more information about who had
24 written those checks?

25 A Yes. But Marty was also clear that when he said

1 the checks were stolen, he wanted to place a police report
2 saying -- what's the legal term, citing that Loren took
3 them. He thought Loren took them.

4 Q Okay. So just to kind of clarify, what Marty was
5 telling you was that it was his gut reaction to it that it
6 was Loren that was responsible?

7 A Correct.

8 Q But -- and that's why he definitely wanted to make
9 the police report?

10 A Yes.

11 Q And your understanding -- you weren't with Marty
12 when he actually made the police report?

13 A I was not in the room. I took him to the police
14 department. I waited in the foyer.

15 Q And from what Marty told you about making the
16 police report, he was going to as part of that report say
17 that Loren was the person he most suspected as being --

18 A Yes.

19 Q -- responsible?

20 A Yes.

21 Q Okay. But that he certainly didn't know for a
22 fact that it was Loren?

23 A Correct.

24 Q And I think you told us that one of the first
25 things Marty said to you when he left you a message earlier

1 that day was I love you, I'm okay, but I don't think my kids
2 are okay?

3 A Yes.

4 Q And so he also thought that Kristen might be
5 involved with Loren?

6 A Yes.

7 Q Okay. Do you recall that night after you all got
8 back to Marty's apartment that Marty started pulling out
9 some papers that he had specifically related to Loren?

10 A Yes.

11 Q Some psychological reports --

12 A Yes.

13 Q -- et cetera from Loren being in trouble
14 previously?

15 A Yes.

16 Q And Marty kind of showing you that information
17 saying do you want to see the worst of it?

18 A Yes.

19 Q And from your perspective in terms of the
20 statements that Marty made and him showing you those things,
21 that kind of confirmed to you that he really suspected that
22 Loren was responsible?

23 A I believe Marty thought it was certainly possible.

24 Q Okay. You -- a couple of times Mr. Brackley asked
25 you about Marty Grisham's demeanor when he was talking about

1 things?

2 A Correct.

3 Q And I think I heard you describe him as calm?

4 A Yes.

5 Q Okay. And I think I also heard you say something
6 about your -- in your interactions with Marty he was
7 typically calm?

8 A Yes.

9 Q That he was typically hopeful?

10 A Yes.

11 Q You knew from talking to Marty about his past that
12 calm may not have always been his first and foremost
13 demeanor?

14 A That's correct.

15 Q He shared with you that especially when it came to
16 his children that he probably hadn't been as calm with them
17 as he wanted to be?

18 A I believe that's correct.

19 Q And that he may have even had some trouble
20 controlling his anger with his children previously?

21 A I would assume so --

22 Q Okay.

23 A -- judging from the comments he did make. We did
24 not talk all the time about his children. They were -- I
25 don't have children. So I understand that they're a part of

1 his life, and we would have conversations here or there.
2 But then we'd move on to other topics.

3 MS. RING: Nothing further. Thank you.

4 THE COURT: Any redirect?

5 REDIRECT EXAMINATION

6 BY MR. BRACKLEY:

7 Q So let me just clarify the nature of your
8 relationship as it transformed from participants in the
9 divorce group to intimate partners, what kind of things did
10 you and Marty Grisham do together that led to this spark as
11 Ms. Ring termed it?

12 A I don't know what led to the spark. I guess we
13 realized just in maybe having some general conversations.
14 Divorce group can be pretty intense. And they have homework
15 things and you do things with partners there.

16 So I think we just would have some conversations
17 and realized that we had many outdoor things in common;
18 sports, riding bicycles, skiing, just in general love of the
19 outdoors. Maybe that we both drank coffee. We would meet
20 for coffee often in the morning. And just general
21 conversations I think.

22 Q So is it fair to say that this is sort of in that
23 new relationship phase where you're finding out things about
24 each other?

25 A Yes, because I never walked into that divorce

1 seminar and, you know, got into that seminar and looked at
2 him and went oh, my God, look at this guy, you know. It was
3 not like that. I was really focused on working on my
4 divorce issues.

5 Q Do you recall telling the police on the
6 November 2, 1994 interview that Nina was a therapist from
7 the City of Boulder Employee Assistance Program?

8 A I don't recall if I said exactly that. I wasn't
9 clear if Nina was like an EIP person or a financial person
10 or someone related with the City.

11 There was a statement about his -- Marty's mission
12 statement. And whether that was for work or goals in the
13 future towards retirement, I was very unclear about that.

14 Q But when you and I were talking about -- here in
15 court about Marty's plan not to confront Kristen if she came
16 over, but just to wait and see where those checks were going
17 to go, that was something that he had discussed with Nina
18 and that was kind of their plan together?

19 A I believe so, yes.

20 Q So -- and it's fair to say that Marty didn't know
21 for certain whether Loren stole his checks?

22 A That's correct.

23 Q He didn't know for certain that Kristen stole his
24 checks?

25 A That's correct.

1 Q And he essentially died thinking his kids stole
2 his checks?

3 A I believe that's correct.

4 MR. BRACKLEY: Thank you. No further questions.

5 THE COURT: All right. Any recross, Ms. Ring?

6 MS. RING: No, thank you.

7 THE COURT: Ms. Swider, you can step down.

8 Can this witness be excused?

9 MR. BRACKLEY: She may, Your Honor. Thank you.

10 THE COURT: So thank you, Ms. Swider. You can be
11 excused.

12 THE WITNESS: Thank you.

13 THE COURT: Next witness.

14 MR. BRACKLEY: Mr. Kirk Magill.

15 THE COURT: Would you step forward please, sir?
16 Come on all the way up here. And if you would please face
17 me and raise your right hand.

18 KIRK MAGILL,
19 called as a witness on behalf of the People, having been
20 first duly sworn, was examined and testified as follows:

21 THE COURT: Please have a seat.

22 Go ahead, Mr. Brackley.

23 MR. BRACKLEY: Thank you, Your Honor.

24 DIRECT EXAMINATION

25 BY MR. BRACKLEY:

1 Q Good morning, sir. Could you state your name and
2 spell your last name for the record?

3 A Richard Kirk Magill, M-A-G-I-L-L.

4 Q Mr. Magill, are you currently employed?

5 A Yes.

6 Q What do you do?

7 A I'm a tech coordinator for school districts.

8 Q In what state?

9 A In Iowa.

10 Q How long have you been in Iowa for?

11 A 13 years.

12 Q Where were you prior to Iowa?

13 A I lived in Florida for four or five years.

14 Q Okay. Prior to that?

15 A In Boulder.

16 Q How long have you been with the school district
17 there in Iowa?

18 A This is going on the tenth year.

19 Q Did you know -- let me bring you back to 1994 in
20 November, say summer into the fall of 1994. Where were you
21 living at that time?

22 A Fairways Apartments, 55th and Arapahoe.

23 Q Okay. And what were you doing for employment at
24 that time?

25 A We were the apartment managers, on-site residents.

1 Q When you say we, who are you talking about?

2 A My wife and I and two children.

3 Q And as apartment managers on site what did that
4 mean?

5 A We were in charge of leasing, upkeep, turn-over
6 and maintenance of the grounds.

7 Q Did you know the tenants who lived in the Fairway
8 Apartments in summer into the fall of 1994?

9 A Yes.

10 Q Did you know a Mr. Marty Grisham?

11 A Yes.

12 Q How did you know Marty Grisham?

13 A He was a friend and a neighbor, also one of the
14 tenants.

15 Q Let me back up just a little bit. Can you
16 describe the nature of the tenants at the Fairway Apartments
17 back in the fall of 1994? What kind of folks were living
18 there?

19 A Majority of our tenants were young professionals,
20 retired or grad students.

21 Q Would that be considered a family complex?

22 A I wouldn't consider it a family complex. Most of
23 the units were too small for families.

24 Q Did folks in the -- in the apartment complex
25 socialize together?

1 A Yes.

2 Q Tell us about some of that.

3 A A lot of times we were around the courtyard, so we
4 would have weekend social gatherings in the courtyard where
5 folks would come and play guitar and hang out. And we'd do
6 barbecues and stuff like that out there.

7 Q You had described Marty Grisham as a friend and a
8 tenant. How do you characterize -- why do you characterize
9 him as a friend?

10 A Well, socially at -- like at the gatherings he
11 would be one of the tenants that would typically be out with
12 the group that would typically come out and hang out and
13 just socialize with one another. He and I went on a couple
14 of bike rides together.

15 Q When you're socializing with Marty Grisham did you
16 talk to him about what he was up to?

17 A Not necessarily. I'd say the socializing was
18 typically based on music and food and drink.

19 Q Do you recall the day that Marty Grisham was
20 murdered, November 1, 1994?

21 A Yes.

22 Q Do you recall when you spoke -- when you last
23 spoke to Marty Grisham prior to his murder on November 1,
24 1994?

25 A If it wasn't that day it was the day prior. He'd

1 come to us and asked us to change locks.

2 Q And did he come to you in your professional
3 capacity as on-site manager of the building?

4 A Yes.

5 Q Okay. Tell us about Marty Grisham coming to you
6 in that capacity on either the day he was murdered or the
7 day before?

8 A He had come in to ask us to change locks. He had
9 had some concerns that someone had been in his apartment and
10 removed some items.

11 Q Did he specify what type of items?

12 A Yeah. He mentioned that there were some checks
13 missing, and potentially some other items that I don't
14 recall.

15 Q Okay. And as a result of that conversation did
16 you change his locks?

17 A It was a work order that was in the process.

18 Q Typically would you have changed locks
19 immediately?

20 A Typically we would have, but I didn't have any
21 cores. So I remember we were going to have to go over to
22 McGuckin's, and we had some on order.

23 Q For instance, if he had come to you the day before
24 November 1st would it be typical to have had those locks
25 changed by the night of November 1st?

1 A Never really got too many requests for lock
2 changes. So when that came through it became a priority I
3 guess at that point. So there was no precedent, so I
4 couldn't tell you honestly that we would have made it happen
5 any faster.

6 Q Okay. But did you act on this priority?

7 A Yes. We called to get some lock cores ordered for
8 the apartment.

9 Q And did you ever get to change the locks?

10 A Not prior to that night.

11 Q Not prior to the murder of Marty Grisham?

12 A Correct.

13 Q Do you recall a conversation with Marty Grisham
14 around that time about problems that he was having or
15 perceiving with his daughter?

16 A We -- you know, just in more personal nature when
17 he asked about the locks I asked, you know, what was going
18 on. And he mentioned that he thought probably that his
19 daughter and her boyfriend had come in and had potentially
20 taken those items from his apartment.

21 Q And do you recall when he was talking to you how
22 he sounded, what his demeanor was at this time?

23 A I don't recall that he seemed extremely upset or
24 anything like that. It was more just kind of a
25 conversation, you know. It was -- he didn't come in

1 distraught or frustrated. You could tell he was frustrated,
2 obviously wanted the locks changed. But it just seemed like
3 something that he needed -- he wanted to get done. Didn't
4 seem like -- he didn't make it seem like he was extremely
5 rushed by it, but he'd like to get it done.

6 Q And when he started -- when he mentioned that he
7 had suspected perhaps it was his daughter or her boyfriend,
8 was that in response to a question that you asked him as to
9 why he wanted his locks changed?

10 A Yes.

11 Q Did Mr. Grisham appear concerned?

12 A I -- I don't recall. I mean, like I said, he
13 wanted his locks changed, and he had what I consider to be
14 pretty good reason to have them changed.

15 Q Okay.

16 A But I don't remember him being nervous or overly
17 concerned.

18 Q And as a result of that conversation you started
19 the process to change his locks?

20 A Yes.

21 Q But never got to do it?

22 A No.

23 MR. BRACKLEY: No further questions, Judge.

24 THE COURT: Cross-examination, Ms. Milfeld.

25 CROSS-EXAMINATION

1 BY MS. MILFELD:

2 Q The reason why you had spoken to Mr. Grisham
3 either the day before the murder or the day of the murder
4 was his request to change the locks?

5 A Correct.

6 Q He hadn't called you up to hang out?

7 A No.

8 Q He had made a specific request, and he made that
9 request to you because you were the maintenance worker?

10 A Correct.

11 Q You would have been the person that any of the
12 tenants would have called if they had a maintenance need?

13 A Yes.

14 Q So he called you in some professional capacity?

15 A Yes.

16 Q To get a job done?

17 A Yep.

18 Q When you met with Mr. Grisham you asked him why
19 did you get the locks changed?

20 A Yes.

21 Q It was only in response to that question where he
22 told you the reason why he wanted the locks changed was
23 because things out of his place were stolen?

24 A Correct.

25 Q He didn't offer up that information?

1 A Well, it was all in the same transaction. So I
2 don't know that it was all part of a singular conversation.

3 Q But the reason why he was telling you about that
4 is because you were going to change the locks for him?

5 A Yeah. Yeah.

6 Q You talked about your relationship with
7 Mr. Grisham. And it would be fair to say that your
8 relationship was limited to the social gatherings you would
9 have? That was one aspect of your relationship?

10 A Yes.

11 Q You also said that you'd occasionally go for bike
12 rides together?

13 A On a couple of occasions, yes.

14 Q Over what period of time?

15 A Probably within a year. Yeah, within probably
16 that prior season of riding.

17 Q Would you go riding with him alone or with other
18 people?

19 A It was the two of us when we went.

20 Q Besides the social gatherings and the bike rides
21 you didn't socialize with him in any other way?

22 A No.

23 Q You didn't go over to his place to have dinner?

24 A No.

25 Q He didn't go over to your place to have dinner?

1 A No.

2 Q You had not met any members of his family?

3 A I had -- I'm pretty sure I had met his daughter
4 and the boyfriend at one point.

5 Q Did you -- and so you said that you met her and a
6 boyfriend. Was that an assumption that you made that he was
7 a boyfriend because he was with her?

8 A Yeah. Yeah.

9 Q So you didn't know whether or not the person that
10 you met with Mr. Grisham's daughter was actually her
11 boyfriend or not?

12 A We were pretty nosy. Because of the way the
13 apartment complex was laid out, we kept pretty good tabs on
14 who came and went. So when people were coming and going we
15 would quite frequently ask about things like that.

16 Q But you don't recall having a specific
17 conversation with Kristen Grisham about whether or not he
18 was her boyfriend?

19 A Absolutely not.

20 Q So that was just an assumption that you had made
21 because you'd seen them at some point together?

22 A Or yeah, I can't tell you when -- when the
23 knowledge of the fact that he was her boyfriend was given to
24 me. It was probably at some prior conversation with Marty
25 or something along those lines.

1 Q But you don't specifically recall a conversation
2 that you had with anyone about that?

3 A No.

4 Q At these social gatherings that you talked about
5 you said that there were other people besides Mr. Grisham
6 that were there?

7 A Um-hmm.

8 Q So you wouldn't -- is that a yes? You just have
9 to respond out loud.

10 A Yes. I'm sorry.

11 Q You weren't there just to hang out with
12 Mr. Grisham?

13 A Not particularly. Not in particular, no.

14 Q You were there to hang out with a bigger group of
15 people?

16 A Usually it was pretty quaint, six to eight, maybe
17 ten people.

18 Q So you were there to hang out with other people
19 besides Mr. Grisham?

20 A Yes.

21 Q You weren't there specifically just to meet with
22 him?

23 A No.

24 Q And at these social gatherings you said that you
25 weren't really engaged in personal conversations with

1 individual people?

2 A I might have said that. But conversations often
3 got personal. I mean, you get to know people.

4 Q But you were there to eat good food?

5 A Yeah.

6 Q Listen to music?

7 A Yes.

8 Q And that was the purpose of these meetings?

9 A Yes.

10 Q You talked about how as a maintenance worker at
11 the Fairway Apartments you knew a lot of the tenants that
12 were there?

13 A We knew all of them.

14 Q And the reason why you knew all of them was it was
15 part of your job --

16 A Yes.

17 Q -- to know who they were?

18 As a maintenance worker you needed to know where
19 people were, and to some degree what they did?

20 A Yes.

21 Q And so it was kind of a requirement of your job to
22 at least know some details about their lives?

23 A We also were the ones that would gather the
24 leasing information, take in the application for the lease,
25 process that information. So prior to people moving in we

1 usually got to know them, you know, on paper pretty well.

2 Q So you met everyone before they'd actually moved
3 into the apartments?

4 A Yes.

5 Q And knowing Mr. Grisham, you knew other people in
6 that same capacity?

7 A Yes.

8 MS. MILFELD: Nothing further.

9 THE COURT: Any redirect?

10 MR. BRACKLEY: No, Your Honor. Thank you.

11 THE COURT: Sir, you can step down.

12 Can this witness be excused?

13 MR. BRACKLEY: He may.

14 THE COURT: All right. Thank you, Mr. Magill.

15 Next witness.

16 MR. BRACKLEY: People call Ms. Barbara Lennon.

17 THE COURT: Okay. Before we do that, is this a
18 statement made to the police by the victim?

19 MR. BRACKLEY: It is.

20 THE COURT: Why is this not testimonial?

21 MR. BRACKLEY: Judge, I'm going -- I would -- one,
22 it may not be testimonial. I think we could hear testimony
23 about the nature of this particular person's job with the
24 police.

25 But two, People have an alternate theory which --

1 first of all, I don't know what the defense's position to
2 this statement would be. I don't know whether or not
3 there's even an objection to it because there hasn't been a
4 response.

5 But if the statement is in fact testimonial, then
6 the Court -- and the Court finds that the statement is
7 testimonial, I think the People can lay a foundation very,
8 very easily that that statement may be admissible by
9 forfeiture by wrongdoing pursuant to the *People v. Vasquez*
10 case which I'll present to the Court.

11 THE COURT: Okay.

12 MR. BRACKLEY: People call Ms. Barbara Lennon.

13 THE COURT: Would you step forward please, ma'am?
14 If you'd come on all the way up here. Would you please
15 raise your right hand?

16 BARBARA LENNON,
17 called as a witness on behalf of the People, having been
18 first duly sworn, was examined and testified as follows:

19 THE COURT: Please have a seat.

20 THE WITNESS: I can switch to these other glasses.

21 THE COURT: All right. Just let me know when
22 you're ready.

23 THE WITNESS: Okay.

24 THE COURT: All right. Go ahead, Mr. Brackley.

25 DIRECT EXAMINATION

1 BY MR. BRACKLEY:

2 Q Okay. Good morning.

3 A Good morning.

4 Q Can you tell us your name and spell your last name
5 for us?

6 A Certainly. It's Barbara Lennon, L-E-N-N-O-N.

7 Q Ms. Lennon, are you currently working?

8 A No.

9 Q When is the last time you were employed?

10 A July of 1998.

11 Q And what did you do?

12 A I worked at the Boulder Police Department as a
13 report specialist.

14 Q And what is a report specialist?

15 A I took non-emergency crime reports for the Boulder
16 Police Department.

17 Q When you say non-emergency reports, typically how
18 was that done?

19 A They -- the reports -- I worked at the police
20 department proper. We had an office called the operations
21 support unit located in the lobby of the police department.

22 And the reports were either generated through
23 people who came into the lobby, sometimes reports were
24 generated through direct telephone calls from either
25 officers or detectives that were referred directly to me or

1 someone else who worked in the office with me. Or the
2 reports were referred through our CAD system, computer aided
3 dispatch, which came on a screen where we could see the
4 calls that were coming from the dispatch calls from
5 upstairs. And we could actually either pull those calls
6 directly off the screen, or sometimes dispatch actually
7 assigned those calls to our unit.

8 And then they were our calls, and we would
9 determine based on the nature of the call whether it was
10 appropriate for us to have them. Sometimes we would
11 actually reassign them back to dispatch if we felt that it
12 wasn't appropriate for us to take that call.

13 Q So civilians -- would part of your job be to -- to
14 take calls or visits from civilians who would say something
15 happened, this is what happened, and you would talk to them
16 about it?

17 A Correct.

18 Q And sometimes you filed reports and sometimes not?

19 A Correct.

20 Q Sometimes they would talk about a crime having
21 been committed. Other times you would determine that a
22 crime wasn't in fact committed?

23 A Correct.

24 Q Sometimes you would refer it on to detectives,
25 sometimes you would just close it?

1 A Correct.

2 Q Do you remember as you sit here today November 1,
3 1994 getting a call from Mr. Marty Grisham?

4 A Yes, I do.

5 Q You remember that as you sit here today?

6 A Yes, I do.

7 Q Tell us what you remember as you sit here today.

8 A I remember that I got a phone call from Marty
9 Grisham. Initially he called me, left a message on my
10 voicemail. He had been referred to me by Detective
11 Kithcart. And I returned that phone call to him.

12 Q Let me just ask you this up front, why is it that
13 you remember this particular call in the history of this
14 case and your job? Why do you remember this particular day?

15 A Because it always haunted me, this particular
16 incident. I was there when -- later that evening when the
17 call came out. We have a radio in our office where all the
18 calls are dispatched. We can hear all the calls.

19 And after I took the report from Mr. Grisham over
20 the phone, he later brought me the list of the information
21 that he had obtained from his credit union and then went
22 home. And couple hours later I was still in the office when
23 a call came out about a shooting at the same address. And I
24 had just met with him a couple hours previously.

25 Q And you recognized the name?

1 A I recognized the address and I recognized the
2 name.

3 Q And you say it's haunted you, it's something
4 you've thought about all these years?

5 A Yes, it is.

6 Q So you remember coming in and meeting with me?

7 A Yes, I do.

8 Q And you remember recalling all these facts without
9 even having to look at your report?

10 A Correct.

11 Q So tell us what you remember.

12 A I remember -- I remember everything. I
13 remember -- I remember Marty calling me. I remember him
14 leaving me a message. I remember me returning his call at
15 3:15 in the afternoon on November 1st.

16 I remember him telling me that on October 31st the
17 previous evening he had been writing out checks paying bills
18 and he discovered that when he wrote out one final check he
19 went to get another book of checks from the box and that the
20 next book of checks was missing.

21 And he thought that's strange, there should be
22 another book of checks. And that would have been 1546 to
23 1565. And he also thought I also haven't been able to
24 locate my statement, and that's also kind of strange. But
25 he thought well, maybe I misplaced it.

1 So he went and got another box of checks that he
2 kept in a different location and continued writing checks
3 paying his bills.

4 And he went to work the next day, the 1st of
5 November, and got a phone call from Patty Harris at Boulder
6 Municipal Employees Federal Credit Union, the City's credit
7 union, and was advised that a male had contacted the credit
8 union inquiring about a balance on his account.

9 And -- and the caller had when asked to provide
10 additional information given an address from the checking
11 account and had provided an address for the account, but it
12 was -- it was the address that was on the checks, but that
13 was the previous address. And I think -- and Patty knew
14 that Marty had a different address. Marty worked for the
15 City.

16 The caller then hung up, so it was unable to
17 obtain any information. Patty contacted Marty Grisham. I'm
18 going to refer to him as Marty if that's okay.

19 Q That's fine.

20 A And -- and Marty then went to the credit union and
21 discovered that there were a number of checks from that
22 missing book of checks that had been cashed during a period
23 of time from the 11th of November -- excuse me, October
24 until -- I would have to check my notes for this because I
25 know there were two additional checks on an addendum report

1 that I did on the 3rd after Marty was shot.

2 There were two additional checks because the total
3 number of checks, originally it was thought that there were
4 13 -- 14 checks cashed, but there were actually only 13
5 checks cashed in the original number of checks totalling
6 \$2800, a little over \$2800. I don't recall the exact --
7 that exact figure.

8 Q Ms. Lennon, so let's continue talking about what
9 Marty Grisham said to you as opposed to anything you might
10 have learned in the investigation or --

11 A Okay.

12 Q -- after Mr. Grisham was shot.

13 A Okay. So he told me that he believed that based
14 on when the first check was cashed, which was the 11th of
15 October, he thought that the checks must have been taken
16 between the 8th -- on or about the 8th or the 9th of
17 October.

18 And he told me that the only people who had keys
19 to his condo besides himself were his girlfriend Barbara
20 Burger and his twin children Loren and Kristen who I believe
21 were 19 at the time. Loren lived in Glenwood Springs, and
22 Kristen lived with her mother in Louisville.

23 And I -- I questioned him about both children, and
24 he didn't believe that Loren had been in the area during
25 that time, but he said that he would look into it and get

1 back to me.

2 And I questioned him more about Kristen, and he
3 said that he really didn't think that Kristen was a suspect
4 per se, but that her behavior had been a little suspicious
5 lately. He said that there was some question about whether
6 or not she was attending Front Range college.

7 And I asked about whether or not she had any --
8 any boyfriends that, you know, may have had access to the
9 apartment, that type of thing. And he proceeded to tell me
10 about an incident that had come up recently where she was
11 involved in a motorcycle accident involving a boyfriend and
12 the motorcycle was stolen.

13 Q Just in the life of this particular conversation
14 with Marty Grisham what happened next? For instance, what
15 did you do with the information that you got from Marty
16 Grisham?

17 A Well, I noted all of this in my report. I pulled
18 the report -- I pulled the report on the motorcycle theft to
19 attach it to my report. I documented all of this in my
20 report. This was all information I obtained over the phone
21 from Mr. Grisham.

22 Q Okay.

23 A And he told me that he was going to bring me the
24 list of this -- the forged checks. And -- and he had noted
25 that all he had from the credit union at that time was the

1 check number, the amount of the checks that had been forged
2 and the date those particular checks had been forged. No
3 information on where the checks had been forged or who the
4 checks had been made out to, no specific information of that
5 type. So he was going to -- he was going to drop that off
6 to me on his way home -- on his way home from work.

7 And so I started working on my report and waited
8 until, you know, he brought me that information.

9 Q So at the time that you heard over the radio that
10 Marty Grisham had been murdered you didn't have access to
11 any information about who the checks were written to or what
12 signature was on them, et cetera?

13 A Correct.

14 Q At the time Marty Grisham was murdered, had -- had
15 he been interviewed by any detectives?

16 A Had -- excuse me?

17 Q Had Marty Grisham been interviewed by any
18 detectives about these stolen checks?

19 A No. I was the only one who had spoken with him.

20 Q Would it have been the next course of action in
21 the life of a case for a detective to get involved and make
22 an interview and do an interview?

23 A Not at that point.

24 Q Okay.

25 A Because we had no information on even where the

1 forgery had occurred.

2 THE COURT: Ms. Lennon, didn't you say at the
3 beginning that Mr. Grisham had been referred to you by
4 another detective?

5 THE WITNESS: Correct.

6 THE COURT: Do you know what that was about or how
7 that happened?

8 THE WITNESS: Yes.

9 Q (By Mr. Brackley) Tell us about that then.

10 A When Marty was at the credit union speaking with
11 Patty Harris, it's my understanding that Patty Harris had
12 given him the name, or perhaps, I don't know, Marty may have
13 known the number for the detective division. I don't know
14 exactly.

15 But somehow he got through to Jeff Kithcart, who
16 is the head forgery detective. And -- and I at the time was
17 sort of the lead intake if you will person to take initial
18 white collar crime reports. Detectives didn't take the
19 initial reports.

20 Q Right. So Detective Kithcart referred it to you
21 to take that initial report?

22 A Exactly.

23 Q And then should there -- something be
24 substantiated, then it would get kicked back to detectives
25 for further work?

1 A Right. If you look at my report at the bottom it
2 says open, refer to detectives.

3 Q Okay. But --

4 A Go ahead.

5 Q I'm sorry. But as of the time of Marty Grisham's
6 murder he had not been interviewed by detectives?

7 A Correct. And there was no information yet to
8 follow up on. So it would be open until there was more
9 information to -- it needed further follow-up.

10 Q Right. So at the time of your conversation with
11 Marty Grisham you had no information about what checks,
12 which checks, when checks, where checks?

13 A I had the -- I had what checks, amount of checks,
14 I had the dates, the check numbers and the amounts.

15 Q But to clarify --

16 A Yes.

17 Q -- is that specific information came after the
18 1st?

19 A No. No.

20 Q So he gave you that information on the phone the
21 first time around?

22 A He brought me that information at -- I took the
23 report at 3:15. He brought me that information at 5:10.

24 Q Right. So I guess what I want to focus on is the
25 information that you learned at 3:15.

1 A Um-hmm.

2 Q Is it everything you testified to except for the
3 specific check numbers, et cetera? And would it be helpful
4 to look at a report?

5 A No. I'm not following you, no. I know the
6 report, but I'm not following.

7 Q I guess if you could -- if you could differentiate
8 what information you learned on the phone versus what you
9 learned in person.

10 A What I learned on the phone was that he had 14
11 checks and --

12 Q Okay.

13 A -- that the checks totalled X amount and that he
14 knew the check numbers and he would be bringing me the list
15 at the end of the day in a couple hours.

16 Q Right.

17 A So I didn't complete my report until he brought me
18 that.

19 Q Okay. Did you learn the information about the
20 conversation he had with the people at the credit union on
21 the phone?

22 A Yes.

23 Q Did you learn the information about his son and
24 his daughter and his ex-wife on the phone?

25 A Yes.

1 Q Did you learn the information about him looking --
2 him paying bills and writing checks on October 31st on the
3 phone?

4 A Yes. The only thing that occurred in person was
5 the -- the emphasis that I gave to him about not discussing
6 this filing this police report with anyone, his ex-wife, his
7 children, with anyone until after we developed suspect
8 information. He was very agitated.

9 Q So when he walked out there was no suspect
10 information developed?

11 A Correct.

12 Q And then he was murdered?

13 A Correct.

14 MR. BRACKLEY: No further questions.

15 THE COURT: Cross-examination, Ms. Ring.

16 MS. RING: Thank you.

17 CROSS-EXAMINATION

18 BY MS. RING:

19 Q Good morning, Ms. Lennon.

20 A Good morning.

21 Q We've never met before?

22 A Not technically, no.

23 Q What?

24 A Not technically, no.

25 Q You got a call from -- you met one of my

1 investigators?

2 A Yes.

3 Q You never met me personally?

4 A I haven't met you in person, no. But I have met
5 you sort of indirectly.

6 Q I have to admit I'm not sure what you mean. Is it
7 in any way relevant to this case?

8 A No, not at all.

9 Q Okay. Is there anything I should be concerned
10 about?

11 A No. No.

12 Q So I'll -- maybe I'll ask you that later.

13 A Okay.

14 Q I'll try that again.

15 Mr. Brackley was talking about meeting with you
16 prior to this hearing?

17 A Yes.

18 Q And you haven't met with anyone from my office
19 about this case prior to this meeting?

20 A One of your investigators came to my home.

21 Q And served you a subpoena?

22 A Correct, and requested an interview. But I
23 declined.

24 Q Mr. Brackley spent some time talking about how
25 well you remember the details of your conversations with

1 Marty Grisham?

2 A Correct.

3 Q Okay. And what I heard you say was the
4 conversation with Marty Grisham and the information you got
5 from him sticks out in your mind because of Marty Grisham
6 being murdered that evening right after you had spoken to
7 him and met with him?

8 A Correct.

9 Q Okay. You hadn't met Marty Grisham prior to
10 speaking with him on November 1st of 1994?

11 A Correct.

12 Q You're not calling him Marty by first name because
13 you had any kind of relationship with him outside the
14 conversations about his report to the Boulder police?

15 A No.

16 Q Okay. And it's fair to say the only reason Marty
17 Grisham was interacting with you on November 1st of 1994 was
18 because of your role with the Boulder Police Department at
19 that time?

20 A Correct.

21 Q Mr. Brackley also asked you about how well you
22 remembered these details, and at some point offered to show
23 you a copy of your report?

24 A Correct.

25 Q And you seemed to indicate that you'd seen that

1 report?

2 A Correct.

3 Q And do you have a copy of the report with you up
4 there?

5 A Yes, I do.

6 Q Okay. So even though these details are things
7 that you have an independent recollection of, you have
8 reviewed your report before you testified today?

9 A Yes, I have.

10 Q And that's pretty typical police personnel
11 practice?

12 A Yes.

13 Q Okay. So when you reviewed that report from 1994,
14 your independent memory of your conversations with Marty
15 Grisham, that report accurately reflects what you remember
16 as well?

17 A Yeah.

18 Q You didn't read that report and say well, I think
19 Marty told me this and it was important and I didn't put it
20 in the report?

21 A I'm sorry. Can you repeat that?

22 Q When you were looking over your report that you
23 did back in 1994 --

24 A Yes.

25 Q -- recently --

1 A Yes.

2 Q -- you didn't say wow, I remember Marty telling me
3 this, it was important and I didn't put it in there? That
4 didn't happen to you?

5 A I'm not following that.

6 Q When you wrote the report in 1994 you were trying
7 to be accurate about the information that Marty Grisham gave
8 you about the check situation?

9 A Correct.

10 Q That was your habit when you would write those
11 reports when you worked for Boulder Police?

12 A Correct.

13 Q Okay. So I just want to make sure because you're
14 telling us you have this independent memory of your
15 conversation with Marty?

16 A Correct.

17 Q That isn't solely based on that report; right?

18 A Okay.

19 Q There's nothing that you remember differently from
20 what's actually in your report?

21 A There are some things that I remember that aren't
22 in my report.

23 Q Like?

24 A Like his demeanor.

25 Q Okay. And describe what you remember about his

1 demeanor.

2 A He was agitated.

3 Q Are we talking about on the phone or in person?

4 A Both.

5 Q Okay.

6 A And that's not typically something that I would
7 document in a report.

8 Q Let's start with the phone conversation. What
9 about your recollection of the phone conversation with Marty
10 makes you recall that you believed he was agitated during
11 the phone conversation?

12 A He was speaking very quickly. He was -- he was
13 agitated. He was upset. He was -- he was agitated. He was
14 upset.

15 Q Okay. Since you didn't document that in your
16 report in recalling when Marty was giving you information
17 about the checks being missing, do you recall anything in
18 particular about what he was talking about that seemed to
19 make him more agitated, or that's when you recall him being
20 agitated?

21 A You have to repeat that.

22 Q Sorry. You're telling us today you recall Marty
23 being agitated on the phone when he's making the report?

24 A Right.

25 Q Do you have any specific recollection of when he

1 was conveying certain information to you that that's when he
2 seemed the most agitated, or just the entire conversation?

3 A It was just -- it was just his overall demeanor.

4 Q And you said you also recall him being agitated
5 when he came in --

6 A Right.

7 Q -- to the police station?

8 A Correct.

9 Q And do you have any independent memory today about
10 what specifically about his demeanor would make you describe
11 it as agitated?

12 A It was -- it was the way he was talking about
13 having to call his wife and discuss his -- his -- what was
14 going on with his daughter to the -- it was what caused me
15 to include the information in my -- in that last part of my
16 report where I state adamantly for him not to contact anyone
17 about the theft of the checks or the forgeries until we've
18 developed suspect information.

19 And I also note about him getting his locks
20 changed because he was so adamant about -- he was so adamant
21 about wanting to do something immediately. He was -- he was
22 worked up. He was just worked up. He was -- he was
23 agitated. I don't know how else to put that he was
24 agitated.

25 Q Okay. Going back to more specifically your role

1 with the Boulder Police Department and your role in talking
2 to Marty Grisham that day, you're there to take information
3 from people who are reporting crimes; right?

4 A Primarily. Yes, primarily.

5 Q Okay. And you know that somehow Detective
6 Kithcart had been involved prior to you talking to Marty
7 Grisham; right?

8 A He -- briefly, yes.

9 Q Okay. And it was your understanding that it was
10 Detective Kithcart who directed Marty Grisham to contact
11 you?

12 A Yes.

13 Q Okay. And you said it was fairly typical at the
14 Boulder Police Department for someone like yourself to take
15 an initial report of an alleged crime?

16 A Yes.

17 Q Rather than the detective?

18 A Correct.

19 Q And that based on the information you got from the
20 individual reporting the crime that would -- it would then
21 be forwarded to the appropriate detective for follow-up?

22 A Correct.

23 Q And that when this happened in November of 1994
24 Detective Kithcart was in charge of the forgery unit of the
25 Boulder Police detective unit?

1 A There were two detectives in that area at that
2 time I believe.

3 Q And Detective Kithcart would have been one of
4 them?

5 A Correct.

6 Q And is it fair that based on your being aware of
7 the practices and procedures within the Boulder Police
8 Department that it made sense to you that Detective Kithcart
9 would have made the referral for Marty Grisham to give the
10 information to you?

11 A Absolutely, yes.

12 Q Okay. Your recollection is you get a call
13 directly from Marty Grisham?

14 A Correct.

15 Q And he leaves you a voicemail?

16 A Correct.

17 Q And of course when he's calling you he's calling
18 you at a number relating to the Boulder Police Department?

19 A It's my direct number, yes.

20 Q But it would be clear he's calling somebody at the
21 Boulder Police Department? Your voicemail message would
22 have indicated that?

23 A Correct.

24 Q Okay. You call him back?

25 A Correct.

1 Q And you -- again, you would have introduced
2 yourself and who you were --

3 A Right.

4 Q -- vis-a-vis working for the Boulder Police
5 Department?

6 A Correct.

7 Q And I need information from you to follow up on
8 what you were telling Detective Kithcart?

9 A Right.

10 Q That's the purpose of the conversation?

11 A Correct.

12 Q You try to get as much information from Marty
13 Grisham as you can over the phone?

14 A Correct.

15 Q About what he knows about the stolen checks?

16 A Right.

17 Q And what -- what he believes is a forgery of those
18 checks?

19 A Yes.

20 Q At this point he's been to the credit union and
21 realizes that checks have actually cleared that he didn't
22 write?

23 A Correct.

24 Q So it's both the checks being stolen out of his
25 house?

1 A Correct.

2 Q And checks being forged that he learned when he
3 went actually went to the credit union?

4 A Correct.

5 Q Fair that you would have told Marty what you want
6 him to bring to the police department to you?

7 A Correct.

8 Q To assist in the investigation?

9 A Correct.

10 Q And that's why he shows up later at about 5:00 --
11 a little before 5:00?

12 A 5:10.

13 Q And delivers what you asked him to deliver to you?

14 A Correct.

15 Q As part of your investigation of these alleged
16 crimes?

17 A Correct.

18 Q And is it fair that you told Mr. Grisham we're
19 going to follow up on this; right?

20 A Correct.

21 Q What the typical police procedure from there is
22 going to be?

23 A Correct.

24 Q And then you make this specific statement to him
25 that he really shouldn't tell anybody else about the

1 investigation?

2 A Based on -- on my evaluation of his state at that
3 point in time I felt that that was best, yes.

4 Q And it's fair that you believe once the checks
5 clear that will give the Boulder Police Department more
6 information about who might be responsible?

7 A Correct.

8 Q And you don't want Mr. Grisham to alert anyone who
9 might be a potential suspect ahead of time?

10 A Correct.

11 Q Your understanding from speaking to Marty Grisham
12 was that this was the first time he'd reported to the police
13 that the checks were missing?

14 A Correct.

15 Q And it seemed that he really didn't know anything
16 about any checks being forged until he'd actually gone down
17 to the credit union that day?

18 A Correct.

19 Q You told us that you actually went and pulled
20 Marty Grisham -- I mean pulled -- I'm sorry, let me start
21 over.

22 After your conversation with Marty Grisham you
23 said you went and pulled the motorcycle incident he talked
24 about?

25 A Motorcycle theft report, yes.

1 Q Okay. And you were able to pull that using Marty
2 Grisham and Kristen Grisham's name?

3 A Kristen Grisham's name.

4 Q Okay. You didn't have a name of a supposed
5 boyfriend who was involved?

6 A Not at that time.

7 Q That wasn't something that Marty gave you?

8 A No.

9 Q If I already asked this question I'm sure you'll
10 let me know. The judge -- I know a while ago I asked you
11 about if there was anything in the report when you reviewed
12 it that you didn't put in the report that you remembered
13 today.

14 A That was his -- Marty's demeanor.

15 Q Right. So we spent some time talking about
16 Marty's demeanor?

17 A Right.

18 Q I don't think I asked you, was there anything else
19 that was noted in your report that you have an independent
20 recollection of?

21 A Just the events which occurred after my report was
22 completed while I was still in the office.

23 Q But the details of both of your conversations with
24 Marty Grisham over the phone and in person are accurately
25 reflected in that report?

1 A Correct, other than the demeanor, which isn't
2 appropriate for my report.

3 MS. RING: Okay. Nothing further. Thank you.

4 THE COURT: Okay. Redirect examination?

5 MR. BRACKLEY: Just one.

6 REDIRECT EXAMINATION

7 BY MR. BRACKLEY:

8 Q So at the time that Marty Grisham was murdered he
9 hadn't mentioned the name Michael Clark?

10 A No. Just the boyfriend and the motorcycle
11 incident.

12 MR. BRACKLEY: Okay. No further questions.

13 THE COURT: All right. Any recross?

14 MS. RING: No.

15 THE COURT: All right. Ms. Lennon, you can step
16 down.

17 Can this witness be excused?

18 MR. BRACKLEY: She may, Your Honor.

19 THE COURT: All right. Ms. Lennon, you're
20 excused.

21 THE WITNESS: Thank you very much.

22 THE COURT: We'll go ahead and take a recess until
23 11:00. When we come back at 11:00 I'll hear argument on
24 each of the three witnesses who are proffering hearsay
25 statements of the decedent.

1 With respect to Ms. Lennon I will certainly hear
2 argument on whether or not it is testimonial. But the
3 People should be prepared if they intend to proceed with
4 establishing that the defendant has forfeited his
5 Constitutional right to confront the witness for the
6 statements made to Ms. Lennon under the forfeiture of
7 wrongdoing theory. Should be prepared to proceed on that.

8 MR. BRACKLEY: And Judge, I will tell you by way
9 of taking a break, I gave Ms. Ring four cases which apply to
10 both forfeiture of wrongdoing and also 807. These are cases
11 I know this Court is familiar with. I'm going to give them
12 to the Court. I don't know that there's an objection
13 frankly because I haven't seen a response.

14 But I will proceed on forfeiture by wrongdoing
15 pursuant to Colorado Rule of Evidence 104 and a
16 preponderance of the evidence standard. I will then ask the
17 Court to take judicial notice of the arrest affidavit and
18 the preliminary hearing testimony, all of which Your Honor
19 has presided over. And I can do that pursuant to the case
20 law.

21 THE COURT: Okay.

22 MR. BRACKLEY: So I'd be making that argument.
23 But one other thing I wanted to mention, and it might make a
24 lot more sense to argue the res gestae motion first because
25 it is in that motion that we cover that second prong of 807,

1 that being materiality of the statements. It just makes a
2 lot more sense to argue that motion first.

3 THE COURT: Does that make sense to you, Ms. Ring?

4 MS. RING: That's fine.

5 MR. BRACKLEY: It's essentially one big argument,
6 but I think they're kind of together.

7 THE COURT: I was hoping you would break it out
8 into smaller arguments so that my brain can comprehend
9 everything, but I'll do my best. All right. That's fine.
10 We can take up the res gestae first.

11 MR. BRACKLEY: I've heard that before, Your Honor,
12 about breaking it into smaller arguments. And I know you
13 can handle it.

14 THE COURT: We'll go off the record.

15 (A recess was taken.)

16 THE COURT: All right. We're back on the record
17 in 12CR222. Counsel and the defendant are present.

18 By agreement the parties wanted to take up the
19 issue on the People's res gestae evidence which encompasses
20 two separate motions.

21 Why don't we start with the first one, the
22 People's motion in limine re res gestae evidence which
23 addresses the handgun and the theft and forgery evidence.

24 MR. KELLNER: And Judge, I haven't received a
25 response from the defense, so I'm not entirely sure if

1 there's an objection to admitting this evidence or not.

2 Could we start at that position before I begin to argue?

3 THE COURT: Well, let's assume that they object.

4 Because frankly, I still need to determine whether or not
5 it's going to be admissible.

6 MR. KELLNER: Well Judge, as you understand, I
7 mean, res gestae is a theory of relevance which says that
8 certain evidence is relevant because of its unique
9 relationship to the charged offense.

10 And as we laid out in the motion, the defendant's
11 possession of the handgun, how he came to possess the same
12 handgun which has the same caliber which ultimately murdered
13 Marty Grisham was in his possession on the day of.

14 And then the very statements made regarding the
15 disposition of that gun to both law enforcement, Dion Moore
16 and Leon Stackhouse is frankly direct evidence in this case,
17 even more so than just res gestae.

18 It is the possession of the murder weapon which as
19 I read the defense's motion to clarify, you know, originally
20 I thought -- I sort of struggled with how to approach that
21 because it just seemed so obviously part of the case.

22 THE COURT: Okay. Well, that may be true. But in
23 paragraph 16 of your motion you only mention the theft and
24 forgeries, which is -- frankly, I thought it was a sincere
25 question.

1 MR. KELLNER: After I re-read it and I thought
2 about it I realized, and that's why obviously I submitted --

3 THE COURT: Okay.

4 MR. KELLNER: -- the clarification. And I can
5 understand where that came from.

6 But looking at it now today, I mean, the
7 possession of that gun is very clearly direct evidence in
8 this case, very much relevant to the defendant's ability and
9 opportunity to commit the murder.

10 With respect to the checks, the checks dovetails
11 into the motorcycle case. And if you don't mind, Judge, I'd
12 like to address that at the same time.

13 THE COURT: Go ahead.

14 MR. KELLNER: Starting with the motorcycle case,
15 that is the beginning of the defendant's sort of downward
16 spiral and provides context to the precarious position that
17 his recruitment into the Marine Corps was in at the time.

18 It is the initial step in forming his ultimate
19 motive which is to eliminate Marty Grisham so that he can
20 avoid future legal troubles and still complete his
21 recruitment and join the Marine Corps.

22 That's the People's theory of the case. I think
23 it's been well established in both the affidavit for arrest,
24 the preliminary hearing, the motions we have had on
25 suppressing statements.

1 But the motorcycle case is more than just
2 establishing the motive. It's integrally intertwined in
3 this case because just listening to Barb Lennon talk about
4 taking a report, when Marty Grisham left the lobby of the
5 police department that day there were no suspects.

6 When she heard it on the radio she started looking
7 into it and pulled the case with Kristen Grisham's name
8 about the motorcycle which had the defendant's name in it,
9 which ultimately led to him developed as a suspect in the
10 homicide and the forgery case.

11 The motorcycle incident is relevant to this case
12 because at the time it will show that the defendant
13 possessed both a key to Marty Grisham's house on
14 September 22nd given to him by Kristen Grisham as well as a
15 key to the Marine Corps recruiting office.

16 And I laid out some of those facts in the motion
17 itself. But the reason why those are relevant independent
18 of any bad inference maybe about his character or some other
19 inference out there is that he possessed the knowledge of
20 Marty Grisham's house, its location, the ability to go in
21 and commit the check fraud -- or the theft of the checks as
22 well as possession of that recruiting office key, which part
23 of the case that we're presenting is really the dire
24 circumstances of Mr. Clark's life at the time.

25 He was essentially as you heard earlier sort of

1 couch surfing place to place. And his ticket out, you'll
2 hear testimony about how much he wanted to join the Marine
3 Corps, about how important that was to him and that was his
4 ticket sort of out of this town and on to a different life.

5 And possessing the key to the recruiting office
6 really starts to show the entire picture, because they gave
7 him the key because here is this young guy who didn't even
8 have a place to stay at times, he was sleeping on the couch
9 in there and sleeping on Robert Mann's couch up in
10 Gunbarrel.

11 The statements he made to Pam Grisham after he was
12 released from jail on the motorcycle case about how he was
13 concerned about this impacting his recruitment into the
14 Marine Corps, statements to Sgt. Weyer and then Sgt. Weyer's
15 attempts to try and help him out by getting him a more
16 favorable plea deal or contact the District Attorney's
17 Office establish how important this initial case was.

18 It establishes that Sgt. Weyer will say, you know,
19 anymore trouble and you are definitely done. You may be
20 done right now. Your recruitment may be finished.

21 It's relevant because he made statements to Leon
22 Stackhouse in the jail which are going to be integral to the
23 People's case of course in which he ultimately confesses to
24 Leon Stackhouse.

25 And he tells Leon Stackhouse some things that Leon

1 Stackhouse couldn't know except from the defendant such as
2 that he was arrested on this motorcycle theft case. And he
3 also tells Leon Stackhouse he's concerned about how that
4 would have impacted his recruitment.

5 So this is the beginning where he's on thin ice
6 with his recruitment and his future potential.

7 And additionally, I'd add that he even used some
8 of the money from the check fraud to pay the fines
9 associated with his misdemeanor conviction in the motorcycle
10 theft.

11 So moving on, he's on this thin ice. Now he's in
12 trouble potentially for the check fraud, which is so closely
13 related in time and to the offense itself knowing exactly
14 where Marty Grisham lives, going into his house and telling
15 Leon Stackhouse, for example, that there were other things
16 that he wanted to take from that house. And ultimately of
17 course he admits it to the police and even pleads guilty in
18 a court here in Boulder.

19 All of those facts make this very relevant
20 information, not unfairly prejudicial to the defendant, and
21 also integral to this case. I think, Judge, without
22 presenting that information to the jury there would be a
23 sort of complete vacuum as to how or why this murder took
24 place.

25 And in order for them to have a full understanding

1 of what was going on in the defendant's life, Marty
2 Grisham's life, Kristen Grisham's life and all the other
3 characters, this information has to come out and be
4 presented to the jury.

5 THE COURT: Okay. Thank you.

6 Ms. Ring.

7 MS. RING: Thank you.

8 You know, Judge, frankly -- and you understood
9 exactly why I asked for the motion for clarification,
10 because at one point it did seem like they were just asking
11 for evidence as to the theft and forgery.

12 In reviewing the motion, in listening to the
13 district attorney's argument, I frankly have a very
14 difficult time making an argument that the evidence and
15 statements related to the checks and the forgery and to the
16 gun are not admissible.

17 THE COURT: Okay. I appreciate that.

18 MS. RING: I have my appellate office in my ear
19 right now, but I'm not going to make an argument. I don't
20 believe that makes any sense.

21 THE COURT: Okay.

22 MS. RING: The motorcycle incident, I would
23 suggest there's definitely a distinctive difference there.
24 And I would submit it's not *res gestae*, and it certainly
25 doesn't meet the *Spoto* test.

1 I'm not thrilled, but the -- their motion to
2 introduce res gestae is the motion that we get on late
3 Friday afternoon, which is the piece that I actually think
4 there's a real argument about and that there are real
5 problems with.

6 But you know, we're getting close to trial. And
7 but as the Court noted in the e-mail exchange because of the
8 late filing of the motion, there certainly isn't anything
9 new about this and there's no reason why the motion was
10 filed that late on Friday.

11 THE COURT: But none of that goes to the merits.

12 MS. RING: None of that goes to the merits. It
13 just goes to my ability to articulate as many reasons why I
14 don't think it fits under either res gestae or 404(b).

15 THE COURT: Well, let me ask you this, would you
16 like some time to be able to prepare that argument with
17 respect to the admissibility of the res gestae evidence on
18 the motorcycle theft? Because if you do, I can find another
19 hour or two prior to the trial date to try and give you that
20 opportunity.

21 MS. RING: Well, I think we're all in the position
22 where because we're so close to trial that we all want to
23 know these answers sooner rather than later because I think
24 we're all preparing for trial right now.

25 THE COURT: Okay.

1 MS. RING: So I'm going to make my argument. And
2 you know, Judge, if I think I missed some things, I'll file
3 an additional response and the Court can decide whether it's
4 timely or not and, you know, if the Court's going to rule
5 today regardless. And but I'd rather at least start the
6 process so we all get an answer sooner rather than later.

7 THE COURT: Okay. I understand that.

8 MS. RING: First of all, I would suggest -- and it
9 was a little bit difficult and I understand why
10 Mr. Kellner's argument kind of involved all of the res
11 gestae pieces. But to try to pull out the motorcycle case,
12 it certainly seems to me that much of what they want to get
13 in they can get in without talking about it actually being a
14 crime.

15 So for instance, if the -- part of their motion
16 talks about Kristen Grisham taking the Marine recruiting key
17 from the key ring instead of her father's key ring.

18 There's certainly a way to talk about that Kristen
19 Grisham and Michael Clark were together in a time frame, and
20 even talk about being on a motorcycle together in an
21 accident that I don't think is being disingenuous to the
22 jury, but not bringing in the concerns we have about it
23 being 404(b) and being prejudicial to my client.

24 There are a number of cases in the -- interviews
25 in the discovery, for instance, a gentleman Jim McCutchen,

1 (phonetic) who lets Michael Clark live at his house for a
2 while, and Michael's dating his daughter Jessica during that
3 time frame. He said oh, if I'd known about that motorcycle
4 accident, that he was on a stolen motorcycle, that would
5 have changed my whole opinion of Michael Clark.

6 And when you hear those things that's what makes
7 me concerned about what a jury is going to do and take that
8 evidence related to the actual being on a stolen motorcycle
9 how that plays into the bad character inference which isn't
10 allowed.

11 Mr. Kellner used things like downward spiral and
12 other phrases that again go I think to a concern that this
13 evidence could be construed as propensity, as bad character
14 as opposed to relevant evidence to what happened here.

15 The -- it seems to me that the only -- what I hear
16 the district attorney saying is that they need this
17 evidence -- sorry, let me back up.

18 This evidence is not intertwined in the same way
19 that the checks are and the gun are to the case. So
20 starting there, I think what I hear the district attorney
21 saying is that they need some of this evidence because it's
22 part of their entire theory of the case and the motive for
23 Mr. Clark and that's what makes it res gestae.

24 The -- I think their theory is that Michael Clark
25 wants to get into the Marines, he picks up the motorcycle

1 case. And he knows if he gets in trouble again he isn't
2 going to get into the Marines so he steals and forges Marty
3 Grisham's checks and then kills Marty Grisham.

4 And we obviously think there's some concerns with
5 that theory, but it's not a clear enough -- I mean, the
6 argument could be Michael Clark wouldn't have stolen those
7 checks because if he got in trouble again he wasn't going to
8 make it into the Marines.

9 And I think when you start getting into how
10 circular that can get about the theft by receiving, when you
11 look at the prejudicial versus probative value, the
12 prejudicial value outweighs any probative value there.

13 So it goes into -- in their paragraph when they
14 talk about why it would come into 404(b) and how it's common
15 motive and how it provides context, so providing context
16 isn't anything -- this is on the last page of their motion.
17 It's paragraph 19. I mean, providing context doesn't meet
18 the *Spoto* requirements.

19 THE COURT: Right.

20 MS. RING: Providing context goes much more to
21 whether it's *res gestae* or not.

22 And these are the issues where I believe providing
23 the context, they have other ways to get in that evidence
24 without bringing up another clearly prior bad act by my
25 client, which is being on a stolen motorcycle and picking up

1 new charges for that.

2 And I would suggest the common motive doesn't meet
3 the *Spoto* requirement as it's designed in the case law.

4 So for all of those reasons I, number one, am
5 saying I don't believe it's *res gestae*. Number two, that
6 the issues that the DA's think they need to do to establish
7 their case, there are other ways to do that without bringing
8 out that my client had a prior bad act, which it clearly is,
9 and that overall it's more prejudicial than probative in
10 terms of whether my client's a bad guy who committed all
11 these crimes in this short time frame.

12 THE COURT: Okay. Mr. Kellner, explain to me
13 again the circumstances regarding the key on the key ring
14 that Kristen Grisham handles after the defendant flees from
15 the stolen motorcycle.

16 MR. KELLNER: So once the defendant is taken into
17 custody shortly after fleeing the scene he's being taken to
18 the jail under arrest. He has a key to Marty Grisham's
19 apartment on his key ring.

20 Kristen Grisham does not want to leave it with him
21 when he goes to the jail. She needs someone to take care of
22 his animals, his cat while he's out of town. Michael Clark
23 was going to do that.

24 So because he was going to be in jail, she takes
25 the key off of the key ring. Turns out the key she took was

1 in fact the key to the Marine Corps recruiting office.

2 THE COURT: Okay.

3 MR. KELLNER: Once Mr. Clark gets out of jail he
4 goes to Pam Grisham's residence and says hey, do you have
5 that key to Pam Grisham.

6 THE COURT: Which key?

7 MR. KELLNER: It's actually the Marine Corps
8 recruiting key.

9 THE COURT: Okay.

10 MR. KELLNER: My understanding he sort of
11 represents that's Marty Grisham's key to the apartment and
12 he's still going to take care of the animals because he's
13 out of jail now.

14 Bottom line is he -- he needs to go back and get
15 that key to the Marine Corps recruiting office. And in that
16 conversation he says to Pam Grisham words to the effect of
17 I'm very worried about how this motorcycle incident is going
18 to impact my recruitment into the Marine Corps.

19 THE COURT: Okay. Thanks.

20 MR. KELLNER: Judge -- I'm sorry.

21 THE COURT: Go ahead and respond to Ms. Ring's
22 argument.

23 MR. KELLNER: With respect to 404(b), obviously I
24 did put in my motion -- and I do apologize for the lateness
25 of it. In fact, as I sat there thinking about the motion to

1 clarify the res gestae, it occurred to me that, you know,
2 this is something that should be raised now, or frankly
3 earlier.

4 THE COURT: Okay.

5 MR. KELLNER: That being said, Judge, the
6 question -- if you look at the *Quintana* case cited in both
7 our res gestae motions, it really boils down to this,
8 whether the evidence is independent from the charged offense
9 or if it is linked to the offense.

10 If it's independent, then it needs to be analyzed
11 under 404(b). If it's linked in some way, then the Court
12 can look at it as res gestae.

13 But with respect to whether or not the Court
14 thinks it's more properly characterized as 404(b) evidence
15 it does meet the *Spoto* test. There is a -- there is a
16 reason independent -- a logically relevant reason
17 independent of the defendant's character for wanting to
18 admit this evidence, needing to admit this evidence to
19 provide a full not just context to the case, but to his
20 motive.

21 Ultimately we have to prove that he intended to
22 kill Marty Grisham. And to get to that point we need to
23 establish what was going on in the defendant's life. And as
24 I characterized it before, maybe it's a bit of a hyperbole,
25 but the downward spiral that he was in at that time.

1 Now, the fact that he may have had a contact with
2 the police, if we were to try and sanitize this in some way
3 so that the arrest was taken out of it, the jury would have
4 no understanding then why Sgt. Weyer is saying your
5 recruitment is seriously at issue now because of something
6 that happened.

7 There would be no context for his statement to
8 Leon Stackhouse or to these other people as to why he was
9 concerned now about his recruitment into the Marine Corps.

10 The fact of the arrest or that an arrest took
11 place is vitally important to establish this timeline of
12 sort of his decline and the issues he was having with trying
13 to get this better life.

14 THE COURT: Well, isn't it more the fact of the
15 charges rather than the arrest? Isn't it the charge?

16 MR. KELLNER: I could see that the charge is
17 certainly important.

18 THE COURT: Okay. Why do you need the evidence of
19 the chase and the abandonment of the motorcycle and the
20 fleeing?

21 MR. KELLNER: Well, let's say the fleeing is taken
22 out of the picture. The whole part about him being arrested
23 with the key is still important.

24 Him telling Stackhouse that he was arrested for
25 this motorcycle incident is still important. And I don't

1 see a way to frankly sanitize that out and present it to the
2 jury in a way that's truthful.

3 I mean, what we're looking at, Judge, is a
4 question of whether or not the probative value is
5 substantially outweighed by the prejudice.

6 And the evidence that's going to be admitted in
7 this case certainly does revolve around some prior criminal
8 misconduct of the defendant, but that in and of itself is
9 not a bar to presenting that evidence.

10 The Court should accord that evidence its greatest
11 probative value and the minimal probative -- or minimal
12 prejudicial -- when you look at, for instance, this man who
13 his daughter was dating the defendant at the time, and he
14 says well, if I had known about the motorcycle that might
15 have changed -- that would have changed what I thought about
16 the defendant, it's talking about a person who is dating his
17 daughter, not --

18 THE COURT: I think that's an illustration of
19 frankly most people's reaction to hearing that someone that
20 they're acquainted with has charges or a conviction for auto
21 theft. I mean, there's an adverse inference there. It is
22 a -- it's a reflection on the person's character.

23 So I mean, I think that's a proper illustration.
24 But the question is whether or not that prejudicial effect
25 substantially outweighs the probative value.

1 So you know, in the motion to admit the res gestae
2 regarding the motorcycle theft, you know, you go through the
3 whole sequence of events where Officer Yamaguchi attempts to
4 stop him, he attempts to flee, ultimately crashes, Kristen
5 Grisham remains on the scene while the defendant flees on
6 foot, I mean, tell me why all of that has significant
7 probative value.

8 MR. KELLNER: Judge, I can see why the fleeing
9 could be sanitized out of the picture of the arrest to
10 minimize the prejudicial impact on the defendant.

11 THE COURT: Okay.

12 MR. KELLNER: But the fact of the arrest needs to
13 remain intact. It's sort of -- for instance, I mean, if he
14 had fought with the police officer at the time or resisted
15 arrest, I could see why that would be sanitized out.

16 And Judge, now that I think about it some more,
17 removing the fleeing part would make sense in order to
18 minimize any potential prejudice. But the fact of the
19 arrest still remains highly probative in the context of the
20 case.

21 THE COURT: Okay. All right. Ms. Ring, did you
22 want to respond at all?

23 MS. RING: Just that, Judge, I mean, I think the
24 most compelling argument that they've made about why the
25 motorcycle incident is relevant is their theory that Michael

1 Clark was so concerned about getting into the Marines that
2 the Marines had told him if you get in anymore trouble -- I
3 mean, that seems to be the -- the key issue.

4 I mean, the theory about how Michael Clark gets
5 the key to Marty Grisham's house and has opportunity to go
6 in the house and take the checks, Kristen giving Michael
7 Clark the key and getting the key back and having the -- you
8 know, how Kristen gets the key that's the Marine recruiting
9 key versus the key to Marty's apartment and then the
10 exchange with Pam Grisham really aren't -- don't need to be
11 tied to the motorcycle incident at all.

12 THE COURT: What about the defendant's purported
13 statement to the fellow inmate at the jail referencing the
14 arrest for the motorcycle theft?

15 MS. RING: Well, what the Court pointed out was
16 it's the charge. I mean, if he'd gotten arrested for the
17 motorcycle incident and there was no pending case because
18 they didn't press charges, my guess is the Marine recruiting
19 office wouldn't have cared.

20 THE COURT: Right. No, my question was what about
21 the credibility, the argument that the underlying arrest for
22 the motorcycle theft is necessary to contextualize and in
23 part corroborate the statement that the defendant allegedly
24 made to Leon Stackhouse in the Boulder County Jail?

25 MS. RING: Well, I guess if -- I mean, I know we

1 really want to be careful about changing things in terms of
2 what the jury's perception is. But to me the difference
3 between Michael Clark supposedly saying I was arrested on a
4 stolen motorcycle or I was charged with being on a stolen
5 motorcycle and that is causing me problems with the Marines
6 and -- I don't know, maybe we don't need to change the exact
7 statement that Walter Stackhouse says my client made. It's
8 what evidence are they seeking to introduce related to that
9 incident.

10 Because as the Court pointed out, the fleeing is
11 more prejudicial. The whole discussion of the police -- I
12 mean, and if what they really are getting at is that they
13 need to be -- they need to establish for the jury that the
14 Marine recruiting people were very clear with my client that
15 if you get in anymore trouble after the motorcycle incident,
16 then we should be trying to reduce the prejudicial impact of
17 what's coming in.

18 THE COURT: Okay. So let me analyze this in sort
19 of two different parts. I appreciate defense counsel's
20 candid statement regarding the admissibility of the res
21 gestae evidence related to the 9mm handgun and the theft
22 slash check forgery.

23 I do think that that -- that each of those are
24 admissible evidence under the theory of res gestae. They
25 are -- as the case law indicates, they are linked in time

1 and circumstances with the charged crime. They form an
2 integral and natural part and account of the crime. I think
3 they are necessary to complete the story of the crime.

4 For the jury they also will help the jury have a
5 more complete understanding of the events and the context in
6 which the murder here occurred. So the handgun, the theft
7 and check forgery are admissible as res gestae evidence.

8 With respect to the proposed res gestae evidence
9 regarding the motorcycle theft, I have great concerns that
10 if this jury were to hear an extended description of the
11 defendant's conduct on the motorcycle, fleeing from Officer
12 Yamaguchi, crashing the motorcycle -- I'm sorry, eluding,
13 driving recklessly, attempting to flee, ultimately crashing
14 and then fleeing on foot, that is the type of evidence that
15 the prejudicial effect does substantially outweigh any
16 probative value.

17 I hear the People saying -- and I recognize there
18 is some probative value to the fact that the defendant was
19 charged with a crime which impacted -- or at least to his
20 understanding impacted his ability to enlist in the Marines,
21 and upon resolution of the original charge by a plea to a
22 misdemeanor left him eligible for enlistment in the Marines
23 but essentially on a zero tolerance status; so that, any
24 further criminal activity would likely foreclose his ability
25 to enlist in the Marines.

1 The probative value of that evidence is -- as I
2 see it is that it would help the fact finder understand at
3 least under the theory that the People have laid out, it
4 would help the fact finder understand why the defendant's
5 reaction to being discovered for the theft of the checks and
6 the forgery of the checks was to go to the apartment of the
7 check owner and shoot him.

8 So I think that that evidence of the charge and
9 the conviction is probative. While prejudicial, I can't
10 find that the prejudicial effect substantially outweighs the
11 probative value because it really does -- the evidence
12 really does go to the intent and the motive of the
13 defendant.

14 Regarding the argument that the arrest -- evidence
15 of the arrest is necessary to explain how Kristen Grisham
16 comes into possession of the Marine recruiting office key,
17 that's something that I think can be explained. Because
18 ultimately it goes to her mother Pamela Grisham.

19 That's something that I think can be explained
20 without having to reference that there was a stolen
21 motorcycle, a chase, a crash and flight on foot.

22 Because what's really relevant and material are
23 the statements made by the defendant to Pamela Grisham when
24 he goes to retrieve the apartment -- key for the victim's
25 apartment.

1 So I don't see that the evidence of the arrest is
2 necessary to explain that set of circumstances. It's not --
3 to the extent that it's res gestae to explain that, the
4 prejudicial effect substantially outweighs the probative
5 value. And I think that there's an alternative method to
6 explain that that isn't disingenuous for the jury, it
7 doesn't shield them from true facts.

8 With respect to whether or not the evidence of the
9 arrest for the stolen motorcycle is necessary res gestae
10 evidence to help the jury understand the context in which
11 Stackhouse -- context in which the defendant makes
12 statements to Stackhouse in the jail, that is a statement
13 that the defendant made on his own that can stand on its
14 own. It doesn't require to contextualize or for any other
15 purpose evidence of the motorcycle chase, crash, flight on
16 foot or arrest.

17 So I will allow as res gestae evidence the fact
18 that the defendant was charged with a crime for the
19 motorcycle, that he pled guilty to a reduced crime because
20 it relates directly to his status with the Marine Corps,
21 which is a significant part of the People's theory of the
22 case here.

23 But I think any evidence beyond that is -- even
24 affording maximum probative value and minimum prejudicial
25 effect, the probative value is minimal and I would find is

1 substantially outweighed by the prejudicial effect.

2 So witnesses can talk about the fact of the charge
3 and the disposition of that charge, but not about the actual
4 conduct by the defendant as he was driving the motorcycle.

5 Make sense?

6 MR. KELLNER: It does, Judge.

7 THE COURT: Okay.

8 MR. KELLNER: There were two other pieces that I
9 just would like clarification on.

10 One, you heard from Barb Lennon earlier. When she
11 heard this on the radio it made her think I need to pull
12 this motorcycle -- or Kristen Grisham's name, pull that
13 case, which leads to the defendant being a suspect in the
14 homicide vis-a-vis the forgery case.

15 How the defendant ultimately sort of gets on the
16 police radar, you know, why they're picking him up is going
17 to be very important evidence to present to the jury, at
18 least to initially establish why they contacted him or
19 wanted to find him.

20 Additionally, the part about how he used money
21 from the check fraud to pay fines for the motorcycle case,
22 we would seek to admit that evidence as well with respect to
23 establishing the fraud and theft case.

24 So I don't want to run afoul of your rulings, but
25 those are two things that I wasn't able to make -- or

1 understand how that could be presented.

2 THE COURT: Well, why does it -- why is it
3 relevant how he used the money that he gained from the check
4 forgery? Or if it is relevant --

5 MR. KELLNER: Judge, co-counsel is saying we're
6 not going to present that part of it.

7 THE COURT: Okay.

8 MR. KELLNER: So I'll withdraw that.

9 THE COURT: All right.

10 MR. KELLNER: But with respect to how he became a
11 suspect in the case, or rather how his name came to be known
12 to the police --

13 THE COURT: How -- help me understand why it is
14 relevant to a material fact in this case as to how he
15 becomes a suspect. If statements of Marty Grisham are
16 admitted, there were some references to -- and I can't
17 remember which witness at this time.

18 I see Ms. Ring standing up. Go ahead. Do you
19 want to make an argument before I --

20 MS. RING: Well Judge, you know, I'm not recalling
21 anywhere in discovery where it says Barbara Lennon pulled
22 this police report, so we started investigating Michael
23 Clark.

24 THE COURT: That's what she said today. I don't
25 know, I don't have the police reports.

1 MS. RING: Right. And I don't have anything in
2 there that shows that she actually pulled that report.
3 That's the first I've heard of that.

4 I could be wrong, but right now my recollection is
5 that Michael Clark gets identified as a suspect in some
6 other way fairly early on. And as I'm sitting here I'm
7 thinking that because they were looking at those -- trying
8 to get copies of those cleared checks as quickly as
9 possible, that that might have been it.

10 But I would like to be pointed to somewhere in
11 discovery where it's Barbara Lennon pulling that report
12 which puts Michael Clark on their radar. But I don't --
13 that's not my recollection of how Michael Clark gets on the
14 radar.

15 MR. KELLNER: There are a couple thousand of pages
16 of discovery. I don't know what page that is. I just --
17 you know, what I heard here in court.

18 THE COURT: Okay.

19 But Judge, in the interest of efficiency I think
20 Detective Kithcart does his investigation into the check
21 fraud case which ultimately also leads to the defendant. So
22 we'll just present that information which you've already
23 said is res gestae through Detective Kithcart leading to the
24 defendant in that fashion. I think that --

25 THE COURT: I think that's safer quite frankly

1 because it eliminates the prejudicial evidence.

2 All right. So that takes care of the res gestae
3 evidence; correct? Any other clarification needed by either
4 party?

5 MR. KELLNER: No. I understand the Court's
6 ruling.

7 THE COURT: Okay. Let me -- give me one second.
8 Let me turn to the residual hearsay. Do you want to give me
9 one -- do you need a minute?

10 MR. BRACKLEY: Judge, I guess the reason why I
11 sort of started off by saying I'm not sure there's an
12 objection to the residual hearsay at least from Ms. Swider
13 then Burger, Mr. Magill, I understand the issues -- the
14 other issues with Ms. Lennon which we would probably address
15 in very short order.

16 THE COURT: Okay.

17 MR. BRACKLEY: But I'm not sure -- and I'm just
18 saying this kind of academically and intellectually, I'm not
19 sure whether there's an objection to that stuff because
20 there's a lot of stuff in it that is very helpful to the
21 defense and I'm sure they would want.

22 So I don't know if we're going to be litigating it
23 on an academic level. I don't know. I asked Ms. Ring, and
24 I guess counsel may be conferring with each other.

25 THE COURT: I mean, look, we're going to need to

1 break for lunch at some point anyways. Do you want to think
2 about it over the lunch hour, then we can come back at about
3 1:30? Will that work for you?

4 MR. BRACKLEY: That's fine, Your Honor.

5 THE COURT: Okay. Go ahead.

6 MR. BRACKLEY: I would if possible -- maybe this
7 may necessitate getting some work down now. Perhaps we
8 could talk about Ms. Lennon.

9 I have a meeting which I don't have to make, but I
10 would like to make at 2:45 downtown with my daughter. She's
11 very ornery.

12 THE COURT: Downtown Denver?

13 MR. BRACKLEY: Downtown Boulder.

14 THE COURT: We should be okay.

15 Let me just -- it is -- so under the 807 analysis
16 speaking specifically of Barb Lennon, I mean, the
17 testimonial statement that's made is only admissible where
18 the witness is unavailable and the defendant had a prior
19 opportunity to cross-examine the witness. And here there
20 was neither of those circumstances.

21 I mean, he is -- you know, when *Crawford* started
22 to flesh out what were those categories of testimonial
23 statements, statements made to police in anticipation of
24 furthering an investigation was one of those categories that
25 *Crawford* clearly identified.

1 And here the evidence from Ms. Lennon is that she
2 was an employee of the police department, it was her job to
3 take the reports of criminal activity.

4 Her voice message that would have been heard by
5 Mr. Grisham when he called identified herself as a police
6 department employee. He clearly left information for her
7 related to a suspected crime and a -- and a potential
8 investigation. When she called him back she identified
9 herself as an employee of the police department.

10 And it seems clear to me that the statements that
11 Mr. Grisham makes to Ms. Lennon regarding the stolen checks,
12 the forgeries and that information is clearly done for the
13 primary purpose of furthering an investigation.

14 So I would find that those statements made by
15 Mr. Grisham to Barb Lennon are in fact testimonial
16 statements.

17 That being said, they are not admissible unless
18 there is a separate and independent reason to find that the
19 defendant has forfeited his right to confront Marty Grisham
20 regarding those statements. One of those exceptions is
21 forfeiture by wrongdoing.

22 Do you, Ms. Ring, want to think about it over the
23 lunch hour?

24 MS. RING: (Attorney nods head.)

25 THE COURT: Can you let me know whether or not you

1 do contest a finding that there was a forfeiture by
2 wrongdoing at least for *Crawford* purposes? If you don't,
3 then I'll move to the 807 analysis. If you do, then there
4 would need to be further evidence and information so that I
5 could make the proper finding of forfeiture by wrongdoing
6 pursuant to *Vasquez* and *Pena*. Does that help?

7 MR. BRACKLEY: It does, Your Honor.

8 I agree with Your Honor's testimonial analysis. I
9 don't think that presenting the testimony of Ms. Lennon even
10 if we weren't going to go down the road of forfeiture by
11 wrongdoing was not a complete waste of time because again,
12 pursuant to the *Vasquez* case on a completely different note
13 she does frame the circumstances which existed at the time
14 that Mr. Grisham was making these statements to other
15 people; for instance, Ms. Burger also now known as
16 Mr. Swider, also to Mr. Magill. I think she does put those
17 into context.

18 And it's not corroborating information, it's
19 information which creates and sets those circumstances. So
20 I do think it's very important information for the Court to
21 hear in the context of the hearing.

22 THE COURT: I don't think it was a waste of time
23 at all. But if I'm reading between the lines, you're
24 telling me that you may not want to proceed.

25 MR. BRACKLEY: I'm going to take a shot at it,

1 sure. I'm going to take a shot at it.

2 THE COURT: Okay. Anything else we can take up
3 before we recess?

4 MR. BRACKLEY: No, Your Honor.

5 MS. RING: I think so, Judge.

6 THE COURT: Go ahead.

7 MS. RING: I think my recollection is Mr. Brackley
8 filed a motion quite a long time ago asking for a jury
9 questionnaire. I think Your Honor had suggested that we get
10 together with a proposed jury questionnaire, present it to
11 the Court now.

12 I handed one to Mr. Brackley this morning. I
13 think he's looked at it enough, but if you look at it again
14 over the lunch hour. I was going to hand the Court a copy.
15 It's not as formal as I would have because we really --

16 THE COURT: I understand it's a draft of a working
17 document that ultimately --

18 MS. RING: Right. It's probably a little bit
19 longer than the Court typically would use. But I think
20 Mr. Brackley doesn't disagree with me if we're going to use
21 a questionnaire in a case like this, the sooner we can weed
22 out people that are going to have issues. But that's our
23 starting base. We understand that.

24 THE COURT: Okay.

25 MS. RING: And then in terms of the People's

1 motion for discovery relating to experts.

2 THE COURT: Yeah.

3 MS. RING: The Court had granted the unopposed
4 motion to allow us to have certain evidence related to
5 ballistics released to my experts.

6 They just called me yesterday and are asking that
7 rather than returning them to the Boulder Police Department
8 on I believe Monday, if we could extend that until next
9 Friday.

10 That allows me time to meet with them. And then I
11 would be able to let Mr. Brackley know if there are reports,
12 et cetera, that I would be providing him because I intend on
13 calling my experts or not.

14 THE COURT: Okay. So you want until
15 September 14th to return the ballistics evidence to the
16 prosecution?

17 MS. RING: Yes.

18 THE COURT: What's the prosecution's position?

19 MR. BRACKLEY: No objection.

20 THE COURT: That's fine.

21 MS. RING: Right. And then because I need that
22 additional time, I don't have a response to whether
23 there's -- what I need to disclose because I may indeed not
24 be doing anything. But I can tell Mr. Brackley that better
25 once I meet with my experts next week.

1 THE COURT: Well, let me ask you this, if you are
2 intending to call an expert, what is your position on me
3 ordering that you either disclose the expert's report or
4 that you provide a summary of the expert's opinion along
5 with the results of any testing? Because that's really what
6 he's asking for in the motion for discovery.

7 MS. RING: Right. And I think he's entitled to
8 that.

9 THE COURT: Okay. So I think for purposes of that
10 motion I can grant it understanding that if you decide not
11 to endorse or call an expert witness, then no such --

12 MS. RING: Right.

13 THE COURT: -- report, statement or summary is
14 necessary.

15 MS. RING: I just wanted Mr. Brackley to know my
16 timing on making that decision and giving him that
17 information.

18 MR. BRACKLEY: I'm fine with that, Judge. And
19 I -- what I understand of the issues or the expertise, I'm
20 not sure there's anything that will be surprising one way or
21 another. I just want to make sure I get it as soon as
22 possible.

23 But if Ms. Ring could -- I would imagine by the
24 time they're ready to return it she's probably going to be
25 ready to tell me whether or not there's going to be a report

1 forthcoming.

2 THE COURT: One would think.

3 MR. BRACKLEY: Perhaps what that's going to be.

4 MS. RING: Right.

5 THE COURT: I mean, I think -- I mean, I know
6 trial is less than a month away. But I think there's still
7 sufficient time to have the defense experts analyze the
8 ballistics, allow Ms. Ring to make a determination about
9 whether or not she's going to call somebody, and if she is
10 along with the disclosure of any report or statement or
11 providing a summary with the test results, then there should
12 be enough time to get it done.

13 MS. RING: Right.

14 MR. BRACKLEY: That's fair.

15 THE COURT: Okay. So why don't we do this, why
16 don't we recess until 1:30. And we'll take up the 807
17 issues including Ms. Lennon and the forfeiture by
18 wrongdoing.

19 So Mr. Clark, if you'll be back here at 1:30. And
20 then we'll pick up the case at that time. Thank you.

21 We'll be in recess.

22 (A recess was taken.)

23 THE COURT: This is 12CR222, People versus Michael
24 Clark. Counsel and defendant are present.

25 I need to address the People's motion to introduce

1 statements of Marty Grisham through Rule 807. And right
2 before the recess I'd asked the defense what their position
3 was with respect to the admission of Grisham's statements
4 made to respectively Barbara Burger, Barb Lennon and Kirk
5 Magill.

6 Ms. Milfeld.

7 MS. MILFELD: Judge, our understanding is that the
8 People seek to present statements by Ms. Swider --

9 THE COURT: Yeah.

10 MS. MILFELD: -- that are from the 31st and that
11 are also part of the transcript that the People submitted
12 which was made on the 2nd and subsequent dates.

13 THE COURT: Right.

14 MS. MILFELD: We agree that those statements can
15 come in under the residual exception under 807.

16 THE COURT: Okay. Then I'll allow those
17 statements to be admitted.

18 MS. MILFELD: And just to be clear, Judge, the
19 People's motion, the actual statements that were included in
20 the motion were actually quite smaller than what was
21 attached as part of the transcript.

22 So we agree that those other statements that
23 they've said that they want to introduce should come in
24 under the residual exception.

25 THE COURT: So both the statements made by

1 Mr. Grisham that are noted in the transcript attached to the
2 motion as well as any statements testified to by Ms. Swider
3 this morning, is that what you're saying?

4 MS. MILFELD: Yes, Judge.

5 THE COURT: Okay. Then let me -- just for
6 purposes of the record and ruling, I would find that those
7 statements that Mr. Grisham made to Ms. Swider were in fact
8 non-testimonial in nature. They are relevant. They are
9 offered for the truth of the matter.

10 And I'll find that they are admissible under 807,
11 an exception to the hearsay rule. Because I find that
12 there's sufficient indicia of reliability that is clear from
13 their surrounding circumstances.

14 The testimony from Ms. Swider and the information
15 contained in the transcripts indicates that she and
16 Mr. Grisham had become a couple, were intimate and had been
17 dating for several months, about two months at the time that
18 the statements of Mr. Grisham were made.

19 They were in a type of relationship where they
20 talked fairly regularly about -- and Mr. Grisham
21 specifically talked about his personal life, his children,
22 his relationship with them, his job, his hopes and
23 ambitions. So it's not unusual in that type of relationship
24 Mr. Grisham would confide some fairly personal things to
25 Ms. Swider.

1 I would also find that the statements made by
2 Mr. Grisham were spontaneous, not self-serving. There's no
3 indication of any motivation to lie. It's apparent that he
4 had personal knowledge of the information that he was
5 relating to Ms. Swider.

6 And there's -- there isn't any reason to question
7 Mr. Grisham's ability to perceive, remember or relate the
8 matters that he discussed with Ms. Swider. So those
9 statements will be admitted.

10 Ms. Milfeld, with respect to the statements that
11 Mr. Grisham made to Barb Lennon, what's the defendant's
12 position?

13 MS. MILFELD: Judge, we would disagree that the
14 statements that Ms. Lennon discusses constitute forfeiture
15 by wrongdoing.

16 I reviewed *People v. Vasquez*, and I think the
17 factual scenario in that case differs substantially from the
18 factual scenario we're dealing with here.

19 *People v. Vasquez* was a situation where the
20 defendant confessed to the first arriving police officer.
21 He told the police officer I killed my wife because she set
22 me up.

23 Here we have the exact opposite. We have someone
24 who was arrested a few days later who spoke to numerous
25 police officers --

1 THE COURT: Let me --

2 MS. MILFELD: -- and never confessed.

3 THE COURT: I think we're sort of putting the cart
4 before the horse because I need to know if the district
5 attorney is going to proceed under the theory that there was
6 a forfeiture by wrongdoing.

7 And then I'll need to listen to the argument -- or
8 evidence that they want to present, because it's their
9 burden to show by a preponderance of the evidence. Then I
10 would be happy to hear your argument in opposition to the
11 People. So let me pass on Ms. Lennon.

12 MR. BRACKLEY: Yes, Judge. I am going to present
13 the Court with a couple of exhibits if the Court wants them.
14 And I will make that argument. I'm not going to be
15 presenting any other testimony.

16 THE COURT: Okay. Then so let me ask you, what
17 about the statements made by Mr. Grisham to Kirk Magill?

18 MS. MILFELD: Judge, we object because the
19 statements do not meet the residual exception standard.
20 Specifically the Court needs to look at the circumstances of
21 trustworthiness of the evidence.

22 *People v. Fuller* noted that one of the things the
23 Court needs to look at is the relationship of the parties.
24 We heard testimony from Kirk Magill that he was really just
25 an acquaintance of Mr. Grisham's. And I think his testimony

1 supported that.

2 He said that he occasionally saw him at the social
3 gatherings where there were other people. He also said they
4 occasionally went on bike rides together. But they didn't
5 have the type of friendship or relationship that would make
6 the evidence more reliable as seen in *Fuller*.

7 In *Fuller* one of the witnesses in that case was a
8 neighbor of the victim and had known that person for 20
9 years, they were close friends, they had shared personal
10 information between each other.

11 And we don't have that situation here. Mr. Magill
12 testified that he had never met any of the family members
13 and he really didn't know any of the intimate details of
14 Mr. Grisham's life that we saw with, for example,
15 Ms. Swider.

16 Also, the Court needs to look at the nature and
17 the character of the statement. And the statement wasn't
18 made in a spontaneous nature, which is what *People v. Jensen*
19 and *People v. Fuller* talk about. The more spontaneous the
20 statement is, the more likely it is to be reliable.

21 Mr. Grisham had called Mr. Magill up to change the
22 locks. And in response to a question by Mr. Magill why are
23 you changing the locks, Mr. Grisham said well, I'm changing
24 my locks because of this number of reasons.

25 So I think looking at the relationship of the

1 parties as well as the nature and the character of the
2 statement makes it such that this evidence doesn't fall
3 under the residual exception.

4 Another thing the Court can look at as part of the
5 807 test is whether or not the People can get the other
6 information from other witnesses. And the information that
7 he talks about is clearly substantiated by Ms. Barbara
8 Swider which the Court has previously admitted.

9 So I don't think that the Court will need to --
10 the People will need Mr. Magill to get out the statements
11 that Mr. Grisham made to him.

12 THE COURT: Let me -- Mr. Kellner, is this your
13 issue -- oh, Mr. Brackley. Why is this evidence, the
14 statements of Mr. Grisham to Mr. Magill, relevant?

15 MR. BRACKLEY: Judge, Mr. Magill is relevant for
16 other reasons. He heard the shots. He was the first person
17 to get to the body of Mr. Grisham. I think that's testimony
18 that we will be presenting to the jury in any event.

19 THE COURT: Okay.

20 MR. BRACKLEY: However, the fact that Mr. Grisham
21 came to Mr. Magill on the day that he was murdered and said
22 I'd like to get my locks changed, someone is stealing
23 checks, stuff from my apartment, I think that's certainly
24 relevant because at that point he doesn't know who is
25 stealing checks from his apartment. At that point he had

1 just found out someone was stealing from him, he didn't know
2 who. He suspected his daughter. That will develop over the
3 course of the trial.

4 But the fact of the matter is he's dead within
5 hours of making that report to the building manager in his
6 apartment complex that he would like his locks changed
7 because someone was stealing from him.

8 It goes to, again, the defendant's motive to
9 murder the person from whom he was stealing and had just
10 found out about it and was beginning to make reports to
11 people that his checks had been stolen.

12 THE COURT: Well, for that to be relevant wouldn't
13 there need to be some evidence that the defendant knew that
14 Mr. Grisham was making that request and report to
15 Mr. Magill?

16 MR. BRACKLEY: Well, the fact that the
17 defendant -- and this Court knows that the defendant
18 admitted he stole the checks. The defendant admitted that
19 had he called the credit union and made the inquiry. The
20 defendant admitted when they questioned him he hung up. At
21 this point as far as the defendant is concerned this jig may
22 be up.

23 THE COURT: Right. But what about the statements
24 that Grisham makes to Magill himself, wants the locks
25 changed because someone came into his apartment, there was

1 some checks missing and maybe some other items, and thought
2 maybe it was his daughter and her boyfriend that came in and
3 took the items, why is that relevant?

4 MR. BRACKLEY: Judge, I think it's relevant to
5 Mr. Grisham's state of mind just prior to his death.
6 It's -- it is -- it is essentially the same type of
7 relevance as the -- as the statements to Ms. Barbara Burger,
8 Ms. Barbara Swider at this point in time.

9 He gets a call from his bank, he goes to the
10 police department, he goes to his building manager, the
11 police department to file a report, the building manager to
12 change his locks.

13 Building manager questions him in his capacity as
14 the building manager, and Marty -- Mr. Grisham responds in a
15 way that I believe the Court has already characterized as
16 not biased, no motive to lie, clearly doesn't have an ax to
17 grind against anyone, but he's simply stating his belief at
18 that time that someone is stealing from him and that it
19 could very well be his daughter. We know that's not true.
20 But at the time given all the circumstances that was his
21 supposition.

22 The fact that -- I mean, just to -- I guess if
23 Your Honor is just focused on relevance, I'm going to stop
24 there. But if you want me to focus on some other points
25 that Ms. Milfeld made --

1 THE COURT: No, I do want you to discuss the
2 circumstantial guarantees of trustworthiness. But for some
3 reason I'm having a hard time getting past the ability to
4 understand how that evidence has some tendency to make it
5 more less likely a fact that's material to either the --

6 MR. BRACKLEY: Judge, I think the victim's state
7 of mind prior to his homicide, particularly when he's
8 discussing -- when he's discussing the defendant's motive to
9 commit that homicide, i.e. someone is stealing my checks, I
10 don't know who, his purpose for Magill is to change the
11 locks, his purpose for the police is to find out who is
12 doing this. He was murdered before any of that could
13 happen. State of mind of the victim is important and it's
14 relevant.

15 THE COURT: Maybe I'm just being obtuse.

16 Okay. Why don't you talk about the circumstantial
17 guarantees of trustworthiness.

18 MR. BRACKLEY: Your Honor, I agree that under the
19 specific facts of the *Fuller* case the circumstantial
20 guarantees of trustworthiness were enhanced by the fact that
21 we were talking about folks who had a very long
22 relationship, they were friends for 20 years.

23 The supposition there is that folks in that type
24 of relationship would be more or less -- would be more than
25 likely to tell the truth to each other, particularly in

1 spontaneous type situations. I think the Court pointed that
2 out in the context of Ms. Barbara Swider. They were
3 entering into that type of relationship.

4 But I don't think 807 is a -- is an exception that
5 it is limited to friendship. I think it's an exception that
6 is limited to circumstances which portray a -- a
7 circumstantial guarantee of trustworthiness.

8 So for instance, a person could go to a
9 professional in a professional capacity and make a report.
10 And of course I almost said to a police officer who the
11 person has never met. But we now know under *Crawford* that
12 would be testimonial and out for other reasons.

13 But Mr. Magill was a professional, and he was
14 approached by Marty Grisham in a professional context. He
15 is the building manager of his building. It is his job to
16 change locks. It's his job to do maintenance.

17 Mr. Grisham needed locks changed. He went to
18 Mr. Magill for that purpose, I need my locks changed.
19 Mr. Magill asked him why.

20 And again, you heard from Mr. Magill his interest
21 in the building. They kept a close eye on people coming and
22 going. It was their building. They knew everybody. His
23 asking why was not -- it wasn't out of pure self-interest,
24 it wasn't just curiosity, it was why do you need the locks
25 changed. He asked him that in his capacity as building

1 manager.

2 And Marty Grisham essentially uttered a couple of
3 sentences, someone is stealing my checks, I think it's my
4 daughter. It is about as spontaneous as a statement can be
5 without falling under the spontaneous utterance exception,
6 and it was uttered to a person who asked for a particular
7 reason having to do with his job.

8 THE COURT: Okay.

9 MR. BRACKLEY: Thank you.

10 THE COURT: Ms. Milfeld, did you want to respond
11 briefly?

12 MS. MILFELD: Judge, part of the test is whether
13 or not the information provided is really corroborated.
14 The --

15 MR. BRACKLEY: It's not.

16 THE COURT: No, I can't unfortunately look at
17 corroboration. That's one factor that I can't look at. I
18 have to look at the context of the actual statement itself
19 to determine whether or not it's reliable. And I cannot
20 look at corroborating evidence. And I forget the citation.

21 MR. BRACKLEY: If the Court were to look at
22 corroboration, Ms. Lennon did testify that he did ask to
23 have his locks changed.

24 MS. MILFELD: So Judge, part of our concern is
25 that the statement that was attached by the People was a

1 recent interview that was conducted by Detective Heidel. He
2 had never provided any of that information to the police at
3 the time.

4 The only information that we have from him is when
5 he talked to Officer Witson and he said that he heard the
6 shots, he went to the victim's apartment, provided aid to
7 the victim, didn't see any suspects, knew about the burglary
8 and loss of the checks of the victim's.

9 He doesn't provide any additional detail about
10 that such as I suspected -- Mr. Grisham told Mr. Magill that
11 he suspected his daughter Kristen, that I had changed the
12 locks before, that he came to me because he wanted the locks
13 changed.

14 MR. BRACKLEY: Judge, that's again not necessarily
15 true. We did provide to the defense in discovery some
16 newspaper articles in addition to a video of Mr. Magill
17 talking to the news where he did mention specifically
18 Mr. Grisham came to him and asked for the locks to be
19 changed, and he did that on November 2, 1994.

20 THE COURT: Well, under an 807 analysis the
21 relationship between the parties is significant, but so is
22 the nature and character of the statement.

23 So where Marty Grisham is making a statement in
24 essentially a business relationship to somebody that he's
25 acquainted with, you know, the character of the statements

1 is I want my locks changed, and then the query about why and
2 the response to that. I mean, there's some indication of
3 trustworthiness there.

4 But look, I'll be honest with you, I can't figure
5 out why it's relevant to what his state of mind was at the
6 time he's talking to the building manager. And I don't --
7 I'm not following how that has some tendency to make more or
8 less likely a fact that's material or bears on the weight or
9 credibility of a witness or the evidence. I'm just not
10 seeing it.

11 MR. BRACKLEY: When the building manager asks him
12 why and he says because, and he gives the response, that --
13 that is the relevance of it. That is the state of mind.

14 In fact, I would argue that it is admissible under
15 the traditional hearsay exceptions, being that of state of
16 mind. Why do you want this done? Someone is stealing my
17 checks, et cetera.

18 I mean, even if we were to say it's not for the
19 truth, but it goes to why he was asking to have his locks
20 changed, it would be admissible under that particular
21 exception.

22 But the fact that he is expressing the reasons why
23 being his state of mind, that is the relevance.

24 THE COURT: What --

25 MR. BRACKLEY: State of mind is relevant.

1 THE COURT: To what? I mean, what does it go to,
2 what does it prove?

3 MR. BRACKLEY: To why he wants his locks changed.

4 THE COURT: What does that help prove in the
5 context of the murder or the defense?

6 MR. BRACKLEY: It goes to prove that Marty Grisham
7 had just found out that someone was stealing his checks, but
8 he didn't know who. And the person who stole those checks
9 would have a motive to kill him before he learned who. That
10 is the relevance.

11 And that is what the People have been talking
12 about with -- for the brunt of today. He had just found out
13 someone was stealing his checks. He suspected, but he
14 didn't know who. And then he was murdered before he figured
15 it out.

16 Did Marty Grisham know that the police would one
17 day investigate, find out who did it and that person would
18 confess? It doesn't really matter. At that time it goes to
19 show that he had just found out that someone was stealing
20 from him, and he was murdered hours later.

21 The relevance is he had just found out. The
22 People's theory is the person who was doing it had motive to
23 kill him.

24 This shows that in this limited small time frame
25 Marty Grisham had just found out, which is why he wasn't

1 killed before he found out or a week before he found out or
2 before the checks were stolen. He was murdered when he
3 found out and the jig was up.

4 This just goes to establish that he in fact found
5 out. The fact that he has asked for his locks to be
6 changed, we can't establish that from anyone other than Kirk
7 Magill because he's the one who he asked to change his
8 locks.

9 THE COURT: Well, that's -- I'm not worried about
10 the request to change the locks. What I'm worried about is
11 the statement that says in response to the question I think
12 my daughter and her boyfriend came in and took stuff.

13 I mean, his approaching Kirk Magill and asking to
14 have his locks changed really isn't anything that's even
15 necessarily analyzed under an 807 because it was probably
16 not offered for the truth of the matter. And the actions
17 that he takes in response to that aren't analyzed under 807.

18 But I mean, I just -- I got to respectfully
19 disagree with you. I don't think that the statements that
20 he makes to Kirk Magill about what happened and his
21 suspicion that his daughter and her boyfriend came in and
22 took the items, at that point in time I understand that it's
23 very limited. I don't see the relevance of that.

24 MR. BRACKLEY: And not only is it very limited,
25 but you may also argue that that part of it can be obtained

1 from other purposes, i.e. Barbara Swider, who will be
2 testifying as to all that.

3 THE COURT: Well, it's cumulative.

4 MR. BRACKLEY: But you may argue that's
5 cumulative, but --

6 THE COURT: Well, I'm not arguing, I'm finding.

7 MR. BRACKLEY: One may not find, but one may argue
8 that it's cumulative.

9 But I just -- I disagree with the Court's
10 reservations as to the relevance of that particular
11 statement. And I -- and as you just pointed out, you're the
12 one who gets to decide.

13 THE COURT: That's the beauty of my job.

14 I -- I'm going to find that the statements to Kirk
15 Magill by Marty Grisham to the extent that he explains that
16 someone came in, took his checks and maybe other items and
17 he thinks it was his daughter and her boyfriend that came in
18 and took the items, I'm going to find that those aren't
19 relevant and admissible. I just -- which obviates the
20 necessity for the rest of the 807 analysis.

21 MR. BRACKLEY: We'll, I mean, I -- I'm not arguing
22 anymore. We'll accept that ruling and --

23 THE COURT: I know you disagree, I get that.

24 MR. BRACKLEY: Right.

25 THE COURT: All right. So let's turn to the

1 statements from Marty Grisham to Barb Lennon. You're asking
2 me to find -- I found that they are testimonial in nature.
3 And you're asking me to find that the defendant has
4 forfeited his right to confront the declarant because
5 declarant -- because of his own wrongdoing.

6 So let me just -- for purposes of the record let
7 me just set the standard. *Vasquez v. People*, 173 P.3d 1099,
8 Colorado Supreme Court from 2007, along with the case of
9 *Pena v. People*, 173 P.3d 1107, Colorado Supreme Court from
10 2007, have set forth the test for the Court examining
11 whether or not a defendant has waived or forfeited his right
12 to confront a witness by his own -- by the defendant's own
13 wrongdoing.

14 There are three elements. First of all, the
15 witness must be unavailable. It's axiomatic that the
16 witness, the declarant, Marty Grisham, is not available.
17 He's deceased and the alleged victim of the homicide charged
18 against Mr. Clark.

19 The second element is that the defendant was
20 involved in or responsible for procuring the unavailability
21 of the witness.

22 And then the third element is that the defendant
23 acted with the intent to deprive the criminal justice system
24 of evidence.

25 If all three of those are established and found by

1 a preponderance of the evidence, then in fact the defendant
2 has forfeited his right to confront the witness in all
3 proceedings in which the victim's statements are otherwise
4 admissible.

5 If the Court determines that the defendant has
6 forfeited his constitutional right to confront Marty Grisham
7 through the defendant's wrongdoing, then the Court has to
8 examine the admissibility of the hearsay statements
9 according to the Colorado Rules of Evidence, which is either
10 under a firmly rooted hearsay exception or pursuant to
11 Rule 807.

12 So with that as the standard, Mr. Brackley, with
13 respect to the People's evidence?

14 MR. BRACKLEY: Judge, pursuant to Colorado Rule of
15 Evidence 104 I'm going to make an offer of proof. And I'm
16 going to ask the Court whether the Court wishes these
17 additional documents in your particular file.

18 But I have the warrant for arrest upon affidavit,
19 and I have the full transcript of the preliminary hearing
20 minutes. I'm not sure the Court would have these, but I'm
21 certainly -- the Court has the warrant and affidavit.

22 MS. RING: Judge, can I interrupt and approach for
23 a minute please?

24 THE COURT: Yeah, you want it off the record or on
25 the record?

1 MS. RING: Off the record.

2 THE COURT: Off the record, yeah.

3 (A discussion occurred at the bench off the
4 record.)

5 THE COURT: Now on the record at the bench.

6 (The following proceedings occurred at the bench
7 out of the hearing of the rest of the courtroom.)

8 THE COURT: So I understand the concern when the
9 first part of the conversation wasn't on the record.

10 Ms. Ring, do you want to place that on the record?

11 MS. RING: Sure.

12 So I'm noting that there are press in the
13 courtroom. And my concern is the nature of what we're
14 talking about now and the standard under *Vasquez*, that the
15 Camera can print something that I think would be potentially
16 prejudicial to my client, you know, for the most part the
17 Court making some kind of finding.

18 And I'm worried about potential taint to our jury
19 pool, because my experience historically in big cases is
20 Boulder County jurors read the Camera and pay attention to
21 those things. And if we're less than a month out from
22 trial --

23 MR. BRACKLEY: I agree with that and I agree with
24 the nature of this argument is going to be something fairly
25 sensational.

1 I did hear the Court to say, and I'm willing to do
2 this, to essentially rely and rest on the facts which I know
3 this Court has heard, rely and rest on the affidavit which I
4 will submit which I know this Court has reviewed.

5 I do think -- I mean, I would like to make the
6 argument as to why I believe that third prong is satisfied.
7 I think the first prong is satisfied.

8 But if I'm hearing the Court to say that yes,
9 there is a preponderance as to that third prong, then maybe
10 I could limit it to the second or something.

11 I mean, I want to -- I don't want to run into
12 exactly what Ms. Ring is afraid of either.

13 THE COURT: So I would make two points. First of
14 all, it's a public courtroom. And I can't exclude the
15 press, though I understand and appreciate the concerns that
16 counsel has raised.

17 To the extent that the People want to tender or
18 ask me to take judicial notice of the file, the court file,
19 and rely upon the affidavit for arrest of Michael Clark as
20 well as the testimony presented at the preliminary hearing
21 which I presided over, I can do that in the context of
22 making a determination as to whether or not the defendant
23 has in fact forfeited his right to confrontation.

24 I can do that even generally vague and in
25 generally vague terms. I don't know to what extent counsel

1 wants to argue for purposes of the record or for purposes of
2 persuasion. I mean, it is -- do you want argue that in
3 court even?

4 Let me put it this way, even if you do, I still
5 anticipate that my findings would be relatively vague and --
6 one, because I think that the evidence will speak for itself
7 in terms of the affidavit and the preliminary hearing
8 testimony.

9 And second of all, I think there is the concern
10 that if I make a finding that is more specific, then it will
11 be something that could be sensationalized in the press that
12 is going to make it more difficult for us to get a jury.

13 So do you want an opportunity to argue in open
14 court?

15 MR. BRACKLEY: If I have to. I mean, I don't want
16 to. I'm prepared to, but I don't -- I mean, I always want
17 to argue, but --

18 THE COURT: Okay. Let me put it this way --

19 MR. BRACKLEY: I'm missing something.

20 THE COURT: The first prong is that the witness is
21 unavailable. That's axiomatic.

22 Second prong is that the defendant was involved
23 and was responsible for procuring the unavailability of the
24 witness. By a preponderance of the evidence is the evidence
25 sufficient to show that Mr. Clark caused the death of Marty

1 Grisham? By a preponderance of the evidence I would say
2 yes.

3 So really what we're talking about is I already
4 found by probable cause, which I understand is a little bit
5 different standard, but --

6 MS. RING: Right.

7 THE COURT: So the third prong is really whether
8 or not he acted with the intent to deprive the criminal
9 justice system of the evidence. That's the one that seems
10 to be --

11 MR. BRACKLEY: Exactly.

12 THE COURT: -- in dispute.

13 Is that something that you want to argue in open
14 court?

15 MS. RING: So Ms. Milfeld is making this argument.
16 So before I answer, I better check with her.

17 THE COURT: Why don't you. We'll hold on for a
18 second.

19 (Pause.)

20 MS. RING: So I think that if we proceed the way
21 the Court is suggesting, you make your offer of proof, you
22 make your findings that you presided at prelim, et cetera, I
23 think we can just stand on the record.

24 THE COURT: Okay. So what I would do, if he makes
25 his offer of proof, I'll ask if you have any evidence to

1 offer, any argument. You rest on the record. Then I'll
2 make the findings generic.

3 And then obviously I'm going to say something
4 along the lines of, you know, that finding doesn't mandate
5 the admissibility of the statements to Ms. Lennon, that we
6 still need to do the 807 analysis. And that's something
7 that I would --

8 MS. RING: That makes sense.

9 MR. BRACKLEY: Right. Yeah.

10 MS. RING: Thank you.

11 (The following proceedings occurred in open
12 court.)

13 THE COURT: Mr. Brackley, on behalf of the People,
14 your submission of proof in support of the issue?

15 MR. BRACKLEY: Judge, I'm going to submit the
16 warrant for arrest upon affidavit. I'm going to mark that
17 as People's No. 1 for the purposes of this hearing.

18 I will recognize that the Court had reviewed this
19 prior to the defendant's arrest, in addition to a number of
20 other affidavits which were substantially the same, if not
21 very similar to this particular affidavit.

22 I'm also going to admit People's 2 for the
23 purposes of this hearing, which is the complete testimony
24 from the preliminary hearing which was held on April 5,
25 2012.

1 It consists of testimony, both direct and
2 cross-examination by Detective Sgt. Tom Trujillo, Commander
3 Weinheimer, Detective Chuck Heidel from the Boulder Police
4 Department, and Special Agent Jonathan Grusing from the FBI.

5 It's approximately 161 pages, including the cover
6 sheet and the table of contents. It's -- it has the court
7 reporter's certification on the end, and it's Ms. Chioda
8 here, that it is the true and accurate transcription of the
9 stenotype notes and the following language.

10 I'm going to submit that to the Court as
11 People's 1 and 2.

12 THE COURT: This is an offer of proof?

13 MR. BRACKLEY: It is, Your Honor.

14 THE COURT: All right. Ms. Milfeld, on behalf of
15 the defendant do you have any competing evidence to submit?

16 MS. MILFELD: Judge, we stand on the record. And
17 we'll also stand on the record with regards to the residual
18 exception.

19 THE COURT: With respect to the 807 analysis?

20 MS. MILFELD: Correct, Judge.

21 THE COURT: Okay. The Court will receive
22 Exhibits -- I'm assuming no objection to 1 and 2 for
23 purposes of this hearing?

24 MS. MILFELD: No objection.

25 THE COURT: Court will receive Exhibit 1 and

1 Exhibit 2. They'll be maintained for the Court's record.

2 The Court was in fact the judicial officer that
3 reviewed the affidavit for arrest and on January 3, 2012
4 found probable cause and issued the warrant for the arrest
5 of Mr. Clark.

6 The Court also presided over the preliminary
7 hearing and recalls clearly the testimony that was
8 presented; that my memory is supplemented by the actual
9 transcript from that hearing in addition to the affidavit is
10 what I'm relying on for the following findings.

11 I would find pursuant to *Vasquez* that the People
12 have established each of the three elements by a
13 preponderance of the evidence.

14 That finding does not authorize the admissibility
15 of Mr. Grisham's statements to Barb Lennon. But having made
16 that finding under *Vasquez* and *Pena*, the Court now turns to
17 the analysis under 807; that is, whether or not there are
18 circumstantial guarantees of trustworthiness as to the
19 statements made by Marty Grisham to Barb Lennon.

20 And Ms. Milfeld, do I understand you do not wish
21 to make any argument on the 807 analysis?

22 MS. MILFELD: No, Judge.

23 THE COURT: Okay. Mr. Brackley, I'm assuming you
24 don't have any further argument on that analysis?

25 MR. BRACKLEY: Not unless you have questions of

1 me.

2 THE COURT: I do not right now.

3 So if I've stated these before I apologize, Dawn.

4 But there are a number of factors that I can consider in
5 determining whether or not there's circumstantial guarantees
6 of trustworthiness; that is, the relationship of the
7 parties, the nature and character of the statements, the
8 motivation of the declarant, the circumstances under which
9 the statement is made, the knowledge and qualifications of
10 the declarant, the existence or lack of corroboration, and
11 then the availability of declarant at trial for
12 cross-examination.

13 I can look at whether or not the statements were
14 spontaneous, whether or not they are self-serving, whether
15 or not there's any indication of a motive to lie, whether or
16 not the declarant has personal knowledge of the events
17 described. And then also I can conduct an analysis of the
18 declarant's ability to perceive, recall and recount.

19 These are statements that were made by Marty
20 Grisham to a representative of the Boulder Police Department
21 essentially reporting the theft of his checks and the
22 forgery of his checks.

23 The relationship between the parties is one of
24 citizen and police officer. The nature and character of the
25 statement is a straight forward report of the circumstances

1 that Mr. Grisham believed that he had uncovered both in
2 terms of his observations within his apartment and after
3 contacting the credit union which had the checking account
4 for which the checks that were stolen applied.

5 The motivation of Marty Grisham based on the
6 nature of the statement appears to simply be a straight
7 forward report of the circumstances that he found.

8 The report and the statement are made almost
9 immediately after receiving information from the credit
10 union and within approximately 24 hours or thereabouts of
11 discovering or at least noting some unusual circumstances
12 regarding the presence of a book of checks and his most
13 recent bank statement.

14 He has knowledge of the circumstances from his own
15 activities and from his dealings with the credit union.

16 There is some corroboration within the statements
17 made by Mr. Grisham because at the time he is face to face
18 with Barb Lennon describing what he knows or believes. He
19 also is able to provide her with specific information that
20 was obtained from the credit union that would essentially
21 corroborate what he's reporting to her.

22 The statements are spontaneous in the sense that
23 it was at his initiative and almost directly after learning
24 of the theft that Mr. Grisham goes to the police department.

25 They're self-serving in the sense that he is the

1 victim of the crime and he's reporting that to the police,
2 but not self-serving in the sense that he's trying to gain
3 some unnecessary or unreasonable advantage or to cause
4 unnecessary or unreasonable harm to another party.

5 It does not appear within the statements any
6 motive for him to lie.

7 And based on the testimony of Barb Lennon it
8 appears that Mr. Grisham certainly had the ability to
9 perceive, recall and recount the circumstances that he had
10 knowledge of.

11 So I would find under Rule 807 that those
12 statements do contain circumstantial guarantees of
13 trustworthiness and they are otherwise admissible pursuant
14 to the residual hearsay exception at Rule 807.

15 Any request for clarification from either party?

16 MR. BRACKLEY: No, Your Honor.

17 THE COURT: All right. I think the only other
18 issue to take up was the jury selection process.

19 MR. BRACKLEY: Yes.

20 MS. RING: And I've been trying to tighten up the
21 jury questionnaire.

22 THE COURT: Okay.

23 MR. BRACKLEY: I don't think we've tightened it
24 up. I think we agreed that although longer than the parties
25 are used to -- and I will say it's only really a page

1 longer.

2 THE COURT: Here is the -- usually my concern with
3 having a two-page questionnaire is I need to get it copied
4 and distributed to the parties while I've got jurors waiting
5 downstairs. That's my concern.

6 But here where we're calling the panel in early to
7 do the questionnaire we're going to have sufficient time to
8 process and copy and distribute. So if the parties agree on
9 the questionnaire that is longer than I typically allow, I
10 don't have a problem with it.

11 Is there an agreement as to the questionnaire or
12 do you need some time to work on it?

13 MR. BRACKLEY: I just have a couple things I want
14 to put out, and maybe we can agree pretty quickly. One
15 is -- and this is an issue that Your Honor and I faced in
16 the last case which was a murder in the second degree case.
17 And I've -- and I faced it on virtually every first degree
18 murder case, and that's people want to come back and ask if
19 it's a death penalty case.

20 I think it's probably okay in the context of this
21 somewhere to say this is not a death penalty case or death
22 penalty is not a consideration or possible sentence, because
23 that always gets a few people in the chair in the back.

24 So I don't know if that's something we want to put
25 in there just to stave off that particular concern given

1 that it does state it's a first degree murder case. That's
2 just a suggestion.

3 And next -- I'm sorry.

4 THE COURT: What do you think?

5 MS. RING: I know exactly what Mr. Brackley is
6 talking about. So I'm not exactly sure off the top of my
7 head how we do that, but I also do think it -- you get some
8 interesting answers from jurors that are confusing because
9 you want to say if I just took that piece out would that
10 change your answer. So I agree with him.

11 THE COURT: Okay.

12 MR. BRACKLEY: The next one is numbers two and
13 three, but primarily two about the address. That's not
14 something we ask jurors under any circumstances. And I
15 think given the nature of the charge it could be something
16 that if jurors feel compelled to give their address they may
17 feel less compelled to be forthcoming in other areas of the
18 thing.

19 Now, that being said, I always like to know --
20 I've never been satisfied this way in a Boulder County
21 courtroom -- kind of what part of the county people live in.
22 I might -- I think that might be appropriate. Generally it
23 is. But specific address I think is inappropriate.

24 MS. RING: So just change it to what city in
25 Boulder County do you live in.

1 MR. BRACKLEY: Or part of the county, city.

2 THE COURT: We may get some citizens who live in
3 unincorporated Boulder County. So I mean, what part of the
4 county.

5 MS. RING: Yeah.

6 THE COURT: So change to what part of the county
7 do you live in, what part of Boulder County do you live in.

8 MS. RING: Right.

9 MR. BRACKLEY: Being born and raised, again, I
10 don't have a strong objection to it. It's just not
11 something that we usually ask jurors during the regular
12 course of voir dire, so why would it be on a questionnaire.

13 MS. RING: We usually ask them how long they've
14 lived in Colorado. So that's kind of --

15 MR. BRACKLEY: Right.

16 MS. RING: -- where that question came from and
17 kind of getting at that similar --

18 THE COURT: What if we change from address to what
19 part of Boulder County do you live in. That's okay with
20 both counsel?

21 MR. BRACKLEY: Yes.

22 MS. RING: Yes.

23 THE COURT: Okay.

24 MR. BRACKLEY: I was raising my concerns as to
25 question three for conversation, not necessarily as

1 objection. But you know, I'm fine with it. I'm fine with
2 it.

3 THE COURT: Okay.

4 MS. RING: Except it needs a D.

5 MR. BRACKLEY: Yes.

6 THE COURT: Who is going to be the scribe for this
7 document?

8 MS. RING: I will be.

9 THE COURT: Okay.

10 MR. BRACKLEY: And then paragraph 31 I had to
11 explain to Mr. Kellner what sequestered means. I figure if
12 Mr. Kellner didn't know what sequestered means, perhaps some
13 members of the general public might not.

14 MS. MILFELD: Embarrassing.

15 MR. BRACKLEY: Detective Heidel didn't know
16 either.

17 THE COURT: He knows.

18 Well, let me ask you this, why does it say may
19 last up to three weeks?

20 MR. BRACKLEY: I wondered the same thing, but --

21 MS. RING: Because of deliberations. I mean,
22 we're not starting until Tuesday. If we take -- it's not
23 unreasonable we wouldn't be closing until Thursday or Friday
24 the following week, which means you've got deliberations.
25 And I don't think it's fair not to let jurors know that.

1 THE COURT: I mean, do you anticipate there's
2 going to be eight days of --

3 MR. BRACKLEY: I anticipate we'll be closing by
4 the following Thursday or Friday. We are -- we're in the
5 middle -- we're all in the middle of that process now of
6 picking exactly who is going to testify and in what order,
7 how much time. And I think we may have an answer to that
8 closer to the time these are given to jurors, but we don't
9 have that answer right now today.

10 THE COURT: Okay. I think it's important to be
11 fair with the jurors about what the anticipated time is.

12 MS. RING: I --

13 THE COURT: Go ahead.

14 MS. RING: I'm sorry, Judge.

15 THE COURT: Okay. Let's leave it at three weeks.

16 MR. BRACKLEY: I was -- when I saw three weeks I
17 was comfortable with it, but I thought we could also put two
18 in there we'd probably be done.

19 But I think we should wait until we're closer
20 to -- and we'll have this conversation again when
21 Mr. Kellner and I can better tell the Court where we're
22 going.

23 THE COURT: Okay.

24 MS. RING: I mean, the reason I chose up to and
25 including deliberations, I know that jurors might not really

1 get that. My problem is we're starting on Tuesday. And I
2 can't imagine it's not going to take all day Tuesday to pick
3 a jury.

4 You know, if we -- even if we close early on the
5 latter part of Wednesday or Thursday morning, in a case like
6 this I don't think you can count on deliberations only
7 taking a day or day and a half.

8 THE COURT: No, I agree.

9 Typically what I'll tell the jury is that I've
10 talked about it with the lawyers, we think that the evidence
11 and argument is going to take something less than two weeks.
12 The unknown is how long the jury would take to deliberate on
13 a case like this.

14 And so when we tell you up to three weeks, we
15 really mean we think we'll have the evidence and arguments
16 done and the case to you in less than two weeks. And we're
17 just trying to allow sufficient time for you to deliberate.

18 I guess there's going to be some people that are
19 going to raise hardship concerns over that extra week that
20 wouldn't raise it over two weeks, but I would imagine that
21 that margin is a pretty small number of people.

22 Why don't we leave it at three weeks, and then --

23 MR. BRACKLEY: Again, in your experience, Your
24 Honor, do we need to define sequester? I don't know about
25 how the jury --

1 THE COURT: I never have.

2 MR. BRACKLEY: -- will not be sequestered
3 overnight or something like that.

4 THE COURT: I mean, I've never had to define it
5 either as a trial lawyer or as a judge.

6 One thing I'll say about Boulder jurors, they're
7 actually pretty smart.

8 MR. BRACKLEY: Right. I mean, I think it does
9 happen where people will ask from the box. And it's pretty
10 easy answer to the entire panel.

11 MS. RING: Everybody has got a smart phone, so
12 they can just Google sequester.

13 THE COURT: Well, that's the other -- what we're
14 going to have to put here -- I'm glad you brought that up.
15 We're going to have to put in here a paragraph that
16 indicates that they can't do any outside research or
17 investigation.

18 And I've got some language that I can put my hands
19 on shortly and I can even forward it to counsel that you can
20 take a look at. But it's essentially the introductory
21 remarks that basically says everybody has got a smart phone,
22 but you can't use it to research this trial or the
23 participants.

24 So why don't I -- I don't see the need to define
25 sequester. And why don't I forward the language on. It's

1 actually the Supreme Court's recommended instruction.

2 And then if you guys can come to an agreement on
3 the questionnaire, whatever the length is, that's great.
4 Just get me -- actually get Krista the finalized version the
5 Friday before the Friday that the panel is coming in.

6 MS. RING: So that's going to have to include a
7 witness list.

8 THE COURT: Yes, a single all-inclusive witness
9 list.

10 MS. RING: Right.

11 THE COURT: Is that all manageable?

12 MR. BRACKLEY: Absolutely.

13 THE COURT: Okay. I'm anticipating bringing in
14 about 100 to 110 jurors. Do you think that's enough?

15 MR. BRACKLEY: Judge, there were some other issues
16 which we've already -- I'm sorry for packing up.

17 THE COURT: I know you need to be somewhere at
18 2:45.

19 MR. BRACKLEY: We've sort of preliminarily
20 discussed redactions to the videos and things like that. If
21 we could agree on that, that's fine. If not, we'll probably
22 need some judicial intervention.

23 I'm wondering if it's -- if the Court could find a
24 date where we can all be available or a morning maybe a week
25 before or two weeks before so we can kind of get together

1 and see where we are on those types of issues.

2 THE COURT: Sure. I've got time on Friday
3 morning, September 28th. Does that work for counsel's
4 calendar? I wouldn't think it would be more than half hour,
5 45 minutes.

6 MR. BRACKLEY: That's fine.

7 MS. RING: Okay.

8 THE COURT: Do you want to say 9:00? Do you have
9 anything in front of Judge Bailin that will conflict?

10 MR. KELLNER: I've got a bunch of cases, Judge.
11 But I'm sure Mr. Brackley can handle it.

12 THE COURT: Do you want to set it a little later?

13 MR. KELLNER: I can find somebody to cover.

14 MS. RING: Maybe if we could do 10:00 because I
15 have one setting. And that way --

16 THE COURT: September 28th at 10:00. And do you
17 want your client to be present?

18 MS. RING: I guess since Mr. Clark's present and
19 you bring that up, I guess I'd like to have the ability to
20 waive his appearance if based on what I think we're going to
21 be talking about that I can talk to Mr. Clark about that so
22 that I can waive it if I want to.

23 If I think it's going to be a little more
24 litigious, then I'll ask him to be here. But if I could
25 have the time to allow him to not be present.

1 THE COURT: So what I'd say to you, Mr. Clark,
2 we're going to have a conference in this courtroom on
3 September 28th at 10:00. You are welcome to be here. Make
4 sure and talk to your attorney about whether or not you need
5 to be here.

6 And if you come to the decision that you don't
7 want to be here, then she'll let me know and she'll waive
8 your appearance on the 28th.

9 You'll still need to be here for trial on the
10 morning of October 9th.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. Then we can talk then about how
13 long for voir dire, those sort of things.

14 MR. BRACKLEY: On the Friday when the jurors come
15 in for the questionnaire are you going to be appearing
16 before them?

17 THE COURT: Not with this questionnaire that's
18 going to talk about the case. I wasn't planning on it. If
19 you think that I need to I'm willing to, but --

20 MR. BRACKLEY: Our position is generally not. I
21 know last time I tried a case with Mr. Temin in front of
22 Your Honor, it was that they wished to be there for any
23 appearance of the Court and the jurors. So that may be
24 something --

25 THE COURT: I think it had more to do with the

1 fact that they thought the DA was going to be present.

2 So whatever that is, I'm not planning on being
3 there on Friday, October 5th. I'll simply have the jury
4 commissioner -- well, I wonder if I should be there to
5 explain to them why we need them to come back on Tuesday.

6 MR. BRACKLEY: I mean, I will say that we don't
7 need to be there if they don't want to be there. But if
8 they do, we do.

9 THE COURT: Why don't you think about whether or
10 not -- maybe I should go down there on Friday morning, just
11 explain to them why we're doing this in an interrupted
12 process.

13 Wouldn't be more than two or three minutes of just
14 explaining we're trying to get information from them now
15 that we can review over the long weekend so that the process
16 on Tuesday will go much more quickly.

17 MR. BRACKLEY: So to your advisement to Mr. Clark,
18 if we could just add that eventuality also pending
19 conversations with Ms. Ring?

20 THE COURT: Do you understand that, Mr. Clark?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And again, you can talk to Ms. Ring
23 about whether or not you want to be present for that. If
24 you or your lawyers are going to be there on Friday morning
25 when I'm there, then I'm sure the DA will want to be there.

1 But if you and your attorneys don't want to be there, then
2 the DA wouldn't be there.

3 I'll just talk -- I just want to explain to the
4 group of 100 some people why it is that I'm having them come
5 in on Friday morning and then asking them to fill out this
6 questionnaire, then come back on Tuesday.

7 THE DEFENDANT: Right.

8 MS. RING: You're talking about doing that in the
9 jury room downstairs?

10 THE COURT: Yes, in the jury assembly room.

11 MS. RING: Okay. And then in terms of the
12 logistics of us actually getting the questionnaires when
13 they're done?

14 THE COURT: We'll make the copies, Krista, and
15 will try and get them to you ASAP. I mean, we should be
16 able to have them completed I would think by 9:15. We can
17 get them duplicated by probably 10:30 in the morning. I can
18 get them to you certainly by late morning.

19 MR. BRACKLEY: I found if the Court sets a time
20 that we need to sort of report back to you, that's usually
21 pretty helpful. Say by 3:00 that we need to come together
22 with our list of agreements and our list of ones that we
23 don't agree on and that kind of --

24 THE COURT: I'll have to figure out how to do that
25 with that Friday because I'm going to have a docket.

1 But I thought you were asking about how quickly I
2 can get the questionnaires to you. I think I can get them
3 to you by 10:30 or 11:00. Then we can talk on
4 September 28th about what time to come back together on
5 Friday the -- Friday, October 5th. We might even be able to
6 do it on the morning of the 9th.

7 MR. BRACKLEY: I mean, if we could release some
8 people before the long weekend that -- maybe we can talk
9 about that on the 28th.

10 MS. RING: I think the last thing I just want to
11 talk about quickly was jury selection method.

12 THE COURT: I'm assuming you're going to want
13 alternates, two alternates probably. I mean, it's a
14 three-week trial.

15 MR. BRACKLEY: Two at least.

16 THE COURT: Assuming two alternates, we'll set up
17 the box with 28 chairs. We'll call in random order 28
18 jurors into the box. The 28 chairs will constitute the box.
19 Your questions and your challenges will be exercised against
20 the 28 people in the box.

21 If someone is excused for cause, they'll be
22 replaced from someone in the general venire. They will step
23 into the chair that was vacated by the excused juror.

24 And upon replacement, depending on where we are in
25 the voir dire process, I may limit counsel's questions to

1 the replacement juror. Just depends on what happens.

2 Typically the alternates would be designated as
3 the last two jurors called into the jury box who remain on
4 the panel of 14 after the exercise of peremptory challenges.
5 Does that make sense to you?

6 MS. RING: I'm sure it does.

7 MR. BRACKLEY: Meaning the last in time or the
8 last --

9 THE COURT: Last in time, not the last two chairs,
10 unless you want to do it that way.

11 MR. BRACKLEY: It sounds like we are where we want
12 to be in terms of the general nature of selection. We'll
13 talk about the --

14 THE COURT: We can finalize it on September 28th.

15 MR. BRACKLEY: All right.

16 (Pause.)

17 THE COURT: So I need to correct what I just said.
18 I'll have to adjust the -- we'll have to adjust the seating
19 area to accommodate those additional ten jurors.

20 (The hearing concluded.)

21 * * * * *

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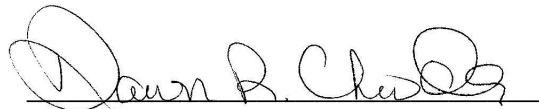
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 18th day of September, 2012.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

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2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for hearing on September 28,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

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

2 THE COURT: So let's go on the record. This is
3 case 12CR222, People versus Michael Clark. The defendant
4 and his counsel are present. Mr. Brackley is here from the
5 District Attorney's Office. It's a pretrial readiness
6 conference.

7 We had some brief discussions about the purpose of
8 the hearing. I think we'll talk about some trial
9 procedures, and then I had just asked counsel about whether
10 or not they needed me to address any video redaction issues.

11 And Mr. Brackley, you were saying?

12 MR. BRACKLEY: I was saying we haven't reached a
13 point where we are disagreeing over anything. We haven't
14 reached a point where Mr. Kellner and I have agreed in-house
15 as to what our approach will be in order to send it over to
16 the defense.

17 MS. RING: You heard that right.

18 MR. BRACKLEY: But I think we can do that pretty
19 quickly this morning without the Court sitting up there on
20 the bench if we were to meet afterwards and talk about it.

21 THE COURT: Okay. That's fine. I will tell you,
22 I mean, I've got some slots next week, which is a motions
23 week for me. So in the event that it was necessary for me
24 to address those issues I could probably find some time for
25 you. But it sounds like you may not need it.

1 I received the jury questionnaire. I took out the
2 duplicate statement in there. But otherwise, I think the
3 questionnaire is acceptable to me. I'm assuming there have
4 been no amendments by the parties since it was transmitted
5 to me.

6 And then I've also received a list of witnesses
7 which is a total of three pages. And I would attach that to
8 the questionnaire. Is this all set to go?

9 MR. BRACKLEY: Yeah.

10 Can I ask, Your Honor, when you plan on mass
11 producing that? And the reason why I'm asking is we got the
12 defense -- some of the witnesses on that list were provided
13 to us by the defense. They're of course people we've always
14 known about.

15 But to a certain extent we've been reactive in
16 interviewing those people, we've added another name to the
17 list yesterday, for instance.

18 I just want to make sure that if in the next
19 couple of days -- and it's not going to be anything more
20 than Monday or Tuesday, and they will be rebuttal type
21 witnesses. But I want to make sure that the Court doesn't
22 mass produce that until maybe Tuesday or Wednesday of next
23 week.

24 THE COURT: We can hold off until Wednesday in
25 terms of making the copies, so if there's going to be an

1 amended witness list.

2 MR. BRACKLEY: I don't expect it frankly, but you
3 just never know.

4 MS. RING: Judge, since that issue came up, since
5 the last time we were in court Mr. Kellner filed a motion
6 saying that we had not complied with Rule 16 in terms of our
7 witness endorsement.

8 And Judge, what I had anticipated would happen was
9 when we were working on this witness list I would get their
10 list and decide if we were adding anybody. And that would
11 be the way that I would be narrowing that endorsement. I
12 think Mr. Brackley understands that.

13 And I think by us providing the additional names
14 we wanted on the witness list, I think Mr. Brackley thinks
15 we're in compliance with Rule 16 and doesn't have any issues
16 with --

17 THE COURT: Is that true?

18 MR. BRACKLEY: Judge, I think at this point it's
19 fair to say Mr. Kellner feels bad about filing that motion.

20 THE COURT: He has not been around as long as you
21 or Ms. Ring, so okay.

22 MS. RING: He apologized, so we're all okay.

23 THE COURT: Okay. Look, you guys are experienced,
24 exceptional attorneys. To the extent that you can marshal
25 these things between yourselves, I'm happy to stay out of

1 it. So you know, I won't intercede unless I'm asked. And I
2 was asked on that motion to clarify. And I'm not going to
3 apologize, but --

4 MR. BRACKLEY: One motion to clarify deserves
5 another.

6 THE COURT: Let me talk to you about one other
7 thing. We're going to use Judge Mallard's courtroom,
8 Courtroom K, for this trial. It's bigger. The old
9 Division 4 next door. No, you don't like that idea?

10 MS. RING: I hate that courtroom. Serious, that
11 one?

12 THE COURT: Would you rather do it here? Let me
13 ask you this, I'm taking that as you would rather do it
14 here.

15 MS. RING: Have you ever tried a case in that
16 courtroom? That's the one -- oh, Mallard's. I'm sorry.
17 Judge Mallard's is fine. I was thinking it's Judge Butler's
18 that's right next door.

19 THE COURT: Judge Mallard's Courtroom K.

20 MS. RING: Sorry.

21 THE COURT: So it would be in Courtroom K, Judge
22 Mallard's courtroom. And I think we can do jury selection
23 in that courtroom.

24 What I would propose to do -- and when you get a
25 chance go take a look at K -- but just for voir dire taking

1 counsel tables and rotating them and moving them back
2 90 degrees so they're next to the clerk's seating area. So
3 you have the clerk seating area one table, then the next
4 table they fit in there. And there's about an 18-inch space
5 between them so that counsel can get in and out of there.

6 I mean, it's a little cozy, but I mean, with
7 professional, cooperative counsel I don't think it will be a
8 problem.

9 And I think that I don't know how many people
10 you're going to want to have. Clearly there will be at
11 least three at the defendant's table. The tables are that
12 size. And we can probably leave enough room -- record
13 should reflect Mr. Kellner is here.

14 We can leave enough room behind counsel table so
15 that, you know, additional counsel or advisory witnesses can
16 sit in the general area.

17 MR. BRACKLEY: Is the idea to have all the
18 panelists that we're talking to at once right in front of
19 us?

20 THE COURT: Exactly. We can get 38 chairs in
21 there pretty easily. So we'd have the panel of 38 right in
22 front of you. If you want the podium in front of counsel
23 tables, we can do that. If you want us to pull it out of
24 the way, we can do that as well.

25 But then I've also got enough seating room in the

1 gallery because there's an extra three rows, there's enough
2 seating room that we can get all the jurors in that
3 courtroom.

4 MR. BRACKLEY: That's the courtroom that has that
5 video thing?

6 THE COURT: Yes.

7 MR. BRACKLEY: Okay.

8 THE COURT: That may be -- I don't know how much
9 audio visual the parties are going to be relying on, but
10 certainly it's available. You can use it. And I'm told
11 that it works pretty well. I've never used it, but I talked
12 to Judge Mallard.

13 MR. BRACKLEY: I haven't either. I just want to
14 make sure that my people know that they're gearing towards
15 that.

16 THE COURT: And not this with the --

17 MR. BRACKLEY: Yeah.

18 THE COURT: Does that pose any problems at least
19 as far as the district attorney's concerned?

20 MR. BRACKLEY: No, Your Honor.

21 THE COURT: Ms. Ring, how about on behalf of
22 the --

23 MS. RING: That's fine.

24 THE COURT: Then obviously once the jury is
25 selected we'll move counsel tables back.

1 And jury questionnaires will go to the jurors --
2 prospective jurors on Friday morning. Should be able to get
3 copies of the questionnaires to you by I'm guessing 10:00 or
4 so. It's going to take a while to copy them. But if you
5 can get a list to me by mid-afternoon, you can do it by
6 e-mail, of jurors that you can agree should be excused
7 without any further --

8 MS. RING: I'm sorry, Judge. You want us to be --
9 to be available to get the questionnaires from the Court at
10 what time?

11 THE COURT: 10:00. I mean, I think we may have
12 them earlier.

13 MS. RING: Okay.

14 MR. BRACKLEY: That's fine.

15 THE COURT: I mean, I'll have Ms. Batchelder
16 deliver them to you as soon as they're done copying.

17 MR. BRACKLEY: And then we'll work among ourselves
18 to come to a time that we will get together and --

19 MS. RING: Right. Okay.

20 MR. BRACKLEY: E-mail or whatever, and we'll have
21 them back to the Court say by 3:00.

22 THE COURT: I'm just thinking if that gives you
23 enough time. I'm assuming that's about four hours, you
24 know, including a lunch break. And then if you can tell me
25 the jurors that you would agree to excuse, we can at least

1 notify those jurors prior to Tuesday morning.

2 The next list that I would be asking for is those
3 jurors that you want to have individual voir dire with. I
4 don't really need that until Tuesday morning.

5 MS. RING: Well, except if we had that to you
6 ahead of time arguably you could just have those jurors come
7 back in in the morning and do them first.

8 MR. BRACKLEY: I have found those two cuts are
9 pretty simple. You know when you see it. We may not agree,
10 but we'll know when we see it.

11 THE COURT: Okay. I mean, if you can get me those
12 two lists by 3:00 on Friday, that would be great.

13 MS. RING: We can do that.

14 THE COURT: You sure?

15 MS. RING: So would you -- does it make sense that
16 we're all here at 10:00 on Friday? And that way we know
17 whether the questionnaires are ready, we'll take the
18 questionnaires, we'll decide when we're going to meet. That
19 way we're in the same place and you know where we are.

20 THE COURT: Sure, that's great.

21 MS. RING: Okay.

22 MR. BRACKLEY: And just to -- I think we talked
23 about this before, but I don't remember if we resolved it,
24 we're not going to be there in our suits standing in front
25 of the jurors.

1 THE COURT: Right. What I anticipate I will do is
2 go down there, introduce myself and just explain to them in
3 very basic terms why I'm giving them the questionnaires on
4 Friday morning and telling them not to come back until
5 Tuesday.

6 And essentially what I'm going to say to them is
7 because of the Monday holiday court is not in session, we're
8 using the Friday to make up for that so that we can get the
9 evidence presented within two weeks. So I'm basically using
10 the Friday to replace the Monday.

11 MS. RING: But you're going to ask them to stay to
12 the end of the day so you can let them know who has to come
13 back or not?

14 THE COURT: No, we'll let them go. Then we're
15 going to need to contact them through the Jury
16 Commissioner's Office.

17 MS. RING: So the jury commissioner will contact
18 them over the weekend?

19 THE COURT: Jury commissioner and Ms. Batchelder
20 and some other folks.

21 MS. RING: Okay.

22 THE COURT: But I think the standard -- my
23 instruction to them is they need to plan to be back at 8:30
24 on Tuesday morning for further voir dire unless they hear
25 otherwise from the Court or the jury commissioner.

1 MS. RING: And then are we agreeing that the idea
2 will be the first thing we would start with Tuesday morning
3 would be those individuals that we want to do individual
4 voir dire with?

5 THE COURT: Yes.

6 MS. RING: Before we get to the panel?

7 THE COURT: Yes.

8 MR. BRACKLEY: Right.

9 THE COURT: We'll do those in the jury room for
10 Courtroom K.

11 MS. RING: Right. Okay.

12 Does the Court have something -- in terms of a
13 couple of logistic issues that I want to clarify, my
14 understanding in talking to the district attorney is that
15 there are two witnesses, Jamie Uhlir and Allyson Hackman
16 that we both have under subpoena that are out of state
17 witnesses that the district attorney is telling me that
18 they're bringing them here; so that, I'm not making -- we're
19 not making double travel arrangements.

20 And I think the District Attorney's Office was
21 comfortable letting me know that because I don't want to be
22 in the position where I've got somebody under subpoena who
23 is not here and I didn't --

24 THE COURT: So can the defense rely on the
25 People's subpoena and transportation arrangements so that

1 the arrangements are made to bring Jamie Uhler and Allyson
2 Hackman?

3 MR. BRACKLEY: Yes. The short answer is yes.
4 However, Allyson Hackman is not under subpoena. She's just
5 someone who we called and said would you come and she said
6 yeah. And so we're bringing her. We don't expect her to
7 suddenly not show up. And she is not under our subpoena.

8 MS. RING: She's either under our subpoena
9 presently or is --

10 THE COURT: About to be.

11 MS. RING: -- about to be. So I appreciate
12 that --

13 THE COURT: Okay.

14 MS. RING: -- clarification.

15 Then my other issue in terms of travel and just
16 because we're in a, you know, financial situation where my
17 State office keeps telling me to make travel arrangements as
18 tight as possible, the district attorney thinks that they're
19 going to be done with their case if things go relatively
20 smoothly Tuesday or Wednesday.

21 MR. BRACKLEY: Yeah, by Wednesday morning.

22 THE COURT: Wednesday morning of week two?

23 MR. BRACKLEY: Of week two.

24 MS. RING: So is the Court comfortable with me
25 having witnesses ready on Wednesday, or does the Court want

1 me to be more cautious and have people for Tuesday
2 afternoon? Because of course even though we think
3 Wednesday, that sometimes means --

4 THE COURT: Sometimes it means Tuesday, sometimes
5 it means Thursday.

6 If the defendant presents evidence, how long do
7 you anticipate your evidence would take?

8 MS. RING: At the outside two days. I know
9 Mr. Brackley and I also are going to talk about because of
10 the age of this case how much we are going to have to
11 impeach slash refresh memory with who knows how that's --
12 that's one of the big unknowns in terms of how many people
13 we're calling to deal with that.

14 THE COURT: So you think maximum length of time
15 right now you anticipate is two days for presentation. So
16 if the district attorney is done by Wednesday morning, then
17 in theory the defense would be done by Friday morning-ish,
18 Friday midday.

19 MR. BRACKLEY: Right. I -- one of the things that
20 we're going to talk about, Your Honor, is many witnesses are
21 actually in practice could be sort of two witnesses. I
22 mean, do you remember saying this? No.

23 THE COURT: Then the impeachment.

24 MR. BRACKLEY: But I think for the most part there
25 are transcripts for these witnesses, and I have found it

1 generally works. You know, do you remember saying this?
2 No, but. And then that sort of goes to the jury under
3 16-10-201.

4 THE COURT: Right.

5 MR. BRACKLEY: But there's that additional step
6 that I think is almost required of calling the next witness
7 or showing the video or showing the -- I'm willing to not
8 take that additional step.

9 I just think it's more efficient, it makes more
10 sense. But -- but there are some witnesses without
11 transcripts. And I think there are some witnesses either
12 party may decide it's better to bring in that other person
13 to say that. So I think we'll probably talk about that.

14 THE COURT: Okay. So you're assuming your
15 evidence presentation is going to take five days?

16 MR. BRACKLEY: Five days would have us finishing
17 on Tuesday afternoon. It's quite possible there's some
18 left-over on Wednesday morning.

19 THE COURT: So you're thinking five days, a little
20 more?

21 MR. BRACKLEY: Yes. And I think I've always been
22 pretty accurate, so I think that's a good estimate.

23 MS. RING: So you're planning on opening Wednesday
24 morning?

25 MR. BRACKLEY: That's assuming opening Wednesday

1 morning.

2 THE COURT: What were you assuming?

3 MS. RING: My jury selections never go as quickly
4 as they should, but let's hope.

5 THE COURT: Well, so I think the -- to answer your
6 question, I think having witnesses for the defendant
7 available starting Wednesday morning is reasonable. So to
8 the extent you need to make travel arrangements for
9 out-of-state or, you know, out-of-county witnesses, I think
10 you can plan to have them here on Wednesday morning.

11 I am assuming that there may be some witnesses who
12 are local that who if all the sudden the district attorney's
13 case is truncated or moves along more quickly than
14 anticipated there may be some people that you could start
15 calling on Tuesday afternoon. But I think for traveling
16 witnesses and those types of arrangements Wednesday morning
17 is fine.

18 We start doing individual voir dire at -- let me
19 check one thing.

20 (Pause.)

21 THE COURT: So I don't have anything -- I don't
22 have any 8:15's on Tuesday morning, October 9th. So I think
23 we could start individual voir dire at 8:30.

24 MR. BRACKLEY: That's fine.

25 THE COURT: Remind me how long I told you you

1 could have for voir dire? Was it two hours?

2 MS. RING: We were both not sure that you told us
3 that yet.

4 MR. BRACKLEY: Two hours is doable.

5 THE COURT: Two hours a side?

6 MS. RING: Uh-huh.

7 Judge, one other thing that I wanted to mention,
8 it's not that big a deal, but having -- Kristin and Nicole
9 tried the Elmarr case. I forget who was on the district
10 attorney side. It was a similar very old case.

11 And their suggestion was we try to draft a jury
12 instruction that kind of explains to the jurors why with
13 these witnesses we do all this, you know. And so we're
14 still working on that.

15 But that's one of the ways I think we're going to
16 try to help address the confusion of why do you approach and
17 transcript and all of those things and --

18 THE COURT: Read it to them prior to the
19 presentation of evidence?

20 MS. RING: Right.

21 THE COURT: Like an introductory instruction.
22 That's a great idea.

23 MS. RING: I don't know that we've drafted it yet,
24 but it's an idea.

25 MR. BRACKLEY: Could I ask -- I mean, I guess this

1 is a question to find out now if Bruce Langer is there if I
2 can catch him. But would you then send the transcripts or
3 excerpts from the transcripts back, or would it just sort of
4 be the reading of the transcripts would be the evidence?

5 MS. RING: I don't know what they did about that
6 transcript because it was just more -- it was --

7 THE COURT: Just so they understand the process.

8 MS. RING: Right. And why we're all doing this so
9 that they're not as confused about hopefully that piece of
10 it and why it works that way.

11 MR. BRACKLEY: That makes great sense.

12 THE COURT: I agree with that, okay.

13 MS. RING: My jury instruction drafter is working
14 on that. She's really smart.

15 THE COURT: Okay. And that's something that could
16 be read after the -- after the jury is sworn as part of the
17 introductory packet.

18 I think two hours for -- I thought we talked about
19 a length of time, but two hours certainly seems reasonable
20 for voir dire. Rough guess is we'd be done with individual
21 voir dire probably by late morning. So if we did Court's
22 voir dire by the noon recess, then counsel's voir dire in
23 the afternoon. I think I would like to get the jury picked
24 by the close of business on Tuesday. So I think
25 anticipating opening statements on Wednesday morning is

1 reasonable.

2 MR. BRACKLEY: Reasonable.

3 THE COURT: Do you think I'm being optimistic,
4 Ms. Ring?

5 MS. RING: I do. But sometimes the jury
6 questionnaire piece helps so much that it actually sometimes
7 makes it much more streamlined. So I'm hopeful that you --
8 if you allowed us to ask additional questions in the jury
9 questionnaire is going to help us.

10 THE COURT: Understand I'm not going to use the
11 board.

12 MS. RING: Right.

13 THE COURT: And frankly, my questioning to the
14 panel will be fairly abbreviated.

15 MR. BRACKLEY: We'll know who those first 38 are
16 after the individual.

17 THE COURT: Right. Well, we should be able to
18 get -- off the record.

19 (A discussion occurred off the record.)

20 THE COURT: So back on the record. We'll get the
21 randomized bailiff report on Friday. And so you're going to
22 know who your first 38 are going to be after --

23 MR. BRACKLEY: Right.

24 THE COURT: -- individual voir dire.

25 MR. BRACKLEY: Right. Okay.

1 THE COURT: Okay. So why don't you guys work on
2 that instruction. To the extent you can agree on it, that's
3 great. If you can't agree on it, then why don't you each
4 submit your proposed instructions and I'll take a look at
5 them. And but I think that makes a lot of sense. I think
6 it's going to help the jury understand.

7 I had I think in probably an informal e-mail query
8 asked what the parties' positions were with respect to
9 questions of witnesses from jurors. I got a response from
10 the district attorney indicating that they wanted questions
11 to be allowed per the rule. And I don't think I saw a
12 response from you, Ms. Ring. What's your position on behalf
13 of Mr. Clark?

14 MS. RING: We strongly object to having jurors ask
15 questions of witnesses.

16 THE COURT: Did you file a response?

17 MS. RING: I didn't. I'm sorry, Judge.

18 MR. BRACKLEY: Judge, just to clarify the People's
19 position, it's the People just asked that the Court
20 recognize that there is a rule and the Court follow that
21 rule.

22 THE COURT: Sure.

23 MR. BRACKLEY: That's the position of the district
24 attorney.

25 THE COURT: There is a rule, and I intend to

1 follow that rule. I mean, the rule essentially says yeah,
2 you should allow jury questions unless there's good cause
3 not to. And that can be in consideration of the nature of
4 the evidence, the seriousness of the charges and other
5 factors.

6 Ms. Ring, do you want to respond now or do you
7 want to do that in writing?

8 MS. RING: I'll do it in writing, Judge, if you
9 don't mind. I apologize for not doing that sooner.

10 THE COURT: Part of it is my fault because I was a
11 little bit informal in asking what your position was. And I
12 thought I would bring it up today.

13 What else?

14 MS. RING: Can I have that filed by next
15 Wednesday?

16 THE COURT: Sure. You don't need an opportunity
17 to respond, do you?

18 MR. BRACKLEY: No. I have done a response to it
19 before, and it essentially states my position, the Supreme
20 Court's in favor of it. There is a rule.

21 THE COURT: I mean, I typically do it, but that's
22 not to say that, you know, I just automatically would do it
23 in this case. This case is more serious than other cases in
24 which I've done it, and there may be good reason not to do
25 it here. So I'm willing to listen to that argument and then

1 make a decision.

2 What else can we talk about that would help you?

3 MR. BRACKLEY: Perhaps at this point whether the
4 Court is going to set a limit on time for opening
5 statements. I don't know if the Court does that. I don't
6 think that the Court does. But if you're going to in this
7 case maybe we should talk about that now.

8 MS. RING: I think we're all experienced enough
9 trial lawyers to know that if you talk too much you lose
10 your jury.

11 MR. BRACKLEY: I agree with that.

12 THE COURT: I would agree with that as well. So
13 let me put it this way, for opening I won't set a time
14 limit. You do what you think is reasonable and in the best
15 interests of your respective clients.

16 You know, part of what I'll have to take into
17 consideration when it comes time for closing arguments is
18 whether or not there appears to be a need to set a time
19 limit.

20 MS. RING: Well, and Mr. Brackley likes to write
21 his rebuttal way ahead of time. So you can let him know how
22 much time he has, and it won't affect his rebuttal because
23 his rebuttal is actually always pre-prepared.

24 THE COURT: One point. Some of his time got used
25 up if I recall. No? Anyways, no time limit on opening, two

1 hours for voir dire of the panel.

2 When we're talking to jurors individually in the
3 jury room we need to make sure the questions are limited
4 just to the specific issues that raise the concern that
5 resulted in the individual voir dire. Anything else?

6 MR. BRACKLEY: No, Your Honor.

7 MS. RING: Judge, the last issue I have, and I
8 mentioned it to Mr. Brackley briefly when we came in, is
9 that my recollection is the Court ordered GPS monitoring at
10 the discretion of Community Justice Services as a condition
11 of bond. That was quite a long time ago.

12 THE COURT: Yeah.

13 MS. RING: My client has been on GPS since that
14 time. And even though he has struggled financially with it
15 for quite some time, you know, the fact that the Court let
16 my client go out of state for a wedding and the issue around
17 the pending DUI charge, we didn't think there was any
18 opportune time to ask the Court to reconsider that.

19 The problem we have now is all week long my client
20 has been getting calls about what's roughly a \$150
21 outstanding balance. And he was ordered to meet with them
22 this morning after court.

23 THE COURT: Okay.

24 MS. RING: I'm a little concerned that Community
25 Justice Services may be taking the position that because of

1 the outstanding balance they're not willing to continue to
2 monitor Mr. Clark on his bond. And I know Mr. Clark doesn't
3 have any additional money right now.

4 And it seems to me that it would be completely
5 unjust that we're a couple of weeks out from trial and that
6 would be the reason that my client would not be allowed to
7 remain on bond.

8 Mr. Brackley just asked me this morning, and I
9 didn't have time to tell him the answer, my client is
10 planning on staying in Boulder County at his uncle's house
11 during the actual trial. And I believe it's his uncle is
12 the one who actually posted the surety on this bond.

13 So I think he put his house up or some significant
14 property because it was a surety bond -- I mean, sorry,
15 property bond, not a surety bond.

16 But rather than my client go downstairs to
17 Community Justice Services and me try to -- emergently try
18 to deal with this issue, I'm raising it now.

19 My client actually tried to meet at 9:00 a.m. with
20 Community Justice Services so that if we had an issue we
21 could tell the Court what it was. But evidently they
22 weren't available to meet until after court.

23 (Pause.)

24 THE COURT: So essentially you're asking me to
25 remove GPS monitoring as a condition of his bond?

1 MS. RING: Well, I thought what I heard
2 Mr. Brackley say is that he didn't have an objection during
3 the trial if my client was staying in Boulder County to not
4 having him be on the GPS during that time frame. But I'm
5 not sure if Mr. Brackley thought that through.

6 MR. BRACKLEY: Judge, I didn't say I didn't have
7 an objection. It was just a question that I had just to
8 sort of process the whole thing.

9 It seems to me if Mr. Clark was going to be in
10 Boulder County during the trial that's something that I
11 think could be and should be communicated to Community
12 Justice. I really -- short of saying that, I know the bond
13 issue in this case was a hotly contested issue.

14 THE COURT: Oh, I remember.

15 MR. BRACKLEY: People vigorously objected to --
16 you know, Mr. Clark has one kind of what is a relatively
17 minor sort of blip in the whole process. He has complied
18 with his bond. But it's still a first degree murder case
19 and it's going to trial within a week.

20 I really am going to stand back and short of
21 stating that let the Community Justice people use their
22 discretion, and which is what we asked them to do, and
23 process the information that I learned about where he would
24 be staying for trial. I'd go from there.

25 I just really have a level of discomfort about the

1 status of the bond as it is in this particular case given
2 the charges.

3 THE COURT: Certainly aware of that.

4 MS. RING: I mean, frankly what I in a perfect
5 world would -- I ask be the Court to do is somehow find
6 judicial funds to deal with the financial -- I mean, it's a
7 financial issue, which is what --

8 THE COURT: Right, which --

9 MS. RING: -- is disturbing about it.

10 THE COURT: Right. I mean, well, first of all,
11 I'm certainly not under the impression that if he goes to
12 Community Justice Services in 20 minutes and they say you
13 need to pay \$150 to stay on your GPS monitor and he says I
14 don't have it that they're going to take him into custody
15 right then and there.

16 Second of all, it occurs to me that there are
17 probably some arrangements that can be made with Community
18 Justice Services surrounding the financial obligation to
19 remain on the GPS monitoring.

20 And if it is truly an impossible situation where
21 Mr. Clark does not have the funds to pay for the GPS
22 monitor, then I would expect Community Justice Services to
23 look at alternatives for supervision monitoring while he's
24 on bond.

25 I mean, I'll stand by the ruling that I made

1 initially that a \$100,000 secured bond is sufficient for
2 Mr. Clark. But that was in part on with the confidence that
3 he was going to be closely monitored by Community Justice
4 Services, including a GPS monitor.

5 Now, it's true with one exception, and that being
6 the DUI arrest, he's been otherwise compliant with his bond
7 conditions, he's made all of his court appearances. But I'm
8 not comfortable simply removing the GPS monitoring condition
9 without some better idea about what he can afford or how
10 Community Justice Services could alternatively monitor him.

11 So I guess that's a long way of saying I'm not
12 going to grant the motion to remove the GPS condition on the
13 bond today.

14 Mr. Clark, why don't you go talk to Community
15 Justice Services. I don't know who you're going to be
16 meeting down there, but -- and I don't know if you're going
17 to go with him, Ms. Ring. But if there's a concern that he
18 wouldn't be allowed to remain on bond without the GPS
19 because there's no other reasonable alternative, then I
20 would expect CJS would talk to both the district attorney
21 and hopefully me. I'm willing to look at alternatives, but
22 simply removing the GPS monitor at this time is not one of
23 them.

24 MS. RING: Would it be fair for me to also convey
25 to Community Justice Services that the Court's position is

1 the Court's preference is that Mr. Clark stay on GPS through
2 the trial, but it's the Court's preference that CJS do
3 whatever they can with Mr. Clark and his financial situation
4 to allow that to happen?

5 THE COURT: Absolutely.

6 MS. RING: Okay.

7 THE COURT: That's a fair statement. And to
8 extent that I need to talk to Community Justice Services,
9 whether it's Monica Rotner or somebody else there to try and
10 figure out either a payment plan or some other alternative
11 supervision, obviously the district attorney can be in on
12 that discussion as well, but I'm willing to do that. I
13 don't want Mr. Clark to be not on bond.

14 MS. RING: Right.

15 THE COURT: But --

16 MS. RING: I understand.

17 THE COURT: -- on bond we need to have enough
18 confidence that we know where he is.

19 The other thing, and Ms. Chioda pointed this out
20 before I forget, when we're doing individual voir dire in
21 the jury room it helps to have a signal where counsel is
22 agreeing that the juror can be excused for cause. I've used
23 a cup where you turn the cup over. I've had the people set
24 their pen out in the middle of the table.

25 MR. BRACKLEY: I like the pen.

1 MS. RING: I like the pen.

2 THE COURT: You like the pen, okay.

3 So let's agree then that if we are doing
4 individual voir dire with a juror in the jury room and
5 counsel believes that they're going to be asking that
6 they're excused for cause to simply set their pen down
7 conspicuously so that I and opposing counsel can see it.
8 And then if I see two pens then I'll simply stop voir dire
9 and excuse the juror.

10 MR. BRACKLEY: I also think this is worth talking
11 about. Last time I did individual voir dire with Your
12 Honor, opposing counsel was somewhat prickly about this
13 particular point, but I think it's something we should talk
14 about, when the juror comes back, sits down, introduces him
15 or herself, clearly we know what the issue is with that
16 juror because there's a questionnaire.

17 It would be the People's position that the Court
18 starts that questioning, and then the parties can follow up
19 after that as opposed to the parties starting the question
20 and then the Court follows up.

21 THE COURT: I thought I had done the initial --

22 MR. BRACKLEY: Right.

23 THE COURT: -- questioning.

24 MR. BRACKLEY: But I would prefer the Court to do
25 the initial because I think that makes it go a little more

1 efficiently.

2 THE COURT: I'm -- I was planning to use that
3 procedure. Ms. Ring, do you have any opposition to that?

4 MS. RING: That's what I'm used to.

5 THE COURT: Okay. I would do that. And
6 obviously -- yeah, I mean, I'll try and get some initial
7 information from the juror and then just turn it over to the
8 prosecution and then defense counsel. And I'll try and --
9 if there are more than -- if there is more than one issue
10 raised in the questionnaire I try and address all of them.
11 But okay, anything else?

12 MR. BRACKLEY: No, Your Honor. It would make
13 sense to perhaps docket us for something next week if you
14 have the time. We may not use it, but it would make sense
15 to schedule that if you have some time some date next week.

16 THE COURT: Well, I'll tell you what I've got.
17 I've got 3:00 on Tuesday, I've got 1:30 on Wednesday, I've
18 got 1:30 on Thursday. So I don't know that you'd want me to
19 firm set anything right now.

20 MR. BRACKLEY: Sounds like you have enough
21 available. We'll know a little more later on today.

22 THE COURT: I mean, I can even -- I mean, look,
23 I've even got time on Friday morning. I've got a
24 10:00 sentencing. So I could do something at 9:00 or 9:30
25 or I could do something at 11:00. I could even do it over

1 the lunch hour any of those days.

2 MR. BRACKLEY: Sounds like we have enough
3 available. If we need it we'll find you.

4 THE COURT: Okay. I'll assume no news is good
5 news.

6 Anything else? Okay. Then we'll be in recess.

7 Mr. Clark, if I don't see you before Tuesday,
8 October 9th I'll see you in this courtroom on Tuesday,
9 October 9th at 8:30 in the morning -- I'm sorry, you're
10 right, next door Courtroom K.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Not directly next door, two down.
13 Thanks.

14 (The hearing concluded.)

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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 4th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 9,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

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

2 THE COURT: This is 12CR222, People versus Michael
3 Clark. Could I have the appearances of counsel please?

4 MR. BRACKLEY: Ryan Brackley and John Kellner for
5 the People. Also here is Detective Chuck Heidel.

6 MS. RING: Megan Ring and Nelissa Milfeld
7 appearing on behalf of Michael Clark. He's also present.

8 THE COURT: All right. We're appearing outside
9 the presence of the panel. We're in the jury room about to
10 conduct individual voir dire.

11 A couple of issues that I need to take up on the
12 record. First of all, these -- this panel was brought in on
13 Friday, October 5th and completed questionnaires and was
14 excused until this morning at 8:30.

15 In the mean time, counsel had a chance to review
16 the questionnaires. They came to an agreement that the
17 following jurors would be excused without necessity for any
18 further voir dire. They're contained in a list submitted by
19 Mr. Brackley in an e-mail with two corrections and then one
20 addition.

21 So I'm going to read off the juror numbers of
22 those who have been excused. 3960, 3976, 3978, 4010, 4031,
23 4041, 4052, 4053, 4057, 4061, 4063, 4064, 4067, 4087, 4091,
24 4096, 4124, 4134, 4144, 4150, 4058, 4171, 4174, 4175, 4185,
25 4186, 4190, 4233, 4241, 4257, 4264, 4281, 4286. And then

1 after 5:00 on Friday the parties agreed to excuse 4074,
2 Mr. Donohue, for hardship.

3 Is that an accurate statement of the agreement
4 between the parties for jurors to excuse, Mr. Brackley?

5 MR. BRACKLEY: Yes, Your Honor.

6 THE COURT: Ms. Ring?

7 MS. RING: Yes.

8 THE COURT: All right. We're now discussing those
9 jurors who will be individually voir dired. The People have
10 submitted a list to the defense of 26 names.

11 Mr. Brackley, the criteria as I understand it is
12 that people who indicated at some level a question or an
13 inability to be a fair juror, those individuals were
14 selected, those individuals who expressed a hardship to any
15 degree, and then those individuals who expressed any
16 knowledge of media coverage. Are those accurate criteria?

17 MR. BRACKLEY: Yes. I will say those who
18 expressed a hardship which includes actual plans, for
19 instance, there was one juror who expressed a hardship, said
20 this is a hardship, but I'm going to deal with it, that's
21 not a person that we put in this pile.

22 THE COURT: All right. And Ms. Ring, you've seen
23 that list of 26 proposed jurors from the prosecution?

24 MS. RING: I have.

25 THE COURT: Do you have an objection to that list?

1 MS. RING: No.

2 THE COURT: All right. And I understand you had
3 at least one other prospective juror that you wanted to do?

4 MS. RING: Right.

5 THE COURT: And have you exchanged that name with
6 the prosecution?

7 MR. BRACKLEY: Yes. That's Ms. Terri Rush, 3999.

8 THE COURT: All right. We're going to have to be
9 efficient with the jurors in chambers to do 27 people and
10 get the jury selected today.

11 MR. BRACKLEY: I think given the nature of most of
12 them I would say of the 27 probably 25 are 24 are hardship.
13 And I think that's --

14 THE COURT: I need a copy of the list so that I
15 can give it to the bailiff so that she can start directing
16 individual jurors here. Who has a list that I can use
17 that -- I'll copy it.

18 MR. BRACKLEY: I have a list. It's on the left
19 side of the page.

20 THE COURT: So under the IVD column?

21 MS. RING: Yes.

22 THE COURT: And I see Terri Rush has been added.

23 MR. BRACKLEY: Yes.

24 THE COURT: Ms. Ring, do you have the same list?

25 MS. RING: I do.

1 THE COURT: So we excused him, so you can cross
2 him off, Donohue, 4074.

3 Okay. So what I'm going to do now, these are in
4 numerical order. Comfortable calling the people in
5 numerical order?

6 MS. RING: Yes.

7 THE COURT: All right. I'm going to go give this
8 list to the bailiff after I make a copy of it. Then I'm
9 going to have her start bringing the individual jurors
10 starting with Mr. Bishop. Is that okay? Anything you want
11 to take up before we start that?

12 MS. RING: Not from our end.

13 THE COURT: All right. I'll be right back.

14 (Pause.)

15 THE COURT: So I anticipate that Mr. Bishop is
16 going to come in in just a second with -- is there anything
17 we need to take up on the record? Do you want me to lock
18 the door before --

19 MR. BRACKLEY: No. Ms. Ring just reminded me
20 we're going with the pen method. This is my pen.

21 THE COURT: Right. Counsel wants me to start the
22 voir dire; right? And then you can follow up. That's what
23 you told me initially that you wanted.

24 THE CLERK: Your Honor, this is Claudia Murray.
25 John Bishop I don't believe is here.

1 THE COURT: Hi, Ms. Murray. Would you go ahead
2 and have a seat.

3 So we brought you in here to talk to you
4 individually because of some of the information that you put
5 on your questionnaire. Let me find your questionnaire real
6 quick. You're juror 3961; right?

7 JUROR: Yes.

8 THE COURT: So I think the question had to do with
9 you'd mentioned that you knew a teller at a credit union --

10 JUROR: Right.

11 THE COURT: -- by the name of Patti Harris. And I
12 know that was one of the people on the list of potential
13 witnesses. Do you remember what credit union or when this
14 would have been that you knew that person?

15 JUROR: Yeah. When I first knew her she was at
16 the Boulder County Credit Employee -- Boulder City Employees
17 Credit Union, BECMU or something like that. And then I
18 think either the credit union moved or she switched to a
19 different credit union which is up on Alpine and Broadway
20 was the last time I saw her.

21 THE COURT: How long ago was that?

22 JUROR: I just went in there because a friend of
23 mine has an account there and she was doing some banking.
24 And that was probably two years ago, a year to two years
25 ago.

1 THE COURT: Is this someone that you know outside
2 of her work at the credit union? Do you know her socially?

3 JUROR: No, I don't.

4 THE COURT: How do you think you would evaluate
5 her as a witness if she were to testify?

6 JUROR: Oh, I would -- I'd suspect she'd be a
7 really credible witness. I mean, she seems like a really,
8 you know, intelligent, clear person, yeah. She seems like
9 she would be credible.

10 THE COURT: Okay. Now I'm going to let each of
11 the attorneys follow up real quickly. Mr. Brackley.

12 MR. BRACKLEY: So really, thanks for coming in.
13 We want to start our trial at this point where folks come in
14 as jurors and they have open minds, they're impartial, they
15 don't have biases or prejudices one way or another about any
16 of the witnesses or type of case this is, the facts. Do you
17 think you could do that with Patti Harris if she were to
18 come in and testify?

19 JUROR: Yeah. Like I said, I really don't have a
20 personal relationship with her.

21 MR. BRACKLEY: Right.

22 JUROR: And it's just an incidental relationship.

23 MR. BRACKLEY: How do you recognize that name? I
24 don't know if I could recognize the name of someone as a
25 bank or a bank teller.

1 JUROR: Well, because -- well, first of all, she
2 was at my bank when I worked with the City, which is a lot
3 of years ago.

4 And I actually know my bank tellers because I have
5 to frequent the bank a lot. And that was a small credit
6 union. And I know the tellers at my bank now because I see
7 them several times a week. And I -- that's how.

8 MR. BRACKLEY: Okay. I know my ATM really well.

9 JUROR: Yeah, right. Well, I don't have a car, so
10 I'm on foot, I'm on bike. And I'm in the bank a lot and
11 always, you know, kind of covering my low balance basically.

12 MR. BRACKLEY: Could you be a fair and impartial
13 juror as it pertains to any testimony given by Patti Harris?

14 JUROR: Yeah.

15 MR. BRACKLEY: Would you be able to evaluate and
16 judge her testimony fairly as you would any other witness?

17 JUROR: I believe so.

18 MR. BRACKLEY: Okay. Thank you.

19 THE COURT: All right. Ms. Ring.

20 MS. RING: Ms. Murray, I think you've answered the
21 questions that we all had concerning your relationship with
22 Ms. Harris.

23 I guess you're already back here and you've had
24 the weekend. After reviewing the questionnaire on Friday
25 has anything else come to mind that you might want to share

1 with us that came up subsequent to filling out the
2 questionnaire last Friday?

3 JUROR: No. That was really the only thing --

4 MS. RING: Right.

5 JUROR: -- that caught my attention.

6 MS. RING: Okay. Thanks.

7 I have no other questions, Judge.

8 THE COURT: Thank you very much, Ms. Murray. So
9 you can step right back through into the courtroom and
10 then --

11 (The juror left the courtroom.)

12 THE COURT: So the next one is probably going to
13 be Miles, 3962.

14 THE CLERK: I have Barbara Miles.

15 THE COURT: Hi, Ms. Miles. Do you want to come in
16 and have a seat there? So we wanted to talk to you in
17 private because of some of the information that you gave us
18 on your questionnaire.

19 And I think it has to do with you list -- you
20 indicated that you're an independent contractor, and it says
21 it would depend on what the daily pay would be.

22 So I guess I just wanted to talk to you a little
23 bit about the financial circumstances that you find yourself
24 in and what that means for your ability to serve on this
25 jury.

1 JUROR: Well, I have four dependents. My husband
2 passed two years ago. So I went back to school, got my
3 certified nursing assistant license. And I just make it
4 month to month. And so I calculated after the initial
5 meeting, and I wouldn't be able to pay the bills.

6 THE COURT: For jury service typically after the
7 third full day the State can pay \$50 a day. Is that
8 something that you factored into your calculations?

9 JUROR: I did.

10 THE COURT: So you were aware of that?

11 JUROR: Um-hmm.

12 THE COURT: Okay.

13 JUROR: I have four dependents at home. I have
14 eight children actually, but I have four at home.

15 THE COURT: I think I saw that when you listed it
16 on the questionnaire.

17 All right. So what do you think that means if you
18 were -- if you were chosen to sit on this jury, what do you
19 think that means for your ability to pay attention and to,
20 you know, sort of evaluate the case?

21 JUROR: Well, I don't think that would affect me
22 other than when I got home worrying about the end of the
23 month if I can pay the bills.

24 THE COURT: Okay. So I mean, do you think you
25 could listen and pay attention and not be distracted by the

1 financial worries?

2 JUROR: Yes.

3 THE COURT: Okay. Mr. Brackley.

4 MR. BRACKLEY: Ms. Miles, do you have -- if you
5 were to not sit on this jury would you have steady contract
6 work over the next two weeks? For instance, if you're
7 available do you get the work?

8 JUROR: Yes. I have regular clients right now.

9 THE COURT: Do you have any clients, anything
10 scheduled over the next couple of weeks, stuff that's
11 already in the books?

12 JUROR: Yes.

13 THE COURT: Ms. Ring.

14 MS. RING: I don't have any questions. Thank you.

15 THE COURT: Okay. So Ms. Miles, let me have you
16 take a seat back out in the courtroom, and I'll talk to the
17 lawyers and then we will get back to you.

18 JUROR: All right. Thank you.

19 (The juror left the jury room.)

20 THE COURT: Is that --

21 MR. BRACKLEY: Yes, Your Honor. I'm sorry, I had
22 forgotten about the --

23 THE COURT: Okay. This only works if you
24 remember.

25 All right. Both sides indicated that Ms. Miles

1 can be excused for cause, so we'll go ahead and excuse her
2 for cause. I'll let the bailiff know as soon as she comes
3 back in with another juror.

4 MS. RING: I tried to put you out by putting my
5 pen out there.

6 THE CLERK: This is Samuel Hall.

7 THE COURT: Would you tell Ms. Miles that she's
8 excused and thank her very much?

9 THE CLERK: Okay. Thank you.

10 THE COURT: And I'm sorry, you're Mr. Hall?

11 JUROR: Yes, sir.

12 THE COURT: Please have a seat.

13 So Mr. Hall, we wanted to talk to you in private
14 because of some of the information that you listed on your
15 questionnaire. And give us a second to find your
16 questionnaire.

17 JUROR: No problem.

18 THE COURT: And I think it had to do with a couple
19 of circumstances that you listed regarding --

20 JUROR: Sure.

21 THE COURT: -- work arrangements, conferences.
22 And then also I think you had some travel arrangements going
23 to Los Angeles on October 17th.

24 JUROR: My girlfriend is going to be on Wheel of
25 Fortune next week. So I know that's a bad reason, but once

1 in a lifetime experience.

2 THE COURT: It's a new one. I've never heard that
3 before.

4 Talk to me first about the -- you're hosting a
5 conference on the 15th and 16th?

6 JUROR: Yes, sir.

7 THE COURT: So what's your obligation to that
8 conference?

9 JUROR: I'm the technology manager at my school.
10 So I basically run all the audio visual, everything like
11 that, basically make sure that all of our presenters are
12 ready to go and they have everything that they need.

13 I've been doing that since I've been at the school
14 for 12 years. I'm the only one that's ever done this. So
15 if I'm not there, then, you know, we don't really have
16 anybody qualified to run the sound board and make sure that
17 our participants are able to hear our presenters.

18 THE COURT: I mean, what happens if you get sick?
19 I mean, what happens to the conference if you're just laid
20 out in a bed with flu or something?

21 JUROR: It's never happened, but I would probably
22 just work anyways.

23 THE COURT: Well, what if you're too sick to get
24 out of bed, then what happens to the conference?

25 JUROR: I guess we'd probably have to hire

1 somebody.

2 THE COURT: Okay.

3 JUROR: We've got a company that we worked with
4 some of our bigger conferences that they bill out. You
5 know, it's a lot more expensive, but we could probably hire
6 one of them to come if they were available to come and just
7 run all of our equipment for us.

8 THE COURT: Okay. So the conference could go on
9 if you're not there?

10 JUROR: That one, yes, absolutely.

11 THE COURT: And I know you listed that you have a
12 presentation in Chicago. I would expect that this case will
13 be done long before November 1st.

14 JUROR: Okay.

15 THE COURT: And then your girlfriend is going to
16 be on the Wheel of Fortune?

17 JUROR: Correct.

18 THE COURT: Tell me about the travel arrangements,
19 who made them, who is paying for them.

20 JUROR: I'm -- well, basically I'm paying for my
21 way out there, she's paying for hers. Wheel of Fortune
22 works even if you lose you get a thousand dollars, so she's
23 basically going to pay me back for my flight depending on --
24 either way she's going to be paying for my arrangements.

25 THE COURT: So I don't want to seem callous, but

1 even if you don't go, if you have to serve on this jury it
2 sounds like you're going to be reimbursed through the Wheel
3 of Fortune show for that money?

4 JUROR: Sure.

5 THE COURT: And then tell me about your elderly
6 grandfather.

7 JUROR: He lives in Texas. He's just, you know,
8 getting older. And my folks had a divorce a couple years
9 ago, so I don't get to see him as much as I used to.

10 So he's, you know, just celebrating his birthday,
11 and all of his friends are pretty much dead. And I just
12 thought it would be nice -- my girlfriend has never met him.
13 And I thought it would be nice for us to go down there and
14 have her get to meet him before he potentially passes away.

15 THE COURT: This is a driving trip?

16 JUROR: Yes, sir.

17 THE COURT: So there's some flexibility in terms
18 of when you leave and when you go. If you couldn't go on
19 the 12th through the 14th you wouldn't be out any money?

20 JUROR: Right.

21 THE COURT: Let me see if the prosecution has any
22 questions for you.

23 MR. BRACKLEY: Mr. Hall, thank you. I don't.

24 THE COURT: All right. Ms. Ring.

25 MS. RING: You also noted in your questionnaire

1 that you -- I think if I understand it correctly that your
2 best friend in high school was Michael Breslin?

3 JUROR: Correct.

4 MS. RING: So you noticed a name on the list --

5 JUROR: Jason.

6 MS. RING: Who is Michael's brother?

7 JUROR: Potentially.

8 MS. RING: If he is Michael's brother, you know
9 Jason as well?

10 JUROR: Correct.

11 MS. RING: And where did you go to high school?

12 JUROR: Boulder High.

13 MS. RING: And tell me a little bit more about
14 your relationship with Jason.

15 JUROR: He was probably what, three or four years
16 older than me I think and kind of a -- you know, as an older
17 sibling of, you know, a couple of rowdy high school boys
18 would be, didn't really like us very much and was -- you
19 know, obviously, you know, treated us like an older brother
20 would to younger siblings.

21 You know, he was kind of a reclusive a little bit
22 and not very social. And we kind of were a little bit mean
23 to him and gave him kind of a hard time, and then he
24 reciprocated back. And you know, it was high school.

25 So I've gotten in a couple little scuffles with

1 him. And I think once he's threatened me, you know, that he
2 would, you know, kick my ass and kill me or something like
3 that, you know, just stupid things like that, but high
4 school drama. But I wouldn't say that I like him, and I
5 wouldn't say that I really respect him or trust him.

6 MS. RING: So you were just talking about all this
7 as high school and in the context of being high school boys.
8 Do you still have a relationship with his brother?

9 JUROR: I do. I haven't seen him in quite a
10 while.

11 MS. RING: Him being?

12 JUROR: Jason. But I do see Michael quite often.

13 MS. RING: I don't have any other questions.
14 Thank you.

15 THE COURT: Okay. Thank you, sir. If you'd have
16 a seat back out in the courtroom.

17 JUROR: Sure. Thank you.

18 (The juror left the jury room.)

19 THE COURT: If there are any -- if it's not agreed
20 that the juror is going to be excused, if there's any
21 challenges for cause, go ahead and raise it after the
22 individual has left.

23 MR. BRACKLEY: I would make a motion to challenge
24 Mr. Hall for cause. He stated that he doesn't trust -- I
25 don't -- it doesn't matter that he doesn't like him, I

1 understand that. But the fact that he has stated he doesn't
2 trust a witness for the People I think is problematic. And
3 I would move to challenge Mr. Hall for cause.

4 THE COURT: Hold on for just a minute.

5 Ms. Ring.

6 MS. RING: Judge, I don't think their record was
7 clear enough that it rises to the level of a challenge for
8 cause. Certainly the prosecution could have followed up.

9 We're talking about a relationship with somebody
10 from high school where he says he doesn't really see him
11 anymore. And his -- he kept using the caveat of when we
12 were in high school, how high school people are. He never
13 said that it would have any impact on his listening to
14 Mr. Breslin's testimony in this context.

15 THE COURT: Yeah, I don't think the record is
16 sufficient to justify challenge for cause at this point in
17 time. So I'll deny that with respect to Mr. Hall.

18 Krista.

19 (A juror entered the jury room.)

20 THE COURT: Hi. Do you want to go ahead and have
21 a seat? Are you -- how do you pronounce your last name?

22 JUROR: Ghaffarkhan.

23 THE COURT: Good morning, sir. Thanks for being
24 here.

25 So we wanted to talk to you in private because of

1 some of the information that you included on your
2 questionnaire. So give us a minute to find your
3 questionnaire in the pile.

4 JUROR: Sure.

5 THE COURT: You indicated you're scheduled to
6 leave town from the 14th through the 21st?

7 JUROR: Correct.

8 THE COURT: What's that --

9 JUROR: First vacation I've taken in a year and a
10 half.

11 THE COURT: Where are you going?

12 JUROR: Puerto Rico.

13 THE COURT: Tell me about the trip. Who paid for
14 it, how you getting there?

15 JUROR: I paid -- well, I'm using frequent flyer
16 miles built up from the last job I had from when I switched
17 over paying for it.

18 THE COURT: Okay.

19 JUROR: I don't have paid leave or anything like
20 that, so I'm just taking the time.

21 THE COURT: Is it the kind of trip that if you
22 were selected to be on this jury that you could reschedule?

23 JUROR: No.

24 THE COURT: Why not?

25 JUROR: Well, I mean, because I'm meeting two

1 friends there, and they can't reschedule.

2 THE COURT: Okay.

3 JUROR: So I would just end up wasting a ticket
4 and kind of -- I don't know. I mean, I guess I could
5 probably take the time off again, but my friends can't.

6 THE COURT: Okay. How about any financial loss to
7 you?

8 JUROR: Yeah, if I took -- if I was on this trial,
9 yes.

10 THE COURT: Yeah.

11 JUROR: Yeah. I'm a design engineer.

12 THE COURT: I'm sorry, I should have been clearer
13 with my question. If you have to reschedule this trip
14 because you're on this jury are you going to lose any money?

15 JUROR: Correct. Yes. I'd have to buy another
16 ticket or I'd have to try and reschedule a ticket. And I
17 don't think if I -- if I try and reschedule -- I mean, it's
18 more less just a lost ticket.

19 THE COURT: Okay. But you used frequent flyer
20 miles; right?

21 JUROR: Correct. So if I wanted to reschedule I'd
22 probably have to buy a ticket.

23 THE COURT: Okay. You also indicated that you had
24 to deal with police officers on a couple of occasions.

25 JUROR: Yeah. I don't have the most favorable

1 opinion of most law enforcement.

2 THE COURT: Okay. And why do you say that?

3 JUROR: I don't know. I mean, just in general
4 everytime I've had to deal with police I feel kind of
5 awkward and a little bit harassed.

6 Just the last time I was thinking about it I was
7 walking down to Pearl Street with my buddy at 8:00 at night.
8 And all of the sudden I was asked for my ID and questioned
9 what I was doing, walking to dinner. Oh, really? I was
10 like yeah, walking to dinner.

11 THE COURT: Okay.

12 JUROR: Stuff like that.

13 THE COURT: Okay. Let me see if the prosecution
14 has any questions for you. Mr. Brackley.

15 MR. BRACKLEY: So these were Boulder Police
16 Department --

17 JUROR: Yeah.

18 MR. BRACKLEY: -- officers?

19 If I were to tell you that this trial would have
20 many, many officers from the Boulder Police Department,
21 would those officers start off on kind of the wrong foot
22 with you in terms of their ability to testify with any
23 credibility?

24 JUROR: Yeah.

25 MR. BRACKLEY: Could you have an open mind as to

1 the testimony of Boulder police officers?

2 JUROR: I would try. But you know, can't -- you
3 know, sorry, the arm shrug is probably not the answer you're
4 looking for.

5 MR. BRACKLEY: I guess I need for the sake of our
6 record elaboration on the arm shrug. I do the arm shrug
7 too.

8 JUROR: Sure. I mean, I don't trust them. I'm
9 not sure if I would trust their ability to make any sort of
10 judgments or assessments now.

11 MR. BRACKLEY: So as you sit here right now can
12 you tell us whether or not you could have an open mind
13 towards the testimony of Boulder police officers?

14 JUROR: I'd probably say no.

15 MR. BRACKLEY: Okay. Are you probably saying no
16 or are you just saying no?

17 JUROR: I'm just saying no.

18 THE COURT: All right. So Mr. Ghaffarkhan, we're
19 going to go ahead and excuse you from this panel. Thank you
20 for your time. And you can leave, you can go straight
21 through the courtroom.

22 JUROR: Okay. Thank you, sir. So just sit and
23 wait?

24 THE COURT: No. You're done. You can go.

25 JUROR: Okay. Thank you.

1 (The juror left the jury room.)

2 THE COURT: The record should reflect both counsel
3 put their pen down on the table indicating both were
4 challenging for cause.

5 Should be Zeff I believe.

6 THE CLERK: This is Mr. Gary Zeff.

7 THE COURT: Would you please have a seat there.

8 JUROR: Yes.

9 THE COURT: So Mr. Zeff, I wanted to talk to you
10 in private because of some of the information that you put
11 on your questionnaire. And if you'd give me just a minute
12 to find that questionnaire. There it is.

13 You had I think raised a concern about your
14 eligibility for unemployment if you were to serve on this
15 jury.

16 JUROR: Yes.

17 THE COURT: So tell me a little bit more
18 specifically what you're worried about.

19 JUROR: I have unemployment insurance for I think
20 six months. And in order to collect it we have to be able
21 to work if called. If someone offers me a job today I have
22 to be available to work. Otherwise, I don't get the money.
23 Whether they extend that out if I do serve I don't know.

24 THE COURT: You mean if you serve on a jury you're
25 not sure if you would be available to work?

1 JUROR: Oh, certainly wouldn't be available to
2 work.

3 THE COURT: I mean, as a practical matter on the
4 days that you're serving on the jury I get that.

5 Have you checked with the State to see what
6 happens to your unemployment?

7 JUROR: No.

8 THE COURT: Okay.

9 JUROR: They were closed yesterday I assume.

10 THE COURT: Yeah, they were.

11 Okay. You also indicated that I think you had
12 volunteered for about two and a half years for MESA?

13 JUROR: Yes.

14 THE COURT: As a sexual assault phone counselor?

15 JUROR: Yes.

16 THE COURT: Can you talk to me about that.

17 JUROR: Purely volunteer. It's an organization
18 that is available 24 hours a day to anybody who needs any
19 counseling for sexual assault.

20 It could be anything from a current sexual
21 assault. It could be often someone who was assaulted ten
22 years ago is watching a movie and the person on the screen
23 looks like the person that assaulted them and they needed
24 somebody to talk to.

25 THE COURT: So what did you do?

1 JUROR: We had 40 hours of training. And then
2 after that we had -- I think it was five times a month we
3 had to give three or four hours to be available by call.

4 So if someone called in they would talk to an
5 operator, they would call me and then connect the call and
6 we would talk to them. And if they needed to go to the
7 hospital, we would offer to go with them.

8 THE COURT: Okay. How long ago were you doing
9 that? When is the last time that you volunteered with that
10 group?

11 JUROR: I think it's been probably three years.

12 THE COURT: Okay. Any particular reason that you
13 stopped doing it?

14 JUROR: It was hard. So I did it for two and a
15 half years, and it was enough.

16 THE COURT: You indicated that you got a
17 presentation from the District Attorney's Office, I'm
18 assuming as part of that 40-hour training?

19 JUROR: Right.

20 THE COURT: What are your thoughts about the
21 Boulder District Attorney's Office based on that experience?

22 JUROR: They were -- gave quite a good
23 presentation of what -- why they might follow a case, why
24 they may not follow a case, how difficult it was to prove
25 some of the things. But it was positive. I don't think it

1 was a long presentation.

2 THE COURT: Okay. I mean, clearly in this case
3 the prosecution is going to be presented by the District
4 Attorney's Office, Mr. Brackley and Mr. Kellner. Are you
5 going to be inclined to sort of listen more attentively or
6 maybe lean their way because you're familiar with their
7 office from that volunteer work?

8 JUROR: I hope not.

9 THE COURT: I hope not too, but I'm asking.

10 JUROR: I can't say at this point. I can say that
11 was a positive experience. I can't say that I lean towards
12 them or against them.

13 THE COURT: Would you be able to listen with an
14 open mind?

15 JUROR: I think so.

16 THE COURT: Would you be able to follow the law
17 that I give to you?

18 JUROR: I think so.

19 THE COURT: Mr. Brackley, any questions?

20 MR. BRACKLEY: Just real quick. Mr. Zeff, what
21 kind of work did you do prior to your unemployment?

22 JUROR: How far back do you want to go? I'll give
23 it quick. I worked for Kodak for 27 years in marketing and
24 sales. I got an early retirement from that and started an
25 arts nonprofit here in Boulder called Open Studios. Did

1 that for 15 years and then worked one year as a director of
2 Colorado Group.

3 MR. BRACKLEY: Thank you.

4 THE COURT: Ms. Ring.

5 MS. RING: Ms. Milfeld, I'm sorry.

6 MS. MILFELD: Why did you choose to volunteer for
7 MESA?

8 JUROR: I was not working at the time by choice,
9 and I just retired from a nonprofit and wanted to do
10 something to serve the community.

11 And I had a few friends that were advocates for
12 the police department. You probably know what that is.
13 They would go out if they were called for a bank robbery or
14 something. And it seemed like something interesting and it
15 seemed like something that not a lot of people wanted to do,
16 so I thought I'd volunteer and see.

17 MS. MILFELD: Explain to me more what you mean by
18 advocates in the police department. I'm not really familiar
19 with that.

20 JUROR: Oh, the police department has volunteers,
21 and the sheriff has another group of advocates. So if they
22 go out on let's say a bank robbery and one of the tellers is
23 really upset from that, they can call one of the advocates
24 to come. And they're trained to talk to them and kind of
25 calm them down a bit.

1 MS. MILFELD: Were you close with these people?

2 JUROR: I have -- I knew three of them that were
3 advocates.

4 MS. MILFELD: Did you know any police officers
5 besides these advocates?

6 JUROR: No. I've traveled with the police I think
7 twice since I've lived here.

8 MS. MILFELD: Where did you travel to?

9 JUROR: I mean not to jail. I mean a ride along,
10 yeah.

11 MS. MILFELD: Okay. Did you interact with the
12 police in any other way at MESA or in your personal life?

13 JUROR: I think there was one time when I went to
14 the hospital and the police went also. So I talked to them
15 there, but it was a small amount of time.

16 MS. MILFELD: From your work at MESA did you ever
17 develop an opinion about police officers and their
18 credibility?

19 JUROR: I think I had a pretty good appreciation
20 of police officers before that. My father-in-law was a
21 police officer. And so never had anything bad.

22 MS. MILFELD: Were you close to your
23 father-in-law?

24 JUROR: Yeah.

25 MS. MILFELD: Based on your experience, your

1 father-in-law and the people that you worked with, you're
2 going to hear testimony from police officers. And if you
3 hear testimony from them do you think you're going to
4 automatically find them credible?

5 JUROR: Yeah.

6 MS. MILFELD: That's because your father-in-law
7 was a police officer and that's also based on your
8 experience in MESA as well?

9 JUROR: Yeah. I've had only positive experiences
10 with police officers or law enforcement.

11 MS. MILFELD: So I don't want to put words in your
12 mouth, but what I'm hearing you say is that if a police
13 officer gets up and testifies that you're more likely to
14 believe a police officer than say just hear the testimony
15 and keep an open mind about it?

16 JUROR: I think so.

17 MS. MILFELD: And it sounds like you have a
18 difficult time judging the witnesses credibility just on
19 that person itself because you would more likely believe a
20 police officer getting up and giving testimony?

21 JUROR: Without specifics I would say if
22 someone's -- if a police officer testifies and someone else
23 testifies in opposition of that, I'd be more inclined to
24 believe the police officer. But I -- on the other hand, I
25 mean, I still think I'd have an open mind, but I don't know

1 if I'd know if I have an open mind.

2 MS. MILFELD: What you're saying is based on your
3 experience it sounds like you'd be impartial -- I mean
4 partial I would say.

5 JUROR: If I was leaning any way it would be that,
6 but --

7 MS. MILFELD: Okay.

8 THE COURT: Well Mr. Zeff, I guess the real
9 question is would you be able to look at other evidence in
10 comparison to whatever --

11 JUROR: Sure.

12 THE COURT: -- a police officer says?

13 JUROR: Yeah, I'm not saying -- the way I
14 understood her question is no matter what the other party
15 said would you still believe a police officer. And no, but
16 if everything else being equal I would tend to. But I still
17 would have -- I'd have an open mind.

18 THE COURT: Would you be willing to look at a
19 police officer's testimony and evaluate it just like you
20 would any other witness' testimony?

21 JUROR: I think so.

22 THE COURT: Okay. All right. So Mr. Zeff, I'm
23 going to have you return to the courtroom. Thank you very
24 much, sir.

25 (The juror left the jury room.)

1 THE COURT: Any challenge?

2 MS. MILFELD: Judge, we'll challenge him for
3 cause.

4 THE COURT: People's response?

5 MS. MILFELD: Just a quick record. We heard from
6 Mr. Zeff that his father-in-law was a police officer. He's
7 interacted with police officers before. He characterizes
8 his prior experience as all being positive.

9 The first question I asked him about if he
10 listened to a police officer's testimony he said that he
11 probably would find that person credible.

12 All things being equal if he heard two different
13 people testify he would probably be more likely to believe
14 the police officer.

15 That was before Your Honor started asking him
16 questions about whether or not he'd keep an open mind. He
17 used language such as I think I could be impartial, I hope
18 I'd be impartial. But ultimately what he was telling
19 everyone is that he would find police officers more credible
20 than an average witness.

21 THE COURT: Response from the People?

22 MR. BRACKLEY: Judge, I think those were
23 Ms. Milfeld's words. I think the words out of the actual
24 juror were he will -- he'll -- he hopes he could. And I
25 think that's the best we could expect.

1 You talk to these jurors in a vacuum of two
2 anonymous unknown people, it's a lot different than you talk
3 to them of the scale of an entire trial where there's going
4 to be a lot of different sides presented.

5 That's how Your Honor staged the question to the
6 panelist, in which case he said he could, that he would try.
7 That's the best we could ask for anyway.

8 THE COURT: I understood the juror to say he would
9 listen with an open mind and weigh testimony of a police
10 officer. I think his initial characterizations were he said
11 he was assuming in all of the things being equal. But I
12 think he clarified it enough that I don't have a concern
13 that he should be excused for cause. So I'll deny that
14 challenge.

15 This should be O'Hanlon.

16 THE CLERK: Mr. Conor O'Hanlon.

17 THE COURT: Hi, Mr. O'Hanlon. So we wanted to
18 talk to you in private because of some of the information
19 that you put on your questionnaire. As you can tell we've
20 got a lot of them. So I need a minute to find yours.

21 JUROR: Take your time.

22 THE COURT: Counsel, do you see what page he's on?

23 MR. BRACKLEY: Your Honor, I can slide mine over
24 there if you want to.

25 THE COURT: Well, I'm going to take you up on

1 that.

2 MR. KELLNER: He's on page 2.

3 THE COURT: All right. Sorry about that,
4 Mr. O'Hanlon.

5 JUROR: No worries.

6 THE COURT: Trying to juggle about a hundred pages
7 of paper, a hundred questionnaires.

8 So I think we wanted to talk to you in private
9 because of the answer you put about having a particularly
10 good or bad experience with a police officer. And you said
11 you feel harassed by the police on a regular basis in
12 Longmont. Can you be a little more specific about that for
13 me?

14 JUROR: Probably five or six times I've been
15 pulled over just walking home from work. I work late hours.
16 I'm a bartender. And probably five or six times in the last
17 maybe two months I've been pulled over and just stopped for
18 I don't really know why.

19 You know, it started to really not make sense to
20 me how frequently it started to happen. And never have I
21 been ticketed or charged or even suspected of anything, just
22 stopped by the police.

23 THE COURT: What time are you getting off work and
24 driving home?

25 JUROR: I don't drive. I walk. That's what

1 really bugs me is I'm wearing a white T-shirt just going
2 from getting pulled over for I don't know what. And it's
3 just -- it's just happened too many times in the last two
4 months to not be anything, you know. I know they're just
5 doing their job, but it's just an inconvenience to me. And
6 they're not very nice about it when they do it.

7 THE COURT: How does that translate to if you're a
8 juror and you hear a police officer testify? I mean, what
9 are you going to think about their testimony?

10 JUROR: That would depend on what he says I
11 suppose.

12 THE COURT: Okay.

13 JUROR: Depends on the testimony specifically for
14 sure.

15 THE COURT: Okay. Well, I guess, you know, one of
16 the things that I'd be worried about is that since you've
17 had these bad experiences that all of the sudden you're
18 going to see a police officer on the stand and go oh, police
19 been mean to me, hassling me, I'm not going to listen or I'm
20 not --

21 JUROR: It's a fair assessment that I might be
22 biased, yeah, in that situation.

23 THE COURT: Okay. And then the question is what
24 do you do with that bias? How does that affect your ability
25 to be a juror, I mean, to listen with an open mind?

1 JUROR: It might -- like I said, it depends on the
2 testimony.

3 THE COURT: Okay. Let me have the attorneys
4 follow up with a couple questions. Mr. Brackley.

5 MR. BRACKLEY: So Mr. O'Hanlon, we're concerned
6 here about people who come in and say I've had great
7 experiences with the cops, you know, my father-in-law is a
8 police officer and I would tend to believe a police officer
9 over anyone else.

10 And we also have experiences in this room with
11 folks who say I feel like I get harassed by the police
12 walking home from work, and I would tend to disbelieve a
13 police officer over anyone else.

14 So what we really need you to think about to talk
15 to us about here today is in the context of a trial where
16 we're going to be calling a whole bunch of witnesses, and a
17 lot them are police officers, and a lot of them folks who
18 are civilians, some folks who were former police officers.
19 And they're all going to be giving testimony about what they
20 did or saw or heard or said over the course of a whole lot
21 of years.

22 JUROR: Well, I definitely don't think that --

23 MR. BRACKLEY: When a police officer comes in and
24 agrees to testify and takes an oath to tell the truth, will
25 you start off with a bias that says I am not going to

1 believe this person because he's a police officer?

2 JUROR: Somewhat, yeah.

3 MR. BRACKLEY: When you say somewhat, can you
4 quantify that?

5 JUROR: I would probably be less inclined to take
6 everything he says as fact.

7 MR. BRACKLEY: Simply because he's a police
8 officer?

9 JUROR: Yes.

10 MR. BRACKLEY: Notwithstanding what he says in
11 relation or regards to anything else you've heard? You said
12 starting off when he's sitting there on the witness stand?

13 JUROR: Yes, my first impression would leave me
14 with a bias of I don't innately trust this person.

15 MR. BRACKLEY: Because that person is a police
16 officer?

17 JUROR: Yes.

18 MR. BRACKLEY: Okay. Thanks.

19 THE COURT: Hold on. For the defendant.

20 MS. RING: Mr. O'Hanlon, the first thing you told
21 us was about your personal experience with police officers
22 recently; right?

23 JUROR: Yes.

24 MS. RING: And this is all -- all the instances
25 we're talking about happened in Longmont?

1 JUROR: Yes.

2 MS. RING: So all Longmont Police Department
3 officers?

4 JUROR: Yes.

5 MS. RING: Seem to be the same officers or
6 different officers, or do you even know?

7 JUROR: I quit taking cards after the fourth and
8 fifth time, so I don't really know.

9 MS. RING: Okay. And you know, as Mr. Brackley
10 said we're just as concerned with people who are going to
11 have a bias because they think that police are automatically
12 more truthful.

13 And you know, what we're looking for is jurors
14 that will listen to all of the evidence and based on all the
15 evidence they hear from different witnesses and what the
16 questions are make a decision based on that evidence; right?
17 Does that make sense?

18 JUROR: Yeah.

19 THE COURT: So we're looking for jurors from
20 different walks of life and different experiences. And so
21 if you were to hear that all of the police officers that --
22 actually none of the police officers involved are part of
23 the Longmont Police Department, that we're talking about
24 basically a Boulder Police Department investigation, does
25 that have an impact on what you think your bias might or

1 might not be?

2 JUROR: I don't particularly think so, no. I
3 mean, they all wear the same badge as far as I'm concerned.
4 And I've had bad experiences with the police in Boulder as
5 well several times.

6 MS. RING: Okay. So you --

7 JUROR: That was years ago. But still, I've had
8 bad experiences with the police in Boulder as well as in
9 Longmont.

10 MS. RING: And even if the judge were to tell you
11 you're allowed to use your life experiences, but you need to
12 weigh all the evidence and not make assumptions based on
13 simply somebody wearing a badge, that's still something you
14 think you'd have a difficult time doing?

15 JUROR: Yeah.

16 MS. RING: Thank you.

17 THE COURT: Mr. O'Hanlon, I'm going to go ahead
18 and excuse you from the panel. So you're done. You can go.

19 JUROR: Cool.

20 (The juror left the jury room.)

21 THE COURT: The record should reflect that both
22 counsel put their pen down as a challenge for cause.

23 Next one should be Sprigg is in because of the --

24 MR. BRACKLEY: I guess we wanted to ask what that
25 meant, because of timing or availability?

1 THE COURT: The illness of her father.

2 THE CLERK: This is Ms. Kristen Sprigg.

3 THE COURT: Hi, Ms. Sprigg. Come on in and have a
4 seat there.

5 I wanted to talk to you in private because you
6 indicated that your father was ill.

7 JUROR: Yes, sir.

8 THE COURT: And I wanted to know what that meant
9 in terms of, you know, if you were required to sit on this
10 jury for the next two weeks, how is he doing, and do you
11 have any sense of what your obligations are going to be
12 regarding him over the next couple of weeks?

13 JUROR: Absolutely not. It's one of those things
14 where a very vibrant, very outgoing man was stricken with
15 multiple things at a very short period of time. And he's
16 just weak, and so I just check on him daily. And it's not
17 that I live with him, you know, by any means.

18 THE COURT: I understand why you would want to
19 check on him. Does he have other caregivers that can be
20 with him if you're on jury service?

21 JUROR: Yes, sir.

22 THE COURT: Mr. Brackley, do you have any
23 questions?

24 MR. BRACKLEY: No. We just wanted to kind of
25 clarify.

1 THE COURT: Yeah, I just wanted to make sure.

2 Ms. Ring?

3 MS. MILFELD: You also indicated in your jury
4 questionnaire that your son works for the Sheriff's
5 Department?

6 JUROR: In Hillsborough County. He's getting
7 ready to transfer to Tampa PD now.

8 MS. MILFELD: How long has he been there for?

9 JUROR: He went through Hillsborough County
10 Academy. That was a year. And then he's been on just over
11 a year, a year and a half.

12 MS. MILFELD: You have other family members that
13 have been in the police department?

14 JUROR: Well, my ex-husband was law enforcement
15 military, then short term out.

16 MS. MILFELD: How long was he with the police
17 department for?

18 JUROR: My ex-husband?

19 MS. MILFELD: Yeah.

20 JUROR: Not long at all. He transferred as he was
21 going to school.

22 MS. MILFELD: You also have a sister that works
23 for the TSA?

24 JUROR: Yes.

25 MS. MILFELD: How long has she worked there for?

1 JUROR: Oh lord, 15 years, 20 years.

2 MS. MILFELD: Do you have any friends that are in
3 the police departments?

4 JUROR: I know a lot in a nice way. I go to
5 Flatirons Community Church. We have a lot of the guys there
6 from the area. And then I work at McGuckins, and the guys
7 are in there all the time.

8 MS. MILFELD: Based on your family experience with
9 people working at various agencies do you have an opinion
10 about police officers whether they're good, whether they're
11 bad?

12 JUROR: I'm kind of biased on that. I think they
13 all get a bad rap I think. I've never met one personally
14 myself or had an experience in any way whatsoever other than
15 they deserve our ultimate respect.

16 MS. MILFELD: And when you answered that you said
17 I'm kind of biased?

18 JUROR: My son. I want everybody to be very nice
19 to my son.

20 MS. MILFELD: Okay. And besides, you know, you
21 want people to be nice to your son, are you biased in the
22 sense that if you hear testimony from a police officer do
23 you think that you're just naturally more likely to believe
24 what he or she says?

25 JUROR: Wow. I would definitely find myself, you

1 know, listening to that intently, definitely. I mean, you
2 know, I don't feel like in their position they wouldn't have
3 anything to gain by dishonesty or bringing in any type of
4 evidence that would cause problems. I mean, that's their
5 job is to make sure that that's done well.

6 So I -- yeah, I think I'd probably listen very
7 intently.

8 MS. MILFELD: Okay. Do you think that the
9 starting off point, you see a police officer walk up to the
10 stand and sit down, where do you think you're starting off
11 as far as judging that person's credibility before you even
12 heard anything come out of his or her mouth?

13 JUROR: I think I would have to hear what he had
14 to say based on whatever is sitting in front of him.

15 MS. MILFELD: I don't have any further questions,
16 Judge.

17 THE COURT: Thank you very much. If you'd return
18 to the courtroom.

19 JUROR: Thank you, sir.

20 THE COURT: All right. Thank you very much.

21 (The juror left the jury room.)

22 THE COURT: Next one should be Casas, Jacqueline
23 Casas.

24 MS. RING: We're trying to alternate, Judge. So
25 this one is me.

1 THE COURT: It only matters so I know whose pen to
2 look for.

3 MS. RING: I'm in charge of the pens.

4 THE COURT: Always?

5 MS. MILFELD: She's always in charge of the pens.

6 THE COURT: That makes it easier.

7 MS. RING: She's so young.

8 THE CLERK: This is Ms. Casas.

9 THE COURT: Hi, Ms. Casas. Go ahead and have a
10 seat if you would please.

11 So I wanted to talk to you in private because of a
12 couple things that you put on your questionnaire. The first
13 one had to do with your brother's situation.

14 JUROR: Yeah.

15 THE COURT: What's going on with him right now?

16 JUROR: Right now he's on the up and up. He's --
17 you know, he finished all of his probation and all that good
18 stuff doing the best he can. It's hard when you have a
19 felony on your record. But he's not been in trouble in a
20 long time.

21 THE COURT: Okay. And you in put in your
22 questionnaire that you'd been the support system for your
23 brother.

24 JUROR: I've come to all of his -- I always came
25 to all of his court dates and all that good stuff and

1 just -- I mean, he's my brother. He made some dumb
2 mistakes. And you know, I just supported him the best that
3 I could.

4 THE COURT: Okay.

5 JUROR: I've also seen on the flip side how hard
6 it can be.

7 THE COURT: Because of the felony?

8 JUROR: Yeah.

9 THE COURT: So based on that experience what do
10 you think that means for your ability to be a juror?

11 JUROR: I'm not sure it allows me a hundred
12 percent to be impartial, I mean, if that's the best way to
13 put it. I definitely have seen some things inside with him
14 on certain things maybe not knowing that that's what I'm
15 doing. I don't know how else to explain it.

16 THE COURT: Well, no, actually I think that's a
17 good way to explain it.

18 I mean, look, everybody walks into the courtroom
19 with, you know, life experiences and biases and prejudices.
20 I mean, that's just who we are as people.

21 JUROR: Yeah.

22 THE COURT: So really the question is based on
23 your experience with your brother, do you think that what
24 you know from that and what you learned from that and what
25 you feel from that, do you think you could set that aside if

1 you were a juror in this case?

2 JUROR: I don't know that I could.

3 THE COURT: Okay. Let me ask it another way, do
4 you think you could listen to all the evidence with an open
5 mind?

6 JUROR: Yeah, but I still think lingering would be
7 some concerns. Again, I've seen some -- been through some
8 stuff with him. I'm not sure if I can separate those two.
9 It's kind of an emotional thing for me.

10 I've been through a lot of emotional life
11 experience. I think it might make it a little bit hard.
12 When I was 16 my mother was killed in a traffic accident.
13 So we had to go through a big civil lawsuit. So I have
14 some, you know, lingering emotional things about that as
15 well that perhaps could make it hard for me to -- to set
16 those things aside.

17 THE COURT: Okay. Let me see if the attorneys
18 have any questions for you. Mr. Brackley.

19 MR. BRACKLEY: So Ms. Casas, what we ask for today
20 in this process -- and I mean, like right here in this room
21 is with the understanding that we know and we expect people
22 to come into this room with a lot of life experience and a
23 lot of things that sort of define how they feel about
24 certain things, the promise that we ask for is could you put
25 that aside so that you can give both the People and the

1 defendant a fair trial. Can you put any life experiences
2 aside so that you have an open mind, that you can be
3 impartial?

4 JUROR: Um, it's hard. It's very tough. I --
5 honestly I'm not sure I can. I don't know if I can answer
6 that with yes, a hundred percent sure I can come in and say
7 this happened over here and just not have these things
8 wandering, be a part of -- I mean, they're, you know, some
9 deep roots for me in those kinds of things.

10 MR. BRACKLEY: Is there anything about your
11 brother's case focusing on his interaction with law
12 enforcement that has defined your feelings today?

13 JUROR: You mean that stands out?

14 MR. BRACKLEY: Well, I mean, obviously he was
15 arrested and he was convicted. So that could be considered
16 a negative interaction with law enforcement.

17 But was there anything about his experience with
18 law enforcement that, you know, about -- or that you think
19 about that gives you a bias against the police?

20 JUROR: I mean, just being honest, I can -- going
21 through the process a lot of times it was tough on us, you
22 know. He had a tough row to hoe. He has little people that
23 he tries to take care ever. He could get so close to being
24 finished with probation and things, but then he couldn't get
25 a job so he couldn't pay for it. So I mean, a lot of those

1 kinds of feelings make you feel like geez. I mean, I don't
2 know if that's what you're asking for.

3 MR. BRACKLEY: Those are common experiences. But
4 do you think he was treated fairly?

5 JUROR: I suppose so.

6 MR. BRACKLEY: Do you think the police treated him
7 fairly? Was it here in Boulder County?

8 JUROR: Yeah, what happened to him was in Boulder
9 County.

10 MR. BRACKLEY: Do you have any impressions about
11 the DA's Office here in Boulder County?

12 JUROR: No impressions, not negative or positive.

13 MR. BRACKLEY: Okay. So would you say that your
14 brother was treated fairly by the DA's Office?

15 JUROR: I suppose so.

16 MR. BRACKLEY: Okay. I think I -- I think my
17 ultimate question kind of got lost by my additional
18 questions. But can you promise us an open mind?

19 JUROR: I don't know that's what I can promise.
20 That's why I was trying to be honest on my questionnaire. I
21 do have a lot of deep seeded roots and all that stuff.

22 MR. BRACKLEY: Okay. When you say you don't know
23 that you can promise us an open mind, are you expressing
24 some biases against any particular part of the system or
25 party? I guess I'm trying to more specifically define --

1 JUROR: Why I can't be open-minded?

2 MR. BRACKLEY: Right.

3 JUROR: Again, it's just a lot. I've been in this
4 courtroom a million times for both types of cases. And I
5 don't always have -- I don't always leave here all warm and
6 fuzzy. And so yeah, I have -- I do have a lot of -- like a
7 lot of negative experiences here, but not because it was --
8 I don't know. I don't know how to describe it.

9 MR. BRACKLEY: Okay. Thank you.

10 THE COURT: Ms. Ring?

11 MS. RING: So I think we all appreciate you
12 sharing this with us and your experiences. And we certainly
13 don't want to put you in a position where you're going to be
14 uncomfortable.

15 On the other hand, in order to get the best panel
16 of fair and impartial jurors in any case you want people
17 from different walks of life and different experiences.

18 And in some ways some of your -- the idea of these
19 experiences you've had, especially when you're not telling
20 us that they are, you know, anti-defense attorney,
21 anti-judge or anti-police department, that if it's a general
22 skepticism about the system that in some ways that maybe
23 that makes you a better juror.

24 And I think what Mr. Brackley's questions were
25 more like this bias or the inability to keep an open mind.

1 If it's -- if it's really just experience that's there and
2 it's not going to say I'm more likely to believe the
3 individual's guilty or I don't trust the police department,
4 in some ways it almost seems like you're a better candidate
5 than some other jurors.

6 So I guess the first thing I want to know and kind
7 of try to elaborate more about what we're concerned about, I
8 still -- are you feeling there's some bias towards any part
9 of this process?

10 JUROR: I mean, it's -- I'm not sure how to answer
11 this. I feel like just being here, excuse me, is kind of
12 emotional for me. So I don't know that I could mentally,
13 you know, differentiate those things. It's just hard. I
14 don't know how else to describe it. I mean, on the flip
15 side of that I don't know how I could explain the bias.
16 It's just kind of tough.

17 MS. RING: So one question sometimes I ask of
18 people is so let's say it was your brother or someone else
19 who is close to you who was going to be on trial.

20 JUROR: Yes.

21 MS. RING: Would you want someone with your
22 mindset and experiences as a juror or --

23 JUROR: No. I think I would want somebody who is
24 like a well-rounded -- like you described, somebody who
25 comes in clear-minded and they don't have all of these

1 things in their mind of, you know, I know what could happen
2 to this person. I know that this person is my brother, he's
3 my family. But man, he's made some crazy mistakes in his
4 life too.

5 So I also think of that of well, this is what --
6 you know, this is what's been handed to you, this is the way
7 this goes. But I think I want somebody who just was eager
8 and mentally, you know, a little bit more of a clean slate
9 or a blank piece of paper.

10 MS. RING: I don't have any other questions.

11 THE COURT: Okay. Ms. Casas, let me ask you one
12 other thing. You indicated that you got three smaller
13 children; 8, 5 and 2. Who is watching the kids while you're
14 here?

15 JUROR: Today my husband is. He has a small
16 business. He's just opening late.

17 THE COURT: Who is going to watch the kids for the
18 next two weeks if you're on this jury?

19 JUROR: I have no idea. I mean, my dad works
20 full-time. He lives close. So do his parents. So I don't
21 know. That's where my question comes in to you, what do
22 people do in my situation? It stressed me out all weekend
23 to think about it. I have no idea where I would put them.

24 THE COURT: Last thing I'd ask you, if you're on
25 this panel, if you're on this jury and you have to make a

1 decision, can you promise that you would make your decision
2 only on the evidence that you hear in the courtroom and not
3 based on anything else?

4 JUROR: Yeah, I think so.

5 THE COURT: Okay. All right. So why don't you go
6 ahead and have a seat back in the courtroom.

7 JUROR: Please take the little things into
8 consideration when you're thinking of me. I know it's not a
9 hardship, but it's hard. I don't know what we'll do. Thank
10 you.

11 THE COURT: Okay. Thank you.

12 (The juror left the jury room.)

13 THE COURT: This pen thing is confusing me. Is
14 your pen down?

15 MS. RING: My pen always goes out there I guess if
16 we --

17 THE COURT: Is your pen down?

18 MR. BRACKLEY: Yes.

19 MS. RING: Let's excuse her.

20 THE COURT: Okay. By agreement she'll be excused,
21 Ms. Casas.

22 MR. BRACKLEY: Yes, Your Honor.

23 MS. RING: Yeah.

24 MR. BRACKLEY: I think if we put her on the jury
25 she would be back tomorrow in tears.

1 THE COURT: This should be Ron Smith I think.

2 THE CLERK: This is Mr. Ronald Smith.

3 THE COURT: Hi, Mr. Smith.

4 Krista, would you let Ms. Casas know that she is
5 excused?

6 THE CLERK: Is it okay if I hand out the wireless
7 password? Is that okay?

8 THE COURT: But remember tell them they can't look
9 up anything about this case.

10 THE CLERK: Hi, Mr. Smith. Sorry, I don't mean to
11 talk over you like you're not there.

12 We wanted to talk to you in private based on some
13 of the information that you put on your questionnaire. It
14 had to do with your job and some hardship regarding that.
15 Can you tell me a little bit more about what your concerns
16 were?

17 JUROR: Yeah, I'm involved in setting up equipment
18 around the country. And right now I'm in the middle of a
19 job in North Dakota that I have three other individuals that
20 are under my supervision. The work isn't going to stop if
21 I'm not there, but it will take longer to complete. And
22 I've talked to someone with my boss. They've made some
23 arrangements if I am selected as a juror.

24 THE COURT: Okay. Are you comfortable with the
25 idea that you could serve on this jury and the work would

1 still go on and your boss would accommodate it?

2 JUROR: Yes.

3 THE COURT: Okay. Mr. Brackley, did you have any
4 questions?

5 MR. BRACKLEY: No, I don't. Thank you, sir.

6 THE COURT: Ms. Ring, did you have any?

7 MS. RING: No, thank you.

8 THE COURT: Or Ms. Milfeld, I'm sorry.

9 MS. MILFELD: No, thank you.

10 THE COURT: Mr. Smith, thanks. I appreciate the
11 information. If you'll have a seat back in the courtroom.
12 Thank you, sir.

13 (The juror left the jury room.)

14 THE COURT: Next one should be I think Graham
15 Clark.

16 THE CLERK: This is Mr. Graham Clark.

17 THE COURT: Okay. Hi, Mr. Clark. Come on in and
18 have a seat.

19 Hey Krista, did Mr. Bishop show up?

20 THE CLERK: No, not yet.

21 THE COURT: All right.

22 Good morning, Mr. Clark. So we wanted to talk to
23 you in private because of the some of information that you
24 put in your questionnaire, two different areas that I saw.

25 One, you indicated that you're a born again

1 Christian and that might play into your decision in the
2 courtroom. Can you elaborate on that a little bit?

3 JUROR: It could, it could not. Sometimes on --
4 in judgment of others I would possibly pass on some that I
5 would think that would be close unless I felt very strongly.

6 THE COURT: When you say judgment of others, what
7 are you talking about?

8 JUROR: You know, something like -- I mean, I know
9 that the justice system and all. But if something were to
10 be close, I would probably not try and judge another if I
11 didn't feel very strongly that that was the case.

12 THE COURT: Okay. Well, let me ask you, one of
13 the things that a juror has to do is decide if someone is
14 telling the truth or not.

15 JUROR: Right. And that's not a problem. I can
16 decide that.

17 THE COURT: What if it's close? I mean, is
18 that --

19 JUROR: I would still decide. But my point is I
20 would probably side on less judgment than more.

21 THE COURT: I'm not sure I understand.

22 JUROR: Okay. So I would probably tend to -- if I
23 didn't feel very strongly, I would probably tend to not --
24 not judge another based on -- I guess I don't know how to
25 explain it the best, but unless I felt very strongly about

1 what was the facts and, you know, all the criteria and all
2 the stuff that goes along with the process that I've not
3 been through yet, but that I know of that I would -- it
4 would be more difficult for me to say yes, this person did
5 it if he -- unless I felt very strong.

6 THE COURT: So you're talking about the decision
7 of guilty or not guilty?

8 JUROR: Right.

9 THE COURT: Do you understand that under our
10 system people are presumed innocent?

11 JUROR: Yeah.

12 THE COURT: Do you understand they remain innocent
13 unless and until they're proven guilty beyond a reasonable
14 doubt?

15 JUROR: Yeah.

16 THE COURT: Okay. Do those -- does that make
17 sense to you in terms of what you're talking about and when
18 you say feeling strongly?

19 JUROR: Yeah, it does. All my point is is that --
20 you know, is that I would -- I would -- unless I felt very
21 strongly like you were saying.

22 THE COURT: Beyond a reasonable doubt, is that
23 feeling strongly, is that sort of equivalent in your mind?

24 JUROR: Yeah. It's equivalent, yeah.

25 THE COURT: Okay. Now, so the prosecution has to

1 prove to you beyond a reasonable doubt that Mr. Clark is
2 guilty.

3 JUROR: Right.

4 THE COURT: If they can't do that you understand
5 what your obligation is?

6 JUROR: Right.

7 THE COURT: What would that be?

8 JUROR: To say he's not guilty.

9 THE COURT: Okay. If they are able to prove to
10 you beyond a reasonable doubt, do you understand what your
11 obligation as a juror would be?

12 JUROR: Yeah, to say that he's guilty. I'm just
13 saying that I would feel that that would have to be pretty
14 strong is all my point was.

15 THE COURT: Okay. Let me get back to the point
16 where I was asking you about sort of judging credibility,
17 whether you believe a witness or not. Is that something
18 that you're comfortable doing? Are you able to do that?

19 JUROR: Yeah. I'm able to do that, yeah.

20 THE COURT: Okay.

21 JUROR: Yeah. The point of the questionnaire was
22 just that it would be -- it would take a lot to convince me
23 at some point.

24 THE COURT: Well, let me ask it this way --

25 JUROR: Like you said, beyond a reasonable doubt.

1 THE COURT: Okay. And then you made one other
2 observation in your questionnaire that you had a bad
3 experience. You were driving friends home, and you got
4 pulled over.

5 JUROR: That was just racial profiling.

6 THE COURT: Where was that?

7 JUROR: That was in Iowa.

8 I just felt like that was the only reason that I
9 was pulled over is obviously racial profiling, which I
10 thought was kind of wrong.

11 THE COURT: Okay. That experience, how does that
12 play into your ability to be a fair and impartial juror in
13 this case?

14 JUROR: May or may not on this case. I don't know
15 the details. But it would be more trusting police officers
16 kind of like that they may or may not be pulling people over
17 for the right reasons.

18 THE COURT: So if you hear a police officer
19 testify in this case while you're a juror, what are you
20 going to do with that?

21 JUROR: Well, I would look at what he's saying and
22 see if I believe him. But it would just kind of be in the
23 context that I would bring.

24 THE COURT: Okay. Is that any different than the
25 way that you would evaluate another witness and whether or

1 not they were being truthful?

2 JUROR: Hard to say. Depends on if it would be
3 racial profiling or if it had any racial bias at all
4 involved.

5 THE COURT: Okay. Let me see if the attorneys
6 have any questions. Mr. Brackley?

7 MR. BRACKLEY: I don't, sir. Thank you.

8 THE COURT: Ms. Milfeld?

9 MS. MILFELD: No further questions.

10 THE COURT: Okay. So thank you, Mr. Clark. If
11 you'd have a seat back in the courtroom.

12 (The juror left the jury room.)

13 THE COURT: The next one should be Kacynski.

14 MR. KELLNER: Towards the end, last page.

15 THE COURT: Okay. Thanks.

16 THE CLERK: This is Cynthia Kacynski.

17 THE COURT: Hi, Ms. Kacynski. Come on in and have
18 a seat please.

19 I hope you don't feel singled out. We wanted to
20 talk with you a little bit based on some of the information
21 that you put in your questionnaire, like there were a couple
22 different areas that we wanted to talk to you about.

23 First, you indicated that you maybe knew vaguely
24 about the case. Have you had a chance to think on that
25 anymore?

1 JUROR: No, just vaguely. I just felt like I read
2 something about it. It just sounded familiar.

3 THE COURT: Okay. Let me ask you this, if you're
4 sitting in the middle of the trial and all of the sudden you
5 hear testimony or you see some evidence and all the sudden
6 you start thinking oh, yeah, I remember that from what I
7 read here or heard here, something outside of the courtroom,
8 is that -- your prior knowledge, is that something that you
9 can set aside and not base a decision on it?

10 JUROR: If asked to do so, yes.

11 THE COURT: Yeah, I would ask you to do that,
12 okay?

13 You've mentioned that graphic images and
14 depictions of violence make you feel ill. So obviously this
15 is a murder case.

16 JUROR: That's why I wrote that.

17 THE COURT: You know, I suppose everyone's
18 definition of graphic is probably a little different because
19 it's subjective, but I think there probably will be some
20 photographs of a dead person's body at the crime scene and
21 maybe otherwise, maybe six or eight or ten of them total.

22 If those types of pictures are presented as
23 evidence and you're a juror, how are you going to deal with
24 those?

25 JUROR: Well, it's kind of hard to anticipate

1 that. That's why I wrote that down, because I was feeling a
2 little bushy when I was in that room the other day and I
3 thought I don't know how I would feel. You know, I'm just
4 being honest. I don't know.

5 THE COURT: Okay.

6 JUROR: Hopefully I'd be okay. But I don't know
7 if I'd need to leave. And I thought well, that's not very
8 productive for someone who was trying to give some
9 assistance to a case.

10 THE COURT: Well, I mean, part of my job is to
11 make sure that evidence doesn't come in that's too shocking
12 or too upsetting or too graphic. But you know, everyone has
13 their own sort of individual threshold.

14 If those types of pictures were admitted into
15 evidence, do you think it's something that you could at
16 least look at and consider, because it would be part of your
17 job as a juror?

18 JUROR: I could try. I mean, you know, it's hard
19 to anticipate. Again, I don't -- you know, I would do what
20 I could do, but I can't control all --

21 THE COURT: You can't control your reaction, I
22 understand.

23 JUROR: Yeah, so I appreciate your question, but I
24 can't answer that too definitively because I don't know.

25 THE COURT: Okay. And I understand that. I mean,

1 we're in a vacuum. And I don't have the pictures to show
2 you.

3 So tell me about your travel plans.

4 JUROR: Well, I'm -- I have plans, a flight out to
5 leave on Friday to visit my daughter in college for parents
6 weekend. I haven't seen her since I dropped her off --
7 actually two of them. Our flight is at 2:00. So we were
8 going to leave Boulder at noon, kind of pushing it, just for
9 the weekend, yeah.

10 THE COURT: Let me ask you, is it something where
11 if you had to you could move the flight later Friday?

12 JUROR: I haven't looked into that. I mean, I
13 could look into it. It's a very, very tight trip anyways.
14 But you know, I could check on that.

15 THE COURT: You would be coming back on Sunday?

16 JUROR: Sunday night we're coming back.

17 THE COURT: Where do your daughters go to school?

18 JUROR: They're at Pepperdine University.

19 THE COURT: I have a senior that is looking at
20 colleges, and Pepperdine is very attractive.

21 JUROR: I know your daughter actually. She's
22 friends with my daughter from swimming, yeah. I don't know
23 if that -- that question wasn't asked on there, but --

24 THE COURT: Who is your daughter?

25 JUROR: Blaire Kacynski. Maddie, she's been in

1 our -- I'm sorry, I'm just --

2 THE COURT: That's actually good to know. That's
3 good for the lawyers to know.

4 Okay. I think given all of the circumstances
5 including travel plans we're going to go ahead and excuse
6 you. And I appreciate your time.

7 JUROR: Okay. All right. Thank you.

8 THE COURT: Say hi to your daughter.

9 (The juror left the jury room.)

10 THE COURT: Record should reflect that both
11 counsel put their pen down indicating a challenge for cause.

12 This should be Specht, fourth page.

13 MS. RING: If I could get a ten-minute break after
14 Mr. Specht?

15 THE COURT: Sure. Anything to get out of this
16 polyester sweat box.

17 THE CLERK: This is Michael Debruin.

18 THE COURT: Hi, Mr. Debruin.

19 THE CLERK: There are a few people in the gallery
20 that are not part of the jury panel, and I wasn't sure --
21 we're a little tight on space, but I wasn't sure what --

22 THE COURT: Yeah, I need -- for right now I need
23 to please ask anyone in the courtroom who is not a member of
24 the jury panel, because of space they need to step out in
25 the hallway. Then once we continue in open court they'll be

1 allowed to return to the courtroom.

2 Where is Mr. Specht?

3 THE CLERK: I don't know.

4 THE COURT: Hi, Mr. Debruin. I didn't mean to
5 talk over you like you weren't there. Give me a second to
6 find your questionnaire.

7 We wanted to talk to you in private because of
8 some of the information that you'd included in your
9 questionnaire.

10 MR. BRACKLEY: Are you the big game hunter?

11 JUROR: Yes, sir.

12 THE COURT: I remember the information. I just
13 can't find the questionnaire right now. There it is, second
14 page. So you got a trip starting the 18th?

15 JUROR: Yes, sir. Yes, Your Honor.

16 THE COURT: Tell me where you're going and --

17 JUROR: About 40 miles north and west of Craig,
18 Colorado. It's about a seven-hour drive.

19 THE COURT: Going elk hunting?

20 JUROR: Elk and deer.

21 THE COURT: How long were you planning to be in
22 elk camp?

23 JUROR: We usually do five to seven days. We go
24 up early to get a place to camp. We hunt BLM land. It
25 opens Saturday, the 20th. We'll stay until Wednesday or

1 Thursday depending on what happens and weather conditions
2 and stuff like that. We rustic camp, my son-in-law and
3 myself and a couple other guys.

4 THE COURT: Okay. What game management are you
5 going to be in?

6 JUROR: 3 and 301, usually in unit 3 most of it.
7 They're a combined unit. That's usually in unit 3 where we
8 camp and do most of our hunting.

9 THE COURT: Did you have to use preference points
10 to get your draw for that unit this year?

11 JUROR: I don't think I -- no, I drew a buck
12 license. I think I might have had one point on that one.
13 And I drew a cow elk license, which you don't really need
14 preference points for. And I have over-the-counter bull
15 license.

16 THE COURT: Okay. You said you don't sit well for
17 long periods of time. Tell me a little bit about that.

18 JUROR: That's just my -- I'm -- I've been a
19 carpenter my whole life in construction. And I'm just a
20 mover. I'm kind of on the nervous side. I've never had a
21 sit-down job. I'm pretty much on my feet all the time and
22 moving.

23 THE COURT: Okay.

24 JUROR: That's kind of what I was referring to on
25 that.

1 THE COURT: Not a physical impairment or --

2 JUROR: Well, nothing documented, you know, as far
3 as that goes, no, I guess.

4 THE COURT: Okay.

5 JUROR: I'm just a restless type.

6 THE COURT: Typically I wouldn't have you sitting
7 in your chair for longer than two hours before we take a
8 break. And usually it would be more like an hour and a
9 half. You can accommodate that, can't you?

10 JUROR: If I had to, yes, sir.

11 THE COURT: Okay. Let me see if the attorneys
12 have any questions for you. Mr. Brackley.

13 MR. BRACKLEY: Mr. Debruin, just one follow-up
14 question. Just for the record, can you kind of tell us
15 about any financial loss that you would suffer as a result
16 of not being able to go on this trip?

17 JUROR: Well, not really -- well, I have a hundred
18 fifty dollars worth of licenses in my pocket right now. The
19 time off I have. I'm a contractor, so I can come and go
20 when I want at this point in my life. I can absorb it. My
21 wife has a good job.

22 This is not an economic thing for me as much as it
23 is a yearly tradition. You know, the money thing, well, we
24 all want more all the time, but it's -- you know, I absorb
25 that only because my wife has a very good job.

1 MR. BRACKLEY: Okay.

2 JUROR: We've been married 40 years, so kind of
3 counts I guess.

4 THE COURT: Ms. Ring.

5 MS. RING: Thank you. So clearly the judge knows
6 more about this hunting thing than I do. So if you're
7 picked as a juror in this case what happens to the trip?

8 JUROR: Cancelled.

9 THE COURT: There's no way to reschedule it?

10 JUROR: No. No. It's gone. It's gone for myself
11 and the other people involved pretty much.

12 MS. RING: And then the being a mover as you
13 described yourself, if so let's say somebody close to you is
14 the person who is on trial, and for that person that you
15 care about you want jurors who can really pay attention and
16 sit and focus.

17 JUROR: Correct.

18 THE COURT: Are you concerned that you're not the
19 right person because it's just --

20 JUROR: At this place and time right now, yeah,
21 that would be my whole problem. If I were missing this trip
22 my head is not going to be in court. It's going to be
23 elsewhere.

24 And that's why I wrote what I did and how I did,
25 which is I have no problem anymore doing a jury thing. I've

1 done it before in the '80s when I was starving. And you
2 know, that hurt. But right now it's not a matter of that.
3 I don't see -- I don't see myself getting anybody a fair
4 shake when I'm sitting there freaking out about the whole
5 thing to be quite honest.

6 MS. RING: Okay. Thank you.

7 THE COURT: Okay. Mr. Debruin, let me have you
8 take a seat back in the courtroom, and actually I'm going to
9 follow you out there. So thank you very much.

10 Actually, Mr. Debruin, you're excused, so you're
11 done with your jury service. You can go home.

12 JUROR: Thank you, Your Honor.

13 (The juror left the jury room.)

14 THE COURT: So let's break until 10:20. We seem
15 to be making good progress.

16 (A recess was taken.)

17 THE COURT: So we're back on the record in
18 12CR222. The defendant and all counsel are present.

19 All right. The bailiff was advised by several of
20 the panel members that they'd been approached by non-jurors
21 who had been sitting in the courtroom and then had been
22 asked to leave because of room.

23 The jurors reported to the bailiff that those
24 people in the courtroom were members of the victim's family,
25 and that once they were outside in the hallway I think when

1 I excused the jury at about 10:05, apparently the family
2 members approached two of the jurors in the hallway and
3 tried to talk to them about the case.

4 I'm advised that the jury members advised the
5 family members that they weren't supposed to talk about the
6 case, which is positive. But the two jurors that were
7 specifically spoken to as I understand are Gary Zeff,
8 they're both on the first page, 4102, and Madeleine Pollak,
9 4278.

10 My proposal is to bring both Mr. Zeff and
11 Ms. Pollak into the jury room to talk to them about that
12 encounter.

13 MR. BRACKLEY: Do we know who these people are
14 other than members of the victim's family?

15 THE COURT: I don't. And I don't know that
16 Mr. Pollak -- I'm sorry, Ms. Pollak or Mr. Zeff can shed any
17 light on that or not. We'll bring in probably Mr. Zeff
18 first.

19 (The juror entered the jury room.)

20 THE COURT: All right. So Mr. Zeff, I needed to
21 talk to you again because I'd received some information that
22 someone had tried to talk to you?

23 JUROR: Yeah.

24 THE COURT: Can you tell me what happened?

25 JUROR: Yeah. Your clerk asked those that weren't

1 jurors to go out in the hallway. And then we took a break
2 and I went out to the hallway and sat down, and I said do
3 you guys just like to come to the different trials, is that
4 why you're here. And he -- the gray-haired gentleman said
5 no, it's my son. Then somebody else said to him you're not
6 supposed to say anything.

7 THE COURT: Okay. Did the gray-haired gentleman
8 say anything else to you?

9 JUROR: No.

10 THE COURT: Did you hear him say anything else to
11 anybody else?

12 JUROR: No.

13 THE COURT: Okay. Do you know who he was talking
14 about when he said it's my son?

15 JUROR: I assume it's the defendant.

16 THE COURT: Okay. But you don't know?

17 JUROR: No.

18 THE COURT: Okay. Did you see that gray-haired
19 gentleman talking to any other members of the jury panel?

20 JUROR: There were like four or five people next
21 to him, and I think they were all family. But I don't know
22 who is jury and who isn't at this point.

23 THE COURT: Okay. Is there anything about your
24 interaction with that gray-haired gentleman in the hallway
25 that is going to affect your ability to be a fair juror?

1 JUROR: No.

2 THE COURT: Mr. Brackley, do you have any
3 questions?

4 MR. BRACKLEY: No.

5 MS. RING: No.

6 THE COURT: Mr. Zeff, thank you very much. I
7 appreciate the information.

8 (The juror left the jury room.)

9 THE COURT: Hi, Ms. Pollak. So I wanted to talk
10 to you in private. I understand there was some contact by
11 someone not on the jury with you at the last break?

12 JUROR: Oh, no. She was sitting next to me while
13 the whole jury was in the room.

14 THE COURT: I'm sorry, maybe I got bad
15 information. Who was sitting next to you?

16 JUROR: There's somebody who is sitting in the
17 trial who is going to be at the trial, but she wasn't up for
18 jury. She happened to be sitting right next to me.

19 THE COURT: Okay.

20 JUROR: I was talking with people around me. And
21 she said -- she said I'm not on the jury. I said well, what
22 are you doing here. She said I'm a friend of the family's.
23 I've known them for years. She told me where they grew up
24 and a little bit more about that.

25 THE COURT: Okay.

1 JUROR: Then I suddenly realized oh, my God, we're
2 talking and we shouldn't be. And I don't know what she's
3 doing here.

4 THE COURT: Okay. Do you know what family --
5 whose family she was referring to?

6 JUROR: Yes, the accused.

7 THE COURT: Okay. How long do you think that
8 conversation was between you and the woman?

9 JUROR: Three minutes.

10 THE COURT: Okay. What sort of details did you
11 get from that woman?

12 JUROR: Well, what I -- she said that he had --
13 something about somebody putting up bail. And she was best
14 friends with the family and she taught with them. And what
15 else did she say? That he'd been out for 20 years or he has
16 not served anytime or just briefly. It's something about a
17 bad check.

18 THE COURT: Do you remember what about a bad
19 check?

20 JUROR: I don't know. Maybe he served time for
21 it. I don't remember.

22 THE COURT: Okay.

23 JUROR: It was naturally having a conversation
24 that it was not a good idea to.

25 THE COURT: Well, I'm glad you realized it when

1 you did.

2 Mr. Brackley, do you have any questions for
3 Ms. Pollak?

4 MR. BRACKLEY: Ms. Pollak, could you maybe clarify
5 the sequence of how the conversation began? And I mean, I
6 know it's someone sitting next to you and we have you in a
7 room kind of just waiting for us.

8 But I mean, it's just someone you started
9 conversation with and/or they started the conversation with
10 you. And it sounds like at some point you realized you
11 shouldn't be having this conversation.

12 But did you know that this was a non-juror,
13 someone who was there as a family member to support one side
14 or the other as you were having that conversation?

15 JUROR: Well, I -- I was like if you're not a
16 juror what are you doing here. And she said I'm -- I'm here
17 to watch the trial and it's because I'm really good friends
18 with the family. So that's kind of how that happened.

19 MR. BRACKLEY: And how did that information come
20 about? Like for instance, about checks or serving time or
21 being out for 20 years, how did that information sort of --
22 how did it play out? How did that --

23 JUROR: I was like, oh, my God, you're kidding me.

24 MR. BRACKLEY: When you say oh, my God, you're
25 kidding me?

1 JUROR: I was just like oh, my God, you're friends
2 of the person who was accused. I don't know anything about
3 this case at all. So I was like oh, my God, that's weird.
4 And she's like blah, blah, blah.

5 MR. BRACKLEY: Okay. Was she sort of expressing
6 an opinion about one way or the other?

7 JUROR: She was.

8 MR. BRACKLEY: Okay. Thank you.

9 THE COURT: Ms. Ring?

10 MS. RING: I don't have any questions.

11 JUROR: This is so bizarre. This is very random
12 and bizarre.

13 THE COURT: Actually those are good descriptors
14 because that's kind of what I thought when I heard this.

15 So Ms. Pollak, I think that as soon as you
16 realized that you were having that conversation that you
17 weren't supposed to have, you cut it off. But some
18 information got delivered to you. Accurate or not, it's
19 close enough in time to the trial that I'm going to go ahead
20 and excuse you as a juror in this case. And so you're free
21 to go.

22 MR. BRACKLEY: Judge, could we ask Ms. Pollak, did
23 you see any other folks out there talking with this
24 particular person or --

25 JUROR: No, because I -- she was sitting right by

1 the door, and I was the next person in. And so I turned to
2 the person next to me and I said did you hear that
3 conversation. She was like no, I don't want to hear
4 anything.

5 So I was like -- but there were about four people
6 sitting scattered throughout that were going to be sitting
7 in the trial. And I think they realized later that they
8 shouldn't be sitting there, that they got excused.

9 THE COURT: Okay. So I'm going to follow you out
10 because I'm going to -- I'm just going to step out in the
11 hallway and explain to those people that they can't be
12 talking to members of the jury panel.

13 So you have all your stuff?

14 JUROR: I do.

15 THE CLERK: Mr. Specht is here. He's going to
16 come next.

17 MS. RING: Judge, if we could wait one second
18 before --

19 THE COURT: Go ahead. You can leave. Thank you
20 very much.

21 (The juror left the jury room.)

22 MS. RING: So I would think based on your previous
23 instructions the rest of Michael Clark's family would be
24 outside the courthouse right now -- I mean the courtroom.
25 So certainly if you want us to go talk to his family, we can

1 do that. If you want to go talk to his family, we can do
2 that. However you want to handle it.

3 MR. BRACKLEY: Judge, you know, I don't think -- I
4 mean, we've all been in this business long enough, we've
5 seen families trying to -- I don't think this is that
6 scenario where people are trying to manipulate or trying to
7 cause problems. This is just --

8 THE COURT: I don't get that sense yet. But I
9 want to make sure it doesn't happen with anybody else.

10 MR. BRACKLEY: So I just don't know.

11 THE COURT: Let me suggest this, why don't
12 Ms. Ring and Mr. Brackley come out in the hallway with me.
13 And I'm just going to -- that way everybody is there, you
14 can hear what I tell the family members. And we'll be back
15 in three minutes.

16 (Pause.)

17 THE COURT: Hi. You Cory Specht?

18 JUROR: Cody.

19 THE COURT: I'm sorry, Cody.

20 So we wanted to talk to you back in private
21 because of a couple things you put on the questionnaire.
22 The first one has to do with your beliefs. You put that
23 you're a faithful Christian and you have your beliefs. What
24 does that mean in the context of being on a jury?

25 JUROR: That I just don't really take any sides.

1 I feel like everybody deserves to be forgiven for their
2 mistakes and --

3 THE COURT: Let me ask you --

4 JUROR: -- that's where I'm at.

5 THE COURT: -- have you ever been on a jury
6 before?

7 JUROR: No.

8 THE COURT: When you say you don't really take
9 sides, I mean, could you render a verdict?

10 JUROR: Maybe. I don't know. I don't know. This
11 is all new to me. I know I've been in the system before --

12 THE COURT: I was going to ask you about that.

13 JUROR: -- numerous times. So I just don't -- I
14 don't know. Sorry.

15 THE COURT: Well, I mean, I got to figure out what
16 you mean. So are you willing to listen to evidence that's
17 presented to you?

18 JUROR: Depends.

19 THE COURT: What does it depend on?

20 JUROR: Depends on what this case is all about
21 kind of. I feel I don't know. I see that Joe Pelle is on
22 the witness list as well.

23 THE COURT: Yeah.

24 JUROR: And I grew up with his son.

25 THE COURT: Ms. Ring?

1 MS. RING: Sorry, Judge.

2 THE COURT: You grew up with Joe Pelle's son?

3 JUROR: Yeah, the whole family. I don't know if
4 that would be an issue.

5 THE COURT: Well, you need to tell me would that
6 be an issue.

7 JUROR: Possibly.

8 THE COURT: What if Joe Pelle testifies?

9 JUROR: There could be a conflict of interest
10 there.

11 THE COURT: What do you mean?

12 JUROR: As far as me knowing him and growing up
13 with his family and dealing with him as a child, I feel
14 maybe I might not be able to be completely compliable if he
15 stands in front of me.

16 THE COURT: What do you mean?

17 JUROR: I feel like, I don't know, it's crazy.
18 Just everything I've been through with him, there's a lot in
19 the past with us, his kid and the whole family.

20 THE COURT: Good stuff or bad stuff?

21 JUROR: Goes both ways. More bad stuff. I don't
22 know if I totally agree with him on everything.

23 THE COURT: Well, if Joe Pelle testifies or one of
24 his deputies testify, how are you going to evaluate whether
25 or not they're telling the truth?

1 JUROR: I don't know if I could do that.

2 THE COURT: You understand the defendant is
3 presumed innocent?

4 JUROR: Until proven guilty.

5 THE COURT: Right.

6 JUROR: Yes.

7 THE COURT: I'll tell you what, Mr. Specht, I
8 think we're going to go ahead and excuse you --

9 JUROR: Okay.

10 THE COURT: -- rather than try and go through that
11 line of questioning. So you're excused.

12 JUROR: Sorry I didn't help. Thank you.

13 MR. BRACKLEY: Thank you.

14 (The juror left the jury room.)

15 THE COURT: Tidik, fourth page.

16 THE CLERK: This is Ms. Ingrid Tidik.

17 THE COURT: Come on in and have a seat.

18 JUROR: Okay. I almost stole my neighbor's purse
19 in there. That's one way to get out of it.

20 THE COURT: That would be interesting.

21 So we wanted to talk to you in private about some
22 of the information that you put on your questionnaire.

23 JUROR: Okay.

24 THE COURT: And I think the one part that sort of
25 interested me was when you were talking about your

1 daughter's circumstances. When did that happen?

2 JUROR: She was a senior. She was just starting
3 college at CU. She was a senior at Boulder High School when
4 this happened, though we were unaware of it. And she was
5 obviously stalked. And the way they found her items were
6 her poms outfits were found at this man's apartment.

7 THE COURT: Were they kept at the school? Were
8 they kept in your house?

9 JUROR: We believe they were taken from our house.

10 THE COURT: Okay.

11 JUROR: Our house was on the market at the time,
12 so we had some open houses. And she only had them in her
13 car or in our house. She didn't keep them at school.

14 THE COURT: Okay. Tell me how that experience
15 would affect your ability to be a fair juror in this case.

16 JUROR: Well, I think I can be a fair juror. It
17 was a traumatic experience --

18 THE COURT: I'm sure.

19 JUROR: -- for the family, for all of us.

20 THE COURT: Okay.

21 JUROR: We had a -- she was really, really upset.
22 And apparently there was a restraining order put on him to
23 cover everybody that was affected by this. But we had a
24 restraining order specifically for my daughter. And she was
25 at a sorority house right on the hill, and that covered the

1 sorority house as well because she was scared to death.

2 THE COURT: Okay. Understanding that was
3 traumatic, is it something that -- if you're a juror on this
4 case is it something that you can sort of compartmentalize
5 and set aside?

6 JUROR: I think so, absolutely.

7 THE COURT: Any questions, Mr. Brackley?

8 MR. BRACKLEY: No, thank you.

9 THE COURT: Ms. Ring or Ms. Milfeld?

10 MS. MILFELD: No questions.

11 THE COURT: Okay. All right. So thank you,
12 Ms. Tidik. If you'll have a seat back in the courtroom.

13 JUROR: Absolutely.

14 (The juror left the jury room.)

15 THE COURT: This should be -- is it Lindeke?

16 THE CLERK: This is Bruce Lindeke.

17 THE COURT: Hi, Mr. Lindeke. Do you want to have
18 a seat there?

19 JUROR: Sure. Thanks.

20 THE COURT: We wanted to talk with you in private
21 because of some of the information that you included on your
22 questionnaire.

23 JUROR: Um-hmm.

24 THE COURT: First thing that caught my eye was
25 that you're an attorney.

1 JUROR: Yes.

2 THE COURT: Are you still practicing?

3 JUROR: I'm active in Colorado. I'm active in the
4 oil and gas business primarily. I had a general practice in
5 Arizona for a couple years.

6 THE COURT: Okay.

7 JUROR: Inactive in Arizona.

8 THE COURT: Okay. And I know you clarified and
9 said that you had practiced criminal defense and civil law?

10 JUROR: Yes, I did, in Arizona. When I got out of
11 law school I hung up a sign next to my door and I took
12 whatever knocked.

13 THE COURT: Including criminal stuff?

14 JUROR: Yeah. I got appointed by a lot of judges.
15 Highest criminal case I was involved in was kidnapping and
16 attempted rape. And I co-counseled with the public defender
17 on that.

18 THE COURT: Okay. How long ago was it that you
19 practiced criminal law?

20 JUROR: That would be '78 except for an occasional
21 appearance in juvenile court with a child.

22 THE COURT: Okay.

23 JUROR: One of mine, you know. Didn't really
24 count, drinking tickets.

25 THE COURT: So it's been a while since you've

1 practiced criminal law?

2 JUROR: Correct.

3 THE COURT: Let me ask you this, is there anything
4 about your having practiced criminal law that you think
5 might affect your ability to be a fair and impartial juror
6 in this case?

7 JUROR: No. I think I could be fair and
8 impartial. My only concern is as an attorney if you were
9 sitting and listening to a trial you'd be saying why didn't
10 they object, what is not being said, why didn't they ask
11 this.

12 THE COURT: That's actually -- that's a great
13 point which leads me to the question, I mean, would you make
14 your decision based only on the evidence and the information
15 that you hear --

16 JUROR: Yes.

17 THE COURT: -- in court, what's been admitted?

18 JUROR: All that other stuff will pass through.

19 THE COURT: Okay.

20 JUROR: You couldn't stop it.

21 THE COURT: Let me see if the People have any
22 questions.

23 MR. BRACKLEY: Will that other stuff pass through
24 on both sides of the coin?

25 JUROR: Oh, yes. Yeah.

1 MR. BRACKLEY: Okay.

2 THE COURT: For the defendant. Ms. Ring.

3 MS. RING: You noted that you worked out with a
4 lot of law enforcement officers at Flatirons Athletic Club.

5 JUROR: Yeah. Normally there's a group that get
6 there at 5:30 a.m. when they show up. And one of them,
7 Bruce Haas, who is I think a sergeant or a division
8 commander, something like that, he's with the County. And
9 another County one was Gary Johnson. And there were two
10 others whose names I don't remember. But you know, we're
11 just there to work out, and we're all gone by 6:30 in the
12 morning.

13 MS. RING: You know, anything about that
14 relationship if you hear other officers from the Sheriff's
15 Office testifying that we should be concerned about?

16 JUROR: No. That would be irrelevant, you know,
17 just as my military police duty. You know, those are just
18 things that I've done in my past. But it wouldn't make any
19 difference.

20 When I had a private practice of law I did get
21 involved in cases involving misbehavior by police and a few
22 of those minor instances. And so I'm pretty much neutral on
23 that.

24 MS. RING: When you say you got involved?

25 JUROR: Misbehavior by police?

1 MS. RING: Yeah.

2 JUROR: There were two cases that I had that
3 involved improper behavior of a police officer. One was a
4 fellow who loosened the handcuffs at a jail and broke his
5 girlfriend's -- or boyfriend's nose at the jail house and
6 broke his arm.

7 And the other one involved a police officer who
8 had a history of banging people's heads. He would reach
9 through the bars of a cell, grab the man by the hair and
10 yank them forward and bang his head. And both of those
11 cases were dropped upon request of information from the
12 police department.

13 MS. RING: So your role in that was representing
14 the police officer or representing --

15 JUROR: I was representing the defendants in both
16 cases. And people had habits, you know. And the officer
17 that banged heads had a history of that.

18 And so it was -- in private practice you're aware
19 if you feel that there's a problem with an officer, you
20 notify the department, and then you also notify -- you
21 probably have your own network of defense attorneys that
22 have handled such issues. And they have the phone, pick up
23 the phone and say hey Fred, have you heard anything about
24 officer Joe, you know. And but that was -- those are the
25 only instances involving them.

1 MS. RING: Thank you. I don't have any other
2 questions.

3 THE COURT: Thank you. If you'll return to the
4 courtroom.

5 JUROR: All right.

6 THE COURT: Thank you, sir.

7 (The juror left the jury room.)

8 THE COURT: Next should be Romano.

9 THE CLERK: This is Susan Romano.

10 THE COURT: Hi, Ms. Romano. Do you want to come
11 in and have a seat?

12 So we wanted to talk to you in private because of
13 some of the information that you put on your questionnaire.
14 You indicated that you thought maybe you knew the Marty
15 Grisham involved in this case. Can you tell me the context
16 in which you knew this Marty Grisham?

17 JUROR: Well, I think he worked at StorageTek
18 where I worked. So I knew him through some co-workers,
19 assuming it's that guy. But '94 was a while ago, so my
20 memory is not that great.

21 THE COURT: Okay. Are you confident that the name
22 of the person you worked with was Marty Grisham?

23 JUROR: Well, over the weekend I started thinking
24 maybe it was Marty Tizam. But I know there was a guy at
25 StorageTek that was murdered, so that's why I was thinking

1 it was him.

2 THE COURT: Okay. What if it is the person that
3 you knew who was murdered, how does that affect your ability
4 to be on this jury?

5 JUROR: Well, I think it would make it harder
6 because, I mean, everything you heard about him, it's not
7 like I knew him really personally, but just through work.
8 And I think his wife after years later moved down my street.
9 So you know, I just know like everyone had an extremely high
10 opinion of him.

11 THE COURT: Do you remember his wife's name?

12 JUROR: No.

13 THE COURT: Okay. Let me see if the attorneys
14 have some questions for you. Mr. Brackley.

15 MR. BRACKLEY: When you say down on your street,
16 that would be in Louisville?

17 JUROR: Yeah. She's gone. I mean, she didn't
18 live there very long.

19 MR. BRACKLEY: Oh, okay. Okay. And at the time
20 this fellow that you remember as Marty Grisham, he was
21 actually working at StorageTek at the time?

22 JUROR: Um-hmm.

23 MR. BRACKLEY: What kind of job or position did he
24 have?

25 JUROR: I know he was fairly high up in management

1 I thought. I can't remember if he was more operational or
2 more technical. I mean, I'm lucky if I remember someone
3 from last week. Almost 20 years ago, pretty long time.

4 THE COURT: Okay. Ms. Milfeld, any questions?

5 MS. MILFELD: You wrote that you thought it would
6 be hard to be impartial. And why did you write that?

7 JUROR: Well, because if it really is this guy,
8 knowing what the opinion everyone had of him and knowing
9 that he was, you know, a really good person, it would be
10 harder to be impartial I think.

11 MS. MILFELD: So if you had a family member that
12 was on trial and you knew that there was a juror that was in
13 the same position that you are, would you want that person
14 to be a juror in your trial?

15 JUROR: Probably. But then I would think would I
16 be the most favorable judge or what, would I be a little
17 biased.

18 MS. MILFELD: Okay.

19 THE COURT: Okay. So let me have you do this,
20 Ms. Romano, would you step outside the door and pull it
21 closed behind you? Then just wait there at the door.

22 (The juror left the jury room.)

23 THE COURT: She's left. Is this --

24 MR. BRACKLEY: I don't think so, but I'm going to
25 ask.

1 DETECTIVE CHUCK HEIDEL: He did work at StorageTek
2 at one time early in his career. And if she could name the
3 street we could --

4 MR. BRACKLEY: I didn't want to ask her the
5 street, but --

6 DETECTIVE CHUCK HEIDEL: But Pam is still living
7 on the street in Louisville unless she had a different
8 address out there at one point.

9 MS. RING: Frankly I think the safest thing is to
10 let her go. Because if I point --

11 THE COURT: Do you agree, Mr. Brackley?

12 MR. BRACKLEY: Yeah, I agree.

13 THE COURT: All right. I'll go tell her.

14 (Pause.)

15 THE CLERK: This is Ellen Burgess.

16 THE COURT: Hi, Ms. Burgess. Come on in and have
17 a seat if you would please.

18 So we wanted to talk to you in private because of
19 some of the information that you included on your
20 questionnaire. Give me just a minute to find it.

21 JUROR: Certainly.

22 THE COURT: So I think it had to do with your
23 knowledge of a potential witness named Jim McCutcheon.

24 JUROR: Yes.

25 THE COURT: How well do you know that person?

1 JUROR: I never met him. I only know of him.

2 THE COURT: Okay. What's your opinion of him
3 right now based on what you know, good or bad, or do you
4 have one?

5 JUROR: He and a client were able to resolve an
6 issue around noise, so I have a positive feeling about him.

7 THE COURT: Okay. Is it the kind of feeling that
8 if he testified you'd be automatically believing him or --

9 JUROR: I don't think so, no.

10 THE COURT: No, okay. If that -- if it's the same
11 Jim McCutcheon that you know of and he testified, would you
12 be willing to evaluate his testimony the same as any other
13 witness?

14 JUROR: I wouldn't even recognize him. I think
15 that, yes, I would be able to do that.

16 THE COURT: All right. Mr. Brackley, any
17 questions?

18 MR. BRACKLEY: No, I don't. Thank you.

19 THE COURT: Ms. Ring?

20 MS. RING: No, thank you.

21 THE COURT: All right. Thank you, Ms. Burgess.
22 You can have a seat back in the courtroom. Appreciate it.

23 (The juror left the jury room.)

24 THE CLERK: This is Mr. Raymond Webber.

25 THE COURT: Hi, Mr. Webber. Come on in and have a

1 seat there if you would please.

2 We wanted to talk to you in private because of
3 some of the information that you included on your jury
4 questionnaire.

5 If you'd give me just a minute, I need to find it.
6 Was it your son who was killed?

7 JUROR: Yeah.

8 THE COURT: Okay. Obviously this case involves an
9 allegation of murder.

10 JUROR: Yeah, gunshot.

11 THE COURT: Gunshot.

12 I'm sorry. I'm sorry to hear that. I'm sorry for
13 your loss. Would you be able to sit as a juror in this
14 case, this kind of case?

15 JUROR: I don't know. Considering human relations
16 I would be maybe a little harder than the average person.

17 THE COURT: Harder in what way?

18 JUROR: I don't know. You might feel you want the
19 greatest penalty for the offense, you know.

20 THE COURT: Okay. Would it make you feel any
21 better if I told you that sentencing is my responsibility,
22 I'm the one who decides what the punishment is?

23 JUROR: I understand that. But just basically --
24 or disagree with your prosecutor I think.

25 THE COURT: As a juror?

1 JUROR: Yeah.

2 THE COURT: Yeah. Is that the way sort of you
3 would see your role?

4 JUROR: Kind of basic look I guess. But it boils
5 down to that quite a bit I think as you get into a very
6 abstract case I guess.

7 THE COURT: Well, I mean, you understand that
8 Mr. Clark, he's innocent unless and until the prosecution
9 can prove beyond a reasonable doubt. Does that make sense
10 to you?

11 JUROR: Yes.

12 THE COURT: And when I say beyond a reasonable
13 doubt, you have some idea of what that means?

14 JUROR: That's a very abstract term to me.

15 THE COURT: It is.

16 JUROR: A thin line I think between reasonable and
17 unreasonable doubt. And I think a lot of jurors have
18 problems with that.

19 THE COURT: I think you're probably right.

20 How about you if you're a juror, are you going to
21 have a problem with that?

22 JUROR: Probably know more than the average
23 person.

24 THE COURT: Okay. Given your experience involving
25 your son do you have some concern about whether or not you

1 could be fair to this process and to both sides?

2 JUROR: I'd try to be fair of course, yeah.

3 THE COURT: I don't want to sound callous, but
4 your experience with your son from four or five years ago,
5 is that something that you could set aside when listening to
6 the evidence in this case and deciding whether or not the
7 prosecution has proven their case beyond a reasonable doubt?

8 JUROR: Well, it's actually been about three
9 years, a little over three years I guess.

10 THE COURT: Okay.

11 JUROR: I want to try to do what's right of
12 course.

13 THE COURT: Okay.

14 JUROR: If I was in that man's position I'd want a
15 juror to be fair to me.

16 THE COURT: Do you think you're that kind of
17 juror?

18 JUROR: I've always been -- practice the golden
19 rule to some degree, but, you know, do unto others as do
20 unto you.

21 THE COURT: What do you think that means in a case
22 like this where murder is charged and you're a
23 prospective juror?

24 JUROR: Just deal with the facts.

25 THE COURT: Okay. Let me see if the attorneys

1 have any questions for you. Mr. Brackley.

2 MR. BRACKLEY: Sir, was anyone arrested for the
3 murder of your son?

4 JUROR: Yeah.

5 MR. BRACKLEY: Was there a trial, or has there
6 been a trial?

7 JUROR: Yeah. They ended up in a plea bargain,
8 aggravated assault. Didn't quite gather enough conclusive
9 evidence.

10 MR. BRACKLEY: Is there anything about the plea
11 bargaining process or what the district attorney -- or the
12 way the district attorney handled that case which kind of
13 resonates with you today in the context of the questions
14 that the judge has already asked you?

15 JUROR: Do I have any problems with it?

16 MR. BRACKLEY: Right.

17 JUROR: I wish they could have gone maybe a little
18 longer to gather evidence. You know, expense and time
19 involved, they only go so far. They bugged the individuals
20 and all that, you know. But the one guy was pretty smart,
21 so they were aware of being bugged and all that. They got
22 off a little easier than I would like. What can you do?

23 MR. BRACKLEY: But can you tell us today that you
24 can -- you can come into this trial with an open mind about
25 the facts of this particular case, judge this case on its

1 own facts and not -- you know.

2 JUROR: I should be able to, yes.

3 MR. BRACKLEY: Okay. Thank you, sir.

4 MS. MILFELD: You wrote down in your jury
5 questionnaire that you're possibly a little biased. Could
6 you -- who do you feel the bias is more towards?

7 JUROR: Well, I was thinking in the lines of human
8 nature you might be naturally a little biased if you come to
9 a thin line decision, you know what I mean? That's the only
10 way I can explain that.

11 MS. MILFELD: Do you mean bias towards the
12 prosecution or --

13 JUROR: Or a murderer, yeah.

14 MS. MILFELD: And you talked about how you would
15 like to think that you'd come in with an open mind. But do
16 you think that you do have an open mind at this point?

17 JUROR: As much as I can, yes. As much as I feel
18 I could.

19 MS. MILFELD: You also talked about you said that
20 you would try to be fair. But do you really think that
21 based on your experience with your son being murdered a few
22 years ago that you could be fair towards Mr. Clark?

23 JUROR: Well, I would think 99.9 percent should be
24 able to, yeah.

25 MS. MILFELD: If you were sitting in Mr. Clark's

1 shoes do you think that you would want yourself to be a
2 juror in the case?

3 JUROR: Possibly not.

4 MS. MILFELD: Okay. And why do you say that?

5 JUROR: From human nature.

6 MS. MILFELD: Could you describe that a little
7 more?

8 JUROR: I mean, just like what -- you had three
9 people on a jury that had a family member murdered. You
10 wouldn't want that, would you? You would think maybe
11 there's an abstract thin line, you know, that it would go
12 the other way. I mean, just trying to be honest. That's
13 how I feel.

14 MS. MILFELD: Do you think that with your son's
15 murder and everything even though this is a different crime,
16 it's not, you know, what happened with your son, do you
17 still think that it would be difficult for you to keep an
18 open mind and be fair because of your experience?

19 JUROR: I think I probably could be fair.

20 MS. MILFELD: So for example, if you -- there was
21 a DUI case and lets say a juror had a family member who was
22 killed in a DUI, do you think that person would be a good
23 juror in that case?

24 JUROR: Not perfect, no.

25 MS. MILFELD: I guess what I'm getting at is that,

1 you know, a juror is not right for every single case. And
2 for example, the DUI case that -- that juror who had that
3 family member who died in a DUI, it might not be the right
4 case for that juror. Do you think that's kind of where
5 you're at?

6 JUROR: I don't know. Like I said, I'll try to be
7 fair. And that's up to you to determine.

8 MS. MILFELD: Okay.

9 JUROR: Okay.

10 THE COURT: So let me ask it this way, Mr. Webber;
11 I think what I heard you saying is that people would assume
12 because you had a loved one killed three or four, five years
13 ago that you would be biased if you were to sit on a murder
14 case now. That's the way that people would probably assume
15 you would behave. My question for you is is that the way
16 that you think you're going to behave as a juror?

17 JUROR: I don't think I would be dishonorable to
18 that point. I would try to be fair.

19 THE COURT: Okay.

20 JUROR: This is a different case.

21 THE COURT: So you could listen to the evidence
22 with an open mind?

23 JUROR: Yes.

24 THE COURT: Would you follow the law that I give
25 you?

1 JUROR: Of course.

2 THE COURT: And would you make your decision in
3 this case based only on the evidence that's presented and
4 not on anything else?

5 JUROR: No, sir.

6 THE COURT: Thank you, Mr. Webber. I'm going to
7 have you step back into the courtroom. Thank you, sir.

8 (The juror left the jury room.)

9 THE COURT: Any challenge? No.

10 Next one should be Pipp, Kevin Pipp.

11 THE CLERK: Judge, I just have a quick question.
12 There are two jurors that have further information that they
13 thought you might want to know. Nathan Litsey believes he
14 knows more about the case.

15 THE COURT: Who is it?

16 THE CLERK: Nathan Litsey. He wasn't on your list
17 of individual --

18 THE COURT: Spell his last name.

19 THE CLERK: L-I-T-S-E-Y.

20 MS. RING: Do you know his juror number?

21 THE CLERK: I didn't bring that in with me.

22 MR. BRACKLEY: 3996.

23 THE COURT: Okay. Then who was the other one?

24 THE CLERK: Mr. Clark, Graham Clark. Apparently
25 he was supposed to travel for work this week and forgot to

1 mention that when he was in here.

2 THE COURT: Just forgot that.

3 MR. BRACKLEY: Mr. Clark is 4182.

4 THE COURT: Why don't you bring Mr. Pipp in, and
5 then I'll talk to the attorneys about those other two.

6 THE CLERK: Okay. Thank you.

7 THE COURT: Thank you.

8 Hi, Mr. Pipp. Why don't you go ahead and have a
9 seat.

10 So Mr. Pipp, I wanted to talk to you in private
11 because of some of the things that you mentioned on your
12 questionnaire.

13 JUROR: Sure.

14 THE COURT: First of all, you indicated that you
15 thought you seen headlines about this case on the Daily
16 Camera?

17 JUROR: Yeah.

18 THE COURT: Do you think anything more than
19 headlines?

20 JUROR: I don't -- I recognize the name, sounds
21 familiar to me.

22 THE COURT: Okay.

23 JUROR: But as for anything else --

24 THE COURT: No details?

25 JUROR: Yeah, I'm not familiar.

1 THE COURT: Okay. You also mentioned in the
2 additional comments about your position regarding the
3 homeless population in Boulder, and more specifically up in
4 north Boulder.

5 JUROR: Yes.

6 THE COURT: I don't have any reason to believe
7 that this case is going to involve any of those issues. But
8 I'm curious as to why you thought that would be information
9 that we might want to know.

10 JUROR: There's a huge homeless population here.
11 And a lot of the crimes involve not -- I don't know what
12 percentage anyways, but sometimes there's crimes that
13 involve homeless people.

14 So I just wanted to let you know where I stand. I
15 just don't -- I don't have much empathy for the homeless
16 population because I feel in north Boulder that -- I mean, I
17 have a young daughter and I do a lot of child care and I
18 push her around in a stroller. And bums that are sleeping
19 on the sidewalk that I have to step around, there's people
20 urinating on the side of the path, it's disgusting. So
21 that's my opinion.

22 THE COURT: What if you heard testimony from
23 someone who was essentially homeless but living in another
24 community or another state?

25 JUROR: I don't know. I mean, I don't know how

1 I'll feel. Like I said, I -- it's a problem up where I
2 live, and so I do struggle with having empathy for that type
3 of person.

4 THE COURT: Okay. What about your ability to
5 evaluate their testimony, I mean, listen to what they are
6 saying and try to decide whether they're being truthful or
7 not?

8 JUROR: I would hope that I can just, you know,
9 take it as their word and not judge them as a person. But I
10 guess I don't know until I'm in that situation. I won't
11 know, I could say that. But I don't know. I'd like to not
12 judge a book by its cover, but --

13 THE COURT: Okay. One of the other issues that
14 you raise in your questionnaire was that you provide child
15 care for your daughter.

16 JUROR: Yeah.

17 THE COURT: So who -- she's obviously young.
18 She's 8 months old?

19 JUROR: Yes.

20 THE COURT: And who is watching her today?

21 JUROR: My wife isn't working today.

22 THE COURT: Okay. And if you're selected as a
23 juror in this case who is going to be watching her for the
24 next two weeks?

25 JUROR: We're going to try to get friends. I

1 mean, we have a network of friends around. It's just been
2 my wife or I have been the sole provider for her because of
3 my job and hers. She's a private business owner, but she's
4 now working a lot more. So I've been watching her three or
5 four days a week. So it won't be easy. We don't have any
6 family. We're both from the midwest. And so it's just not
7 quite as simple as that.

8 THE COURT: Okay. Let me see if the attorneys
9 have any questions for you. Mr. Brackley.

10 MR. BRACKLEY: You know, at this time I don't,
11 Mr. Pipp. Thank you.

12 THE COURT: Ms. Ring.

13 MS. RING: Thank you.

14 So Mr. Pipp, you had the weekend to think about
15 what you might have read in the paper about it. And did you
16 come up with any additional details?

17 JUROR: Honestly I didn't think about this at all
18 over the weekend.

19 MS. RING: Good for you.

20 JUROR: I had to remember yesterday to set an
21 alarm on my phone so I did not forget about coming in.

22 MS. RING: I thought I heard -- when the judge
23 asked you about what you recalled I thought I heard you say
24 that you remembered some names out of the article.

25 JUROR: Just Clark. I feel like I saw that, that

1 name. That's what I -- when he said just the brief synopsis
2 of the trial, the name looks familiar to me. And I believe
3 that I saw a headline, but I don't -- I can't be certain.

4 MS. RING: So there's nothing about what you
5 remember seeing that would have any impact on what you think
6 about this case at this point?

7 JUROR: No.

8 MS. RING: So in terms of -- in your questionnaire
9 you talked about the child care issue with your daughter.
10 What I heard you saying is that you understand that maybe
11 for some people daycare is more flexible and you can find a
12 way to resolve that. And I think you were trying to tell us
13 that in your situation it is more of a hardship than maybe
14 for some other people?

15 JUROR: We just haven't had her without anybody
16 besides us. So potentially we can set up daycare. But to
17 just put her into that going from zero to 100, she's 8
18 months old, she's a baby. I don't know. I'm sure many of
19 you have children. She's very young.

20 MS. RING: Right.

21 So -- and I understand that you told us you didn't
22 think about this over the weekend. But in terms of if
23 you're picked for this jury today, have you talked to
24 friends, et cetera, about what's the plan for your daughter
25 for the rest of the week?

1 JUROR: Yeah. I mean, we'll get something
2 together, we'll have to. My wife, you know, maybe can
3 cancel some kids at different times. And you know, we have
4 some friends in the area. So we'll -- we'll have to figure
5 it out if that's what it comes to. I hope not, but --

6 MS. RING: So most of us do have children and
7 certainly can appreciate your concerns. And she's young and
8 she hasn't been in daycare before, so I totally understand
9 that as a worry.

10 So my concern is if you're picked on this jury and
11 we're asking you to be completely focused on listening to
12 the evidence and paying attention, how is that going to work
13 with your concern about your daughter and her daycare
14 situation?

15 JUROR: I don't think I have a choice in that
16 concern. I mean, while I'm here I hope that I can be
17 focused and do the job that I'm supposed to. She'll be in
18 the back of my mind I'm sure. And when I get out of here
19 each day, then I go home to my family.

20 MS. RING: But you -- you believe that at this
21 point you'd be able to focus while you're here during the
22 day and do your job as a juror?

23 JUROR: I think so, yeah. I don't see why not.
24 It's not like I'm going to be getting updates. I mean, if
25 we have a lunch break I'll probably call and check in.

1 Besides that, I'm not going to be text messaging sitting on
2 the stand. I don't think that's allowed.

3 THE COURT: You're right. Thanks.

4 MS. RING: I don't have any other questions.
5 Thank you.

6 THE COURT: Okay. Thanks, Mr. Pipp. If you'd
7 return to the courtroom.

8 (The juror left the jury room.)

9 THE COURT: Next should be Roger Lapthorne.

10 THE CLERK: This is Mr. Roger Lapthorne.

11 THE COURT: Hi. Would you have a seat right
12 there?

13 JUROR: Sure.

14 THE COURT: So we wanted to talk to you back here
15 in private because of some of the information you put on
16 your questionnaire primarily revolving around your son's
17 situation and that crime that he was convicted for and then
18 how that impacts your ability to be a fair juror. Can you
19 talk to me a little bit more about that?

20 JUROR: Do you want to know about his situation or
21 just how it's affected me?

22 THE COURT: Yeah. What happened?

23 JUROR: He was involved in a break-in. I don't
24 remember the exact term for the crime, but he was involved
25 in a break-in with three buddies. Unfortunately he was the

1 only one that was over 18. They were all seniors in high
2 school. He was kind of one of these kids that was held back
3 in his early years, so he was older than his peers. So they
4 were all starting their senior year. It was about six years
5 ago to the day almost that this happened. But it sort of
6 left me with some lingering cynicism I guess towards the
7 system.

8 THE COURT: Okay. Tell me about that.

9 JUROR: You know, we hired a lawyer. It was
10 decided that it wasn't worth contesting. Everybody had, you
11 know, basically came up with the same story as to what
12 transpired and how and when and why. So there was really no
13 thought to contesting it.

14 But I started to get, you know, bad vibes about it
15 when the lawyer that I had hired said that, you know, he
16 talked to the district attorney and there was some mention
17 made of, you know, some case that he had just completed
18 where he had won, the lawyer had won and -- I should say he
19 successfully defended his client, but that because my son
20 was the only one who was not a minor in this case that the
21 district attorney was bound and determined to get his pound
22 of flesh. And that was the three-word phrase that has stuck
23 in my mind ever since that time.

24 THE COURT: Okay.

25 JUROR: And ever since then, you know, I've

1 thought about it, obviously not trying to make light of what
2 my son did and the mistakes that he made and even the
3 mistakes that I made in that process. But nonetheless, you
4 try in your mind to balance justice and fairness and
5 consistency. And it just didn't ever line up for me in that
6 case.

7 THE COURT: So as a result of that experience
8 right now today what -- where do you think the faults were?
9 Where does the blame lie?

10 JUROR: Well, first and foremost with my son. But
11 like I said, I'm just slightly jaded about what goes on
12 before you ever get into court, who is talking to who,
13 what's the district attorney saying, you know, what kind of
14 communication goes on, those kinds of things.

15 But honestly, I -- I just don't have a good
16 feeling about either the way my lawyer, the one that I hired
17 and paid for, handled the situation, or I felt the district
18 attorney came across more as he wasn't seeking justice, but
19 he was seeking, you know, a score card.

20 THE COURT: So a little bit of disenchantment with
21 both sides of the process?

22 JUROR: Absolutely.

23 THE COURT: Where was your son charged, what
24 court? Was it here in Boulder?

25 JUROR: Yeah.

1 THE COURT: So it was the Boulder District
2 Attorney's Office?

3 JUROR: Yes.

4 THE COURT: Okay. And I don't know if it's
5 obvious or not, but the Boulder District Attorney is the
6 prosecutor in this case.

7 JUROR: Sure. Yeah.

8 THE COURT: So what do you think that means from
9 your perspective about your ability to listen to arguments
10 and evaluate evidence from the district attorney?

11 JUROR: Well, you know, I'd like to say that, you
12 know, I would come in with a clean slate and say, you know,
13 I could, you know, focus on facts and what you hear in the
14 courtroom and all that stuff. Probably I am capable of
15 doing that.

16 But like I said, I have -- I thought it was
17 important for everyone to know that I do have a history that
18 might lead me to influence myself so to speak.

19 THE COURT: Okay. And make a decision that's
20 maybe not based entirely on --

21 JUROR: I might, you know, if -- if I didn't
22 really check myself, if something was said in a certain way
23 in the courtroom, I might cast more doubt on it than say a
24 less biased person.

25 THE COURT: Okay. I mean, look, every prospective

1 jury, frankly everybody in this room right here, we all came
2 in here this morning, we all have biases and prejudices and
3 life experiences and preconceived notions. Everybody brings
4 that with them.

5 The question really is given the experience with
6 your son, can you set it aside understanding that you're
7 probably for a long time, maybe forever going to have those
8 feelings. But can you set them aside and just make your
9 decision in this case based on the evidence and the law that
10 you get?

11 JUROR: Yeah. I think that's likely, yes, that I
12 would be able to do that.

13 THE COURT: Okay. Let me see if the people have
14 any questions. Mr. Brackley.

15 MR. BRACKLEY: Mr. Lapthorne, so given -- I think
16 we all understand kind of the dynamic between the lawyer
17 that you paid for and expected to represent your son and
18 best interests of your son and your family and the district
19 attorneys and the communication that they had.

20 But the ultimate outcome of your son's case, was
21 that -- I don't want to ask you the specific ultimate
22 outcome, but was it what you would expect?

23 JUROR: No, not at all.

24 MR. BRACKLEY: Harsher than you thought at all?

25 JUROR: Not at all. That clearly is one of the

1 reasons why I came away from the whole experience with some
2 negative feelings. I was very surprised that someone who
3 did not have any criminal background whatsoever, anybody who
4 would have done any relative amount of homework on the
5 situation would have realized that even though my son was
6 the oldest of the group, he was in no way any sort of ring
7 leader or anything like that.

8 And it's kind of funny, over the years I've -- you
9 know, we've all read in the papers about juveniles that
10 commit crimes and it says in the paper they're trying to
11 consider whether to try this person as an adult.

12 MR. BRACKLEY: Right.

13 JUROR: And I've always never -- I've never
14 thought anything about that. I think, yeah, in certain
15 circumstances it would make sense for a 16-year-old to be
16 treated as if they were 18 or 19 years old.

17 Frankly, I came away I think he should have been
18 tried as a juvenile, you know. The juveniles who were
19 involved in the -- I came away from my son's case who were
20 involved in the incident with him were treated like you
21 would expect juveniles to be treated. They basically did a
22 couple of weeks in a juvenile detention facility and went
23 back to a relatively normal life, community service sort of
24 thing.

25 My son's senior year of high school was taken

1 away. He had to spend time at -- he did a little bit of
2 time in the jail, he did some time in the -- some -- some
3 sort of a halfway kind of house here just down the street on
4 Canyon. And yeah, it was -- it was a very surprising
5 outcome to me.

6 MR. BRACKLEY: Do you follow kind of the crime
7 news here in Boulder County with the local newspapers at
8 all?

9 JUROR: Not that often, no.

10 MR. BRACKLEY: Do you have any -- have you ever
11 had an opportunity between six years ago when your son was
12 involved in this trouble up until the present where you sort
13 of had a judgment about the DA's Office or why they would
14 prosecute a certain case or say certain things in the paper?

15 JUROR: No. I honestly -- and I don't even
16 remember the name. I barely remember -- I think I remember
17 the name of the lawyer I hired, and I don't remember the
18 name of the district attorney at all at that time. So I --
19 but no, I haven't. It's not a -- an ongoing issue in that
20 sense.

21 MR. BRACKLEY: You mentioned you would think that
22 another juror, another person who was less biased than you
23 wouldn't have a problem. And we understand that nobody
24 comes in this building with a clean slate.

25 The ultimate question is to the extent that you do

1 have biases which you've stated, can you put those aside?
2 Can you assure us that you can put those aside, be
3 open-minded, fair and impartial?

4 JUROR: I'm not sure I can give you that hundred
5 percent assurance. I'm not sure what's going to be said in
6 the courtroom.

7 And I'm also -- you know, there are times when I
8 put this incident in the past and there's other times when I
9 have to bring it up, like as of right now. And it sort of,
10 you know, stirs the pot a little bit and it makes me -- it
11 makes me question whether to myself, you know, am I really
12 thinking just clearly, as clearly as I should be and not
13 letting an emotional bias get in the way.

14 MR. BRACKLEY: Sure. When we talk about bias and
15 prejudice in the context of picking a jury we're not talking
16 about, you know, folks that are -- we're not talking about
17 bad people. We're talking about people who just have life
18 experiences which just cannot allow them to say DA I can be
19 fair in this case, defendant I can be fair in this case.
20 Are you one of those folks at this point?

21 JUROR: That could say I could be fair in this
22 case?

23 MR. BRACKLEY: Right.

24 JUROR: I think so.

25 You know, to use another example, like a lot of

1 people I've had incidents, traffic and stuff, where you had
2 to deal with a police officer and come away with a negative
3 feeling maybe towards a particular police officer. But you
4 know, I look at those as people issues.

5 With what happened with my son it wasn't so much
6 about the specific people as much as just, you know, I
7 didn't feel good about the process.

8 MR. BRACKLEY: Right.

9 JUROR: I had came away with negative thoughts
10 towards the process and wondering if we really do the right
11 thing sometimes.

12 MR. BRACKLEY: As a juror you're going to be part
13 of the process.

14 JUROR: Yeah.

15 MR. BRACKLEY: You're going to join with 11 other
16 people with an open mind, unbiased promise that you can be
17 impartial and fair.

18 JUROR: I can promise that I would -- I would make
19 every effort to do that, sure.

20 MR. BRACKLEY: Okay.

21 THE COURT: All right. Ms. Milfeld.

22 MS. MILFELD: You talked about how you were a
23 little jaded about what went on before court with some of
24 the communication. What do you mean by that?

25 JUROR: Well, I mean, I got the sense that, you

1 know, when we decided the best thing to do was to go ahead
2 and plead guilty basically, or my son plead guilty to these
3 charges that there would be some effort made to, you know,
4 understand him and understand the situation.

5 And instead I think the only thing that really
6 mattered is that there was a complaint which had some words
7 written on it and, you know, again, that there was, you
8 know, a sense I got it wasn't about what had happened or who
9 it was and things like that, but it was more about this is
10 my turn, I'm going to put a check box on -- the DA gets to
11 put a check box on his side of the ledger this time and
12 let's move on, next case, you know. It just left me
13 uncomfortable.

14 MS. MILFELD: How did you feel the defense
15 attorney did? Do you feel like he did right for your son?

16 JUROR: No. I mean, I would have liked to have
17 thought that there was an effort made to express some of
18 these things that I thought would be important when it comes
19 to determining, you know, what consequences he would have to
20 face. And I didn't get the sense that enough had been done.

21 There were some other things that made me feel ill
22 will towards the lawyer in general when I went to see him.
23 I never engaged a lawyer before, and I was given an option
24 of paying by the hour or paying a flat right kind of thing.
25 And I thought well, let's go with the flat rate and maybe I

1 wanted to cap my liability so to speak. I don't think -- I
2 think if I'd paid him by the hour I would have paid half as
3 much.

4 I was later told by somebody years later that, you
5 know, really ethically he should have reimbursed you if he
6 didn't actually spend the amount of time. But I never
7 followed up on it.

8 Also there was one day when we had a court date,
9 my son and I showed up, you know, you don't know
10 specifically when your turn is up, you come in with a bunch
11 of other people at 8:00 in the morning kind of like this and
12 wait until it's your turn.

13 Well, we -- our turn never came up because the
14 lawyer never showed up. He had a conflict which he didn't
15 realize, and he was off to Denver by the time he realized
16 there was a conflict. He got back and it was too late and
17 we had to reschedule. It's just a lot of negative aspects
18 to the whole situation.

19 MS. MILFELD: So we're obviously the defense
20 attorneys. And based on your experience do you have any
21 opinion about defense attorneys in general?

22 JUROR: Not in general, no.

23 MS. MILFELD: Just specific to that person?

24 JUROR: Yeah. But you know, like I said,
25 people -- it's not specific people so much as, you know,

1 what the process is, what's really going on with the
2 process. Is the process really, really set up to come out
3 with what's just and fair and consistent.

4 MS. MILFELD: You also talked about how your son
5 took a plea bargain, he decided to plead guilty?

6 JUROR: Pled guilty. It wasn't any bargain. He
7 didn't -- there was nothing offered to him in terms of --
8 well, that I recall. I guess maybe there was. I think
9 there was a reduction. Still was a felony as it turns out,
10 but --

11 MS. MILFELD: So our client has pleaded not guilty
12 and he decided that he wanted to go to trial. Do you have
13 an opinion about that?

14 JUROR: No, not at all. I mean, whether that's
15 smart or not smart or --

16 MS. MILFELD: Just any opinion about it.

17 JUROR: No.

18 MS. MILFELD: I don't have any other questions.

19 THE COURT: All right. Mr. Lapthorne, thank you
20 very much. If you'll return to the courtroom.

21 JUROR: You bet.

22 THE COURT: Thank you.

23 (The juror left the jury room.)

24 THE COURT: Is the next one Gardner?

25 MR. KELLNER: I could not find Gardner in my

1 stack, nor could I find him on the list.

2 MR. BRACKLEY: Mr. Gardner, didn't we --

3 MS. RING: He just got a job with IBM.

4 THE CLERK: This is Margaret Phelan.

5 I think Gardner was one that was excused on
6 Friday.

7 THE COURT: Hi, Ms. Phelan. Would you have a seat
8 right there?

9 We wanted to talk to you back here in private
10 because of some of the information that you put on your
11 questionnaire. And I need to find your questionnaire, so
12 give me just a minute if you would. Sorry, we were
13 expecting someone else to be called in next, so I didn't --
14 so I wanted to talk to you about two things -- well, really
15 three things.

16 First of all, in the -- in answer to the question
17 about if there was any reason why you believed you could not
18 be a fair and impartial juror, you put if the case involved
19 any domestic violence. This case does not directly involve
20 domestic violence in any way, shape or form.

21 JUROR: Great.

22 THE COURT: But having said that, what are your
23 thoughts about --

24 JUROR: I just -- I've had personal experience
25 with it. It would be very difficult.

1 THE COURT: If the case itself involved domestic
2 violence?

3 JUROR: Right. I would have a hard time
4 separating myself and all the experiences I've had.

5 THE COURT: Okay. You indicated that you're a
6 single mom. And obviously your daughter lives with you?

7 JUROR: Yes.

8 THE COURT: She's 16?

9 JUROR: She's 16.

10 THE COURT: Okay. And you said if you were
11 selected as a juror she'd have to go stay with her father
12 out of town?

13 JUROR: Yeah. I was thinking -- at the time I
14 said that I was thinking more of a sequestered sort of
15 thing.

16 THE COURT: We're not going to be sequestered.

17 JUROR: If it was just a normal, you know, 9:00 to
18 5:00 sort of day it wouldn't be necessary.

19 THE COURT: Yeah, it would be a 9:00 to 5:00 kind
20 of day.

21 JUROR: Yes.

22 THE COURT: All right. That alleviates any
23 concerns you had there?

24 JUROR: Yes.

25 THE COURT: Then you also raised the issue about

1 your annual financial audit. It's --

2 JUROR: It couldn't come at a worse time for me.
3 I work for a really small nonprofit. I'm the one and only
4 bookkeeper. And we have a potential audit coming up next
5 week or week after next.

6 THE COURT: Who is doing the audit?

7 JUROR: No, no, it's a private audit, a private
8 company, a CPA firm.

9 THE COURT: Is that something that the nonprofit
10 hires to come in?

11 JUROR: Our fiscal year is off. We actually ended
12 in June, so we put it off a couple times already. And so
13 it's now kind of crunch time and --

14 THE COURT: Do you know what my next question is
15 going to be?

16 JUROR: What?

17 THE COURT: Do you think they could put it off
18 again if you were required --

19 JUROR: I asked my boss that yesterday, or Friday
20 when I was talking to her. And she kind of shrugged her
21 shoulders, said I'm not sure. She wasn't sure at that point
22 whether it would be possible.

23 I think that what she was hoping I would do and I
24 would be willing to do would be work some -- leave here at
25 night, go give a couple hours and work on the weekends and,

1 you know, just kind of plug through.

2 THE COURT: Okay. If it came to that is that
3 something that you could do?

4 JUROR: I mean, yeah. It would be burning the
5 candle at both ends, but that's what bookkeepers do.

6 THE COURT: Sometimes, yeah, especially around
7 audit season.

8 JUROR: Yes, exactly.

9 THE COURT: Let me see if the People have any
10 questions for you. Mr. Brackley.

11 MR. BRACKLEY: Ms. Phelan -- and I'm not making
12 any promises or statements one way or the other, but what if
13 a case -- what if you were to hear testimony from a witness
14 who had -- who had a conviction or an accusation of domestic
15 violence against him, or her for that matter, would you be
16 able to judge that witness' testimony or credibility fairly,
17 impartial with an open mind based on everything else you're
18 hearing at the trial?

19 JUROR: I guess it would have to be based on what
20 else was being said. But I would like to think that I could
21 be, you know, fairly objective. But I've just never been in
22 that position. And I've had so many people in my life. Me
23 personally it would -- yeah, I wouldn't say a hundred
24 percent that I could. I would like to think I could.

25 MR. BRACKLEY: Okay. You'd like to think you

1 could?

2 JUROR: Be impartial. I mean, I don't know.

3 Yeah, it's a tough question, which is why I put it there.

4 I'm not sure. I've never been in that position.

5 MR. BRACKLEY: But right now your assurance to us
6 is you'd listen to the evidence and be fair and impartial
7 and have an open mind right now?

8 JUROR: Yes.

9 MR. BRACKLEY: Thank you, ma'am.

10 THE COURT: Ms. Ring.

11 MS. RING: Thank you.

12 So the hardship piece of this comes up a lot. And
13 part of the reason we have you come back here is, you know,
14 hardship means different things for different people.

15 JUROR: Yeah.

16 MS. RING: And I happened to be a CPA in my prior
17 life. So actually when you're talking about what the
18 bookkeeper needs to do when the audit is coming, my
19 understanding of that is it's pretty significant.

20 And you not being there is -- so you know, I mean,
21 the judge's first proposition was, you know, is there a way
22 to put this out to a different time when you're available.
23 And in saying that you had this conversation with your
24 employer do you feel like that's just not an option that it
25 would happen?

1 JUROR: I don't know. It would be tough. It
2 would be different if I worked for a bigger company, but I
3 am the one and only bookkeeper.

4 And so I think that that's what she was saying is
5 that she might have to pick up the slack. She's a financial
6 director. She's my boss. She'd be the one directly
7 involved with the auditor. But I'm doing all the background
8 stuff. So it would just put a lot more on her.

9 So I don't know if her answer was like that would
10 really suck for me or if it was, you know, there would be a
11 real possibility. I don't know. We've already put it off,
12 you know, a couple times already.

13 MS. RING: And then the next thing you mentioned
14 is that it might be that your employer would actually expect
15 that you might come in after you were done with your jury
16 service at the end of the day?

17 JUROR: I don't think -- no, my boss is not a
18 monster. She would not require me. But I think that the
19 understanding would be like do what you can, you know, fill
20 in when you can weekends, certainly she would expect that.

21 MS. RING: So you know, my experience in talking
22 to jurors who have served on juries before is that actually
23 although you're sitting, it's very intense sitting really
24 trying to pay attention the way that you will need to pay
25 attention during a trial, and that trying to juggle doing

1 this all day long, then having work responsibilities at the
2 end of the day, you know, is less than ideal.

3 JUROR: That's kind of why I mentioned it.

4 MS. RING: Okay. I guess maybe a different way of
5 putting this is the best right now that you can tell us
6 about what you think the next two weeks would look like for
7 you and the pressures from work, if, you know, the person
8 sitting next to me who was accused of a crime was someone
9 important to you, would you want a juror on that jury who
10 had that work pressure in addition to jury service?

11 JUROR: I don't know. That's a good question. I
12 don't -- I don't -- I'd like to think that I -- you know, I
13 wouldn't work 24/7, you know. I would like to think that I
14 would know my boundaries. And my boss, you know, she'd work
15 around my boundaries. So yeah, that's a tough question. I
16 don't know.

17 MS. RING: I don't have any other questions.
18 Thank you.

19 THE COURT: Okay. Thank you very much,
20 Ms. Phelan. If you'd have a seat back in the courtroom.

21 (The juror left the jury room.)

22 THE COURT: This should be Ammon.

23 While we have a second, you know, we have a
24 nursing mother in the courtroom.

25 MS. RING: Right.

1 THE CLERK: I have Ms. Ammon.

2 THE COURT: Hi, Ms. Ammon.

3 JUROR: Hi guys.

4 THE COURT: Would you have a seat over there?

5 So we wanted to talk to you in private because of
6 some of the information that you gave us in the answers on
7 your questionnaire.

8 So couple different things. You indicated you'd
9 have a hard time making a judgment on a murder case.

10 JUROR: I would. I really, really would.

11 THE COURT: What does that mean in practical
12 terms?

13 JUROR: In practical terms I would have a hard
14 time sleeping. I told my husband I'd have to make that
15 decision, and that would be very, very difficult for me. I
16 would probably need to speak to someone afterwards
17 because --

18 THE COURT: Like a counselor or a therapist type
19 person?

20 JUROR: Yes. I really believe that.

21 THE COURT: How about during the jury process,
22 during the trial process, do you think that you'd be able to
23 listen to all of the evidence?

24 JUROR: Oh, I would listen, absolutely. It would
25 be the problem of making the decision and that being on my

1 conscience.

2 THE COURT: Okay. So let me ask it this way, you
3 know that the prosecution has to prove the defendant's guilt
4 beyond a reasonable doubt?

5 JUROR: Um-hmm.

6 THE COURT: If the prosecution did that could you
7 return a verdict of guilty?

8 JUROR: I don't know honestly. I don't know. I
9 think if this weren't a murder trial maybe I could -- I
10 wouldn't -- I think I could answer that question yes. But
11 because this is a murder trial, that just seems to me very
12 difficult to make that decision.

13 THE COURT: Because you're worried about the
14 consequences for the person who is found guilty?

15 JUROR: Absolutely.

16 THE COURT: What if I told you that the decision
17 about the sentence was not the jury's responsibility, it's
18 my responsibility because I'm the judge.

19 JUROR: But we would still be saying guilty or not
20 guilty. That's our decision, not yours.

21 THE COURT: That's true. So what I just told you
22 doesn't make you feel any better?

23 JUROR: No, it doesn't make me feel any better.

24 THE COURT: Okay. Any questions, Mr. Brackley?

25 MR. BRACKLEY: I mean, this is -- we all in the

1 course of these proceedings will make many, many, many tough
2 decisions because it's a serious case and it's a serious
3 charge. Everyone also on the jury will make a tough
4 decision.

5 I guess we need to know from you whether after the
6 evidence is presented -- because I got to tell you, you
7 know, not guilty decision might be just as hard as a guilty
8 decision.

9 JUROR: Absolutely.

10 MR. BRACKLEY: So sort of where do you fall in --
11 I guess I'm just going to ask you the same question the
12 judge asked you because I don't know, can you promise us
13 sitting here now that you will be able to listen to the
14 evidence in a case this serious and participate in
15 deliberations with other jurors and speak and vote your
16 conscience and your mind regardless of how hard that is and
17 what decision that is if I prove my case beyond a reasonable
18 doubt?

19 If the judge is going to define that to you by
20 calling witnesses and presenting evidence to you, can you
21 find the defendant guilty if I've done that, or can you
22 promise me now that you can do that if I've met my burden?

23 JUROR: Well, I feel I would have to be able to
24 make that decision. I totally believe in voting. I vote as
25 much as I can, and I don't ever want to give up that right.

1 And so by giving up that right I would -- or for me saying I
2 don't want to be on this jury means I really shouldn't be
3 voting in my opinion either.

4 But to make that decision, that's a big decision.
5 And I make decisions every day of my life, right. So
6 everybody does. And so it would just be very difficult for
7 me to.

8 I think afterwards I would probably need to just
9 be able to kind of talk it through outside of the jury to
10 say I made that decision, it was right at the time, and I
11 listened the best I could and I made that decision.

12 I mean, that's what a decision is. It's
13 experiences from life helping me make that decision. So I
14 have to make that decision, I understand that, if I got
15 picked. I just know consciously I would have a hard time
16 sleeping during that time and I would also just -- I would
17 probably need to talk to someone afterwards.

18 MR. BRACKLEY: Do you think there's a risk of sort
19 of moving forward in your life after the decision regardless
20 of what it is and having doubts about it?

21 JUROR: Oh, yeah, absolutely, because this is a
22 big decision. And you know, I understand for you all, you
23 help -- you make these decisions. This is not a decision
24 you just take lightly or you just -- but it's a little more
25 common maybe --

1 MR. BRACKLEY: Sure.

2 JUROR: -- for those who aren't involved.

3 MR. BRACKLEY: Do you think if you were to be
4 selected for this jury and the first witness were to be
5 called that you would be more focused on this sort of
6 dilemma of do I really want to be involved in making a
7 decision in a case so serious, or will you be focused on
8 what the witness is saying?

9 JUROR: It would always be in the back of my mind.
10 Absolutely would be in the back of my mind because that
11 decision is going to be made unless something happens;
12 right? We have to make that decision. But I would still be
13 nervous about it, yeah.

14 MR. BRACKLEY: Would it affect your ability to
15 concentrate?

16 JUROR: A little bit, yes.

17 MR. BRACKLEY: Would it affect your ability to
18 sort of focus on different pieces of evidence and how they
19 relate to other pieces of evidence that you're hearing
20 throughout the trial?

21 JUROR: Probably.

22 MR. BRACKLEY: Okay. You know, when you vote
23 which is probably just as important.

24 JUROR: Oh, absolutely.

25 MR. BRACKLEY: As a jury, you know, you getting

1 into that voting booth by yourself and pull a curtain and
2 you never have to tell anyone who you voted for. Jury
3 service, you know, you don't really have to justify your
4 verdict to anyone, but you have to speak it in front of
5 other folks. Can you do that?

6 JUROR: Yes, I can do that.

7 MR. BRACKLEY: Okay.

8 JUROR: I mean, I just know in the back of my mind
9 that it -- it would be a difficult decision. And I think it
10 would be in my mind for a long time afterwards.

11 THE COURT: But I'm also hearing if you had to do
12 it you could do it.

13 JUROR: I would think -- I would hope I could. I
14 mean, I told you before I don't want to give up my right to
15 vote, and I completely understand that. So it would just be
16 very difficult.

17 THE COURT: Okay. Any questions for the
18 defendant?

19 MS. MILFELD: Your brother, Chris Ammon, he lives
20 in Wisconsin?

21 JUROR: That was bizarre. We don't have a last
22 name that's very common. I'm like whoa, that's my brother's
23 name. I'm assuming that wasn't my brother.

24 MS. MILFELD: Your brother lives and works in
25 Wisconsin?

1 JUROR: Yes.

2 MS. MILFELD: Okay. I don't have any other
3 questions.

4 MR. BRACKLEY: Yes. The family name though, this
5 is related to Chris Ammon. Do you know any Ammons in
6 Brooklyn?

7 JUROR: No.

8 MR. BRACKLEY: Any Ammons, anyone in your family
9 tree who is a federal judge that you know of?

10 JUROR: No, not -- I don't think so.

11 MR. BRACKLEY: Okay.

12 THE COURT: All right. Thank you, Ms. Ammon. If
13 you'd have a seat back in the courtroom.

14 JUROR: Thanks guys.

15 (The juror left the jury room.)

16 THE COURT: Next should be Max Bond.

17 THE CLERK: This is Mr. Max Bond.

18 THE COURT: Mr. Bond, come on in and have a seat
19 if you would please.

20 So I just wanted to talk to you in private about
21 just a couple of answers that you put on your questionnaire.

22 So the question was do you know of any reason why
23 you could not be a fair and impartial juror, and you said
24 you don't know. Have you thought about that anymore?

25 JUROR: Yeah, all weekend.

1 THE COURT: What do you think?

2 JUROR: Stressfully.

3 THE COURT: Yeah, I'm sorry about that.

4 JUROR: I have a couple issues, financial. One,
5 I'm self-employed and kind of unemployed because of I work
6 construction. And yeah, work is really slow for me. And to
7 miss two weeks of work without any compensation would just
8 be impossible for me.

9 THE COURT: Did you know that after the third day
10 of service that you get paid \$50 a day?

11 JUROR: Yes.

12 THE COURT: Does that make any difference to you?

13 JUROR: Well --

14 THE COURT: I know it's not what you'd make.

15 JUROR: Yeah, I make more than that.

16 THE COURT: Okay. So I understand you're worried
17 about money. What about the part about being fair and
18 impartial?

19 JUROR: Well, I could -- I'm not certain about
20 that. I -- my second problem is social issues.

21 THE COURT: What do you mean?

22 JUROR: I have problems with crowds. It's just
23 too many people right here for me. I thought there would be
24 three people in here.

25 THE COURT: So I understand, you plus the eight of

1 us, and that's making you uncomfortable?

2 JUROR: Everything makes me uncomfortable in
3 crowds, out there especially. And yeah, I just wouldn't
4 be -- I couldn't make it through a trial.

5 THE COURT: Well, let me ask you, because if
6 you're a juror in this case you're going to be sitting in
7 the jury box with 13 other people. There's going to be 14
8 of you sitting next to each other. And I hear you saying
9 that that makes you uncomfortable?

10 JUROR: Terribly.

11 THE COURT: What does it do to your ability to --
12 well, let me cut to the chase. If you're in the jury box
13 with other people, it's going to interfere with your ability
14 to listen to the evidence and hear what's going on. So I'm
15 going to go ahead and excuse you from this jury panel.

16 JUROR: I appreciate that.

17 THE COURT: Okay. Thank you very much, sir.
18 You're excused.

19 JUROR: I believe in all of this, but somebody
20 else needs to do it, not me.

21 THE COURT: Okay.

22 JUROR: I'm more suited --

23 THE COURT: You better head out the door before we
24 change our mind.

25 JUROR: Well, thanks.

1 THE COURT: Thank you, Mr. Bond.

2 JUROR: Do I need to hang out in here?

3 THE COURT: No, sir. You're excused. Thank you.

4 (The juror left the jury room.)

5 THE COURT: I think this will be Mr. Fernandez.

6 THE CLERK: This is Mr. Andres Fernandez.

7 THE COURT: Go ahead and have a seat would you
8 please, sir?

9 I wanted to talk to you in private because of a
10 couple of things that you put on your questionnaire. You
11 indicated that you're Buddhist and you don't pass judgment
12 on people?

13 JUROR: Correct.

14 THE COURT: What does that mean in terms of being
15 able to serve as a juror?

16 JUROR: It would be hard for me to actually pass
17 judgment for something I haven't witnessed, or in terms of
18 being -- you know, if I'm not there as a witness it would be
19 hard for me to pass judgment.

20 THE COURT: Okay. Well, you have to make
21 decisions on things that you're not personally there to
22 experience; right?

23 JUROR: Right.

24 THE COURT: Okay. So if you're a juror -- let me
25 ask it this way, one of the jobs of a juror is to determine

1 who is telling the truth or not.

2 JUROR: That would be hard for me to judge in this
3 context.

4 THE COURT: Why?

5 JUROR: Because as I said, I guess I'd rather not
6 be in the position where I'm not, you know, a witness.
7 Well, how would I explain this?

8 THE COURT: I mean --

9 JUROR: I don't go around in life trying to pass
10 judgment on people. And I'd rather not do it in a court of
11 law.

12 THE COURT: But if you were a juror and you were
13 instructed that you had to?

14 JUROR: I'd be conflicted as to whether I
15 should -- it would be tough for me to pass judgment on
16 whether the person was guilty or not guilty.

17 THE COURT: But right now I'm asking you about
18 trying to tell whether someone's being truthful. I know you
19 don't necessarily like to do it, you don't want to do it.
20 But the question is can you do it based on your religious
21 convictions?

22 JUROR: Unless they tell me otherwise they've lied
23 to me or something it would be -- I'd rather not do that.

24 THE COURT: I understand you'd rather not. Can
25 you?

1 JUROR: No.

2 THE COURT: Is there anything about your religious
3 convictions that prevent you --

4 JUROR: Yes.

5 THE COURT: What?

6 JUROR: That I'd rather not pass judgment on
7 people. Is that too difficult to -- I don't -- I'm not --
8 I'd rather go through life and focus on myself and not pass
9 judgment on what is happening around me. I'd rather things
10 go the way they go, you know, life set out the way that the
11 universe is so constructed. There's no good or bad, so you
12 look at life and you look at what is around you with -- with
13 a lack of judgment.

14 THE COURT: Okay. What about being able to render
15 a verdict, can you render a verdict of guilty or not guilty
16 based on the evidence?

17 JUROR: No.

18 THE COURT: You could not?

19 JUROR: No.

20 THE COURT: Okay. Any questions, Mr. Brackley?

21 MR. BRACKLEY: No. Thank you, sir.

22 MS. RING: So Mr. Fernandez, I appreciate what
23 you're sharing with us. And one of my concerns is we want a
24 panel of jurors to come from all different walks of life --

25 JUROR: Okay.

1 MS. RING: -- and all different backgrounds and
2 all different religious beliefs.

3 And so it concerns me that we could go through
4 this process, you know, as a society and not have any -- you
5 know, if this is really based on your Buddhist beliefs, not
6 ever have a Buddhist sit on a jury in the United States
7 because of their spiritual beliefs. And do you understand
8 why I would be concerned about that as someone who is part
9 of this process as my career?

10 JUROR: Sure I can understand your reservations I
11 guess.

12 MS. RING: Okay. So is there anything you can
13 share with me to help me to understand how based on your
14 beliefs and how you view the world that it isn't important
15 to have those beliefs and those viewpoints be part of this
16 process?

17 JUROR: It's hard for me to explain at this point.
18 I think I'm also -- I'm also under the weather too, so it's
19 been a little bit difficult for me to kind of make more
20 opinions right now. Can you ask that question again for me?

21 MS. RING: Not exactly sure how I phrased it last
22 time. I was asking you if you've ever thought about if your
23 position of feeling like you can't serve on a jury because
24 you don't want to pass judgment is based on your religious
25 beliefs as a Buddhist, does that then follow that?

1 JUROR: It's not -- Buddhism is religion, but it's
2 also just thoughts, also a way you approach life and how you
3 approach -- how you interact with the world and the
4 universe. Things are -- basically things happen for a
5 reason, okay. Whether that's a good or bad reason I can't
6 pass judgment.

7 MS. RING: I guess I would suggest to you that
8 your role as a juror isn't to pass judgment about whether
9 something is good or bad. It's simply to listen to evidence
10 and facts and decide if sufficient evidence and facts have
11 been presented to you to make a decision rather than whether
12 it's good or bad. It's just making --

13 JUROR: Are we talking about also -- are we just
14 strictly speaking in terms of Buddhism, or are we speaking
15 in terms of the case too?

16 MS. RING: Right now I'm not actually going back
17 to the case, just as your role as a juror is actually just
18 listening to facts and evidence and making a decision based
19 on the facts and evidence that are presented to you.

20 JUROR: Okay.

21 MS. RING: Because if I'd suggest --

22 JUROR: I guess I'm having trouble understanding
23 what you're saying.

24 MS. RING: That's because of your cold or because
25 I'm asking a bad question or both?

1 JUROR: I don't know. I'm a little under the
2 weather too.

3 MS. RING: I appreciate you being here.

4 THE COURT: All right. Mr. Fernandez, I'm going
5 to go ahead and excuse you from jury service. Thank you,
6 sir.

7 JUROR: Okay. Thank you.

8 (The juror left the jury room.)

9 MS. RING: My significant other is a professor of
10 Buddhism. I couldn't help but have him in my ear.

11 MR. KELLNER: Your Honor, you asked about
12 Ms. Kamens-Horton. What did you want --

13 THE COURT: I mean, she needs to express milk
14 every couple hours.

15 MS. RING: I think while we're doing this why
16 don't we ask her.

17 MR. KELLNER: It's noon now.

18 MS. RING: She may not know that she can leave
19 because she's sitting in the --

20 THE COURT: She does. In fact, I offered her the
21 private bathroom that's just inside the lobby area. I just
22 wanted to point out that she's a nursing mother. And I
23 didn't know if that factored into anybody's decisions about
24 her.

25 MS. RING: I would suggest since we're doing this,

1 we've only got three more, we might as well. It can't hurt
2 to bring her back and see how she's feeling after being here
3 this long today about what that looks like.

4 THE COURT: All right.

5 THE CLERK: This is Terri Rush.

6 THE COURT: Hi, Ms. Rush. Would you have a seat
7 there.

8 Did Mr. Bishop show up?

9 THE CLERK: No.

10 THE COURT: After Ms. Rush we have Litsey, Clark,
11 and then I'd like to talk to Ms. Kamens-Horton briefly.

12 THE CLERK: What about Ms. Gloe? She was the one
13 that just had the medical issue.

14 THE COURT: We can talk to her after
15 Ms. Kamens-Horton.

16 So let me do this, bear with me for just a second.
17 I'm going to excuse the rest of the panel until 1:30 with
18 the exception of those four people in addition to Ms. Rush.
19 So give me one second.

20 (Pause.)

21 THE COURT: So Ms. Rush, we wanted to talk to you
22 in private because of some of the information that you'd
23 included on your questionnaire. And it had to do with your
24 knowledge of Richard Denig.

25 JUROR: Okay.

1 THE COURT: How do you know that person?

2 JUROR: He was a neighbor of mine for three years.

3 THE COURT: Okay. And how well did you know him?

4 JUROR: Very well.

5 THE COURT: What sort of things did you do to get
6 to know him?

7 JUROR: Well, I mean, we were next door neighbors,
8 so we, you know, did events together, went out to dinner
9 together. His daughter babysat for my children for several
10 years.

11 THE COURT: Okay. How long ago was it that you --
12 well, do you still socialize with Mr. Denig?

13 JUROR: I haven't seen him for about three years.
14 We're no longer neighbors. We moved, they moved.

15 THE COURT: I'm assuming you still hold a positive
16 opinion of Mr. Denig?

17 JUROR: Yes.

18 THE COURT: If he were to testify as a witness in
19 this case how do you think you would do evaluating his
20 truthfulness?

21 JUROR: Well, I believe he's very honest, so I
22 would believe that he would be totally honest to whatever he
23 testified.

24 THE COURT: Okay. Would you be willing to
25 evaluate, critically analyze what he's saying to determine

1 whether or not it was true?

2 JUROR: Absolutely.

3 THE COURT: Okay. Let me see if the prosecution
4 has any questions. Mr. Brackley.

5 MR. BRACKLEY: So if information were to come from
6 another source or piece of evidence or even from Richard
7 Denig's testimony in and of itself that was different from
8 something he had testified to or different from a report
9 that he had written or different than what another witness
10 had testified to, could you analyze all of the evidence
11 together and make a determination as to whether or not Rich
12 Denig was credible or incredible based on all the evidence?

13 JUROR: Yes.

14 MR. BRACKLEY: That was a terrible question.

15 JUROR: That was a long question. But yes, I
16 could do that.

17 MR. BRACKLEY: You could put any personal
18 experiences you had with Rich Denig and his family aside and
19 keep an open mind as to his testimony?

20 JUROR: Yes.

21 MR. BRACKLEY: Keep an open mind as to his role in
22 this particular case?

23 JUROR: Yes.

24 MR. BRACKLEY: Has he ever discussed his -- these
25 cases with you?

1 JUROR: No.

2 MR. BRACKLEY: Or the kind of work he does at the
3 police department?

4 JUROR: Basically. Sometimes he was a detective,
5 sometimes he was on the street, sometimes he was -- you
6 know, just his different positions. Never anything about
7 any individual cases.

8 MR. BRACKLEY: Okay. Ever told stories about a
9 particular case that was hard, challenging or --

10 JUROR: Never.

11 MR. BRACKLEY: -- anything like that?

12 JUROR: Never.

13 MR. BRACKLEY: Thank you.

14 THE COURT: Okay. Ms. Ring, or Ms. Milfeld, I'm
15 sorry.

16 MS. MILFELD: The shorter version of that question
17 is if he says something and then another witness says
18 something completely different, who are you going to
19 believe?

20 JUROR: Well, it would have to be based on what
21 the evidence is presented.

22 MS. MILFELD: So would it be based on your
23 positive opinion of Mr. Denig before?

24 JUROR: I don't think so.

25 MS. MILFELD: Is there anything about him being a

1 police officer that you formed an opinion about other police
2 officers from your experience with them?

3 JUROR: No, I don't believe so.

4 MS. MILFELD: I don't have any other questions.

5 THE COURT: Okay. Thank you, Ms. Rush. You can
6 go ahead, you're excused for lunch. If you would please
7 return to the courtroom at 1:30. All right. Thank you very
8 much.

9 JUROR: You're welcome.

10 (The juror left the jury room.)

11 THE COURT: This next one should be -- let's see,
12 this juror, he asked to speak with us.

13 MS. RING: He said he remembered more. That's
14 what I remember her saying.

15 MR. BRACKLEY: Yeah.

16 THE CLERK: This is Mr. Nathan Litsey.

17 THE COURT: Go ahead and have a seat if you would
18 please.

19 So I wanted to talk to you in private about some
20 of the information that you provided on the questionnaire.
21 You said that you had some information about this case from
22 probably the Daily Camera. And I think you told my bailiff
23 that you remembered more since you filled this out?

24 JUROR: Yeah, exactly right. It's basically I've
25 been kind of keeping track of it in the paper, you know,

1 throughout the months up until this. And I haven't looked
2 at it since Thursday when I was called in here. But just,
3 you know, mulling it over in my head I remembered a couple
4 like of the details that I did not include on that survey.

5 THE COURT: Details. How did you find out about
6 them, from what source?

7 JUROR: Through the paper.

8 THE COURT: Through the Daily Camera, okay.

9 What additional details do you remember?

10 JUROR: Really two. One was regarding the
11 motorcycle theft, how ultimately they apprehended Mr. Clark
12 and there was a motorcycle chase. They chased him for a
13 while. It sounds like he crashed, tried to evade on foot
14 for a while, but ultimately apprehended him.

15 The other one was about Mr. Grisham's request to
16 have the locks changed on his apartment after the checkbooks
17 were missing.

18 THE COURT: Okay. I mean, do you realize that the
19 newspaper isn't always accurate?

20 JUROR: Sure I do. But I mean, I guess the reason
21 that those stuck out in my mind, what kind of clicked in my
22 head was I seemed to recall those being somehow important,
23 how it sounded like they were inadmissible in court. Maybe
24 I'm wrong about how I remember that, but that's my
25 recollection.

1 THE COURT: Okay. And I know in the next question
2 it said does the information cause you to form an opinion
3 concerning the case, and you said yes. And then the
4 follow-up to that was, you know, can you set it aside, and
5 you said doubtful.

6 So sitting here right now how are you feeling? Do
7 you have this information in your head?

8 JUROR: I do, yeah. I mean, it's -- I've been
9 thinking a lot about it over the weekend, yeah.

10 THE COURT: Now, I would -- if you're a juror in
11 this case I would instruct you that you need to set aside
12 any previous knowledge, preconceived notions, bias,
13 prejudice, and make this decision based only on what you
14 hear in the courtroom. And that's sort what I told you on
15 Friday morning; right?

16 JUROR: Sure.

17 THE COURT: Do you think you can do that if I tell
18 you to ignore what you know or what you read in the paper?

19 JUROR: Honestly it will be hard.

20 THE COURT: Okay. Can you do it?

21 JUROR: That's my honest opinion.

22 THE COURT: Can you do it?

23 JUROR: I would say no.

24 THE COURT: Okay. Mr. Brackley.

25 MR. BRACKLEY: What opinion have you formed, if

1 any? I know you have -- like to what extent have you formed
2 an opinion?

3 JUROR: Well, I mean, I guess, you know, thinking
4 about those two pieces of information, especially the
5 motorcycle theft, where it goes in my mind is Mr. Clark was
6 on the verge of being apprehended for a crime and acted in a
7 desperate manner and --

8 THE COURT: Okay. Even the newspaper told you
9 that was probably inadmissible?

10 JUROR: Yeah, my recollection is that it said that
11 this was not going to be admissible in court.

12 THE COURT: So Mr. -- let's see, I appreciate you
13 bringing that to our attention. And frankly, I appreciate
14 your honest answer. So I'm going to go ahead and excuse you
15 from jury service in this case. And you are free to go.
16 You do not need to return at 1:30.

17 JUROR: Okay.

18 THE COURT: All right. Thank you.

19 (The juror left the jury room.)

20 THE COURT: This will be Mr. Clark again. And he
21 had some travel plans. Is that what the deal was?

22 MR. BRACKLEY: He was the gentleman from Whole
23 Foods I believe.

24 THE CLERK: Hello again, Mr. Clark. Go ahead and
25 have a chair.

1 So the bailiff told me that you remembered some
2 additional information you wanted to share with us.

3 JUROR: Well, I just was wanting to let her know
4 that I have two business trips for work, one this week and
5 one in two weeks from today.

6 THE COURT: So tell me about the one this week.

7 JUROR: This week is a trip to Steamboat Springs
8 for three days, and the next one is in Austin, Texas for
9 three days.

10 THE COURT: When are you supposed to go to
11 Steamboat Springs?

12 JUROR: Wednesday at 1:00.

13 THE COURT: What's it for? I mean, it's work
14 related, but what are you going to be doing?

15 JUROR: It's for our team at work. And so it's
16 like kind of looking forward for the next year planning,
17 that type of thing, in Steamboat Springs.

18 THE COURT: Are you going with your whole team?
19 So this is like a team building?

20 JUROR: Yeah.

21 THE COURT: Okay. And then tell me about the trip
22 a week from -- or two weeks from today.

23 JUROR: That one is to Austin. And that's a
24 nationwide -- our global office is Austin. And week-long
25 annual get-together for planning. I do planning for the

1 business. It's where all the different regions come
2 together global for three days.

3 THE COURT: Okay. The trip to Steamboat, what
4 happens if you miss that because you're on jury service?

5 JUROR: Well, I miss -- I would miss all the
6 planning for the next year. Like our fiscal year just
7 finished, so we're planning all the next fiscal years goals
8 and stuff like that. So it would be a detriment as far as
9 knowing what to expect this next year.

10 THE COURT: Okay. What about if you missed the
11 trip to Austin two weeks from today?

12 JUROR: There's a lot of business decisions made
13 at those where all the regions come together. And as this
14 the is the first one where our specific group -- I guess I
15 don't know.

16 THE COURT: So but it sounds to me like -- I know
17 you want to be there. It sounds like you believe it's
18 important that you're there. But both of those meetings,
19 those events will go on if you're not able to attend because
20 of jury service?

21 JUROR: They would go on, yeah.

22 THE COURT: And it sounds like it would not -- if
23 you missed either or both of them it wouldn't cause you any
24 jeopardy for your work with Whole Foods; is that accurate?

25 JUROR: I'm not sure about that one. I guess

1 we've never -- I've never gone to FDNA Summit they call it,
2 so I don't know exactly what will be done.

3 THE COURT: Is that the one in Austin?

4 JUROR: Yeah.

5 THE COURT: Mr. Brackley, do you have any
6 questions on this area?

7 MR. BRACKLEY: No, sir.

8 THE COURT: Ms. Milfeld?

9 MS. MILFELD: No, thank you.

10 THE COURT: All right. So Mr. Clark, I'm going to
11 go ahead and excuse you for lunch. Then I'm going to ask
12 you to come back at 1:30. Okay. Thank you very much.

13 (The juror left the jury room.)

14 THE COURT: This should be Ms. Kamens-Horton.

15 THE CLERK: This is Ms. Gloe.

16 THE COURT: Oh, Ms. Gloe, okay. Hi, Ms. Gloe. Go
17 ahead and have a seat if you would please.

18 JUROR: I requested this because I felt I needed
19 more full disclosure about me that I didn't put in then if
20 that's okay.

21 THE COURT: Sure, go ahead and have a seat. Let
22 us all find your questionnaire so we make sure we're
23 familiar with you. And then I'll ask you some questions,
24 and then I'll ask the attorneys if they have any questions
25 for you as well.

1 And I know that you were worried about any
2 overnight sequestration. Let me allay any fears that you
3 have, this jury is not going to be sequestered. You're
4 going to be able to return home every evening, sleep in your
5 own bed.

6 JUROR: No problem.

7 THE COURT: Okay. So you said -- I think you told
8 my bailiff that you had some other information.

9 JUROR: Correct.

10 THE COURT: Okay. What did you want to tell us?

11 JUROR: At the time I didn't think about the
12 calendar. My husband is scheduled for surgery on the 29th.
13 I don't know, you know. I guess we run into that and I'm
14 the only one.

15 The other thing is I've recently been diagnosed
16 with hearing problems where I should wear a hearing aid,
17 which I did try and I didn't like. And it's very expensive.
18 But that might matter in the courtroom if I can't hear
19 people clearly and think they're mumbling. I don't think
20 you want me.

21 THE COURT: Well, let me -- that actually brings
22 up a good point. I mean, if you're having difficulty
23 hearing are you the kind of person who you'd be comfortable
24 enough to say excuse me, can you speak up and repeat that?

25 JUROR: Yeah.

1 And the other option I wondered if you had -- do
2 you have stuff --

3 THE COURT: I do. They're not very high tech. I
4 mean, they work. We use them. It's a -- well, no, it's not
5 the horn, it's electronic. And we certainly have that
6 available for you.

7 Let me ask you, do you have better hearing out of
8 one side or the other?

9 JUROR: Well, there is a difference between them,
10 but they're both -- they both -- I brought the record if you
11 had wanted to see it. No, it's like -- you know, it's not
12 just somebody coming up with --

13 THE COURT: I believe you. I appreciate you
14 bringing the record.

15 JUROR: They do separate, and the left is worse
16 supposedly than the right.

17 THE COURT: So the right is better?

18 JUROR: Which is why I'm supposed to go back,
19 because that could mean -- maybe for MRI purposes they tell
20 you all the scary stuff, you know, they do. And even that
21 apnea thing, doctor is saying well, you have to do something
22 about that and wear that horrible thing because you could
23 have a stroke or a heart attack, and I'm like thanks. So
24 there I am.

25 THE COURT: Where have you been sitting in the

1 courtroom so far today?

2 JUROR: So far today in the back.

3 THE COURT: Okay.

4 JUROR: Could I hear her call names? No.

5 THE COURT: You could not, all right.

6 When I came out and was talking to the whole group
7 could you hear me?

8 JUROR: I heard you, and I hear you now.

9 THE COURT: Okay. So let me -- I'm going to see
10 if the attorneys have any questions for you, and then I'm
11 going to come back around and I'm going to ask you, you
12 know, how your hearing has been. Mr. Brackley.

13 MR. BRACKLEY: I don't have any. Thank you.

14 THE COURT: Okay. Ms. Ring.

15 MS. RING: Ms. Gloe, we certainly appreciate you
16 bringing these things to our attention. I think where
17 that -- your husband's surgery on the 29th, that --

18 JUROR: I'll be there.

19 MS. RING: We're not anticipating that being a
20 problem.

21 JUROR: Good.

22 MS. RING: You know, from our perspective we want
23 all kinds of different jurors from all different types of
24 walks of life and et cetera. And so the hearing thing
25 really becomes a question in my mind for you.

1 And I guess one of the ways I'd like you to think
2 about it to try to answer for me is if the person sitting
3 next to me at the table were someone that you really cared
4 about, that they were the one accused of the crime, how
5 would you feel about a juror with your hearing issue being
6 on the jury knowing that it's critical that you hear
7 absolutely everything?

8 JUROR: No, that's -- that was one of the things I
9 wanted to mention, because it was pointed out to me that one
10 of the first things that happens when you start to lose your
11 hearing is your constants are the first to go. And I would
12 want to know that I was hearing clearly.

13 If there is a technical or some way to make sure I
14 am, that's fine. I don't want to be missing out or
15 misinterpreting what was said by someone.

16 MS. RING: And if we were going forward when we're
17 back out in the courtroom to have you try that hearing
18 device --

19 JUROR: Sure.

20 MS. RING: -- you'd let us know whether that was
21 solving the problem or not?

22 JUROR: Yes, I would.

23 MS. RING: Okay.

24 THE COURT: Okay. I'm sorry, did you have any
25 other questions?

1 MS. RING: No.

2 THE COURT: So what I'll do, I'll get one of those
3 hearing assist devices, and during jury selection we'll let
4 you try it out. And then at some point I'll ask you if it's
5 helping, how much you've been able to hear, those sort of
6 things.

7 In the mean time if you think that you're missing
8 anything that I or one of the attorneys are saying or one of
9 the other jurors is saying, raise your hand, let me know.
10 And if it's going to be something that's too difficult for
11 you, then I would excuse you. But we'll -- let's give it a
12 try, okay?

13 JUROR: Yes, because I was willing to say no on
14 the hearing aid because I checked it out and found I operate
15 just fine. But I am also aware that people hear because
16 they see people when they're talking.

17 And where it may become a problem is when there's
18 other noise in the background, then somebody is trying to
19 be -- so I hope everybody in your courtroom is loud and
20 clearly spoken.

21 THE COURT: I will try to make that happen.

22 All right. So we'll see you back in the courtroom
23 at 1:30.

24 JUROR: Thanks for hearing me.

25 THE COURT: No problem. Thank you.

1 (The juror left the jury room.)

2 THE CLERK: Judge, there's a juror whose mother is
3 in -- mother-in-law is in hospice care, and they don't think
4 she's going to make it through the next three weeks which
5 would require a trip back to Michigan. And I didn't know if
6 you wanted to speak to him or if that's something to take up
7 in the panel?

8 THE COURT: What's the juror's --

9 THE CLERK: Paul Weiss.

10 THE COURT: Can you spell that for me?

11 THE CLERK: W-E-I-S-S.

12 THE COURT: Is he still here?

13 THE CLERK: He is.

14 THE COURT: So let's talk to Ms. Kamens-Horton,
15 then if you'd have Mr. Weiss ready.

16 Hi, Ms. Kamens-Horton. How are you?

17 JUROR: Good. How are you?

18 THE COURT: So I wanted to talk with you,
19 obviously you're a nursing mother, and we tried to make some
20 accommodations this morning. But I sort of wanted to check
21 with you to see if -- how that's working for you.

22 JUROR: I've made it work before. I've nursed,
23 I've had to pump on airplanes. You know, you have to do
24 things because I want to keep on nursing my son.

25 THE COURT: Okay. Are the accommodations that we

1 provided this morning, are they -- they're manageable?

2 JUROR: Yeah.

3 THE COURT: Okay. In terms of the trial schedule,
4 we would start at 9:00 in the morning, we'd end at 5:00,
5 break from 12:00 to 1:30 for lunch and about 15 minutes
6 mid-morning, mid-afternoon.

7 JUROR: Okay.

8 THE COURT: Is that the kind of schedule that
9 would allow you to continue to express as needed?

10 JUROR: Yeah, as long as like during -- probably
11 during those 15 minutes in the morning and the afternoon I
12 would just have to do it.

13 THE COURT: Does 15 minutes give you enough time?

14 JUROR: Yeah. I mean, normally it's closer to
15 about 20, but I could make it work.

16 THE COURT: Okay.

17 JUROR: It's just more important that I do it some
18 period of time. My son is old enough now that I'm not -- I
19 wouldn't be too concerned. I have a good freezer stash that
20 I'm not too concerned about making sure he has what he needs
21 everyday. But it's more of I have to do it twice a day to
22 maintain it. So if it was slightly shorter for the duration
23 that's fine.

24 THE COURT: Okay. Mr. Brackley, do you have any
25 questions?

1 MR. BRACKLEY: Just on another slightly different
2 topic, I think we endeavor to get -- to finish at the end of
3 everyday by 5:00. There is some days where it just makes
4 sense to go a little bit longer. And I don't think we ever
5 go past 5:30.

6 JUROR: Assuming I can call my daycare. If I call
7 them, I can tell them to move my son to the other room and I
8 can get there by I think 6:00. But that requires me calling
9 them and them having to do like -- you know, does that make
10 sense?

11 MR. BRACKLEY: It does make sense. But there is
12 that 15, 20 minute rule if we need to to go a little bit?

13 JUROR: As long as I can call them and let them
14 know I can't get there by 5:30.

15 THE COURT: Any questions, Ms. Ring?

16 MS. RING: No.

17 THE COURT: Okay. Thank you, Ms. Kamens-Horton.
18 We'll see you back in the courtroom at 1:30.

19 (The juror left the jury room.)

20 THE COURT: Hi, Mr. Weiss. Come on in and have a
21 seat right there.

22 JUROR: Okay.

23 THE COURT: So I know on your juror questionnaire
24 you indicated that your mother-in-law was in hospice care.
25 Has anything changed since Friday?

1 JUROR: She's still in hospice care of course.

2 And father-in-law's been calling, and things are progressing
3 downward. So I think my wife's going to head down Monday
4 back to Michigan.

5 THE COURT: A week from today?

6 JUROR: Yeah, maybe sooner. Today is Tuesday;
7 right? Could be sooner, I don't know. She hasn't said.
8 She'd take one of our daughters, then I'll stay here with
9 the other one.

10 THE COURT: Okay.

11 JUROR: She may not -- you said three weeks?

12 THE COURT: Well, what I anticipate is that the
13 evidence is going to be done by the end of the second week.

14 JUROR: Basically she has emphysema, COPD, and
15 she's decided she's going to smoke her way out, so classic
16 smoking thing. So that's going to accelerate it.

17 THE COURT: Okay.

18 JUROR: When she wasn't smoking that wasn't the
19 case when we were just back there. But now I think she's
20 just like to hell with it.

21 THE COURT: Let me see if the attorneys have any
22 questions.

23 MR. BRACKLEY: I don't. Thank you.

24 THE COURT: Ms. Ring or Ms. Milfeld?

25 MS. MILFELD: No questions, thank you.

1 THE COURT: Okay. I think what I can tell you,
2 Mr. Weiss, if something like that happens, obviously let me
3 know, we'll see what we can do. If she passes and you need
4 to travel, you know, I'll try and figure out the best way to
5 accommodate that. But for right now what I'm going to ask
6 you to do is come back at 1:30 this afternoon.

7 JUROR: That's fine. I just wanted to make sure
8 you were aware of it.

9 THE COURT: I appreciate that.

10 (The juror left the jury room.)

11 THE COURT: Anything else before we take the noon
12 break?

13 MR. BRACKLEY: Could we -- can you preview sort of
14 how we're going to run the rest of the afternoon given the
15 fact that we've had questionnaires? Are we going to put
16 jurors in the box and do any kind of individual round
17 through them, should we be filling out our little charts
18 now?

19 THE COURT: They're going to be called in the
20 order that you have on the randomized chart. The first 38,
21 they'll fill the box. I've got some introductory
22 instructions and I'll ask probably not even a handful of
23 general questions. And then I'm going to turn it over to
24 the attorneys for your voir dire. Is that what you were
25 asking?

1 MR. BRACKLEY: Yeah, pretty much. I just wanted
2 to know what the procedure will be.

3 THE COURT: So let me -- I think when we talked
4 earlier we talked about two hours for voir dire. You still
5 think you need two hours for voir dire given the number and
6 extent of the individual voir dire that we've conducted?

7 MR. BRACKLEY: I don't expect to use two hours,
8 but I would like to have it. I just don't know.

9 THE COURT: Ms. Ring.

10 MS. RING: I think the minute I say we don't need
11 two hours now something will come up and I'll say -- so,
12 again, I think, Judge, all of us have done this. We know
13 jurors get really tired when you start to beat a dead horse.
14 Because of the nature of the case and the number of jurors
15 we're talking to, I want to make sure we have time to talk
16 to them.

17 THE COURT: Okay.

18 MS. RING: Just so the everyone knows, Ms. Milfeld
19 and I plan on splitting our time.

20 THE COURT: That's fine. Okay.

21 MS. MILFELD: Just with Mr. Weiss there, he might
22 have opened my financial account a few years ago that I have
23 with Wells Fargo, but I don't know. He just looked
24 familiar.

25 MS. RING: That's one of the general questions, do

1 you know what my account balance is.

2 THE COURT: We'll be in recess, 1:30 sharp.

3 (A recess was taken, whereupon the following
4 proceedings occurred in the courtroom.)

5 THE COURT: Good afternoon, ladies and gentlemen.
6 I'd introduced myself to you previously on Friday, but I'm
7 Judge Thomas Mulvahill. I'm one of the district court
8 judges. I'm assigned to preside over the case of People
9 versus Michael Clark, which is the case that you've all been
10 summoned here as prospective jurors for.

11 As an initial matter -- and you guys have been
12 very good about this so far, but I'm going to ask you if you
13 have a cell phone or electronic device, turn it off so that
14 it doesn't go off in the courtroom, one.

15 And then, two, you're not allowed to do any
16 outside investigation, including looking up anything on any
17 electronic devices.

18 And I want to remind you as I mentioned on Friday
19 that you can't do any independent research, view or listen
20 to any media reports or access any information via the
21 internet.

22 I had previously introduced you to Krista
23 Batchelder. She's my law clerk. She also acts as the
24 bailiff for this trial.

25 Sitting in front of me is Dawn Chioda. She's my

1 court reporter. She's literally taking down every word that
2 is spoken in this courtroom. I don't know how it happens.
3 It's close to magic.

4 But sometimes you'll hear me asking witnesses or
5 lawyers to speak up or slow down. And that's in part
6 because I need to make sure that the court reporter is able
7 to get everything that everybody says down for the
8 transcript.

9 As I mentioned, the case we're going to be hearing
10 today is the case of People versus Michael Clark. The
11 prosecution is represented by the District Attorney's
12 Office. And I'm going to ask those attorneys to please
13 stand and introduce themselves and the gentleman seated with
14 them.

15 MR. BRACKLEY: My name is Ryan Brackley. This is
16 Detective Chuck Heidel from the Boulder Police Department.

17 MR. KELLNER: Good afternoon. My name is John
18 Kellner. I'm a deputy district attorney.

19 THE COURT: And I'm going to ask Mr. Clark and his
20 attorneys to stand and introduce themselves to you.

21 MS. RING: Good afternoon. My name is Megan Ring.

22 MS. MILFELD: I'm Nelissa Milfeld.

23 MS. RING: Our client, Mr. Clark.

24 THE COURT: All right. The fact that the case is
25 entitled the People versus Michael Clark means it's a

1 criminal case. A criminal case involves the People, the
2 government, the State of Colorado filing charges against an
3 individual.

4 A criminal case seeks punishment of the defendant.
5 And so some of the rules and procedures that apply to a
6 criminal case are different than you would find in a civil
7 case.

8 The plaintiff in a criminal case is the
9 government. You're going to hear them referred to as the
10 People or the prosecution.

11 The charge in this case, there is a single count.
12 It is Murder in the First Degree. It alleges that on or
13 about November 1, 1994, in or triable in the County of
14 Boulder, State of Colorado, Michael Martin Clark unlawfully,
15 feloniously, after deliberation and with the intent to cause
16 the death of a person other than himself, caused the death
17 of Marty Joe Grisham.

18 You need to understand that Mr. Clark has pleaded
19 not guilty to this charge. The charge against him is not
20 evidence. In fact, the charge is simply a set of
21 paperwork -- Mr. Weiss, you can sit up here.

22 JUROR: Thanks.

23 THE COURT: The charge is simply a set of
24 paperwork by which the defendant, the Court and you are
25 advised of the charges that the district attorney will

1 attempt to be -- will attempt to prove in this trial.

2 Mr. Clark is presumed innocent of the charge.

3 That presumption of innocence remains with him throughout
4 the trial. And he cannot be found guilty unless and until
5 the district attorney presents evidence which convinces
6 every member of the jury beyond a reasonable doubt that the
7 defendant has in fact committed the alleged offense.

8 You should understand that the district attorney
9 has the burden of proof in this case. And that is the only
10 party with any burden of proof. The defendant has no
11 obligation to present any evidence or testimony at all.

12 The defendant does not have to testify. And if he
13 chooses not to testify, you cannot hold it against him in
14 any way. You may not consider it for any purpose.

15 Throughout this trial you will hear the term
16 beyond a reasonable doubt many times. It has a specific
17 meaning in the law. Let me read you that definition.

18 Reasonable doubt means a doubt based on reason and
19 common sense which arises from a fair and rational
20 consideration of all of the evidence, or the lack of
21 evidence, in a case.

22 It is a doubt which is not a vague, speculative or
23 imaginary doubt, but such as doubt as would cause reasonable
24 people to hesitate to act in matters of importance to
25 themselves.

1 If the district attorney is able to prove the
2 defendant committed the offense beyond a reasonable doubt,
3 you must find the defendant guilty. If the district
4 attorney does not prove the defendant guilty beyond a
5 reasonable doubt, you must find the defendant not guilty.

6 Let me talk a little bit about the jury's role and
7 then the judge's role in the case. It is the jury's job to
8 decide the facts of the case. You will listen to the
9 evidence and decide what you believe and what inferences can
10 be drawn from the evidence you hear.

11 My job is to give the jury the applicable law in
12 the form of instructions. And I will give you an oath to
13 follow those instructions.

14 It is also my role to make sure that both sides
15 get a fair trial. So I have to decide what evidence the
16 jury will be allowed to hear.

17 There are many complicated rules about what
18 evidence is proper in this kind of trial. The attorneys may
19 make objections, and I will rule on them. An objection
20 means that the attorney believes that the question being
21 asked is being asked in the wrong form or will elicit
22 improper evidence.

23 If I sustain an objection it means I agree with
24 the person making the objection, and I will not allow the
25 question to be answered. And if it has been answered, the

1 jury is instructed to disregard the answer. If you are
2 instructed to disregard the answer you may not regard the
3 answer as being any evidence whatsoever.

4 If I overrule an objection, it means I disagree
5 with the person making the objection and will allow the
6 question to be answered.

7 You should not try to figure out what I think
8 about the case. As a matter of fact, I know very little
9 about the case now, and I have no opinion other than that I
10 presume, as you must, that the defendant is innocent unless
11 and until the district attorney satisfies the jury that the
12 defendant is guilty.

13 You should not infer anything from my rulings on
14 the objections. That has only to do with the law that I
15 must apply separately with each objection and not with the
16 outcome of the case which you must decide.

17 You also should not concern yourself with the
18 punishment the defendant may receive if he is found guilty.
19 It will be my job to sentence the defendant if he is found
20 guilty. That should not enter into your deliberations at
21 any time. And you may not consider the potential sentence
22 for the defendant at any time in this case.

23 In just a few minutes we're going to begin
24 selecting our jury. We're going to need 14 people to sit as
25 jurors. But because of the method that we use for selecting

1 those 14 jurors, we're going to need many more of you to
2 participate in jury selection.

3 The first thing that we're going to do is ask some
4 questions of jury panel members. I'll ask a few questions
5 first, and then each of the attorneys will have an
6 opportunity to ask you questions after that.

7 We're not trying to pry when we ask you questions.
8 We're not trying to delve into your personal matters. To
9 the extent that we could identify that there were unique or
10 perhaps sensitive issues, we tried to take care of those
11 with individual questioning back in the jury room this
12 morning.

13 But when you're asked a question you need to
14 understand that the attorneys and I are trying to figure out
15 who can be a fair and impartial juror in this case. And so
16 I would ask you to answer the questions candidly and openly.

17 You're not expected to make any fancy speeches.
18 There aren't any right or wrong answers. You just need to
19 be candid and open.

20 If you're not chosen to be on the jury, don't feel
21 that it reflects badly on you. Sometimes I have to
22 disqualify myself from a case because I know the parties too
23 well, and it might appear that I couldn't be fair because of
24 my relationship to one of the parties. It doesn't reflect
25 on me personally.

1 You might also have a special relationship to
2 someone involved in this case or for some other reason you
3 might have to be excused.

4 Sir, you can come up and sit down here if you
5 want.

6 If you're excused as a juror in this case it
7 doesn't reflect on your ability to be a good juror in
8 another case.

9 At this time I need to administer an oath to all
10 of you, so I'm going to ask you all to please stand and
11 raise your right hand.

12 (The prospective jury panel was sworn by the
13 Court.)

14 THE COURT: Is there anyone who was unable to take
15 that oath? Please be seated.

16 Each juror must possess certain basic
17 qualifications for jury service. You should have been
18 pre-screened for these, but I need to ask them again.

19 And by the way, if it seems like I'm sitting up
20 here reading a bunch of things to you, that's exactly what
21 I'm doing.

22 The Supreme Court has set out a process they ask
23 trial judges to go through to make sure that jurors get the
24 necessary information to participate in jury selection and
25 that we make sure that the jurors have the proper

1 qualifications.

2 So while it is part of the script, it's still
3 important that you listen and answer. If you do not possess
4 these qualifications I'm going to ask you to raise your
5 hand.

6 You must be a US citizen. You must be a resident
7 of Boulder County or you must live in the county more than
8 50 percent of the time. You must be 18 years old or older.
9 You must be able to read, speak and understand the English
10 language. You must not be so physically or mentally
11 disabled that you cannot render satisfactory jury service.

12 You may be excused from jury service if you have
13 sole responsibility for daily care of a permanently disabled
14 person living in the same household to the extent that the
15 performance of jury service would cause a substantial risk
16 of injury to the health of the disabled person.

17 Is there anyone who believes that criteria applies
18 to them?

19 MS. RING: Judge, can we approach?

20 THE COURT: Yes. Does it need to be on the
21 record?

22 MS. RING: No.

23 (A discussion occurred at the bench off the
24 record.)

25 THE COURT: Ms. Gloe.

1 JUROR: Yes.

2 THE COURT: I forgot we need to get you the
3 hearing device. In the mean time, why don't you come on up
4 here and sit in the front row. I apologize. Have you been
5 able to hear everything that I've said so far?

6 JUROR: Yes.

7 THE COURT: Okay. And I know we talked about that
8 if you weren't able to hear you would wave and let me know.
9 But we're going to get you the listening assistance in just
10 a minute, okay.

11 You may also be excused from jury service if you
12 presently reside outside of Boulder County with no intention
13 of returning to the county at any time during the next 12
14 months.

15 You may be excused if you were selected and served
16 as a trial or grand juror in any municipal, tribal,
17 military, state or federal court within the preceding 12
18 months or you appeared for jury service in state court
19 within the current calendar year.

20 There are also certain grounds which may
21 disqualify you from service as a juror in this case. Please
22 raise your hand if you believe any of these grounds apply to
23 you.

24 You are related within the third degree by blood,
25 adoption or marriage to the defendant or any attorney of

1 record or attorney engaged in the trial of this case. You
2 stand in the relationship of guardian and ward, employer and
3 employee, landlord and tenant, debtor and creditor, or
4 principal and agent to, or you are a member of the household
5 of or associated in business with or surety on any bond or
6 obligation for the defendant.

7 You are or have been a party adverse to the
8 defendant in a civil action or you complained against or
9 have been accused by the defendant in a criminal
10 prosecution. And that's not to suggest that there have been
11 any such actions previously.

12 You served on the grand jury which returned the
13 indictment or on a coroner's jury which inquired into the
14 death of a person whose death is the subject of the
15 indictment or the information or on any other investigative
16 body which inquired into the facts of the crimes charged.
17 And that's not to suggest that there was any such
18 investigative body.

19 You were a juror at a former trial arising out of
20 the same factual situation or involving the same defendant.
21 And that's not to suggest that there was any such former
22 trial.

23 You were a juror in a civil action against the
24 defendant arising out of the acts charged as a crime. And
25 that's not to suggest that there was any such civil action.

1 You were a witness to the crime or its
2 prosecution.

3 You occupy a fiduciary relationship to the
4 defendant or a person alleged to have been injured by the
5 crime or the person on whose complaint the prosecution was
6 instituted.

7 You presently have the state of mind which
8 manifests a bias for or against the defendant or for or
9 against the prosecution, or you have a previously formed or
10 expressed opinion regarding the guilt or innocence of the
11 defendant.

12 And finally, if you are a compensated employee of
13 a public law enforcement agency or a public defender's
14 office. All right. And I see no one raised their hands.

15 Let me explain to you how we're going to get from
16 this large group of about 80 people to the 38 people who
17 will initially participate in the selection process to the
18 14 people who will actually serve on this jury.

19 The jury box area and the chairs in front are what
20 I'm going to refer to as the jury box. 38 of you are going
21 to be called in a random order to fill this jury box. We're
22 going to fill the jury box from right to left and back to
23 front.

24 And I'll try and give you directions on where you
25 need to sit, but basically right to left, back to front.

1 We're going to call 38 of you in random order.

2 I'll ask a few questions of the 38 people in the
3 box, and then the attorneys will have an opportunity to ask
4 questions of the 38 people in the box.

5 If you're not one of the first 38 people called to
6 the box, it doesn't mean you're off the hook. Let me tell
7 you why.

8 One or more of those 38 people may be excused for
9 a variety of reasons. If one of those 38 people is excused,
10 then I'm going to call on another random person from out
11 there sitting in the wooden benches to fill that juror's
12 seat. And that person filling in the juror's seat will go
13 through the same process of questions and answers.

14 Once the attorneys and I have asked our questions
15 and the jury has been passed for cause, then each side will
16 be allowed to excuse 12 jurors with what are called
17 peremptory challenges. And those are challenges that each
18 side gets to exercise without any explanation or reason to
19 me or to you.

20 But if you do the math, we start with 38, 12
21 peremptory challenges for the prosecution, 12 peremptory
22 challenges for the defendant, 38 minus 24 gets us to the 14
23 people that will be listening to the case.

24 JUROR: I'm hearing fine now.

25 THE COURT: If you can hear me, fine. Then you

1 don't have to use that. You've been able to hear me fine?

2 JUROR: Yes.

3 THE COURT: All right. So look, if I don't see
4 the headset go on, I'm going to assume that you can hear all
5 of us fine. If I see the headset go on, then I'm going to
6 assume that you're having a little bit of difficulty. And
7 I'll make sure and follow up with you to see how it's
8 working for you, okay?

9 JUROR: Okay.

10 THE COURT: All right. So I was talking about
11 doing the math. 38 minus 24 gives us the 14 people that are
12 going to be selected to serve on this jury.

13 While the questioning is being conducted of the 38
14 people up here, I'm going to ask all of the other
15 prospective jurors and the other people in the box to listen
16 to the questions and the answers that are being posed.

17 If you have information or you would answer a
18 question significantly different than what the individual
19 juror who is answering the question, I'm going to ask you to
20 let us know that if you're one of the 38 in the box here.

21 If you're one of the prospective jurors still
22 sitting in the wooden benches, when you get called into the
23 box I'm going to go through a series of questions with you
24 and ask you about the things that the other jurors have been
25 previously asked about. And it's important that you know

1 what the questions were and what the answers were.

2 I already told you that we're not trying to pry
3 into your personal lives. We've tried to take care of
4 personal matters as best we can individually back in the
5 jury room.

6 But if something comes up and it's particularly
7 personal to you and you're not comfortable talking about it
8 in front of the other jurors, let me know. We can step back
9 in the jury room and take care of it there.

10 At this time I'm going to ask Ms. Batchelder to
11 call the names of the prospective jurors. When you hear
12 your name called, come on up and bring all your stuff if you
13 have a purse or a bag or briefcase.

14 The last thing I would say is with a name like
15 Mulvahill I'm particularly sensitive to people
16 mispronouncing my last name. If we mess up your last name,
17 will you please let us know how to pronounce it correctly.

18 Go ahead, Ms. Batchelder.

19 THE CLERK: Jo Ringgenberg, Kristen Sprigg,
20 Maxwell Gambescia.

21 THE COURT: Slow down a little.

22 Actually, Ms. Ringgenberg, right there. There you
23 go.

24 THE CLERK: Bruce Lindeke.

25 JUROR: Lindeke.

1 THE CLERK: Michael Lacopo, Rusty Montgomery,
2 Tonya Hutchins, Colleen Wood.

3 JUROR: It's now O'Harah.

4 THE COURT: We'll have you sit in that far right
5 chair right behind the woman in purple.

6 THE CLERK: Russell Harris, Nathan Smith, Redentor
7 Valencia, Mary Timms, Kathleen Pollard, Toby Sitko, Robert
8 Raicer, Gary Zeff.

9 THE COURT: Mr. Zeff, you want to sit right in
10 that row so -- because you're all the way on the end of that
11 last seat in the second row there.

12 THE CLERK: Elaine Perry.

13 THE COURT: Now Ms. Perry, you're going to be
14 sitting where the juror in the purple is.

15 THE CLERK: Charles Philipp.

16 THE COURT: Did Keith Donohue appear?

17 THE CLERK: No.

18 Graham Clark, Todd Powers, Ted McDonald, Margaret
19 Phelan, Helen Kamens-Horton, Julie Wilson, Elizabeth Ammon.
20 Enrique Arenas.

21 THE COURT: Yes, sir, right there on the end.
22 Thank you.

23 THE CLERK: Raymond Webber, Allan Simon, Patricia
24 Glassner, Gabriel Serenyi, Kathleen Metzger, Rebecca Wilson,
25 Scott Deitz.

1 THE COURT: Mr. Deitz, you're going to sit right
2 there. Thanks. You got it.

3 THE CLERK: Veva Becker, Sarah Brock, Conor
4 O'Hanlon.

5 MS. RING: He was excused earlier.

6 THE CLERK: Was he?

7 James Krolick, Shirl Toepfer.

8 THE COURT: Hold on. Could you maybe sit right in
9 the front row?

10 JUROR: Sure.

11 THE CLERK: Kevin Pipp.

12 THE COURT: Would counsel approach?

13 Ladies and gentlemen of the jury, I'm going to
14 need to talk to the attorneys in private up at the bench.
15 And the reason that we're up here and we're talking softly
16 is because you're not supposed to be able to hear us. So
17 please don't try and listen in. If you think you can hear
18 what we're saying, please distract yourself.

19 Usually these conferences won't take more than a
20 minute or two. If it's something that's going to take
21 longer, then I'll step out of the courtroom with the
22 attorneys.

23 (The following proceedings occurred at the bench
24 out of the hearing of the jury.)

25 THE COURT: My question is if Mr. O'Hanlon -- I

1 remember who he is. I just didn't have him marked as
2 excused. Do you agree he was excused?

3 MR. BRACKLEY: He came from Longmont.

4 THE COURT: I just must have missed his
5 questionnaire in my pile. Okay. Thanks.

6 (The following proceedings occurred in open
7 court.)

8 THE COURT: All right. As we were going through
9 that process is there anyone who is having any difficulties
10 hearing or does anyone have any vision difficulties?

11 For the 38 of you in the box is there anyone who
12 feels that they could not be bound and would not follow the
13 instructions of law that I were to give you for personal or
14 other reasons? Can you all agree to follow the instructions
15 of law as I would give them? All right. I see everyone
16 nodding affirmatively.

17 We asked a lot of questions on the questionnaire,
18 and I know I've talked to a number of you back in individual
19 voir dire. But is there anything at all that we haven't
20 asked you that you think would interfere with your ability
21 to be a fair and impartial juror in this case? Anybody?

22 Okay. At this time I'm going to turn the
23 questioning over to the attorneys. For the prosecution,
24 Mr. Brackley.

25 MR. BRACKLEY: Good afternoon folks. So we've

1 been at it, the attorneys and the judge, we've been at it
2 all morning and we've been repeating a lot of the same
3 things over and over and over again to the limited number of
4 folks who came back into the jury room to talk to us about
5 some things that were in the questionnaires.

6 So part of me feels like I can just move on to
7 some of the important stuff or the most important stuff or
8 the individual stuff. But it occurs to me that there's
9 nothing more important than that one message that we
10 delivered over and over and over again.

11 There's nothing more important than what we're
12 trying to do here in this process of jury selection, and
13 that's pick a jury that will be fair and impartial and
14 unbiased to Mr. Clark, and also for the People of the State
15 of Colorado.

16 This process is designed to make sure that the 14
17 people who take the final oath as jurors have had every
18 opportunity to tell us if there's anything about you, your
19 experiences, things you've been thinking about since Friday
20 when you got that questionnaire, anything we need to know
21 that we haven't already talked about.

22 Maybe we'll talk about some of that stuff again,
23 but anything we need to know before we say this person can
24 be a fair and impartial juror to give Mr. Clark a fair
25 trial, can give the People a fair trial. Because that is

1 the most important thing about any trial, and that's a jury
2 that is fair and impartial.

3 Now, we all have different roles in this
4 courtroom, the judge, the lawyers. Our roles are all
5 different. Yet, we would all say that we're privileged to
6 be here, we're privileged to represent the People. I'm sure
7 Ms. Ring and Ms. Milfeld are privileged to represent
8 Mr. Clark. The judge is privileged to preside over this
9 case.

10 When this trial is over if you've given us your
11 word and you've expressed to us that you can be fair and
12 impartial and you make that final cut into that jury, you
13 will be privileged to have been part of this system, and
14 we'll have been privileged to have you no matter what
15 happens.

16 But to get there from here we have to talk to you.
17 And everytime I do this I think to myself two hours or an
18 hour or an afternoon is just not enough time. We'd like to
19 spend a morning with each of you talking to you about what
20 you're thinking, how did you feel about getting that
21 summons, how do you feel about being in the box here. But
22 we can't do that. We don't have the time.

23 And we find that if you talk to us and you raise
24 your hand and you give input as to what other folks are
25 saying, we get a pretty good sense of who the best jurors

1 for this case will be.

2 I hope that that's the most that I'm going to say
3 in this process and that I can ask a couple questions, throw
4 some things out there and let you all talk to us. Because
5 ultimately we need to get to know you in this very short
6 time so that we can decide whether you can be a fair and
7 impartial juror in this case.

8 Your jury questionnaires talked about it, some
9 folks checked the box and some folks talked to us in the
10 back about it, but I don't want to proceed further until I
11 ask one more time, this is a case of murder in the first
12 degree. It is among, if not the most serious charge someone
13 can be charged with. It's a violent case by the nature of
14 the charge.

15 That alone understanding that you don't know a
16 whole lot about what happened here, if anything, is there
17 anything about the nature of this charge -- and Ms. Ammon is
18 it, I know we spoke about this already. But is anyone else
19 having sat here for the morning and thought about it over
20 the weekend after you turned in those questionnaires, is
21 anyone thinking you know what, this trial is not the right
22 one for me, I can't be fair and impartial?

23 JUROR AMMON: Are we going to talk about that some
24 more now or --

25 MR. BRACKLEY: Well, do you want to follow up in

1 front of everyone on the things we spoke about in the back
2 or do you want to follow up with us in private again?

3 JUROR AMMON: Prefer in private I think.

4 MR. BRACKLEY: Okay.

5 THE COURT: Well, is there anything new that you
6 would add?

7 JUROR AMMON: No. It's the same as what we talked
8 about this morning, that's all. That's fine.

9 THE COURT: Okay.

10 MR. BRACKLEY: Did anyone read your jury
11 questionnaire on Friday and just get excited about the
12 nature of the charge? I'm not expecting anyone to say yes.
13 But think you know what, I'm excited to be part of this
14 particular case based on that charge, anyone?

15 Ms. Sprigg, did the nature of the charge do
16 anything to you, or is it just jury service in general?

17 JUROR SPRIGG: Jury service is definitely -- I'm
18 lucky to be able to do this. Quite frankly, I don't think
19 I've ever felt so shaken to the bone before. I've never
20 been asked to do something like this. So I don't think any
21 of us could say this would be easy.

22 MR. BRACKLEY: Can I get a show of hands just of
23 the group of people in front of me right now how many people
24 have served on a jury before? And of those hands that are
25 up, how many have been in -- have done a criminal jury

1 before? Okay. So two people in front of you on a criminal
2 jury.

3 As you know from the questionnaire and from what
4 the judge has told you already that the date of the incident
5 in this case is November 1, 1984 -- 1994. I was just
6 sitting here doing math before, and I wanted to make sure I
7 got that number. 1994. Thank you.

8 And it's a murder case. And it's a case that
9 officers and detectives from the Boulder Police Department
10 responded to back on November 1, 1994 all the way through
11 the present day.

12 So let's talk about the role of the police in a
13 murder investigation. And I'm going to call on some folks,
14 and I'm going to do it completely randomly. And I'll start
15 with Mr. McDonald, who I believe is right there in the
16 middle.

17 Mr. McDonald, what's the role of the police in a
18 criminal investigation, murder investigation?

19 JUROR McDONALD: To protect everybody's safety and
20 to gather evidence.

21 MR. BRACKLEY: Anyone have anything to add to
22 that, the role of the police in a murder investigation?
23 Mr. -- let me go back there to Mr. Lindeke.

24 JUROR LINDEKE: Well, I said to identify the
25 people who might have done it and bring them to trial,

1 compile evidence to bring them to trial.

2 MR. BRACKLEY: Um, is it the role of the police in
3 a murder investigation to follow every lead, Ms. Hutchins
4 back there?

5 JUROR HUTCHINS: Yes, it is.

6 MR. BRACKLEY: Okay. Everybody agree with that
7 police should follow --

8 JUROR KROLICK: It's at the discretion of the
9 investigators.

10 MR. BRACKLEY: Talk to us about that.

11 JUROR KROLICK: Well, it seems like data is the
12 prime driver in what the investigators are going to do. So
13 you can't follow every single lead. You have to take
14 probability into account.

15 MR. BRACKLEY: Should the police respond to every
16 lead?

17 JUROR KROLICK: Well, an investigator possibly,
18 yes.

19 MR. BRACKLEY: Process it whether it's a priority
20 or lesser priority?

21 I don't want to talk about it a lot, but I want to
22 use an example. Is anyone following this case of the young
23 10-year-old girl who is missing? I read this morning that
24 the police have received 300 leads, whether it's a tip line
25 or a 911 or a website, 300 leads. Should the police be out

1 there following every single one of those leads?

2 Mr. Webber is it?

3 JUROR WEBBER: Probably don't have time to follow
4 all 300 right now, but set priority for the most significant
5 ones.

6 THE COURT: Mr. Perry, you agree with that? Go
7 ahead, Mr. Perry -- Ms. Perry, I'm sorry. I'm sorry.

8 JUROR PERRY: I do, I think 300 leads taken for
9 that, but I definitely think they should -- it's been a long
10 time. I'd still check every lead.

11 MR. BRACKLEY: Do you think that some of those
12 leads, those 300 leads in that particular case -- and again,
13 this is the last time I'm going to talk about it, but do you
14 think some of those leads are just wild goose chases,
15 Mr. Raicer?

16 JUROR RAICER: Yes.

17 MR. BRACKLEY: You agree with that?

18 JUROR RAICER: I do.

19 THE COURT: Ms. Sitko?

20 JUROR SITKO: Yes, I do. And I think some of them
21 are probably intentionally wild goose chases.

22 MR. BRACKLEY: Why do you say that?

23 JUROR SITKO: Well, it just seems like it would be
24 likely that somebody who committed a crime might actually
25 plant some leads that -- that are -- should not -- you know,

1 that are intentionally misleading.

2 MR. BRACKLEY: Ms. Pollard, what do you think
3 about that?

4 JUROR POLLARD: Certainly some of them will be
5 crazy. But I still think they would have to check out every
6 lead they could because you never know. It could be a crazy
7 suspect, you know, I don't know. I think they should try as
8 hard as they could to check out every lead.

9 MR. BRACKLEY: Let me follow up on something that
10 Mr. Krolick said. But do we expect and hope that our -- the
11 investigators in that case are using their experience and
12 their judgment to filter through those leads, send, you
13 know, the cavalry to ones that they think are most
14 important? Ms. Ammon?

15 JUROR AMMON: I would hope so, yes. I mean,
16 there's 24 hours in a day, and they have X amount of
17 detectives on staff.

18 MR. BRACKLEY: Ms. Metzger, what do you think?

19 JUROR METZGER: I think they should make every
20 attempt to follow every lead, especially so early in the
21 case.

22 MR. BRACKLEY: Do you think every single detective
23 and police officer on a murder case -- and let's just talk
24 generally now, okay, let's move away from that case. But do
25 you think that every detective and police officer in a

1 murder investigation is a skilled investigator?

2 JUROR POLLARD: We hope so.

3 MR. BRACKLEY: Mr. Powers, you said no?

4 JUROR POWERS: There's probably different skill
5 levels based on experience.

6 MR. BRACKLEY: Mr. Clark, do you agree with that?

7 JUROR CLARK: Yeah, that's probably true.

8 MR. BRACKLEY: Mr. Clark, in your industry are
9 there folks who work alongside you who have different skill
10 levels?

11 JUROR CLARK: Yes.

12 MR. BRACKLEY: Different abilities?

13 JUROR CLARK: Yes.

14 MR. BRACKLEY: Do you think that the skill level
15 of an investigator, Ms. Ringgenberg, could affect the
16 direction of a murder investigation?

17 JUROR RINGGENBERG: Yes.

18 MR. BRACKLEY: Do you think an investigator with a
19 poor skill level could derail a murder investigation?

20 JUROR RINGGENBERG: Yes.

21 MR. BRACKLEY: And do you think that there's some
22 detectives out there, Ms. Wood, who are just so good they
23 can solve a case quicker than somebody else?

24 JUROR WOOD: It's possible.

25 MR. BRACKLEY: In this trial speaking very

1 generally you may not hear about every tip that the police
2 heard. Anyone want to venture a guess as to why that would
3 be? And if nobody wants to guess, I'll call on Ms. Phelan.

4 JUROR PHELAN: I don't know. I'm sure there's
5 different reasons for why things would be admissible or not,
6 but I'm not an expert at it.

7 MR. BRACKLEY: Well, let's move along from the
8 role of the police. Were you about to raise your hand?

9 JUROR PIPP: I don't think we want to hear about
10 every tip. I think we'd be here for a tremendous amount of
11 time, I assume so. At least we're talking 1994 to present
12 if we heard about all the tips.

13 MR. BRACKLEY: Everyone hear Mr. Pipp?

14 JUROR PIPP: Pipp.

15 MR. BRACKLEY: Everybody hear Mr. Pipp?

16 JUROR: No.

17 MR. BRACKLEY: Mr. Pipp stated that -- I guess he
18 placed it in the context of time that we don't have the time
19 at trial to hear about every tip since 1994.

20 JUROR SIMON: I feel you should make the time.
21 It's important. It's important on the life of the person on
22 trial.

23 MR. BRACKLEY: What if it's a tip that came from
24 someone who was very well meaning, but it went absolutely
25 nowhere?

1 JUROR SIMON: Maybe push it aside and maybe later
2 come back to it.

3 MR. BRACKLEY: At what point?

4 JUROR SIMON: If nothing else pans out.

5 MR. BRACKLEY: Are you talking about in the police
6 investigation or here in court at a trial?

7 JUROR SIMON: In court.

8 MR. BRACKLEY: What if it's a tip that implicated
9 someone who had absolutely nothing to do with the crime?

10 JUROR SIMON: Well, then I think the investigator
11 should look into it while the trial is going on.

12 MR. BRACKLEY: Okay. Ms. Glassner, do you think
13 that -- well, what do you think about the fact I'm telling
14 you right now you are not going to hear about everything the
15 police did over the last 18 years in this particular trial
16 of Mr. Clark? What do you think about that?

17 JUROR GLASSNER: I appreciate that someone
18 hopefully has gleaned the most important information from
19 everything that was presented and is now able to give a
20 concise perspective on everything from which we can then
21 make some decisions.

22 MR. BRACKLEY: You may see attorneys fighting over
23 what's important and what's relevant.

24 But Mr. Lindeke, how do you feel about the
25 prospect that you may not hear about everything the police

1 did during the course of their investigation in this case?

2 JUROR LINDEKE: Probably not reasonable to expect
3 to hear all the evidence, right. But we trust -- I mean,
4 that's what they're there for. You trust them to go through
5 all that and see what's important.

6 MR. BRACKLEY: Mr. Smith, do you want to follow up
7 on that?

8 JUROR SMITH: I mean, the defendant has a right
9 to, you know, a fair and speedy trial.

10 THE COURT: Mr. Smith, I'm going to hold you up
11 for a minute. I need everybody to kind of try and keep
12 their voice up.

13 Mr. Smith, so the other jurors over that way are
14 having difficulty hearing. And I'm trying to turn the
15 volume up as much as I can. It's not necessarily you. It's
16 more the acoustics and the layout of the courtroom. But I'm
17 going to ask each of the jurors to please keep their voices
18 up.

19 JUROR SMITH: I was just saying the defendant has
20 a right to a fair and speedy trial. And we can't possibly
21 go through every lead. I think that's unreasonable.

22 MR. BRACKLEY: Mr. Harris?

23 JUROR HARRIS: Well, I think that the lead
24 investigator is the one to direct everything and take what
25 is important to -- he feels most important and follow that

1 through. And every lead is important no matter how small
2 because a small lead not followed might lead you to
3 something that is going to have a lot of effect on the case.

4 MR. BRACKLEY: Absolutely.

5 At the trial one of the -- a word that you're
6 going to hear a lot from attorneys and we're going to
7 disagree over what that word even means is whether something
8 is relevant.

9 The judge, one of his jobs is to determine that
10 you will only hear evidence that is relevant, okay. At
11 times I may object to a question that one of these attorneys
12 is asking and I'll say that's not relevant, and you may not
13 hear the answer to that question. Are you going to hold
14 that against me if the judge agrees?

15 JUROR: Yeah, because a police officer may have
16 made a mistake and it could be relevant.

17 MR. BRACKLEY: Well, ultimately it's going to be
18 for the judge to decide what's relevant or what's not. I
19 may think something is relevant. Ms. Ring and Ms. Milfeld
20 may disagree. Judge is going to make a decision. And then
21 that shoe is going to be on the other foot a lot during this
22 trial.

23 Are you going to hold it against us attorneys for
24 raising objections that something isn't relevant?

25 JUROR: No.

1 MR. BRACKLEY: Mr. Clark, I'm waiting for --

2 JUROR CLARK: I was trying not to, but it would be
3 hard. Because like I said, the cop could have made a
4 mistake. It could be relevant, he just didn't think it was,
5 or maybe the judge didn't think it was relevant.

6 MR. BRACKLEY: Ms. Brock, you answered?

7 JUROR BROCK: I answered no.

8 MR. BRACKLEY: Why not?

9 JUROR BROCK: Because the judge is impartial.
10 You're both arguing each side. Once the judge makes his
11 ruling, that's not against either side. We just have to
12 take that and continue on.

13 MR. BRACKLEY: Ms. Becker, how are you?

14 JUROR BECKER: Good.

15 THE COURT: Have you ever heard the term likely
16 suspects?

17 JUROR BECKER: Sure.

18 MR. BRACKLEY: What does that mean?

19 JUROR BECKER: It's a person who may have been
20 involved in this, but there isn't enough evidence yet to
21 consider them the suspect. But they have to be investigated
22 and ruled out.

23 MR. BRACKLEY: Okay. You know, I forgot to ask
24 and I should have asked this up front and I neglected to,
25 but one of my favorite questions of jury selection -- and

1 we -- usually we do jury selection differently in most
2 cases, and that's -- we ask a lot of those questions that
3 were on the questionnaire out in open court in front of
4 everybody. And one of the last questions is what do you do
5 with your free time. How do you spend your time when you're
6 not working, riding your bike?

7 And people always like to tell us about what
8 television shows they watch. And you know, I'm not from --
9 I'm not a lifelong resident of this particular area, but I
10 never heard -- really, I never listened to NPR until I came
11 here to Boulder and found out that I need to be part of the
12 listening to NPR. But I watch way too much television, I
13 watch way too much TV.

14 Ms. Sprigg, are you agreeing, do you watch too
15 much TV, or you agree I watch too much TV?

16 JUROR SPRIGG: I have both VCR's set right now.

17 MR. BRACKLEY: My DVR is going to blow up over the
18 next two weeks.

19 Who watches too much TV? Lots of folks. Who
20 watches those crime shows, Law & Order and CSI, all that
21 stuff? Okay. Who has never watched any of that stuff?
22 There's so many of them. I watch them too much, but I've
23 probably seen a minority of them. But you hear that term,
24 likely suspects.

25 And has anyone ever heard that, you know, the

1 ex-wife is always the likely suspect or the ex-husband,
2 something like that?

3 JUROR SIMON: Always.

4 MR. BRACKLEY: Mr. Simon, does that make sense to
5 you?

6 JUROR SIMON: No, it doesn't. But always it's
7 there.

8 MR. BRACKLEY: Okay. Everyone agree that the
9 police at a minimum should be skilled enough to identify who
10 the likely suspects are? Okay.

11 Are you all going to want to hear in this case who
12 the likely suspects are? Anyone not care about who the
13 likely suspects are if they weren't the ones who ended up on
14 trial? Anyone want to raise their hand to that?

15 JUROR ZEFF: I think I'm answering the previous
16 question. You were saying that -- about the police
17 following up on every possible suspect. I would say if you
18 talk -- I'm not clear whether the police do it all or in
19 some cases they would turn it over to the DA's Office to do
20 more investigation of possible suspects.

21 MR. BRACKLEY: You know, it happens different ways
22 in different cases. I don't know -- I don't know if it's a
23 relevant point of contention right now, but it happens
24 different ways in different cases.

25 Do you think -- well, you know what, I'm going to

1 talk more about this in a little bit. And I think I'm going
2 to come exactly to where you are, okay. And if I don't,
3 when I'm done I'm going to say does anyone have anything
4 else they want to say. Remind me, Mr. Zeff, okay?

5 Mr. Powers, you shared with us an incident in your
6 life where you were wrongly accused of something.

7 JUROR POWERS: True.

8 THE COURT: Do you mind talking about that with
9 everybody? I'm not asking you to explain it, but I'm asking
10 you if you mind me going a little bit further --

11 JUROR POWERS: No, go ahead.

12 MR. BRACKLEY: -- in front of the crowd?

13 Mr. Powers was accused of something he didn't do.
14 Is that a fair statement?

15 JUROR POWERS: True.

16 MR. BRACKLEY: Anyone else ever been accused of
17 something you didn't do? And I'm not talking about, you
18 know, siblings fighting with each other. I did not, you did
19 too. But something in your professional capacity or your
20 education capacity even going as far as getting put into the
21 back of a police car. Anyone else share that type of an
22 experience with Mr. Powers?

23 Mr. Powers, how did that make you feel?

24 JUROR POWERS: I wasn't too happy.

25 MR. BRACKLEY: How did you respond to those police

1 officers that accused you of crime?

2 JUROR POWERS: I didn't comply until I had to.

3 MR. BRACKLEY: Okay. And upon complying you got
4 put in the back of a police car?

5 JUROR POWERS: Yeah.

6 MR. BRACKLEY: Did you -- did you try to convince
7 them that they were wrong?

8 JUROR POWERS: Before they gave me no choice.

9 MR. BRACKLEY: Going forward -- and we didn't have
10 a chance to talk to you in the back, and but going forward
11 is that an experience with the police that would lead you to
12 have some bias towards police officers?

13 JUROR POWERS: Yeah.

14 MR. BRACKLEY: Could you be -- there are going to
15 be a lot of police officers testifying in this case. And
16 some of those police officers will testify about likely
17 suspects who were not ended up charged with any crime.

18 As you sit here today can you be a fair and
19 impartial juror in this case given the fact that we're going
20 to hear from a whole lot of police officers testifying?

21 JUROR POWERS: Be questionable.

22 MR. BRACKLEY: Sorry?

23 JUROR POWERS: Be questionable.

24 MR. BRACKLEY: What we need -- and this is
25 something that folks who came into the back heard us say,

1 and we've said it a lot today, we get that people come into
2 this courtroom with not a clean slate. People come in here
3 with life experiences. People come in here with things that
4 happened to themselves and their family members, people they
5 care about. People read things in the paper and they say
6 that is messed up, that's terrible. But what we ask for is
7 not a clean slate, but we ask for the promise that you can
8 be fair and impartial.

9 Mr. Powers, I was going to talk to you about that
10 incident, but I think it's more important that I ask you
11 that question now. Can you be fair and impartial in this
12 case given the fact that you're going to hear testimony from
13 police officers?

14 JUROR POWERS: I would try to the best of my
15 ability to be, but I think I have a colored outlook.

16 MR. BRACKLEY: Okay. Will that colored outlook
17 affect your ability to listen to the police officers?

18 JUROR POWERS: It could.

19 MR. BRACKLEY: We've heard from a lot of people
20 who have had nothing but good experiences with the police.
21 And those people say, you know, I've had nothing but good
22 experiences, I'm not going to start out from a place where
23 I'm judging police officers unfairly.

24 But if you hear two different sides of a story,
25 one from a police officer and one from a non-police officer,

1 are you less inclined to believe the police officer based on
2 your experience?

3 JUROR POWERS: It would depend on the situation.

4 MR. BRACKLEY: For instance?

5 JUROR POWERS: Um, probably an instance where
6 there's no clear evidence and it's word against word.

7 MR. BRACKLEY: I'm going to come back to you at
8 the very, very -- so Mr. Zeff, if I don't come back to you
9 remind me, and Mr. Powers remind me too, because I'm going
10 to come back to you.

11 What kind of -- when the police are looking at
12 someone who is a likely suspect -- and in your case,
13 Mr. Powers, you were a likely suspect because you were
14 wearing certain clothing, fit the description kind of thing?

15 JUROR POWERS: Exactly, very generic.

16 MR. BRACKLEY: What do the police want to look
17 at -- Ms. Brock; right?

18 JUROR BROCK: Um-hmm.

19 MR. BRACKLEY: What do the police want to look at
20 when they're determining whether a likely suspect, just
21 because it's the person who they learned in detective
22 school, you know, the ex-husband or the ex-wife, when the
23 police get to that point of investigating likely suspect,
24 what are they looking for? What kind of things, what kind
25 of questions should they be asking themselves, asking

1 themselves or asking the likely suspect?

2 JUROR BROCK: Time, dates, evidence that would
3 point to that specific person.

4 JUROR: Can you please speak up a little bit?

5 JUROR BROCK: Sure. Time, dates, evidence that
6 would actually point at that specific person that they're
7 questioning at the time.

8 MR. BRACKLEY: Okay. Mr. Deitz, anything to add
9 to that?

10 JUROR DEITZ: I agree it should be solely evidence
11 based and not -- opinions shouldn't come into their --

12 MR. BRACKLEY: So the police would want to know --
13 Mr. Arenas?

14 JUROR ARENAS: Um-hmm.

15 MR. BRACKLEY: Would the police want to know where
16 that particular person was at the time the crime is
17 committed?

18 JUROR ARENAS: Of course. Definitely one of the
19 things they want to know.

20 JUROR POWERS: Alibi.

21 MR. BRACKLEY: Alibi, right. So were they there,
22 could they have been there, other than just this generic
23 term, you know, ex-husband did it.

24 Ms. Perry, I got you right this time; right?

25 JUROR PERRY: I keep -- description of the person,

1 likely suspect's description, you know, alibi, where they
2 were at during that time.

3 MR. BRACKLEY: Okay. Mr. Harris, do you think the
4 police would want to talk to this person about whether they
5 actually did have a motive to commit the crime?

6 JUROR HARRIS: That would have to enter into it.

7 MR. BRACKLEY: Okay. Everybody agree with that?
8 Do you all want to know the motive for a crime?

9 JUROR PIPP: Sure.

10 MR. BRACKLEY: Why do you want to know the motive
11 for a crime?

12 JUROR PIPP: We want an explanation of what caused
13 it, why a crime was done.

14 MR. BRACKLEY: In a crime that -- in a -- in a
15 murder case that's considered a who done it, who did it and
16 why, well, who did it, do you think learning why someone
17 committed a crime helps the police focus on who might have
18 done it? Mr. McDonald?

19 JUROR McDONALD: It's -- I think that would be an
20 important -- follow your initial leads like who has a
21 motive, especially if you're trying to quickly put together
22 a case. Somebody in that motive they probably want to
23 commit the crime.

24 MR. BRACKLEY: So having been through all of that
25 I'm going to tell you -- and I don't know that because we

1 can't talk about the specifics of a case here in jury
2 selection, we just can't. But I don't have to prove in
3 order to meet my burden of proof beyond a reasonable doubt
4 why somebody committed a crime. I don't have to prove
5 motive to you. I only need to prove who did it. Can
6 everyone accept that? Mr. Deitz?

7 JUROR DEITZ: I see motive as circumstantial
8 evidence that might -- there's plenty of crimes committed
9 without motive, people just do things.

10 MR. BRACKLEY: Sure.

11 JUROR DEITZ: So I see it as maybe it would help
12 the investigator as a lead, but it's circumstantial. It's
13 not a hard piece of evidence saying someone did something.

14 MR. BRACKLEY: You shook your head up and down.
15 Do you agree with that?

16 JUROR BECKER: Yes. But there are crimes
17 committed and there is no motive. Sometimes it's someone
18 just reacting or being evil. They don't necessarily have to
19 have a motive, it happens.

20 MR. BRACKLEY: Let me ask the general question,
21 does everybody believe -- does everybody agree with
22 Ms. Becker and Mr. Deitz to a certain extent? I'm not sure
23 if this is actually capturing what you said, but does
24 everybody agree not every crime has a motive?

25 JUROR: It's possible.

1 JUROR: Unless you're insane you should have a
2 reason. Like why would you do it? Just doesn't make sense.

3 MR. BRACKLEY: Mr. McDonald?

4 JUROR McDONALD: Sometimes there could be a
5 motive, but you don't have any evidence of the motive. It's
6 just between the person that committed the crime and the
7 victim.

8 MR. BRACKLEY: Right. Motive is something that
9 someone is thinking; right?

10 JUROR: Spontaneous reaction. She's getting it I
11 think.

12 MR. BRACKLEY: Whether a motive is a spontaneous
13 reaction, something that just happens, but something that
14 someone thinks about or whether it's something that's been
15 planned for weeks upon months, what if I can't give it to
16 you in this particular case? Is anyone going to say you
17 can't give me a motive, I can't find -- I cannot find guilty
18 beyond a reasonable doubt?

19 Mr. Webber, did I get that right? Are you shaking
20 your head up and down?

21 JUROR WEBBER: No. No. I'm just listening to
22 you.

23 JUROR PIPP: I think the evidence has to be that
24 much greater.

25 MR. BRACKLEY: Okay. The other evidence?

1 JUROR PIPP: Yeah.

2 MR. BRACKLEY: Okay. So I think Mr. Pipp really
3 hits on kind of a -- one of the most fundamental points that
4 I'm going to make to you and that Mr. Kellner is going to
5 make to you throughout this trial is that your verdict needs
6 to be based on two things, the evidence and the lack of
7 evidence, okay.

8 But -- and your verdict if it's guilty beyond a
9 reasonable doubt must mean without exception that I have
10 proven each element of the crime as the judge is going to
11 explain to you what the elements are beyond a reasonable
12 doubt.

13 Motive is not an element. What color clothing
14 somebody was wearing on the night the crime was committed is
15 not an element. What car someone was driving as part of the
16 getaway was not an element. I may not be able to tell you
17 what car was involved, what clothing was involved.

18 There are going to be some unanswered questions
19 because in life there are always unanswered questions. Will
20 that affect my ability in anyone's mind to meet my burden
21 beyond a reasonable doubt as to the elements of the crime?

22 JUROR TOEPFER: I think it would depend on what
23 else you have presented to us.

24 MR. BRACKLEY: Right.

25 JUROR TOEPFER: If it weighs heavy and can

1 outweigh the lack of --

2 MR. BRACKLEY: Ms. Toepfer, exactly. Everybody
3 agree with Ms. Toepfer? Okay. Did I get that right?

4 JUROR TOEPFER: Yeah.

5 MR. BRACKLEY: Mr. Powers, you were wearing some
6 nondescript clothing?

7 JUROR POWERS: Correct.

8 MR. BRACKLEY: You fit the description of someone
9 they were looking for. And they put you in the back of the
10 police car and they accused you of a crime. Is it fair to
11 say that you were accused of this crime based on this
12 coincidental occasion of wearing the same type of clothes as
13 someone who they were looking for?

14 JUROR POWERS: Yes.

15 MR. BRACKLEY: Mr. Powers, do you think -- and I
16 bet this is a real hard question for you and I -- and I
17 understand why it would be, but do you think if the police
18 had -- do you think the police kind of had an obligation to
19 do -- to the very least turn their attention to you for as
20 long as it took your friends to tell them you're not the guy
21 because you were with them someplace else?

22 JUROR POWERS: Sure.

23 MR. BRACKLEY: And in your case though it sounds
24 to me like the police just ignored part of the story; right?

25 JUROR POWERS: They did.

1 MR. BRACKLEY: Okay. Does everybody agree that
2 sometimes that likely suspect is as a result of just a
3 coincidence? Ms. Sitko, what do you think about that?

4 JUROR SITKO: I think so, yeah.

5 MR. BRACKLEY: Mr. Montgomery?

6 JUROR MONTGOMERY: Oh, absolutely.

7 MR. BRACKLEY: Ms. Hutchins?

8 JUROR HUTCHINS: Yes.

9 MR. BRACKLEY: Mr. Lacopo?

10 JUROR LACOPO: Yes.

11 MR. BRACKLEY: How do you tell the difference
12 between a coincidence and a piece of evidence which is
13 important -- an important lead, Mr. Lacopo?

14 JUROR LACOPO: You have to investigate it.

15 MR. BRACKLEY: Okay. Investigate further; right?

16 JUROR LACOPO: Yeah.

17 MR. BRACKLEY: Mr. Montgomery, collect more
18 information?

19 JUROR MONTGOMERY: You better investigate further
20 and bring more evidence.

21 MR. BRACKLEY: Is it hard to believe in the case
22 like Mr. Powers, and really an unfortunate situation, is it
23 hard to believe that coincidence could lead to someone being
24 arrested and accused of a crime? Mr. Gambescia, did I get
25 that --

1 JUROR GAMBESCIA: Gambescia.

2 MR. BRACKLEY: Gambescia.

3 JUROR GAMBESCIA: What was the question again?

4 MR. BRACKLEY: Is it hard to believe that someone
5 can be accused of a crime based on a coincidence?

6 JUROR GAMBESCIA: No.

7 MR. BRACKLEY: Everybody agree with that; right?

8 What about two coincidences, still easy to believe
9 but maybe a little bit --

10 JUROR TOEPFER: Pretty unlucky guy, you know.
11 That's --

12 MR. BRACKLEY: I can go all day. What about three
13 coincidences?

14 JUROR WEBBER: You're getting into circumstantial,
15 aren't you?

16 MR. BRACKLEY: I don't know. What does that mean
17 to you by the way?

18 JUROR WEBBER: Maybe if it's three elements that
19 makes him a strong suspect, but you have no concrete
20 evidence. Kind of saying you have circumstantial evidence.
21 Maybe at least take him in for further questioning maybe.

22 MR. BRACKLEY: And then, well, let me ask more
23 folks out here.

24 And the judge is going to tell you at some
25 point -- and I'm not going to stand here and say this is a

1 circumstantial case, so let's talk about it. Who wants to
2 add on and elaborate on that term, circumstantial case?
3 Ms. Kamens-Horton?

4 JUROR KAMENS-HORTON: I would guess that it's
5 really just there's no real hard evidence like the person
6 commits the crime. It's more -- like you said, more general
7 coincidences, maybe stronger than just a generic
8 coincidence, but something drastic.

9 MR. BRACKLEY: Mr. Lindeke, what's the opposite of
10 circumstantial evidence?

11 JUROR LINDEKE: Well, circumstantial evidence
12 would be -- opposite would be direct evidence. But
13 circumstantial is plenty of evidence. Fingerprints are
14 circumstantial. There's bunches of evidence that falls into
15 the circumstantial. Direct evidence would be somebody who
16 actually saw the event take place.

17 MR. BRACKLEY: Right. So direct evidence would be
18 I saw that person commit the crime?

19 JUROR LINDEKE: Yes, as reliable or unreliable as
20 your testimony may be.

21 MR. BRACKLEY: Could direct evidence be I
22 committed the crime?

23 JUROR LINDEKE: Yes.

24 MR. BRACKLEY: Even though nobody saw me do it?

25 JUROR LINDEKE: Yes.

1 MR. BRACKLEY: Could circumstantial evidence be a
2 crime was committed by a person with a particular kind of
3 shoe wear and he took a specific amount of money and a
4 specific type of method, and then police find a suspect who
5 is wearing the same shoes and that is that exact amount of
6 money and has a weapon that was described as being used? Is
7 that what we mean by circumstantial case?

8 JUROR LINDEKE: Certainly. Or they were seen at
9 three banks that were all robbed on the day he was there.

10 MR. BRACKLEY: Okay. Just talk about this,
11 coincidences happen again, I'll move on from that. But
12 merely because I'm wearing the same kind of shoes as the guy
13 who committed a crime, that could be a coincidence; right?
14 But it could also be the first piece of circumstantial
15 evidence; right, Ms. Perry?

16 JUROR PERRY: Yes.

17 MR. BRACKLEY: You agree with that, Ms. Wood?

18 JUROR WOOD: Yes.

19 MR. BRACKLEY: Mr. Harris?

20 JUROR HARRIS: Yes.

21 MR. BRACKLEY: So kind of going back to TV a
22 little bit, as one of the only shows I don't watch, but what
23 does that term mean, Ms. Phelan, cold case?

24 JUROR PHELAN: A lot of times so much time has
25 gone by that maybe the witnesses aren't remembering well as

1 they should, just time, too much time.

2 MR. BRACKLEY: Fair to say, Mr. McDonald?

3 JUROR McDONALD: Isn't it a case that hasn't been
4 solved over time?

5 MR. BRACKLEY: Ms. Ringgenberg?

6 JUROR RINGGENBERG: I think it's a case that
7 wasn't solved, and now maybe some new evidence has come up
8 because it's been looked at again.

9 MR. BRACKLEY: Okay. How are cold cases solved?
10 That's a huge general question because there are so many of
11 them.

12 JUROR MONTGOMERY: Circumstantially.

13 MR. BRACKLEY: Ms. Glassner, how are cases solved?

14 JUROR GLASSNER: I think someone mentioned it back
15 there, some new evidence comes forward or someone remembers
16 something and it's found that it's substantial enough to
17 pursue it, there's new interest, someone who is passionate
18 about the case keeps in front of somebody who might be
19 interested in pursuing answers.

20 MR. BRACKLEY: Mr. Serenyi?

21 JUROR SERENYI: Yes.

22 MR. BRACKLEY: Do you think that there are cold
23 cases that are solved where the suspect was someone who no
24 one ever heard of until the day that case gets solved?

25 JUROR SERENYI: Well, your question is would that

1 be a reason for reopening the case?

2 MR. BRACKLEY: No. But is it possible that -- are
3 there cold cases out there where no one knows who the
4 suspect is, no one knows who did it until there's a break,
5 maybe it's a piece of science, DNA? Do you agree with that?

6 JUROR SERENYI: Yeah.

7 MR. BRACKLEY: Everybody agree with that?

8 Does everyone agree that a cold case could be a
9 case in which the suspect has always been someone who the
10 police suspected was responsible for a crime?

11 JUROR: Um-hmm.

12 MR. BRACKLEY: Are cold cases all resolved in real
13 life? I know on TV it's different. Cold case on TV solved
14 in 20 minutes. But are cold cases always solved using
15 science?

16 JUROR: No.

17 MR. BRACKLEY: Does anyone think because I watch
18 TV, Mr. Simon, do I need science to solve cold cases?

19 JUROR SIMON: No, you don't need science. Science
20 will help. But if you have witnesses and all of the sudden
21 remember or they find something that would prove the guilty.

22 MR. BRACKLEY: Could be just good police work;
23 right?

24 JUROR SIMON: Um-hmm.

25 MR. BRACKLEY: A detective wearing out the bottom

1 of his shoes investigating a case?

2 Mr. Raicer, what do you think about that? How do
3 cold cases get solved? Is there a way to answer that
4 question in a -- in less than two hours?

5 JUROR RAICER: Well, I really couldn't add
6 anymore. I think it's got to be new evidence somehow is
7 brought forward, and it could be by any of the means you
8 just described.

9 MR. BRACKLEY: Anyone ever hear of the Innocence
10 Project? Okay. Mr. Zeff, what is that?

11 JUROR ZEFF: I think it was started by one of the
12 attorneys from the glove case who started a group of
13 attorneys who would respond to people who were in jail or in
14 prison thinking -- saying -- convincing them that they
15 didn't do it. And the Innocence Project if they believed
16 them and had the manpower would take it on as a case.

17 MR. BRACKLEY: So those two attorneys from New
18 York, those -- Neufeld and Scheck?

19 JUROR ZEFF: Yes. Scheck is the one that started
20 it I think.

21 MR. BRACKLEY: Right. And they used DNA to clear
22 people accused of crimes or convicted of crimes; right?

23 In Colorado the Innocence Project is run by the
24 Attorney General's Office. And within the last two or three
25 months there was a huge story, this amazing story out of

1 Grand Junction where a guy who had been incarcerated for a
2 long time was exonerated by DNA. Everyone hear about that?
3 Okay.

4 Anyone disagree with using DNA to clear someone
5 accused of a crime? Anyone have any problem with that?
6 Does anyone understand how DNA technology works in the
7 forensic setting? Mr. Montgomery?

8 JUROR MONTGOMERY: I'm a geneticist.

9 JUROR KAMENS-HORTON: I'm a geneticist as well.

10 MR. BRACKLEY: Do you need to understand it to
11 think it's an amazing tool for law enforcement to not only
12 clear people, but also to investigate people? Everybody
13 agree with that?

14 JUROR: Sure.

15 MR. BRACKLEY: If you hear from an expert in DNA,
16 before you base any decision on that expert's testimony,
17 whatever little piece that expert has to say about this
18 case, whether it's a minute circumstance or it's something
19 that you feel is really important in this case, how much are
20 you going to want to know about the specific science of DNA
21 technology before you rely on the testimony of this expert?
22 Anybody want to volunteer for me? When you go like this --

23 JUROR SPRIGG: I have an itch, just an itch.
24 Sometimes it's just an itch.

25 MR. BRACKLEY: Mr. Montgomery?

1 JUROR MONTGOMERY: Every bit of it.

2 MR. BRACKLEY: Every bit of it?

3 JUROR MONTGOMERY: Absolutely.

4 MR. BRACKLEY: I'm not going to give you every bit
5 of it. I don't understand it. But I can't --

6 JUROR MONTGOMERY: Yeah, of course.

7 MR. BRACKLEY: We're going to have an expert who
8 is going to come in and testify as to conclusions as an
9 expert. Will that be enough for you, Mr. Montgomery, should
10 you be selected for the jury?

11 JUROR MONTGOMERY: I would hope so, yeah.

12 MR. BRACKLEY: Ms. Kamens-Horton?

13 JUROR KAMENS-HORTON: I think as long as they have
14 enough credentials to be talking about it, then yes, they
15 have a background talking about it.

16 THE COURT: Ms. Wilson?

17 JUROR REBECCA WILSON: Which Wilson?

18 MR. BRACKLEY: I have two Wilsons?

19 JUROR JULIE WILSON: She's the one that raised her
20 hand.

21 JUROR REBECCA WILSON: He was looking at you.

22 MR. BRACKLEY: But I have two Wilsons, is that
23 what you're telling me?

24 JUROR JULIE WILSON: In direct line of sight.

25 MR. BRACKLEY: Ms. Wilson?

1 JUROR REBECCA WILSON: I agree with what the
2 individual behind me was saying.

3 MR. BRACKLEY: Okay. I was thinking about this
4 over the weekend and how to make this point, and I was
5 thinking about my -- how many people have kids who get strep
6 every third week? Anybody? All right.

7 Get these strep tests, and next thing you know
8 you're filling prescriptions; right? And you're getting
9 some prescription medication in a bottle and you're giving
10 it to your children; right?

11 But we don't ask exactly what is the science
12 behind that strep test; right? We're relying on the
13 expertise of our doctor; right, someone who we know of
14 course. But when we go to the pharmacy we're relying on the
15 expertise of the pharmacist.

16 Anyone -- can everyone make that leap with me when
17 we talk about experts in the context of a criminal trial?
18 Because we're making important decisions in this courtroom.
19 Mr. Zeff?

20 JUROR ZEFF: I can picture a case where an expert
21 would testify to one thing, and another expert might
22 contradict that.

23 MR. BRACKLEY: Sure. That happens all the time.
24 Experts battle with two different opinions. And we leave it
25 up to jurors to determine which one got it right, okay.

1 But --

2 JUROR PIPP: I'm assuming we're being -- you're
3 going to tell us what makes these people an expert?

4 MR. BRACKLEY: Sure. Absolutely.

5 JUROR PIPP: I mean, we're just not going to be
6 presented with somebody, he's an expert, period?

7 MR. BRACKLEY: Right.

8 JUROR PIPP: You're going to tell us what the
9 background is and everything? Okay.

10 MR. BRACKLEY: Anyone want to talk to me about --
11 you know, I always ask for volunteers and then I call on
12 someone, so don't scratch your head.

13 But does anyone want to talk to me about -- well,
14 let me back up. Should the police use resources to solve a
15 case that happened 20 years ago?

16 JUROR: Do you mean today's resources?

17 MR. BRACKLEY: Any resources. Should they assign
18 someone to look at a case that happened 20 years ago?

19 JUROR GLASSNER: New evidence.

20 MR. BRACKLEY: Ms. Glassner, what do you think
21 about that?

22 JUROR GLASSNER: Absolutely. I mean, if there's
23 some reason, something that comes up that might shed new
24 light on something that happened 20 years ago or 25 years
25 ago or whatever, I think there is an obligation to pursue it

1 to its logical outcome.

2 MR. BRACKLEY: Mr. Serenyi, what do you think
3 about that?

4 JUROR SERENYI: Oh, absolutely. You know,
5 certainly I think they would -- they would have to do it.

6 MR. BRACKLEY: What about between --

7 JUROR LINDEKE: It's got to be rational. You
8 can't say well, we've got a missing girl in Thornton, are we
9 going to go look for a 20-year-old case today or are we
10 going to go down to Thornton and try to find her.

11 MR. BRACKLEY: Absolutely.

12 JUROR LINDEKE: It's got to be balanced with the
13 resources.

14 MR. BRACKLEY: That's a point that I wanted to
15 make. Between point A the date of the crime and point B 20
16 years later, a lot happens between those two points; right?
17 Police get involved in other things; right? Everybody agree
18 with that? Technology changes.

19 Ms. Timms, I haven't picked on you, have I?

20 JUROR TIMMS: No, you have not.

21 MR. BRACKLEY: Technology changes, police
22 personnel changes. But one of the things that Mr. Simon
23 mentioned, Mr. Serenyi mentioned is that well, if there's
24 something new, then of course the police should look at it
25 and of course they should put resources to it.

1 But do you think the police should spend their
2 time if they have it and they're not working on, you know,
3 these emergency cases? But do you think they should spend
4 the time wearing out the bottom of their shoes and shaking
5 the tree and trying to make something happen to solve these
6 old cases? Is that a good use of police resources if
7 they're available?

8 JUROR TIMMS: You got victims.

9 MR. BRACKLEY: Yeah, and the families.

10 JUROR TIMMS: Help them out.

11 MR. BRACKLEY: Okay. Mr. Simon talked about the
12 victims. Police owe it to the victims to do that?

13 JUROR TIMMS: Family.

14 MR. BRACKLEY: Do they owe it to the community to
15 do that?

16 JUROR TIMMS: Yes.

17 JUROR McDONALD: You don't want anymore victims.

18 MR. BRACKLEY: Anyone who feels police just
19 shouldn't waste their time with an old case, bygones be
20 bygones, let's move along and focus on something that's
21 affecting us today? Anyone feel you know what, leave it in
22 the past?

23 Does anyone think that prosecutors, officers, the
24 DA's Office in any jurisdiction should use resources to look
25 at and assist the police or to prosecute a cold case, say a

1 case from 20 years ago? Anyone say that's just a waste of
2 time?

3 JUROR WEBBER: Not to the families.

4 MR. BRACKLEY: What if there is no family,
5 Mr. Webber?

6 JUROR WEBBER: Say again.

7 MR. BRACKLEY: What if there is no family?

8 JUROR WEBBER: Well, there still might be a moral
9 obligation.

10 MR. BRACKLEY: Talk to me about that.

11 JUROR WEBBER: Someone who has acted contrary to
12 the law should be punished regardless of any other elements.

13 MR. BRACKLEY: Even 20 years ago?

14 JUROR WEBBER: Sure.

15 MR. BRACKLEY: Mr. Lindeke, I'm going to come to
16 you for some expertise. What does that mean, statute of
17 limitations?

18 JUROR LINDEKE: Well, the statute of limitations
19 limits the ability to bring a case against somebody over a
20 period of years. So after a certain amount of time since
21 the offense is uncovered and since the crime has occurred,
22 then that statute of limitations could apply. But it
23 doesn't apply to certain types of cases.

24 MR. BRACKLEY: Okay. Why would the statute of
25 limitations -- why would we want something like that all of

1 us for say a theft case, someone who steals a car 20 years
2 ago? Why -- do you think then maybe we get into an area
3 where it's a waste of time to prosecute someone for stealing
4 a car 20 years ago, Ms. Sprigg?

5 JUROR SPRIGG: Yes.

6 MR. BRACKLEY: Okay. Ms. Ringgenberg, you agree
7 with that?

8 JUROR RINGGENBERG: Yes.

9 MR. BRACKLEY: Anybody disagree?

10 JUROR PIPP: Is the statute of limitations
11 different for different crimes I presume?

12 MR. BRACKLEY: Yeah.

13 JUROR PIPP: I mean, stealing a car and murder are
14 different things.

15 MR. BRACKLEY: Well, for murder there is no
16 statute of limitations.

17 But what if that person who stole a car say five
18 years ago and that's past that statute of limitations. You
19 can't prosecute someone for stealing a car five years ago if
20 you haven't done it within three years; right? I'll take
21 that as I'm correct.

22 Does that make sense to everybody? Does that make
23 no sense to someone? Who wants to tell me why it doesn't
24 make sense?

25 JUROR WEBBER: Well, if it was your car you might

1 want to --

2 MR. BRACKLEY: Absolutely.

3 JUROR WEBBER: Doesn't set an example to people
4 from stealing other cars.

5 MR. BRACKLEY: What if that person -- what if the
6 person -- well, who thinks it makes sense? Let me get one
7 of those folks. Mr. Deitz?

8 JUROR DEITZ: It does make sense to have a statute
9 of limitations. It's a way to prioritize your resources.
10 You can't chase a stolen car from 20 years ago. You know,
11 car is a bad example, but --

12 MR. BRACKLEY: What the --

13 JUROR DEITZ: -- just a way to prioritize
14 resources.

15 MR. BRACKLEY: What if the person was identified
16 but never arrested or prosecuted back in say five, ten years
17 ago is still stealing cars, does that change --

18 JUROR DEITZ: Well, then he's your likely suspect
19 and you need to get evidence for the one that's within the
20 statute of limitations.

21 MR. BRACKLEY: Okay. Does someone think well, if
22 he's still stealing cars, let's go back and prosecute for
23 something five years ago? Anyone think that makes sense at
24 all to use resources in that way? Ms. Timms?

25 JUROR TIMMS: For stealing cars?

1 MR. BRACKLEY: Yeah.

2 JUROR TIMMS: No.

3 MR. BRACKLEY: Ms. Pollard, what do you think
4 about that?

5 JUROR POLLARD: I think that resources should go
6 to finding a child kidnapper or someone than worrying about
7 a car that was stolen.

8 MR. BRACKLEY: That makes a lot of sense today;
9 right?

10 JUROR POLLARD: It does.

11 MR. BRACKLEY: So in murder there is no statute of
12 limitations. Does that make sense to everybody?

13 Mr. Valencia, why does that make sense?

14 JUROR VALENCIA: Well, the gravity of the crime is
15 different between stealing cars and murder. So it makes
16 sense that you shouldn't have any limits on prosecuting.

17 MR. BRACKLEY: Mr. Gambescia, what do you think
18 about that? Does it make sense?

19 JUROR GAMBESCIA: Yeah.

20 MR. BRACKLEY: Okay. Why does that make sense to
21 you?

22 JUROR GAMBESCIA: There's different timelines for
23 different crimes and there's different amounts of time you
24 should spend on different -- investigating different crimes.

25 MR. BRACKLEY: Ms. Hutchins?

1 JUROR HUTCHINS: Tell me the question again.

2 MR. BRACKLEY: Does it make sense to you that
3 there's no statute of limitations for murder, someone can be
4 prosecuted, arrested and prosecuted for a murder that was
5 committed 40 years ago?

6 JUROR HUTCHINS: Yeah. They took someone's life.
7 And it doesn't matter how long ago it was, they still did
8 it.

9 MR. BRACKLEY: What if that person has moved on
10 with their own life, Ms. Ammon?

11 JUROR AMMON: That's an interesting question. You
12 know, I'm sure if someone did do it 18, 20 years ago I would
13 imagine they have moved on maybe without -- since there is
14 no statute of limitations for a murder because of the
15 severity of the crime.

16 MR. BRACKLEY: What about if there was -- that
17 person was committing some other crimes too?

18 JUROR AMMON: It's -- it was still a murder. It
19 was -- I mean, they took someone's life.

20 MR. BRACKLEY: Ms. Wilson, what do you think about
21 that?

22 JUROR REBECCA WILSON: Which Wilson?

23 MR. BRACKLEY: That one. You can't hide behind
24 Ms. Wilson all day.

25 JUROR JULIE WILSON: Yeah, murder is more severe

1 than other crimes, and justice should be done.

2 MR. BRACKLEY: Mr. Arenas?

3 JUROR: Yeah, you definitely -- there has to be
4 some kind of closure for that for a family. I don't
5 understand how someone could possibly move on with their own
6 life after taking someone else's without confessing or
7 expressing some remorse to who it was, you know, or
8 whatever.

9 MR. BRACKLEY: Mr. Simon, what do you think about
10 that?

11 JUROR SIMON: It's a life. And I think you can't
12 move on.

13 MR. BRACKLEY: Mr. Clark?

14 JUROR: Yeah, I agree with Mr. Simon. But I think
15 the evidence needs to be significant because I would assume
16 that a lot of this has already been resourced out and
17 they've already spent several years on it. So I would think
18 that the evidence coming forward has to be pretty
19 significant to open up a case.

20 MR. BRACKLEY: That -- that principle applies
21 whether it's murder in the first degree or theft of a car.
22 Our burden beyond a reasonable doubt is the same. It's
23 heavy and it's serious and it's strong. It's a strong
24 burden. But what I'm getting at right now is not that
25 burden because we're going to talk about that too.

1 But let me ask you this, does anyone remember
2 those cases back in the '80s, maybe back in the '90s of
3 the -- they were student protestors and they were
4 responsible for bombings in New York City and an armored car
5 heist somewhere else, and they had essentially gone on to
6 become moms living in communities raising children, married
7 and they got caught, through whatever reason they got caught
8 and they were prosecuted. Does anyone agree with those
9 types of situations?

10 JUROR POWERS: Um-hmm.

11 MR. BRACKLEY: Mr. Powers?

12 JUROR POWERS: Yes.

13 MR. BRACKLEY: Why?

14 JUROR POWERS: Because they did the crime. Just
15 because some time passed and they started building their own
16 life doesn't change anything.

17 MR. BRACKLEY: Mr. McDonald?

18 JUROR McDONALD: I think part of it is you want it
19 to be a deterrent for people to think oh, I could like go
20 hide out and get away with it for a long time instead of
21 accepting the punishment.

22 MR. BRACKLEY: Mr. Lacopo?

23 JUROR LACOPO: I think the life that was lost 20
24 years ago is just as important as the person who might have
25 been killed yesterday.

1 MR. BRACKLEY: Mr. Gambescia?

2 JUROR GAMBESCIA: I don't know those cases, but it
3 does make sense.

4 MR. BRACKLEY: Ms. Ringgenberg?

5 JUROR RINGGENBERG: Yes.

6 MR. BRACKLEY: Mr. Harris?

7 JUROR HARRIS: Yes.

8 MR. BRACKLEY: Mr. Smith?

9 JUROR SMITH: Yes.

10 MR. BRACKLEY: You agree with that? Anyone
11 disagree with that?

12 Who knows those cases I'm talking about? Just
13 Mr. McDonald.

14 Did you feel sorry, did you feel sympathy at all?
15 You must have felt sympathy for these women; right? Did
16 you?

17 JUROR McDONALD: Maybe I'm thinking of a different
18 case. These -- are these people that are tied politically
19 because I'm thinking -- okay. I might be thinking of a
20 different case. Can you re-ask your question?

21 MR. BRACKLEY: But basically a case of a -- it was
22 a woman who had committed a bombing. It was a political
23 scenario back in the '60s. It was some folks who were
24 involved in protesting the Vietnam war, and they were
25 building bombs in a townhouse in Greenwich Village in New

1 York. And they got away to use the -- to use that term.

2 And they were eventually arrested some 20 years later.

3 And they had -- they were moms, they had families,
4 husbands who had no idea, communities who had no idea. And
5 they were prosecuted. And I think in this particular
6 scenario let's just say they were prosecuted and they
7 went -- they were punished.

8 JUROR McDONALD: Yeah.

9 MR. BRACKLEY: Does it make sense,
10 Ms. Ringgenberg --

11 JUROR RINGGENBERG: Yes.

12 MR. BRACKLEY: -- to feel sorry for that person?

13 JUROR RINGGENBERG: If they committed the crime
14 they're responsible for their actions.

15 JUROR: Why didn't they confess? Why didn't they
16 go in to really help their life?

17 JUROR RINGGENBERG: Yeah, exactly.

18 MR. BRACKLEY: Well, that doesn't always happen.

19 JUROR: Did anyone die in the bombing?

20 MR. BRACKLEY: What I'm getting at, Mr. Pipp, how
21 do you feel for this person's children? Do you feel sorry
22 for them?

23 JUROR PIPP: Sure. They're an innocent party.
24 The child has no idea. How can they? Their mother still
25 committed the crime and in the passage of all that time

1 still they didn't make any amendments for what they did.

2 MR. BRACKLEY: Ms. Wilson?

3 JUROR REBECCA WILSON: I could feel sorry for the
4 kids, yeah, but --

5 MR. BRACKLEY: I'm going to expand it out to that
6 person's community, their neighbors, people they've worked
7 with; right? I mean, is it okay to feel sorry for these
8 people?

9 JUROR REBECCA WILSON: Sure.

10 MR. BRACKLEY: Feel sympathy for them?

11 JUROR REBECCA WILSON: They weren't responsible.

12 MR. BRACKLEY: We all do; right, to a certain
13 extent?

14 Do we feel sorry for the -- this person who is now
15 caught and facing the responsibility for their actions?

16 JUROR SIMON: Well, I grew up in New York, and I
17 remember the case. When they caught her, that's one woman
18 that I know of, I did have mixed feelings about it, you
19 know, after all these years and family.

20 MR. BRACKLEY: Sure, and mixed feelings because
21 you felt sympathy for them; right?

22 JUROR SIMON: Yeah, uh-huh.

23 MR. BRACKLEY: Ms. Glassner, you agree with that?

24 JUROR GLASSNER: Absolutely.

25 MR. BRACKLEY: Of course.

1 Does anyone think that that sympathy, feeling
2 sorry for whether it's the accused or the accused's family
3 or community or friends, does anyone think that has anything
4 to do with whether or not the People have met their burden
5 beyond a reasonable doubt? Mr. Philipp?

6 JUROR PHILIPP: No, I don't think it has anything
7 to do with it.

8 MR. BRACKLEY: Ms. Ringgenberg?

9 JUROR RINGGENBERG: No.

10 MR. BRACKLEY: Mr. Simon?

11 JUROR SIMON: No, it should have nothing to do
12 with it.

13 MR. BRACKLEY: Mr. Serenyi?

14 JUROR SERENYI: You know, it's part of human
15 nature to feel sorry for people if they were not involved in
16 the situation. But that doesn't remove the guilt of the
17 person who set off the bomb that killed other people.

18 MR. BRACKLEY: Anyone have anything to add on this
19 point? Because it's an important point that I want to make,
20 and I want to move on having been satisfied that everyone
21 has had an opportunity to talk to me about this.
22 Mr. Montgomery?

23 JUROR MONTGOMERY: No additional comments.

24 MR. BRACKLEY: Mr. Zeff?

25 JUROR ZEFF: In some respect the difference of the

1 person who got caught, let's say the case you mentioned,
2 there were two women and they caught one and didn't catch
3 the other.

4 So the only difference in those two cases is that
5 somebody in law enforcement wasn't good enough to get the
6 other person, so they -- the other one got away with it. So
7 because of that I don't think that -- the crime was still
8 the crime no matter if they were caught early or late.

9 MR. BRACKLEY: Okay. Ms. Ammon?

10 JUROR AMMON: I think sympathy still makes -- is
11 part of a decision making. And maybe when we question or
12 not feel that the evidence was what you called it elemental
13 really before, I think that could make -- could play in that
14 decision making.

15 MR. BRACKLEY: So Ms. Ammon, would my burden of
16 proof be higher than beyond a reasonable doubt if you felt
17 sorry for someone?

18 JUROR AMMON: I think it would be lower.

19 MR. BRACKLEY: I'm sorry?

20 JUROR AMMON: I think the opposite.

21 MR. BRACKLEY: My burden would be lower?

22 JUROR AMMON: When you're saying that burden of
23 proof, I'm going to question it maybe if I was feeling more
24 sympathy towards that person.

25 MR. BRACKLEY: Okay. So if you felt sympathy

1 towards the victim, for instance, my victim was portrayed as
2 someone who was just incredibly sympathetic, would my burden
3 be less? You'd be more inclined to convict maybe if I
4 hadn't met my burden of proof beyond a reasonable doubt?

5 JUROR AMMON: I think so.

6 MR. BRACKLEY: And I guess on the flip side of
7 that is if you felt sympathy for the accused, for the
8 defendant, would my burden be higher than beyond a
9 reasonable doubt?

10 JUROR AMMON: It could be higher.

11 MR. BRACKLEY: What if the judge tells you that
12 sympathy for or against the defendant, prejudice for or
13 against the defendant, and sympathy for or against the
14 victim or witness or prejudice for or against the victim or
15 witness has no role in whether or not the People have or can
16 or will meet their burden beyond a reasonable doubt, can you
17 follow that instruction?

18 JUROR AMMON: I think that personal piece of it
19 would still be in part -- it would be in the back of my
20 mind.

21 MR. BRACKLEY: Okay. But can you put that -- and
22 this is something that we as lawyers ask people to do and we
23 mean it. Can you put that out of the back of your mind and
24 follow the judge's instructions and not allow sympathy or
25 prejudice to play a role in your verdict? If you can't,

1 then that's fine. We need to know. But if you can do it,
2 tell us that.

3 JUROR AMMON: I would hope I could.

4 MR. BRACKLEY: Okay. You're going to try? You're
5 going to do --

6 JUROR AMMON: I mean, it is always our personal
7 experiences; right, what we've experienced in life. And
8 sympathy towards others or for whatever reason, I feel more
9 sympathy towards that person than someone else will still I
10 think plays a role in that decision.

11 THE COURT: Ms. Ammon, let me be real clear on two
12 points. The burden that the prosecution has to prove guilt
13 is beyond a reasonable doubt always. It does not change up
14 or down. You understand that?

15 JUROR AMMON: I understand that.

16 THE COURT: Can you apply that burden? Can you
17 follow that instruction?

18 JUROR AMMON: Yes.

19 THE COURT: All right. The other point, everybody
20 who came into this courtroom has their own life experiences,
21 they have their own beliefs, they have their own biases,
22 they have their own prejudices, every one of us.

23 When you are making a decision in this case as a
24 juror you must make your decision only on the evidence that
25 is presented in this courtroom and you apply that evidence

1 to the law that I give you. Can you do that?

2 JUROR AMMON: Yes.

3 THE COURT: Okay.

4 MR. BRACKLEY: Thank you, Judge.

5 Are we going to take a break?

6 THE COURT: How much longer do you have?

7 MR. BRACKLEY: Probably about a half an hour.

8 THE COURT: Okay.

9 MR. BRACKLEY: If we were this would be a good
10 time. If we weren't I would keep going.

11 THE COURT: Why don't we. We've been going for an
12 hour 45 minutes. We're going to take the mid-afternoon
13 recess. We're going to be in recess until 3:30.

14 I'm going to ask you all to be back in your exact
15 same place at 3:30 sharp. I know the 38 people that are
16 sitting here. I think I have a pretty good idea of who is
17 sitting out there. But I want you to look to your right and
18 look to your left. Because when we come back at 3:30 I'm
19 going to ask you if anybody is missing and I'm going to need
20 you to help me out.

21 Couple things. Don't talk about the case with
22 anybody. Don't do any outside research.

23 It is apparent to me that we're going to go past
24 5:00 to try and get this jury picked, probably 5:30 or 5:45.
25 So if you have any people that you need to notify,

1 significant other, a spouse, daycare, employer, whatever
2 else, now would be a good time to do it. We'll be in recess
3 until 3:30.

4 (A recess was taken, whereupon this reporter's
5 portion of the trial concluded.)

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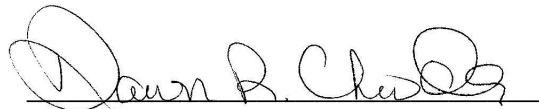
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 29th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

DISTRICT COURT
BOULDER COUNTY
COLORADO

1777 6th Street
Boulder, CO 80302

Plaintiff:

People of the State of Colorado

Defendant:

Michael Martin Clark

FOR COURT USE ONLY

Case No. 12CR222
Division 6

For the People:

Ryan Brackley and John Kellner
Deputy District Attorneys

For the Defendant:

Megan Ring and Nelissa Milfeld
Public Defenders

The matter came on for jury trial on October 9th,
2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
Boulder District Court, and the following proceedings were
had.

1 **P R O C E E D I N G S**

2 The matter came on for jury trial on October 9th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: Well, ladies and gentlemen of the jury,
8 sometimes I'm a good prognosticator and sometimes I'm not so
9 good. It is apparent to me that I have not been able to be as
10 efficient today as I had hoped. I thought that we were moving
11 quickly enough so that I really could complete jury selection
12 today, but in order to do that, we're going to run probably
13 until 6:00 and even later, and I know that for several of you
14 there are significant child care concerns and they are ripen
15 at about 5:30 or 5:45. So what we are going to have to do,
16 and I'm sure there's going to be a lot of moments when I tell
17 you this, but we are going to finish the prosecution's part of
18 questioning for jurors this afternoon, and I'm going to ask
19 you to come back tomorrow morning at 8:30. We'll probably
20 need about 2, 2-and-a-half hours to finish your jury selection
21 at this point, and for all but 14 of you, you will have
22 completed your service at that point in time. I'm sorry, I
23 had hoped that I could get this completed today. It's now
24 apparent to me that I'm not going to be able to do that, so
25 it's on me, I'm sorry, and I hope that you understand.

1 Having said that, Mr. Brackley, when we recessed you
2 were conducting your voir dire.

3 MR. BRACKLEY: Ms. Wilson, where was I.

4 PROSPECTIVE JUROR: I'm sorry, I don't recall.

5 MR. BRACKLEY: Me either. So we talked a little bit
6 about the role of the police in a criminal case. We talked a
7 little bit about the role of the prosecutor in a criminal
8 case. Who wants to talk to me about the role of the jury in a
9 criminal case? Yes, ma'am.

10 PROSPECTIVE JUROR: Well, I think that it's the
11 jury's responsibility to evaluate the presentation on both
12 sides, the prosecution and the defense, and see if the
13 prosecution's case meets the reasonable doubt category. They
14 have to work carefully and evaluate all the information. They
15 have to listen to each other, see what everybody's point of
16 view is, give everybody an opportunity to state his or her
17 position. You know, if there's disagreements, they try to
18 work through those. And, you know, I think in most cases the
19 jury can reach a verdict based on all those factors and
20 sometimes they can't and there's a hung jury.

21 MR. BRACKLEY: I don't know if I would have had
22 anything else to add to that. Anyone -- anyone else have
23 anything to add to that, what you see the role of the juror is
24 in a criminal case?

25 The judge is going to tell you at the end of the

1 trial after you have heard all of the testimony that one of
2 the -- a very important role of the jury is to determine the
3 credibility of witnesses, put it simply, whether witnesses are
4 telling the truth, and those could be witnesses who wear
5 police uniforms, they could be witnesses who are not police
6 officers, they could be witnesses who come into these doors as
7 witnesses with criminal records. Could be folks who come in
8 the doors and never having had any problem with the law at
9 all.

10 As jurors you get to decide whether you believe
11 everything that a witness says, you get to decide whether you
12 believe some of what a witness says, and then you can apply
13 some of -- you can apply what you do believe to the rest of
14 the evidence in making your decision, or you can believe
15 nothing that a particular witness says. As jurors that's your
16 duty and that's your responsibility. So everyone comfortable
17 with that? We're going to ask you, you tell us who you
18 believe, is everyone comfortable with that?

19 Mr. Philipp --

20 PROSPECTIVE JUROR: Mm-hmm.

21 MR. BRACKLEY: -- are you comfortable with that?

22 PROSPECTIVE JUROR: Yes.

23 MR. BRACKLEY: Is that something that you can do?

24 PROSPECTIVE JUROR: Mm-hmm.

25 MR. BRACKLEY: Ms. Ammon, are you comfortable with

1 that?

2 PROSPECTIVE JUROR: I'm still waffling on that.

3 THE COURT: I need -- you need to keep your voice
4 up.

5 PROSPECTIVE JUROR: I'm sorry. I said I was still
6 waffling on making that decision as we had discussed this
7 morning.

8 MR. BRACKLEY: Then I'm going to come back to you.
9 You might be the last person that I talk to. Okay.

10 PROSPECTIVE JUROR: Don't forget the other guys.

11 MR. BRACKLEY: Well, Mr. Powers and Mr. Zeff, I
12 think that we have already covered that, but you are going to
13 tell me.

14 Anyone have a job -- as I pause to catch my breath.
15 Um, anyone have a job that requires you on a daily basis or on
16 a regular basis, maybe not every day, but to make
17 determinations as to whether people are telling the truth to
18 you?

19 PROSPECTIVE JUROR: I used to, I'm retired now.

20 MR. BRACKLEY: Mr. Serenyi.

21 PROSPECTIVE JUROR: But I worked in human resources
22 business where we had to do that every day.

23 MR. BRACKLEY: Okay. Anyone else ever have a job
24 where you had to make those types of determinations, is
25 someone telling you the truth? Okay. Ms. Wilson.

1 PROSPECTIVE JUROR: I managed, um, a group of People
2 who might come to me with complaints about other people, and I
3 would have to get the information and make a judgment based on
4 that.

5 PROSPECTIVE JUROR: Yes, I was a investigator at
6 Rocky Flats for security incidents and so forth where I had to
7 interview people and write up reports and make determinations.

8 MR. BRACKLEY: Okay. Anyone else ever have a job
9 like that? Ms. Kamens.

10 PROSPECTIVE JUROR: I mean I'm a scientist so every
11 day I'm reading what other people have done and trying to
12 evaluate whether I believe them or not.

13 MR. BRACKLEY: Okay. And you are making credibility
14 assessments based on someone's training and experience and
15 background and -- and the work that they have done, right?

16 Anyone else? I saw Ms. Brock.

17 PROSPECTIVE JUROR: I work in the pharmaceutical
18 industry.

19 THE COURT: You have to keep your voice up.

20 PROSPECTIVE JUROR: I work in the pharmaceutical
21 industry so I, too -- there's things that go wrong and you
22 have to investigate it and decide if people are telling the
23 truth about what happened.

24 MR. BRACKLEY: So salesmen out in the field whether
25 they are compliant and stuff like that.

1 PROSPECTIVE JUROR: I'm on the floor. As you are
2 producing whatever drug you're making, if something goes
3 wrong, you need to -- you need to interview all the folks on
4 the floor to see what happened.

5 MR. BRACKLEY: Okay. And that's something that you
6 do as a requirement, it's a government requirement that you in
7 your capacity make these inquiries of people. Okay. Anyone
8 else?

9 Okay. Ms. Brock, how do you do it? How do you tell
10 whether someone's telling you the truth or not?

11 PROSPECTIVE JUROR: I don't know if you can fully
12 ever tell if someone's telling you the truth. You pretty much
13 have to look at the evidence and the facts that you have and
14 make that determination with what you have.

15 MR. BRACKLEY: Okay. Ms. Toepfer, you want to add
16 to that?

17 PROSPECTIVE JUROR: Well, we were given training to
18 evaluate people's mannerisms and that type of a thing.

19 MR. BRACKLEY: Okay.

20 PROSPECTIVE JUROR: Also.

21 MR. BRACKLEY: Mr. Sereyni, Ms. Toepfer mentioned
22 people's mannerisms, is that important when you are trying to
23 make a credibility determination?

24 PROSPECTIVE JUROR: People what?

25 MR. BRACKLEY: People's mannerisms.

1 PROSPECTIVE JUROR: Mannerisms.

2 MR. BRACKLEY: Yeah. What does that mean to you,
3 this context of trying to determine whether someone's telling
4 you the truth?

5 PROSPECTIVE JUROR: Well, only if they are annoying.
6 Typically I try not to consider that.

7 MR. BRACKLEY: Okay. What kind of things do you
8 consider or did you consider?

9 PROSPECTIVE JUROR: Did I consider annoying?

10 MR. BRACKLEY: No. No. No. No. No. No, did you
11 answer the question that you had a job that required you to --
12 because we're going to talk about memory loss. It's not going
13 to be 30 seconds, but did you answer that question that you
14 did have that type of job or position in your past?

15 PROSPECTIVE JUROR: Yes.

16 MR. BRACKLEY: Because Ms. Glassner says that you
17 did. How did you -- how did you make those types of
18 decisions?

19 PROSPECTIVE JUROR: Well, you know, it's almost --
20 it's very difficult to make those decisions on the spot. Very
21 often you have to investigate, you know, the -- what the
22 person said, what the opposite person said, what the situation
23 was, interview people, you know, make a decision on that and
24 hope that you made the right decision.

25 Um, you know, people are all different, you know,

1 some are good people, some are bad people, some lie a lot.
2 You know, you have to -- as a matter of course, um, in some
3 cases make a gut decision on that.

4 MR. BRACKLEY: Mr. Gambescia, good people, do good
5 people sometimes tell lies?

6 PROSPECTIVE JUROR: They could.

7 MR. BRACKLEY: Okay. Everyone think that a -- a
8 good person could be incapable either physically or morally or
9 some other aspect of their life to be incapable of coming into
10 court and telling a lie? Mr. Powers.

11 PROSPECTIVE JUROR: People have that capacity.

12 MR. BRACKLEY: Okay.

13 PROSPECTIVE JUROR: Just on their own personal set
14 of morals.

15 MR. BRACKLEY: Okay. Do you think that bad people
16 are capable of telling the truth? It's a simple question.
17 It's really general, right?

18 You may hear from witnesses in this trial who have
19 been convicted of felonies or a felony in some cases more than
20 one felony. The judge is going to tell you that the fact that
21 someone has been convicted of a felony can be a factor in your
22 assessment as to whether or not someone is telling the truth
23 or whether or not someone is not telling the truth.

24 What I need to ask you going forward is, is there
25 anyone who is going to hear that someone has been convicted of

1 a felony and just say I cannot rely on anything this person
2 says simply because they have been convicted of a felony?
3 Anybody want to talk about that? Mr. Pipp.

4 PROSPECTIVE JUROR: I think that it depends on the
5 question being asked and what felony they committed.

6 MR. BRACKLEY: Okay. So do you think it makes a
7 difference whether it's -- it's a --

8 THE COURT: You need to keep your voices up.

9 MR. BRACKLEY: When you say it depends on the
10 question being asked, what do you mean by that? I guess I
11 want to clarify.

12 PROSPECTIVE JUROR: If it's going to -- if it would
13 benefit them to answer in one way or the other.

14 MR. BRACKLEY: Okay. So if someone has a motive to
15 be untruthful, that's something that you would consider,
16 right?

17 PROSPECTIVE JUROR: Sure, if they have a past
18 history of who they are talking about.

19 MR. BRACKLEY: People who have never been convicted
20 of a felony, they may have a motive to be untruthful, right?

21 PROSPECTIVE JUROR: Yeah.

22 MR. BRACKLEY: Anybody agree with that?

23 PROSPECTIVE JUROR: Yeah.

24 MR. BRACKLEY: People who have been convicted of
25 felonies, they may have a motive to be truthful, right?

1 Going back to this work in -- in cold cases or
2 homicide cases, do you think -- can anyone think of a scenario
3 in which the police might want to rely on someone who has a
4 criminal record in order to solve a cold case? Mr. Lindeke.

5 PROSPECTIVE JUROR: Well, there are times when you
6 have to rely on someone that has a criminal record, but it's
7 also, I would guess, important to know whether that felony is
8 relevant to what this person's talking about. If they were
9 convicted of -- of having in possession a certain amount of
10 LSD 30 years ago, um, that was amount, that might be
11 completely irrelevant to their honesty now as -- as opposed to
12 say Bernie Madoff taking the stand and we would all be
13 wondering how are we going to believe this.

14 MR. BRACKLEY: I made the mistake once on this very
15 point of talking about credibility of saying, for instance, if
16 it was a lawyer on the stand.

17 PROSPECTIVE JUROR: That's a good one.

18 MR. BRACKLEY: Everyone laughed at me and I said
19 what are you laughing at, oh... But someone's -- whether or
20 not someone's been convicted of a felony, is that just another
21 piece of information that you are going to apply towards
22 whether or not you can believe this person or is that going to
23 be the end all for you. Ms. Sprigg.

24 PROSPECTIVE JUROR: No.

25 MR. BRACKLEY: No what?

1 PROSPECTIVE JUROR: No. I mean I don't want to make
2 it truthful, but we have all made mistakes in our past and
3 made a bad call, but -- I mean to have somebody sitting in
4 front of you and to be able to testify with something that
5 actually has evidence to corroborate it, I think that there --
6 everybody can turn things around.

7 MR. BRACKLEY: Okay. Mr. Arenas, does it make sense
8 that the police would want to talk to people that have
9 criminal records in order to solve a crime?

10 PROSPECTIVE JUROR: Definitely, everybody's input
11 should be taken into consideration, definitely.

12 MR. BRACKLEY: What would you think about a police
13 officer who says, you know, I'm going to solve this case, but
14 I'm not going to talk to anyone who's ever been convicted of a
15 crime because I don't want to talk to people like that? Is
16 that good police work. Mr. McDonald, good police work.

17 PROSPECTIVE JUROR: Like in engineering you have all
18 the options and gather all the information to rule out
19 everybody and certain people is it a true story. You can't --
20 like, I'm an engineer and we investigate things, you have to
21 look at all the -- at least for me, like, all the potential
22 causes and, like, the -- in my job I can't look at just the
23 good parts and bad parts, I have to look at everything and a
24 detective would do the same thing.

25 MR. BRACKLEY: Ms. Phelan, I'm going to move on down

1 to you. What do you think about that?

2 PROSPECTIVE JUROR: I believe you have to take
3 everything that you are given and weigh it all in. You
4 can't -- you can't push stuff aside because it doesn't seem
5 important to you.

6 MR. BRACKLEY: Ms. Sitko.

7 PROSPECTIVE JUROR: I think -- I think to a certain
8 extent there are -- there is a difference between lies and
9 interpretation and that's -- that's, um -- everybody is -- you
10 know, says what they think is the truth, but actually it's
11 probably their interpretation of the truth then that we're
12 hearing. But I don't think that just because somebody is, um,
13 convicted of a crime, um, that changes what their
14 interpretation is or their -- or their intention to tell the
15 truth.

16 MR. BRACKLEY: Okay. If -- but understand that as a
17 juror it would be your job to make that determination.

18 PROSPECTIVE JUROR: Of course.

19 MR. BRACKLEY: Whether it's an interpretation or an
20 outright falsehood?

21 PROSPECTIVE JUROR: Absolutely.

22 MR. BRACKLEY: Right. Mr. Raicer, what do you think
23 about -- what do you think about that?

24 PROSPECTIVE JUROR: Just because someone's been
25 convicted of a crime doesn't automatically make them, you

1 know, a liar. Other people have said the same things that I
2 believe. It depends on what crime they may have committed and
3 whether it's applicable to the case we're listening to.

4 MR. BRACKLEY: Okay. And anyone ever heard that
5 term informant or a snitch? Okay. Mr. Raicer, let's stay
6 with you. What does that mean?

7 PROSPECTIVE JUROR: Well, it's generally used in a
8 pejorative sense. It means that someone is being an informer
9 to try to better their own predicament.

10 MR. BRACKLEY: Okay. Okay. So someone who's
11 basically providing information in return for a favor?

12 PROSPECTIVE JUROR: Yes.

13 MR. BRACKLEY: Okay. Sir, what do you think about
14 such a person?

15 PROSPECTIVE JUROR: Well, I would have to look at
16 that person and take everything into consideration, what
17 information he's giving us and if it's truthful, and I would
18 just have to make a decision on it.

19 MR. BRACKLEY: Okay.

20 PROSPECTIVE JUROR: Some of them are just doing it
21 just for the money or to get something out of it and you have
22 to decide if that's the case.

23 MR. BRACKLEY: So you would put that person's
24 information to the test of all the other evidence?

25 PROSPECTIVE JUROR: Yes.

1 MR. BRACKLEY: Everybody agree that's the way to do
2 it --

3 PROSPECTIVE JUROR: Yes.

4 MR. BRACKLEY: -- with an informant? Someone's
5 who's an informant or someone may call them a snitch?

6 Ms. Sitko.

7 PROSPECTIVE JUROR: Yeah.

8 MR. BRACKLEY: Okay. Years and years ago I saw a
9 case and it was a -- it was a crime that happened deep down in
10 the belly of a motorcycle outlaw gang clubhouse, all right.
11 And it was one -- it was crime committed one member against
12 another or a -- a family member of one of the other ones and
13 all the witnesses were Hell's Angels and they all had criminal
14 records, the police had no choice but to talk to those folks
15 and rely on them in their investigation.

16 Anyone have a problem prosecuting or considering --
17 or anyone have a problem that the police would pursue a case
18 like that? Ms. Timms.

19 PROSPECTIVE JUROR: No.

20 MR. BRACKLEY: Why not?

21 PROSPECTIVE JUROR: Why wouldn't they have a fair
22 trial, like everybody else. You know, I'm not saying all
23 their choices would be, um, choices that I would make or
24 stuff, but if somebody was killed or something major happened,
25 they should be able to have the same rights.

1 MR. BRACKLEY: Okay. Everyone agree that the police
2 should treat a case where the victim is a bad person with the
3 same seriousness as they would a case where the victim was a
4 good person? Anyone take issue with that? Try to flip that
5 on its side and say, you know what, Mr. Brackley, that's
6 another one of the cases where we just shouldn't waste our
7 time?

8 Mr. Valencia.

9 PROSPECTIVE JUROR: No, everyone should be treated
10 equally.

11 MR. BRACKLEY: Mr. Harris.

12 PROSPECTIVE JUROR: I forget the question?

13 MR. BRACKLEY: Everyone should be treated equally.

14 PROSPECTIVE JUROR: Definitely.

15 MR. BRACKLEY: Okay. Someone who comes before you
16 and testifies as a witness with the felony conviction, you'll
17 judge their testimony, shake it up, put it with the rest of
18 the evidence and evaluate them as you would any other witness?

19 PROSPECTIVE JUROR: Yeah, because you have
20 circumstances and everything, this crime, this mother went out
21 and stole to feed her family, she -- he's a good person, she
22 made a mistake, she had to do something that had to be done,
23 so, yeah, you would have to judge everybody by themselves.

24 MR. BRACKLEY: Is everyone -- can everyone accept
25 the fact that somebody with a felony conviction could come

1 into court and sit on the witness stand and testify simply
2 because he or she believes that it's the right thing to do?
3 Ms. Sprigg.

4 PROSPECTIVE JUROR: Mm-hmm.

5 MR. BRACKLEY: Mr. Powers.

6 PROSPECTIVE JUROR: Yes.

7 MR. BRACKLEY: Anyone going to be thinking what's
8 really going on here? Mr. Clark?

9 PROSPECTIVE JUROR: I would say they have kind of a
10 strike against them as far as their credibility, that's for
11 sure.

12 MR. BRACKLEY: Okay. Is it third strike?

13 PROSPECTIVE JUROR: Maybe, who knows.

14 MR. BRACKLEY: Simply because they have a felony
15 conviction?

16 PROSPECTIVE JUROR: Depends.

17 MR. BRACKLEY: Depends on what?

18 PROSPECTIVE JUROR: I don't know, you know, I don't
19 know -- like other people said, it depends on what the crime
20 was and whether it benefits them. Like, I was just saying,
21 like, Sammy, the Bull, he's like John Gaudy, you know, I
22 consider him like character issues for sure and can you really
23 believe him.

24 MR. BRACKLEY: Right. That's a -- that's a real
25 extreme example.

1 PROSPECTIVE JUROR: That's the only one that I can
2 think of.

3 MR. BRACKLEY: Understatement of the day. I don't
4 think we are going the meet anyone like that, but we're going
5 to meet people who have committed felonieses and we are going
6 to ask you to consider their testimony in light of all the
7 other evidence. And what I'm looking for right now is a
8 promise in everyone that you can do that, can you all do that?
9 Anyone hesitating?

10 PROSPECTIVE JUROR: Not 100 percent. You stated
11 it's a felon, right?

12 PROSPECTIVE JUROR: Yes, but someone may have
13 committed a felony, but they still may have a conscience. You
14 have to sit there and give them as much credibility as anyone
15 else you are listening to.

16 MR. BRACKLEY: True. Mr. Webber, what do you
17 believe -- what are you thinking?

18 PROSPECTIVE JUROR: Well, love your talk about on
19 determining if he is telling the truth or not. You are trying
20 to get us to assume that he is or he isn't. And a lot of
21 times, like you used to say, honestly is like an icicle, once
22 it's gone, it's gone forever. So some of that holds true. We
23 are trying to deal with facts, right?

24 MR. BRACKLEY: Right.

25 PROSPECTIVE JUROR: So it's pretty hard just to

1 assume somebody's telling the truth or not.

2 MR. BRACKLEY: Yeah, and I don't know if -- if I'm
3 asking you to assume.

4 PROSPECTIVE JUROR: Sounds like it.

5 MR. BRACKLEY: I'm asking you to have an open mind.
6 I'm asking you to start out with an open mind, that whether
7 this person is telling the truth or not is a determination
8 that you are going to make as a juror, based on all of the
9 evidence, as opposed to simply saying I cannot base my
10 decision I'm going to make in a court of law on anything that
11 someone with a criminal record says to me. That's what I'm --

12 PROSPECTIVE JUROR: It's not self-serving to him.

13 MR. BRACKLEY: But maybe, and that's something that
14 you are going to use to make your determination, right? But
15 until you have heard self-serving information, are you going
16 to give me an open mind?

17 PROSPECTIVE JUROR: Probably, yeah.

18 MR. BRACKLEY: Okay. You promise me an open mind?

19 PROSPECTIVE JUROR: Yes.

20 MR. BRACKLEY: Can everyone promise me an open mind?

21 PROSPECTIVE JUROR: Yes.

22 MR. BRACKLEY: Okay. So I said 1984 this morning
23 and I'm going to explain why I said it, because I was doing
24 some research over lunch to figure out to try to remind myself
25 of when the space shuttle Challenger exploded when it was

1 taking off, and I so I got online to look just to make sure
2 what date it was. And does anyone remember what date that
3 was?

4 PROSPECTIVE JUROR: '86.

5 MR. BRACKLEY: '86. Mr. Serenyi, did you watch that
6 happened?

7 PROSPECTIVE JUROR: Just the aftermath, you know,
8 not as it happened, no.

9 MR. BRACKLEY: Okay. Who was in front of their TV
10 watching the space shuttle take off when that happened? Okay.
11 Mr. Deitz, you watched it happen?

12 PROSPECTIVE JUROR: Yeah, I was in school.

13 MR. BRACKLEY: Do you remember what -- roughly when
14 it happened?

15 PROSPECTIVE JUROR: Afternoon.

16 MR. BRACKLEY: Okay. Do you remember what month?

17 PROSPECTIVE JUROR: No.

18 MR. BRACKLEY: Okay. Do you remember who you were
19 with watching?

20 PROSPECTIVE JUROR: I was with a classmate and in
21 school.

22 MR. BRACKLEY: Ms. Brock.

23 PROSPECTIVE JUROR: I do remember. I was home sick
24 from school that day with my dad sitting on top of our coffee
25 table watching the TV.

1 MR. BRACKLEY: Okay. Do you remember when it
2 happened?

3 PROSPECTIVE JUROR: Do you mean time of year?

4 MR. BRACKLEY: Yeah.

5 PROSPECTIVE JUROR: No.

6 MR. BRACKLEY: Do you remember how many astronauts
7 were lost in that accident?

8 PROSPECTIVE JUROR: 6 to 10'ish.

9 MR. BRACKLEY: Do you remember any of the names?

10 PROSPECTIVE JUROR: About six.

11 MR. BRACKLEY: Okay.

12 PROSPECTIVE JUROR: Sure, the schoolteacher.

13 MR. BRACKLEY: What was her name, anybody remember?

14 PROSPECTIVE JUROR: Kristin --

15 MR. BRACKLEY: So I was going to say Sally Ride.

16 PROSPECTIVE JUROR: Sally Ride was the woman
17 astronaut.

18 MR. BRACKLEY: Okay. Who else watched that happen?
19 Is it fair to say, um, Mr. Pipp that something you will never
20 forget.

21 PROSPECTIVE JUROR: Yeah.

22 MR. BRACKLEY: Okay. Anyone -- anyone who actually
23 sat there and watched that happen? Anyone ever going to
24 forget that? Life is full of those times, right? Some of
25 them are very personal, something that happened to your

1 family, a tragedy that you actually watched happen, others,
2 it's generational. Some people talk about the day Kennedy was
3 shot and I think that we'll all talk about September 11th,
4 right?

5 Do you think, Ms. Brock, if I had come to your house
6 and interviewed you, um, that day, you would have been able to
7 tell me the date and time it happened?

8 PROSPECTIVE JUROR: Probably, yes.

9 MR. BRACKLEY: Do you think that you would have been
10 able to tell me more about the astronauts, how many there
11 were?

12 PROSPECTIVE JUROR: Yes.

13 MR. BRACKLEY: Do you think that you would have been
14 able to tell me how long it took, how many seconds or minutes
15 the space shuttle was taking off?

16 PROSPECTIVE JUROR: Approximately, yes.

17 MR. BRACKLEY: Okay. Do you think, um, if I had
18 come to -- if I had done an interview like that and I recorded
19 it, whether I did it with pen and paper or a recording device
20 you would all be able to give me a pretty accurate depiction
21 of what you were watching on that day? I think that it was an
22 afternoon. Those who saw it, you all agree with me?

23 PROSPECTIVE JUROR: Morning.

24 MR. BRACKLEY: It was.

25 PROSPECTIVE JUROR: Time zones. Morning is all.

1 PROSPECTIVE JUROR: 10:00 in the morning.

2 MR. BRACKLEY: And I don't remember. I -- I -- I
3 remember watching it, but I can't tell you any of that. I
4 can't tell you who was around me, but I know that there were a
5 lot of people there, but I probably could have told you that
6 that afternoon, right?

7 Do you think that it's fair of me, Ms. Brock, to ask
8 you those details 18 years later and expect you to remember
9 them?

10 PROSPECTIVE JUROR: I think that it's fair of you to
11 ask. The level of what you expect varies from person to
12 person.

13 MR. BRACKLEY: Okay. Do you think it's fair of me
14 to expect you to remember, and if you don't, I call you a
15 liar?

16 PROSPECTIVE JUROR: No.

17 MR. BRACKLEY: Okay. Mr. Dietz.

18 PROSPECTIVE JUROR: No.

19 MR. BRACKLEY: Okay. Do you think that it's fair of
20 me to expect you to remember all those details from 18 years
21 ago?

22 PROSPECTIVE JUROR: No.

23 MR. BRACKLEY: From -- it was more than 18. Okay.
24 Anyone? Anyone think, you know what, you should expect
25 because it's something that I'll never forget. Mr. Gambescia,

1 would you expect, um, Mr. Dietz to remember all those details
2 that he can't remember today?

3 PROSPECTIVE JUROR: Different people will focus on
4 different specifics of the incident.

5 MR. BRACKLEY: In this trial we're going to be
6 asking witnesses to remember things that happened in 1994.
7 Can everyone expect that some witnesses are going to have
8 better memories than others from way back when? Can everyone
9 accept that some witnesses, two of whom were present for the
10 exact same incident, may have different recollections of
11 exactly how it happened?

12 Mr. Smith, how -- how does that happen? Two people
13 there different recollection?

14 PROSPECTIVE JUROR: It's -- you know, your memory
15 gets fuzzy over time.

16 THE COURT: I'm sorry, I can't hear you.

17 PROSPECTIVE JUROR: I'm sorry. Your memory gets
18 fuzzy over time and you try to recall things. Sometimes it
19 gets skewed a little, doesn't mean you are not telling the
20 truth, but you are trying to pull up something that's maybe
21 been lost, a good portion of it, so that's why you get
22 mismatches sometimes.

23 MR. BRACKLEY: Mr. Montgomery, do you want to talk
24 to us a little bit about this. How is it that two people who
25 saw the same thing could remember it differently?

1 PROSPECTIVE JUROR: Easily from differences in
2 ability to remember things to story telling between now and
3 then. Lots of variations can cause differences in memory for
4 sure. Different -- they can be focused on different aspects
5 at the time which can have very differing effects on their
6 ability to remember certain aspects of anything.

7 MR. BRACKLEY: Okay. Do you think it's possible for
8 someone to have absolutely no recollection --

9 PROSPECTIVE JUROR: Mm-hmm.

10 MR. BRACKLEY: -- of something that happened 18
11 years ago?

12 PROSPECTIVE JUROR: Mm-hmm.

13 MR. BRACKLEY: Do you think that it's possible for
14 someone to listen to a recording of his or her voice of
15 something they said 18 years ago and still have absolutely no
16 recollection of that happening?

17 Mr. Sereyni.

18 PROSPECTIVE JUROR: I would think so. You know,
19 it's -- we remember different things. I mean my kids will
20 tell me, Hey, dad, did you remember this and this and this,
21 and they were fairly significant things and, well, not really.
22 It depends on the individual, how important that incident was
23 to that individual and if it's not, then it's possible that
24 you could forget it.

25 MR. BRACKLEY: Sure. Would anyone be suspect if

1 someone who says you know what, I remember that from 18 years
2 ago and here's what I remember... without hearing anything
3 else, I guess that I'm starting with that. I'm asking you for
4 that promise of an open mind to -- to shake and compare
5 everyone's testimony against all the rest of the evidence. Is
6 it possible that somebody would remember every detail of
7 something that happened 18 years ago, Mr. Raicer.

8 PROSPECTIVE JUROR: It's possible. I think that
9 it's unlikely that they will remember every detail, but it may
10 have had an impact on them that was so profound it's really
11 etched in their memory.

12 MR. BRACKLEY: Okay. Ms. Metzger.

13 PROSPECTIVE JUROR: Yeah, I think if something grabs
14 your attention so much that the details just are imprinted and
15 they stay there.

16 MR. BRACKLEY: If I have the ability to help
17 somebody remember something that they said 18 years ago, is it
18 fair for me to present that to a witness and help them try to
19 remember hearing the context of a criminal trial? Mr. Webber.

20 PROSPECTIVE JUROR: It's a borderline maybe.

21 MR. BRACKLEY: Why is it borderline.

22 PROSPECTIVE JUROR: Putting something into their
23 mind a little bit, power of suggestion.

24 MR. BRACKLEY: Okay. What if it's something that
25 they.

1 PROSPECTIVE JUROR: You are talking 18 years ago.

2 MR. BRACKLEY: Right.

3 PROSPECTIVE JUROR: Something that was said, have to
4 be pretty significant.

5 MR. BRACKLEY: What if it was someone that was
6 interviewed. What if it was someone who provided information,
7 a little piece of the story, but they weren't really someone
8 who you would expect this incident to have a huge impact on,
9 right? Why would they remember? Are you saying that you
10 wouldn't be fair for either side, either attorney to help that
11 person try to remember what they said back in 1984?

12 PROSPECTIVE JUROR: It would be reaching I feel --

13 MR. BRACKLEY: Okay.

14 PROSPECTIVE JUROR: -- for that period of time.

15 MR. BRACKLEY: Ms. Brock, what do you think.

16 PROSPECTIVE JUROR: No, I don't agree with that.

17 MR. BRACKLEY: Ms. Becker.

18 PROSPECTIVE JUROR: Well, if there is recorded
19 evidence or written evidence that can be reviewed to remind
20 them of what they said or what they saw, I see no reason why
21 that shouldn't be brought in as evidence. It's going to be up
22 to the judge to decide if it's relevant for us to hear that or
23 not. It's not going to be up to us, it's going to be up to
24 the judge. Once it's presented to us, then it's up to us to
25 listen and evaluate it with everything else.

1 MR. BRACKLEY: Mr. Arenas, what do you think?

2 PROSPECTIVE JUROR: Yes. You would have to -- well,
3 I'm sorry, please repeat that one more sometime.

4 MR. BRACKLEY: Is it fair for me or any attorney,
5 anyone really, to help somebody remember something they said
6 18 years ago or 20 years ago or 30 years ago if we have the
7 ability to do that?

8 PROSPECTIVE JUROR: Of course.

9 MR. BRACKLEY: Why is that fair?

10 PROSPECTIVE JUROR: I don't understand why it
11 wouldn't be fair. You are jogging someone's memory when you
12 are trying to get a question answered. Like you said, that
13 person may not have emphasized his answer so much back then
14 because he wasn't sure it was important. It might have been
15 or it might have not been important to that person ,So why
16 would he remember it. So if you bring up the evidence on
17 something they said, yeah, there is no reason that we
18 shouldn't be able to bring -- to jog his memory so-to-speak.

19 MR. BRACKLEY: Ms. Powers.

20 PROSPECTIVE JUROR: If I was in your shoes, sure, or
21 anybody's shoes trying to win the case, I would want to jog
22 the memory for sure.

23 MR. BRACKLEY: I mean is there anyone who doesn't
24 keep notes or reports or make records of your activities in
25 your -- in your daily life, goes by memory on everything?

1 Anyone? Mr. Pipp.

2 PROSPECTIVE JUROR: You are asking if I'm recording
3 my daily activities.

4 MR. BRACKLEY: Well, your daily professional
5 activities. For instance, when you are -- when you plug your
6 Garmin into your computer after your workouts.

7 PROSPECTIVE JUROR: If I had one, sure.

8 MR. BRACKLEY: Do you remember your -- do you
9 remember your stats and your numbers and your performance and
10 from all your workouts.

11 PROSPECTIVE JUROR: Absolutely not.

12 MR. BRACKLEY: You don't, right. I mean is anyone
13 who -- who, you know, doesn't -- well, I shouldn't ask this
14 one. But is there anyone who doesn't balance their checkbook
15 as they are funneling money out of their bank account, who
16 doesn't check their account?

17 Let me ask you this question. And it's getting
18 late. Why do we keep records of our daily professional
19 activities? Ms. Glassner.

20 PROSPECTIVE JUROR: Shake our memory.

21 MR. BRACKLEY: Okay.

22 PROSPECTIVE JUROR: Refer back to something.

23 MR. BRACKLEY: Mr. Clark.

24 PROSPECTIVE JUROR: To refer back, I agree.

25 MR. BRACKLEY: What do you -- tell me what you agree

1 with.

2 PROSPECTIVE JUROR: I think that it's one thing to
3 jog a memory for something that doesn't have the relevance
4 that this case would. I think, you know, what they are trying
5 to determine by jogging their memory can have lasting effects,
6 and I don't think that's necessarily fair in a trial, maybe in
7 every day life, but I think that's different.

8 MR. BRACKLEY: Does anyone agree with Mr. Webber and
9 Mr. Clark? It's going to happen, Mr. Clark. I'm -- I can
10 guarantee you it's going to happen that a witness is going to
11 say I don't remember and you are going to hear from a
12 transcript or a recording or another witness who is going to
13 say this is what that person said back in 1984. It's going to
14 happen, like -- like any other question that I have asked.
15 Can you be a fair and impartial juror based -- faced with the
16 prospect that is going to happen.

17 PROSPECTIVE JUROR: You said fair and I don't think
18 that it's fair.

19 MR. BRACKLEY: But can you be -- can you be a fair
20 and impartial juror knowing that's going to happen?

21 PROSPECTIVE JUROR: Possibly, but I would have that
22 conviction still.

23 MR. BRACKLEY: In other words, are you going to
24 filter out information, anything that somebody remembers off
25 the top of their head, I'll consider that. Anything that a

1 person has to be -- their -- when their memory has to be
2 refreshed or it has to be reminded of something, I'm not going
3 to consider that. Are you in that place?

4 PROSPECTIVE JUROR: If I thought strongly enough
5 about the leading of the question and that kind of thing, I
6 could be in that place, yeah.

7 MR. BRACKLEY: What about would reading something
8 you said in 1984 help you remember?

9 PROSPECTIVE JUROR: It could help you remember, but
10 like I said, I think that it's a stretch.

11 MR. BRACKLEY: What's the stretch?

12 PROSPECTIVE JUROR: The stretch is that I think that
13 you could be leading something to like, you know, have a
14 memory that isn't there or something like that.

15 MR. BRACKLEY: What if we are leading them towards
16 telling the truth?

17 PROSPECTIVE JUROR: Well, that could be, too. I'm
18 just saying that it could be the other way.

19 MR. BRACKLEY: Mr. Webber, you know I'm coming back
20 to you. Do you want to talk to me more about it.

21 PROSPECTIVE JUROR: Like said, it would have to be a
22 very significant thing for them to recall why you're
23 refreshing their memory like that. I'm going to kill you,
24 maybe if he said that he might remember that, but just
25 something randomly said, I don't know what you are saying to

1 refresh his memory on. I mean a lot of people work their jobs
2 and study every day, they can only remember so much, you know.

3 MR. BRACKLEY: Right, which is why the law permits
4 us to help people refresh their recollection. Can you follow
5 the judge's instructions, because you are going to get one.
6 The judge is going to instruct you.

7 PROSPECTIVE JUROR: I just have to worry about what
8 they say and whether or not we believe it.

9 MR. BRACKLEY: That's what I'm asking. That's what
10 I'm asking everyone. You are going to evaluate what people
11 say, right, and you are going to put it to the test of the
12 rest of the evidence. Mr. Clark, can you go that far for me
13 or are you -- are you pulling up short of that?

14 PROSPECTIVE JUROR: I pull up a little short, but it
15 would depend on the situation.

16 MR. BRACKLEY: Okay.

17 PROSPECTIVE JUROR: It's hard to say. It's all
18 conjecture at this point.

19 MR. BRACKLEY: Having heard none of the evidence,
20 is -- having heard none of the evidence, it's conjecture.

21 PROSPECTIVE JUROR: Right.

22 MR. BRACKLEY: Um, anyone want to comment on this
23 before I move to my final topic.

24 PROSPECTIVE JUROR: I just have a question. Are you
25 talking about evidence?

1 MR. BRACKLEY: Ms. Pollard.

2 PROSPECTIVE JUROR: Like a tape that this person
3 said that is a valid tape and then you play it and say you
4 said this.

5 MR. BRACKLEY: Right.

6 PROSPECTIVE JUROR: That makes sense. You said that
7 much or are you talking about somebody that he said something
8 and somebody said they -- you know what I mean --

9 MR. BRACKLEY: I'm talking --

10 PROSPECTIVE JUROR: Are you talking facts that are
11 coming back that you are saying remember you said this or she
12 didn't say that and then you say, no, listen to this, and it's
13 then --

14 MR. BRACKLEY: Right.

15 PROSPECTIVE JUROR: Is that what you are saying?

16 MR. BRACKLEY: Their voice, their words, something
17 they said in response to a question that they can't even
18 remember being asked, that's what I'm talking about.

19 PROSPECTIVE JUROR: But you have the facts?

20 MR. BRACKLEY: I'm sorry.

21 PROSPECTIVE JUROR: But you have the tape, you have
22 a transcript?

23 PROSPECTIVE JUROR: That's different, yeah.

24 MR. BRACKLEY: I think that I'm lost.

25 PROSPECTIVE JUROR: You are not lost.

1 PROSPECTIVE JUROR: That's why you are reaching in
2 the air and trying to build a case by suggestions. Do you
3 remember saying this to him, but, no, you have evidence that
4 it -- he has said it and you have proof of it.

5 MR. BRACKLEY: I can guarantee you that even if
6 that's something that I thought would be a smart thing to do,
7 I wouldn't be allowed to do it. Okay. Mr. Clark, did you --
8 were you, I think that you understood where I am heading now.

9 PROSPECTIVE JUROR: I still personally kind of still
10 feel like even if they had it on tape it would still be hard.
11 If they did forget it, just that wouldn't necessarily might
12 not do it for them.

13 MR. BRACKLEY: Okay.

14 PROSPECTIVE JUROR: You know it might not jog their
15 memory enough to --

16 MR. BRACKLEY: It might not. And the judge is going
17 to tell you that you can consider under certain circumstances,
18 and it's our job to provide those circumstances, but under
19 certain circumstances you could consider a tape made in 198 --
20 '94 as evidence.

21 PROSPECTIVE JUROR: So the person doesn't have to
22 remember, then, you have it?

23 PROSPECTIVE JUROR: I'm sorry.

24 MR. BRACKLEY: Mr. Clark.

25 PROSPECTIVE JUROR: I still feel like it would be up

1 to their interpretation of how they remember that and there's
2 a lot of things, but, yeah, I could see.

3 MR. BRACKLEY: Let me finish on this. And I have
4 gone beyond the time that I said that I would be going this
5 afternoon and I apologize to everyone. We're still going to
6 get you out of here early.

7 THE COURT: You have five minutes.

8 MR. BRACKLEY: I only needed one, but I'll take the
9 five.

10 My burden is beyond a reasonable doubt and that's a
11 serious burden, and it's a burden that we take seriously and
12 it's a burden that we want you to hold yourselves to, we want
13 you to hold your verdict to that burden, beyond a reasonable
14 doubt.

15 Mr. Lindeke, why, why is it my burden beyond a
16 reasonable doubt?

17 PROSPECTIVE JUROR: Well -- well, that's a standard
18 of proof acquired in the case is it has to be beyond what is a
19 reasonable doubt, and a reasonable doubt where you run into
20 trouble are things -- people think in terms of -- of
21 percentages, what are the odds of this, what are the odds of
22 that. The odds aren't a reasonable doubt. It's a person of
23 reason doubting, um, that this person committed this act.

24 MR. BRACKLEY: Mr. --

25 PROSPECTIVE JUROR: And, um, it's an individual

1 basis based on what you consider is reasonable, but it's
2 not -- it's not odds or statistics or one chance in a trillion
3 of this or one chance out of two. It's whether it is
4 reasonable -- you reasonably think that, wait, this --

5 MR. BRACKLEY: Mr. --

6 PROSPECTIVE JUROR: -- this is unreasonable to think
7 that this person could have done it. I have a reasonable
8 doubt that this person could have done that.

9 MR. BRACKLEY: Does, um, guesswork or speculation
10 come into this determination of reasonable doubt?
11 Mr. McDonald.

12 PROSPECTIVE JUROR: No.

13 MR. BRACKLEY: Does speculation or guesswork come
14 into it?

15 PROSPECTIVE JUROR: I don't consider reasonable
16 doubt a pretty high level basis for your determination.

17 THE COURT: Mr. McDonald, you have to keep your
18 voice up.

19 PROSPECTIVE JUROR: I guess, no, because -- because
20 I think that we are setting a pretty high level because
21 there's a person's life in the balance in that you say
22 reasonable doubt, that's a pretty high level of evidence.

23 MR. BRACKLEY: Sure. And I -- and I'm going to flip
24 that on its head, because I would not ask you to say, well,
25 let's guess that there's reasonable doubt. But do you think

1 that someone could come up with some type of doubt, whether
2 it's unreasonable or a guess as to basically any factual
3 scenario?

4 PROSPECTIVE JUROR: I guess that somebody could try
5 to present evidence to put in a reasonable doubt.

6 MR. BRACKLEY: Okay.

7 PROSPECTIVE JUROR: That's correct. Did I answer
8 that right?

9 MR. BRACKLEY: Well, yeah. Yeah. What if -- what
10 if there is no evidence to support someone's doubt, is that --
11 is that a doubt -- a doubt that's unreasonable?

12 PROSPECTIVE JUROR: You would have to take that into
13 consideration.

14 MR. BRACKLEY: Okay. Ms. Brock, need there be
15 evidence to support someone's doubt?

16 PROSPECTIVE JUROR: Can you rephrase the question,
17 please.

18 MR. BRACKLEY: Well --

19 PROSPECTIVE JUROR: I think that it's -- I think
20 that it's normal and human to doubt on a scale this big.

21 MR. BRACKLEY: Right.

22 PROSPECTIVE JUROR: Everybody wants 100 percent
23 certainty that they are making the right decision. We have to
24 accept that you will never get that 100 percent certainty.
25 You have to make the decision based on what's provided you.

1 MR. BRACKLEY: In other words, can you all base your
2 verdict on the evidence and the lack of evidence and not
3 outside -- well, you know, what if this happened, if there's
4 no evidence that that happened. I -- I -- I have a lot of
5 stories to tell, but I don't have time to do it so I'm cutting
6 right down to the bare bones of this. But at the end of this
7 trial if I ask you -- and I'm going to ask you to make a -- to
8 render a verdict beyond a reasonable doubt, can you all
9 promise me that you are going to do that based on the evidence
10 or the lack of the evidence, and you are not going to guess or
11 try to bring things in that you haven't heard, can you all
12 promise me that?

13 PROSPECTIVE JUROR: Yes.

14 MR. BRACKLEY: Okay. Ms. Ammon, I'm coming to you
15 next, but first I'm going to go to Mr. Powers.

16 THE COURT: You have a minute.

17 MR. BRACKLEY: Can you be fair and impartial juror
18 in this case? It's not just about the police, there's a whole
19 lot of issues going on here, but can you put your personal
20 experiences aside and be a fair and impartial juror in this
21 case?

22 PROSPECTIVE JUROR: I would do my very best to.

23 MR. BRACKLEY: Mr. Clark.

24 PROSPECTIVE JUROR: I would also do my very best.

25 MR. BRACKLEY: Ms. Ammon.

1 PROSPECTIVE JUROR: It would be difficult.

2 MR. BRACKLEY: Okay. But can you do it?

3 PROSPECTIVE JUROR: I don't know.

4 MR. BRACKLEY: Thank you, folks.

5 THE COURT: Okay. Pass the jury for cause.

6 MR. BRACKLEY: Judge, I would like the approach.

7 THE COURT: Would counsel approach.

8 (Whereupon, counsel for the parties and the reporter
9 approached the bench and the following proceedings were had
10 out of the hearing of the jury.)

11 MR. BRACKLEY: Judge, I would have a challenge to
12 cause as to Mr. Clark and Ms. Ammon. Ms. Ammon simply cannot
13 assure -- Ms. Ammon simply cannot assure us so that she could
14 be a fair and impartial juror in this case. I think that she
15 is trying really hard and she cannot -- she cannot make that
16 assurance. I think that that's the simple -- the simple
17 stated reason at this time. As to Mr. Clark, I think that
18 he -- that to the overall general question can you be a fair
19 and impartial juror, the answer was he would try, but
20 Mr. Clark stated that could not follow the instruction that
21 someone's recollection could be refreshed by a prior recorded
22 statement or written statement, he said that he couldn't do
23 it.

24 MS. RING: So, you know, we're objecting to both of
25 those being challenges for cause. I didn't see any difference

1 between Mr. Clark and Mr. Powers responses to Mr. Brackley.
2 What I heard Mr. Clark say, he said that it depended on what
3 was being used to refresh that whole topic and ended up being
4 very confusing about what was he using to refresh recollection
5 and we got to the transcript and the recordings. They were
6 completely different head nodding about that.

7 Ms. Ammon hasn't said anything new or substantive.
8 We met with her back in chambers earlier this morning, she
9 told us it is going to be difficult to make a decision.
10 Jurors in a case like this in particular it should be a
11 difficult decision. It shouldn't be easy, and that's what she
12 is struggling with. She hasn't said that she can't be fair to
13 the prosecution or the defense and she hasn't told us what she
14 can't do, just that this would be very, very difficult for
15 her.

16 MR. BRACKLEY: Judge, if I may. I think that
17 Ms. Ammon did say something differently and that's when we
18 started the second session. She said I'm still thinking about
19 it, you know, I'm not there yet. But the final determination
20 was that I just don't know, she didn't say that, she said I
21 don't know.

22 THE COURT: With Mr. Clark, frankly, I'm going to
23 deny the challenge for cause because I understood his
24 testimony to be that he would in whatever the context was
25 consider the circumstances, the nature of the facts and

1 whatever was being used to refresh his memory, and he would
2 consider only that in making a determination. He never
3 indicated in inability or a refusal to consider that type of
4 evidence, only that he would consider it in essentially the
5 context in which it's presented. So I will deny the challenge
6 for cause as to Mr. Clark.

7 As to Ms. Ammon, she was asked back in the jury room
8 this morning very pointedly if she could follow the law, she
9 said that she could. She was asked if she could be fair and
10 impartial, she said that she could. During earlier
11 questioning out here in front of the jury panel I very clearly
12 explained to her the burden of proof and that it didn't change
13 up or down, and she indicated that she understood that and she
14 could follow. She has not throughout her conversation with
15 counsel indicated an unwillingness or refusal to consider the
16 evidence or follow the law. What she has said all a long is
17 that it's going to be difficult for her, but she thinks at the
18 end of the trial if she is required to serve as a juror that
19 she is likely going to have to go talk to somebody, a
20 therapist or a counselor, to help her deal with the serious
21 nature of this case, but that does not indicate an inability
22 or a refusal to follow the law or to remain fair and
23 impartial. What she said all along is that it's going to be
24 hard for her, but not that it's going to be impossible or that
25 she is being obstinate in terms of whether or not she is going

1 to follow the instruction of law and apply the evidence that's
2 given in this case and consider only the evidence. So I'm
3 going to deny the challenge for cause as to Ms. Ammon as well.

4 With respect to the rest of the panel, you pass them
5 for cause. All right. Then I'm going to -- I'm going to
6 excuse the jury for the evening. I'm going to tell them to
7 return at 8:30 tomorrow morning and we'll take up with
8 Ms. Ring's voir dire at that time. Ms. Ring and Ms. Milfeld
9 because I think that you are splitting it, but we need to take
10 a couple of things up on the record before we recess for the
11 evening.

12 Okay. All right. Thank you.

13 (Whereupon, the following proceedings were had in
14 the presence and the hearing of the jury.)

15 THE COURT: Ladies and gentlemen of the jury, we are
16 going to recess for the evening. I'm going to ask you all to
17 be back here at 8:30 tomorrow morning. When you come back at
18 8:30 I need you to be in the exact same seat that you are in
19 right now. When you come back at 8:30, Ms. Ring, on behalf of
20 Mr. Clark, is going to have a chance to conduct voir dire.
21 We'll have a jury selected by mid to late morning tomorrow, I
22 promise.

23 During the evening, remember what I have told you
24 before, don't talk to anybody about the case. If anybody
25 wants to talk to you about it, what you can say is that I'm on

1 a jury panel and that's all I can say. Don't do any outside
2 research, don't read any in your reports. Don't consider
3 anything outside of what happens in this courtroom. And I
4 hope you all have a good evening and we'll see you back here
5 8:30 sharp. We can't start until you are all here. We'll be
6 ready to go at 8:30. Thank you.

7 (The panel left the courtroom.)

8 THE COURT: The record should reflect that all the
9 perspective jurors have left the courtroom. The Defendant and
10 counsel are present. We need to take up a couple of matters.
11 You are welcome to be seated or stand, whatever is more
12 comfortable for you.

13 Last week counsel had mentioned the possibility of
14 an agreed upon instruction to the jurors that explained the
15 use of prior statements to either refresh and/or impeach a
16 witness' testimony. Has counsel gotten anywhere on that type
17 of an instruction?

18 MR. KELLNER: Judge --

19 MS. MILFELD: Judge I sent the instruction to
20 Mr. Brackley and I haven't heard about their thoughts on that.

21 MR. KELLNER: We have received the instruction, Your
22 Honor, and I think that with just some minor tweaks in
23 language we'll be there by tomorrow.

24 THE COURT: Make sure you talk with opposing counsel
25 about that. What I would like to do is once the jury is sworn

1 and I give them further instructions, I would like to include
2 that in those instructions.

3 Second of all, the defense had filed an objection to
4 the Court allowing juror questioning pursuant to Rule 24(g).
5 The rule says that jurors should be allowed to submit written
6 questions for the Court -- for the Court to ask of witnesses
7 during trial. In compliance with procedures established by
8 the trial court, the trial court shall have the discretion to
9 prohibit or limit questioning in a particular trial for
10 reasons related to the severity of the charges, the presence
11 of significance of press evidence or for other good cause.

12 I understand that the Supreme Court encourages trial
13 judges to allow questioning by jurors, and I understand the
14 rationale behind that. This is the type of case, however,
15 that I think it is a proper exercise of my discretion to not
16 allow juror questions of witnesses. I say that, first of all,
17 because, obviously, this is a Class 1 felony that Mr. Clark is
18 facing. Second of all, there significant evidence that while
19 not formerly expressed, has, in fact, been limited or
20 excluded, a lot of it is *res gestae* or other transaction type
21 evidence that I had excluded previously.

22 My concern is that to allow 14 jurors to start
23 asking questions along the lines that would invite testimony
24 in the areas that I'm not allowing testimony, I think poses a
25 grave risk to the fairness of this trial. It is -- I think

1 it's some level true as pointed out in the defense's
2 objection, that when a juror question, despite being
3 instructed that I have to apply the law to their question just
4 like lawyers questions and they shouldn't speculate about why
5 the question is not answered nor should they speculate about
6 what the answer might have been, because there are some areas
7 of evidence -- as an example, the situation involving the
8 motorcycle chase, and while that -- the fact of the conviction
9 may be allowed or at least court case may be allowed, the
10 underlying facts of that may not be allowed. And I anticipate
11 reasonable jurors are going to be curious about what all led
12 up to that, that's just one example of an area where I have
13 allowed a certain very limited type of evidence. My concern
14 is that jurors will want to know a broader context. Clearly,
15 I can filter the questions and exclude those that are not
16 appropriate, but I think in this case the discretion is the
17 better part of valor and I'm going to sustain the objection to
18 allowing juror questions pursuant the rule 24 G. I think it
19 will best protect Mr. Clark's right to a fair trial and I
20 think it will also properly limit the evidence to that which
21 is admissible and it will keep the jurors focused on that
22 evidence which will be admissible.

23 We had talked sometime back and it came up again
24 today about how we're going to designate the two alternate
25 jurors. Are the -- is counsel clear on how we are going to do

1 that?

2 MR. BRACKLEY: Judge, I'll speak for the People.
3 We're clear -- actually, I'm not clear at all. I guess that
4 my question is this -- and I guess that this is the best
5 hypothetical. Suppose that juror 3, Ms. -- juror 2,
6 Ms. Sprigg --

7 THE COURT: Right.

8 MR. BRACKLEY: -- is removed for cause at some point
9 and she is the only one, and someone, number 37, on the list
10 down sits for Ms. Sprigg.

11 THE COURT: Number 39.

12 MR. BRACKLEY: Number 39 replaces Ms. Sprigg.

13 THE COURT: Right.

14 MR. BRACKLEY: Would that be the second alternate?

15 THE COURT: Yes.

16 MR. BRACKLEY: Okay.

17 THE COURT: Assuming -- assuming that juror 39, who
18 replaces Ms. Sprigg, remains after the exercise of peremptory
19 challenges.

20 MR. BRACKLEY: Right. Right.

21 THE COURT: And then the first alternate would be
22 whichever the second to last juror called into the box is who
23 remains on the panel of 14.

24 MR. BRACKLEY: It's -- understood. It's just
25 confusing. I wonder if there's a less confusing way that we

1 could agree on -- is that how Your Honor has done it in the
2 past?

3 THE COURT: Always.

4 MR. BRACKLEY: Okay. We have no objection to that.

5 THE COURT: For the Defendant?

6 MS. RING: I -- I have to acknowledge that I have
7 not done it that way and it's not -- trying to wrap around my
8 brain about strategically what that looks like, but I can't
9 think of another suggestion at this point and I didn't really
10 think it through until earlier.

11 THE COURT: I mean, look, I'm not wedded to my idea.
12 I'm open to suggestion. I'm open to an agreement, but I just
13 need you all to know when you start to exercise your
14 peremptory challenges how the alternates are going to be
15 identified.

16 MR. BRACKLEY: Right. But I guess that the
17 complication is as we're -- we do a challenge and then the
18 defense does a challenge, we have to then be moving who those
19 alternates are in their minds down the -- down the path. And
20 it's -- it's -- we'll get through it. It's just complicated.
21 I don't remember Your Honor doing it that way, but maybe I
22 wasn't paying attention.

23 THE COURT: I mean that's what we did in Rasinsky.

24 MR. BRACKLEY: Yeah, I don't remember that.

25 THE COURT: I'm open to suggestion. I mean do you

1 want me to randomly designate two seats? You want to randomly
2 designates two seats and they have -- they reshuffle and
3 choose their own -- own chairs, that's who the alternate is
4 going to be. At least identifying them this way, you know --

5 MR. BRACKLEY: People's position is we keep it this
6 way.

7 THE COURT: Okay.

8 MS. RING: That's fine.

9 THE COURT: Okay. And typically what I have done is
10 once you have exercised all of your peremptory challenges and
11 you tell the bailiff that your panel is finalized, I'll come
12 down and ask you to make sure you agree that this juror and
13 this juror are the alternates, first and second. Is that
14 okay?

15 MR. BRACKLEY: So I -- just one more clarifying
16 question. If there are no challenges -- no one replaces any
17 of these jurors, it would just be the highest number.

18 THE COURT: Right.

19 MS. RING: Right.

20 THE COURT: Exactly. Exactly. And, frankly, that's
21 another way to look at it. It's just the highest numbers who
22 are left.

23 MR. BRACKLEY: Right. But number 39 would be
24 sitting in the two chair, in other words.

25 THE COURT: Right.

1 MR. BRACKLEY: Okay. Fine. Okay.

2 THE COURT: Okay. Anything else we need to take up,
3 from the People?

4 MR. BRACKLEY: No, Your Honor.

5 THE COURT: For the Defendant?

6 MS. RING: Um, Judge, just because I don't think --
7 we don't intend on actually asking to have -- my two
8 investigators who are also going to be helping us with
9 witnesses, et cetera, are in the courtroom right now. They
10 are both Public Defender employees.

11 THE COURT: I recognize them.

12 MS. RING: Okay. We don't anticipate nor do we
13 actually have the resources to have one of them to ask to have
14 them be designated to sit with us throughout the trial, but
15 they are going to be able to need to be able to move in and
16 out and assist us. So I want to make sure the District
17 Attorney doesn't have any objection to that, because I see it
18 as being somewhat like having advisory witnesses and it will
19 be both Ms. Viallobos and Ms. Barnard.

20 THE COURT: The People have any problem with that.

21 MR. BRACKLEY: In other words, I'm just -- Judge, I
22 wasn't listening. I was -- I was --

23 THE COURT: They -- they --

24 MR. BRACKLEY: I don't expect to have an objection,
25 but can you explain that in fifth grade terms for me.

1 THE COURT: Let me put it this way. I'll allow it
2 as an exception as necessary to the rule of sequestration that
3 Ms. Viallobos and Ms. Barnard are allowed to come and go from
4 the courtroom and remain as necessary to act as coordinators
5 and investigators, although not formally as advisory
6 witnesses. That anticipates that they are not going to be
7 sitting here for the entirety of the testimony, but rather
8 they come and go. I think that's fine and I think that's
9 appropriate.

10 MS. RING: I want to be clear because they are
11 endorsed, they were on our witness list, because -- because
12 they were investigators there may be a need for them to
13 testify at some point. Now I can't anticipate that, but I
14 don't see that role as being that much different than
15 Detective Heidel.

16 MR. BRACKLEY: Yeah. That's fine, Judge.

17 THE COURT: Okay.

18 MR. BRACKLEY: I understand that and I don't
19 really -- I mean to the extent that advisory witnesses are
20 needed, and I don't really know that there's a limit to that,
21 and it makes sense so...

22 THE COURT: Okay. All right. Anything else?

23 MS. RING: No.

24 THE COURT: Okay. Then we'll see you all at 8:30.
25 Be ready to go at 8:30 and we'll be in recess.

(Court adjourned.)

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 9th day of May, 2013.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
22
23
24
25

DISTRICT COURT
BOULDER COUNTY
COLORADO

1777 6th Street
Boulder, CO 80302

Plaintiff:

People of the State of Colorado

Defendant:

Michael Martin Clark

FOR COURT USE ONLY

Case No. 12CR222
Division 6

For the People:

Ryan Brackley and John Kellner
Deputy District Attorneys

For the Defendant:

Megan Ring and Nelissa Milfeld
Public Defenders

The matter came on for jury trial on October 10th,
2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
Boulder District Court, and a jury of 12 persons, and the
following proceedings were had.

1 **P R O C E E D I N G S**

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3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: All right. Good morning, ladies and
8 gentlemen. This is case 12 CR 222. The record should reflect
9 that the Defendant is present, as are all counsel. I hope
10 that you all had a good evening. When we recessed yesterday
11 evening we were in the middle of voir dire. At this time I'll
12 call on Ms. Ring for the Defendant. Your voir dire.

13 MS. RING: Thank you. Good morning.

14 THE JURY: Good morning.

15 MS. RING: So we get to look at all those jury
16 questionnaires understandably. So how many of you are born in
17 New Jersey? It felt like more, but maybe that's -- I just
18 have to know. How much I have to do with my accent today
19 because I have been gone for a long time, but -- and I talk
20 really fast, so those of you from New York know.

21 That accent I think he's from New York, too.

22 PROSPECTIVE JUROR: You can tell.

23 MR. BRACKLEY: Why are we all here?

24 PROSPECTIVE JUROR: I have been here only 35 years.

25 MS. RING: Right. So the most important part of

1 this process is that you all talk to us. And, of course,
2 we're trial lawyers, so we like to talk a lot, so that's
3 sometimes hard, but the point of the next I hope less than two
4 hours for us is for me to figure out who you are in terms of
5 can you be a fair and impartial juror in this case, right,
6 because not every juror is right for every case.

7 So the first thing that I want to know, because we
8 had a really long day yesterday and you filled out
9 questionnaires last Friday and some of you came in the back
10 and some of you sat here and listened and heard other people.
11 So does anybody have anything that they thought about from
12 yesterday or Friday, your questionnaire, that you thought I
13 would have said this if somebody had asked me? I was nodding
14 my head, I raised my hand and no one noticed or I had
15 something to say?

16 Like Mr. /TAOET, I saw you raise your hand at one
17 point yesterday and I think that Mr. Brackley went over here,
18 and I can't tell you now what you raised your hand about.

19 PROSPECTIVE JUROR: I vaguely remember, but I think
20 that it was addressed, so I didn't re-raise it.

21 MS. RING: Okay. All right. Anybody else have
22 anything that they thought about last night that woke them up
23 at 2:00 in the morning when I was awake?

24 Okay. So having done this for a long time, I would
25 suggest to you that the rules that we apply in this courtroom

1 that are based on the constitution, based on why our criminal
2 justice system works, are not necessarily the same rules that
3 you would apply when you analyze information in your daily
4 life. So I always want to talk to jurors about those things,
5 because I think that it's one of the most difficult things
6 about being a juror. So I want to start with the presumption
7 of innocence, which is probably one of the most fundamental
8 premises that our criminal justice system in the United States
9 is based on. And you keep hearing this morning the judge
10 introduced or noted that my client, Michael Clark, the
11 Defendant, was present.

12 So, Ms. Timms, how does the idea of the presumption
13 of innocence, that Mr. Clark is presumed innocent right now,
14 but he's also called the defendant, right, he's sitting at
15 defense table with his defense lawyers. How do you -- how do
16 you resolve those two things?

17 PROSPECTIVE JUROR: Well, because he's presumed
18 innocent, he would be here, but -- I guess that I'm not
19 exactly sure what you're asking me. I mean he would be here
20 and, of course, he would have his defense lawyers here -- I'm
21 sorry.

22 MS. RING: It's really early for me to pick on you,
23 isn't it, and especially with something that complicated.

24 Let me just throw it out to anybody who --
25 Mr. Montgomery, you at least smiled at me. I mean do you

1 understand why I think that there's attention there?

2 PROSPECTIVE JUROR: Of course.

3 MS. RING: And --

4 PROSPECTIVE JUROR: It's basically a terminology
5 based right, so... defense is by definition means someone's
6 accusing you of something, but you have to keep in mind that
7 they are presumed innocent.

8 MS. RING: Ms. Sitko, I saw you nod your head.

9 PROSPECTIVE JUROR: That's exactly -- to me, it's a
10 linguistic anomaly actually.

11 MS. RING: Okay. And so certainly you both just
12 talked about terminology and linguistics. Mr. Raicer, I saw
13 you shake your head, too. And I guess what I'm getting is
14 the -- is I'm more concerned about conceptually how -- what
15 the terms mean to someone, but if that wasn't why you are
16 shaking your head.

17 PROSPECTIVE JUROR: No, I'm trying to think about
18 how to answer your question, because it's inherently a -- you
19 know, a confrontational system. Someone is being accused of
20 having committed a crime, by definition that person is the
21 defendant.

22 MS. RING: Right.

23 PROSPECTIVE JUROR: I don't see it anything more
24 than a linguistic problem. I have no problem with the notion
25 of someone being presumed innocent until proven beyond, the

1 shadow of a doubt that he is guilty.

2 MS. RING: Mr. Lacopo, and if I mispronounce your
3 name, if -- anybody's name, let me know. I thought that I saw
4 some kind of head shake, nod in your group. Did you --

5 PROSPECTIVE JUROR: I just, you know -- you go
6 through life not knowing that people are presumed innocent.
7 And I don't think that it matters what they're called or put
8 at the other desk, behind the desk, it doesn't enter -- the
9 defendant is still, in my mind, they are presumed innocent.

10 MS. RING: Okay. So I heard you say that you go
11 through life with the notion or the concept of the presumption
12 of innocence, is that what you said?

13 PROSPECTIVE JUROR: Yeah.

14 MS. RING: Okay. Ms. Metzger, what do you think
15 about all of this?

16 PROSPECTIVE JUROR: Well, I guess that a defendant
17 is here because evidence has brought him here, but our laws
18 still say that they are innocent until proven guilty and
19 that's how we follow it.

20 MS. RING: And so part of what I hear you saying
21 is -- because I have talked to jurors who have told me, Well,
22 no, I walked in the room and I wonder what he did, the guy
23 sitting at the table with you, that's the first thought that I
24 had in my mind.

25 And then for some jurors I have spoken to it then

1 becomes difficult when you walk in and say, Well, I wonder
2 what he did, because he's the defendant and he is accused of a
3 crime, and that means that there must be some evidence out
4 there that for some jurors I have talked to, it's very
5 difficult to then say, but I'm really supposed to presume that
6 person innocent, but in -- when I first walked in the room
7 that really wasn't my first thought.

8 Mr. Hutchins, what do you think about that?

9 PROSPECTIVE JUROR: I -- I didn't assume that he was
10 guilty or innocent until you prove to me that he is guilty,
11 I'm going to believe that he is innocent.

12 MS. RING: Okay. Mr. Zeff.

13 PROSPECTIVE JUROR: It's a little different to me in
14 that it's -- since it's a long time, it's not, um -- it's been
15 many years that have gone by so in my mind, I'm thinking that
16 the DA's office was really paying attention to this for a
17 long, long time and probably -- he might be leaning a little
18 more towards the defendant, don't know, than -- than equal
19 coming in.

20 MS. RING: And I need you to explain a little bit to
21 me more that last part. Who's leaning towards don't know?

22 PROSPECTIVE JUROR: I think that I would think a
23 little different in -- I don't know what exactly it would be,
24 but a little different about a defendant in a case that's
25 6 months old than a defendant in a case that's 18 years old.

1 MS. RING: Okay. And which way does that cut for
2 you?

3 PROSPECTIVE JUROR: It cuts that, um, if it's
4 18 years old, um, somebody has had the notion that there's
5 more to it than what was first seen and they -- and they have
6 gone after more for a longer period of time, because they are
7 more convinced maybe now than before that -- that this person
8 was guilty.

9 MS. RING: Okay. So as -- is it fair that as you
10 have sat here since -- because the questionnaire told you that
11 this crime happened in 1994, right? So you now have known
12 since Friday that this was an 18-year-old case --

13 PROSPECTIVE JUROR: Mm-hmm.

14 MS. RING: -- right? So the court reporter takes
15 down everything that we say and when you do this --

16 (Counsel indicated.)

17 PROSPECTIVE JUROR: Oh.

18 MS. RING: I have to either tell Ms. Ritter what you
19 are doing or --

20 PROSPECTIVE JUROR: Yes.

21 MS. RING: Thank you. So as you thought about that
22 and as you think about where we are right now, the fact that
23 it's been an 18-year-old investigation means that you think
24 that the DA might have a stronger case?

25 PROSPECTIVE JUROR: I would have thought that before

1 I sat here for the last couple of days, but I don't think that
2 now.

3 MS. RING: Okay. So part of the way you are talking
4 about that and the strength of the DA's case or whether it was
5 a 6-month case or an 18-year-old case, I think goes to the
6 heart of my -- what I'm talking about is the concern that, you
7 know, it makes sense that you've been thinking about what does
8 it mean that it's been 18 years and we're finally here. That
9 makes perfect sense to me, right?

10 Anybody else have the same thought about why it's
11 took 18 years and that that might mean something? I see
12 people shaking their head, and Mr. Smith and Mr. Clark and
13 Mr. Powers kind of, sort of. So how does that -- and your
14 thoughts about the 18 years and how long the DA must have
15 investigated and what you're thinking about their case, how --
16 what does that have to do with the presumption of innocence?

17 PROSPECTIVE JUROR: I think before I sat here I
18 would say it might have something to do with it, but after
19 sitting here and thinking about it, going through the logic of
20 it, I don't think it does.

21 MS. RING: Okay.

22 PROSPECTIVE JUROR: I'll just add one.

23 MS. RING: So I need to -- the other thing that we
24 need to do here, because it's on the record, is I need to say
25 your name so we know who's talking. So that's why I'm cutting

1 you off, I apologize, but, Mr. Montgomery.

2 PROSPECTIVE JUROR: Yeah. So I think that we're
3 just inherently a judgmental society, and a decision -- we're
4 going to make a decision one way or the other quickly, but you
5 also have to separate that once you are here on the jury
6 panel, just like we have to separate many other aspects, and
7 take court orders into consideration and presume innocence.

8 MS. RING: So you start out saying we're kind of
9 basically a judgmental society, and I guess that you just
10 resaid, I hope, what I was trying to say earlier, is we're
11 asking you to take that judgment piece and change it around a
12 lot and just walk in and say he's presumed innocent. And I
13 think there's some people who are better at doing that and
14 some people really aren't capable of doing that and that's
15 really my question.

16 Mr. Serenyi, which person are you?

17 PROSPECTIVE JUROR: Well, very honestly, I have
18 spent a lot of time worrying about terminology or the whole
19 concept that I think you're talking about.

20 MS. RING: Sorry, I'm going to go ahead and make
21 sure I'm following you. You have or have not worried about?

22 PROSPECTIVE JUROR: I have not.

23 MS. RING: Okay.

24 PROSPECTIVE JUROR: And the reason is, you know, if
25 there was no defendant, we wouldn't be here.

1 MS. RING: Mm-hmm.

2 PROSPECTIVE JUROR: If the DA hadn't found some
3 reason to reopen the case, we wouldn't be here, so why spend a
4 lot of time worrying about it.

5 MS. RING: Mr. Powers, do you have any idea why I'm
6 worried about it? I mean I'm glad that you are not worried
7 about it.

8 PROSPECTIVE JUROR: I think that some people form an
9 opinion more solidly than others and use their intuition or
10 that opinion to move forward more than others.

11 MS. RING: Mr. Pipp, what do you think?

12 PROSPECTIVE JUROR: I forget this gentleman's name
13 behind me.

14 MS. RING: Mr. Serenyi.

15 PROSPECTIVE JUROR: I agree with what he said. You
16 have to have an accused in a case, but we're told to presume
17 that he is innocent and that's what we are going to do. You
18 have to be, as you said, fair and impartial.

19 MS. RING: So probably not surprised I think about
20 what I'm going to talk about a little bit in advance of trial.
21 And so the next thing that I wanted to ask about, if there's
22 any difference in this ability to really presume somebody
23 innocent and think of an accusation as an accusation. Does it
24 make a difference what the crime is, and I end up talking to
25 you because I was going to use a bike theft.

1 Now my guess is if you're bike was stolen, that's a
2 really big deal for you, as opposed -- and a lot of Boulder
3 people, but I'm going to stick with you, and you and I
4 understand that.

5 PROSPECTIVE JUROR: Sure.

6 MS. RING: Bikes are very expensive and important
7 items. Does it make a difference if what we're talking about
8 is property or some kind of crime of that nature versus
9 something as serious as first-degree murder?

10 PROSPECTIVE JUROR: As jurors we're supposed to say
11 no, but it's, of course, a difficult thing. I mean the
12 gravity of theft or murder is very, very different, much more
13 serious crimes. So you have to separate that and sit here and
14 be impartial and hopefully everyone can do their job.

15 MS. RING: So, Mr. Krolick, you know, I'm thinking
16 about some of the words Mr. Pipp just used, like "hopefully,"
17 and "as jurors we have to." I mean and I think that gets to
18 the crux of what I want to talk about. It's not easy, it's
19 difficult, and I'm trying to find people who really actually
20 understand and appreciate that, the difficult part of it and
21 think about what -- whether they really are the right person
22 to do that. And so I'm wondering what you think about the
23 conversation that we've been having.

24 PROSPECTIVE JUROR: Well, personally I intend to
25 rely more on evidence and data than I do my own intuition and

1 how we wake up in the morning or if it's raining out. So I
2 guess that I prefer just laying all the facts out on the table
3 and making a decision based on that.

4 MS. RING: Okay. And tell me a little bit about
5 why -- how you get to be that kind of person.

6 PROSPECTIVE JUROR: Ask my wife, I don't know. It's
7 tough, but, you know.

8 MS. RING: For you or your wife?

9 PROSPECTIVE JUROR: For my wife, definitely for my
10 wife. But really I guess when it comes down to, you know,
11 there's victims and there's also people who create victims,
12 and so at that point you kind of have to take it at face value
13 and see what comes from that so... but I can't be judgmental.
14 I mean it's not fair to -- and it's really -- kind of have to
15 take the middle path on these kind of important things, so
16 that's what I say.

17 MS. RING: So how many people would describe
18 themselves more in Mr. Krolick's kind of line of I like to see
19 facts, I don't use my intuition as much. Raise your hand.
20 Come on ladies.

21 All right. And how many people would put themselves
22 in -- and I know that I'm really generalizing, but it's more
23 of an intuition thing for you than it is clean slate, need to
24 hear the facts? Okay.

25 Mr. Arenas, did I say it right? Arenas.

1 PROSPECTIVE JUROR: Good enough.

2 MS. RING: My last name is Ring, like, people screw
3 that up.

4 What about what I was -- I want to go to what I
5 talked to Mr. Pipp about. Does the nature of the crime make a
6 difference to you, but if you want to go back to something
7 else.

8 PROSPECTIVE JUROR: Not necessarily. I mean I was
9 always raised to give everyone the benefit of the doubt. I
10 don't like making decisions until I have heard all the facts
11 myself, and just arguing with my little sister or anything to
12 that effect.

13 MS. RING: You gave your little sister the benefit
14 of the doubt.

15 PROSPECTIVE JUROR: Not necessarily, anymore I do,
16 but not when we were younger, I got to say.

17 MS. RING: Okay. So unfortunately our questionnaire
18 said Ms. Wood --

19 PROSPECTIVE JUROR: Yes.

20 MS. RING: -- but your name is now Ms. O'Harah.

21 PROSPECTIVE JUROR: Yes.

22 MS. RING: Okay.

23 PROSPECTIVE JUROR: Mm-hmm.

24 MS. RING: This is part of my Alzheimer's
25 prevention, doing all this name stuff.

1 What do you think about what we're talking about?

2 PROSPECTIVE JUROR: Respectfully, emotion doesn't
3 come into play here when we're talking about content, and so
4 in order to honor the process as a whole, for me, I'm -- it's
5 important to stay neutral and gather the facts, listen to the
6 content and make a decision based on the information.

7 MS. RING: Mr. Harris, you have an interesting look
8 on your face.

9 PROSPECTIVE JUROR: I think that it's hard for us to
10 accept the innocent until proven guilty because we have the
11 news media out there bombarding us, and we come in and --
12 well, he's got to be guilty of something because otherwise all
13 these -- all this news that is bombarded would be for nothing,
14 so, yeah, I think that it's a little hard to do.

15 MS. RING: Okay. I mean this has been my career for
16 a really long time. And I have to yell at my mother all the
17 time about what she reads in the news and calls me and says,
18 Do you believe so and so did this horrible thing. And I'm,
19 like, Mom, if I'm your daughter and you can't get that, but I
20 think that the media thing is a great example of why we
21 have -- I have this concern.

22 Mr. Philipp, what do you think?

23 PROSPECTIVE JUROR: I agree. It's -- everything,
24 whether it's a sports athlete who has done something with
25 somebody that he shouldn't have, you immediately think that he

1 did it, so -- and that's -- and people buy a lot of things at
2 the news stand because they like to read about that kind of
3 stuff.

4 MS. RING: So where does that put you in terms of
5 sitting on this jury and being able to do what we're asking
6 you to do?

7 PROSPECTIVE JUROR: From my standpoint, I don't like
8 it. I mean I don't buy that stuff, I don't read that stuff.
9 I mean it's still interesting sometimes if it's on the front
10 page of the sports page, but in general it's okay for me. I
11 mean I'm able to presume that a person is innocent and the
12 facts, I'm a logical person, so I'm going to look at the
13 evidence and facts and...

14 MS. RING: Okay. Mr. Valencia, I haven't picked on
15 you yet this morning, have I?

16 PROSPECTIVE JUROR: No, you haven't.

17 MS. RING: I probably should ask, who has had enough
18 coffee yet? We should talk about what sufficient coffee is.

19 PROSPECTIVE JUROR: Yeah. No, I agree with the --
20 um, point about emotion. I think that emotion has a lot of --
21 to do with judgment, but being an engineer, I tend to be more
22 logical, rational type as well. In this particular case I
23 have no vested emotion in this case and it doesn't cloud my
24 judgment at all.

25 MS. RING: Okay.

1 PROSPECTIVE JUROR: So presumption of innocence is
2 not a problem.

3 MS. RING: Okay. Does anybody -- I think that I
4 started way back with Mr. Pipp asking this question about is
5 there any difference or concern for you as jurors when we are
6 talking about the accusation of first-degree murder versus,
7 you know, shoplifting or stealing some property, you know, not
8 a person being harmed. Does that -- does that raise a concern
9 for anybody? Mr. Valencia.

10 PROSPECTIVE JUROR: I think, if anything, it makes
11 it more important. You have to be even more vigilant about
12 being objective and getting all the facts first, and it's much
13 more important than a smaller time.

14 MS. RING: Okay. So I was going to try to remember
15 your first initial, so I could separate the Wilsons because
16 the fact that you two are sitting like this is --

17 PROSPECTIVE JUROR: Okay.

18 MS. RING: So, Ms. Wilson, who's sitting closer to
19 me, what are your thoughts on this discussion?

20 PROSPECTIVE JUROR: Um, I agree that the gravity of
21 the crime makes me take a -- it more seriously and going to
22 myself and sort of -- you need to separate intellect from
23 emotion and...

24 MS. RING: How many of you are sitting here right
25 now are -- would put yourself in the category of really don't

1 like guns, aren't comfortable around guns, you are just kind
2 of an antigun person? Okay. And how many of you are
3 comfortable with guns, you grew up hunting or you have guns at
4 home, or that's -- you know, guns just don't cause you a
5 problem at all? Okay. So I'm going to start with the people
6 that are not as comfortable with guns, and now I can't
7 remember who raised their hands.

8 Mr. Zeff raised his hand. If you find out that
9 someone has a gun, likes guns, does that cause you a judgment
10 right just based on the gun issue?

11 PROSPECTIVE JUROR: Not just based on the gun issue.

12 MS. RING: Mr. Sitko, did you raise your hand?

13 PROSPECTIVE JUROR: I did. I think it causes me to
14 think about the person and -- and it's not necessarily the --
15 that I -- I have a negative judgment, it's just -- it's
16 just -- it makes me stop and think about it.

17 MS. RING: Okay. Mr. Montgomery, did you nod your
18 head?

19 PROSPECTIVE JUROR: No, I grew up in Oklahoma. I
20 have no problem with guns, but personally I prefer to not have
21 them around me.

22 MS. RING: Anybody else who is just not comfortable
23 around guns and kind of just -- guns make them nervous and
24 maybe wish we had a little more gun control? Ms. O'Harah.

25 PROSPECTIVE JUROR: I don't know the gun control

1 thing, it's just a personal preference, I have never felt I
2 needed a gun, nor would it serve my family to have one in the
3 home. So just a personal preference that -- you know,
4 there's -- somebody was sitting next to me packing a gun, that
5 would be their choice and I hope that it would be licensed.

6 MS. RING: And not loaded and the safety on.
7 Mr. Simon.

8 PROSPECTIVE JUROR: Guns don't bother my. I carry a
9 gun in the service and I had a gun pointed at me, but I would
10 like to see more gun control.

11 MS. RING: Ms. Glassner, you raised your hand.

12 PROSPECTIVE JUROR: It's a personal thing for me. I
13 just don't prefer guns, but I'm around people that hunt and
14 are outdoorsy people and so I'm comfortable with their right
15 to do that and --

16 MS. RING: Okay.

17 PROSPECTIVE JUROR: -- my right to not.

18 MS. RING: So anybody who raised their hand that,
19 you know, isn't really comfortable with guns, have any strong
20 reaction when somebody -- you find out somebody is a gun owner
21 or they kind of really like guns? Anyone?

22 Okay. Mr. Deitz, you're comfortable with guns?

23 PROSPECTIVE JUROR: Yes.

24 MS. RING: Okay. What does that mean for you?

25 PROSPECTIVE JUROR: I grew up in Colorado, hunted

1 since I was a kid and had one for personal protection. I -- I
2 see it as a personal right and that everyone, you know, can
3 either chose to have it or not.

4 MS. RING: Who else told me that they are
5 comfortable with guns? Ms. Brock.

6 PROSPECTIVE JUROR: I have Dobermans named Smith and
7 Wesson.

8 MS. RING: I don't think you really need to say
9 anything else.

10 PROSPECTIVE JUROR: I mean the gun issue is a
11 personal thing and people either have this fear of guns or
12 they are comfortable with guns. And there are so many
13 positive things about using a gun, hunting, skeet shooting,
14 lots of fun things that you can do, too, it doesn't
15 necessarily mean that just because you like guns or support
16 guns, that there's a problem with guns.

17 MS. RING: And I wasn't trying to get at whether
18 there's a problem with guns or not. I just noticed that there
19 are people who are very comfortable with guns, and I feel you
20 couldn't have said it better, and then there are people who
21 aren't. And because you are not -- they are not comfortable
22 with guns, it causes this whole different reaction, and I was
23 just trying to get a sense of who's who.

24 So from what you heard so far from Mr. Brackley
25 talking to you for close to two hours yesterday and the jury

1 questionnaire and all of that, what happens -- Ms. Toepfer,
2 did I say it right?

3 PROSPECTIVE JUROR: No.

4 MS. RING: Okay.

5 PROSPECTIVE JUROR: It's Toepfer.

6 MS. RING: It's T-o-e-p-f-e-r.

7 PROSPECTIVE JUROR: T-o-e-p-f-e-r, but you pronounce
8 it like the "O" is not there.

9 MS. RING: Which is why I tried to spell it that way
10 and it still didn't work. I apologize.

11 PROSPECTIVE JUROR: That's okay.

12 MS. RING: What happens if you end up on this jury
13 and you hear all of the evidence, and it's very clear to you
14 that the victim in the case was murdered, but you have
15 reasonable doubt and no one has told you who's responsible?

16 PROSPECTIVE JUROR: Well, that's not why we're here
17 to find out if -- now say that again. You got me confused.

18 MS. RING: You --

19 PROSPECTIVE JUROR: I -- I have heard all the
20 evidence and I have a reasonable doubt? Are you telling me
21 that I have a reasonable doubt?

22 MS. RING: Yes, as to whether Mr. Clark, who's the
23 named defendant in this case, but you have no doubt that the
24 individual is actually murdered.

25 PROSPECTIVE JUROR: Well, but we're not here -- that

1 isn't what we're here for.

2 MS. RING: Go ahead. Tell me some more about that.

3 PROSPECTIVE JUROR: We're here to decide whether the
4 defendant is innocent or guilty, period. Am I missing
5 something?

6 MS. RING: Not at all. Ms. Brock.

7 PROSPECTIVE JUROR: I agree. We're deciding the
8 case, not on if someone is murdered, but we're deciding the
9 guilt or innocence of the defendant.

10 MS. RING: Ms. Perry, what do you think?

11 PROSPECTIVE JUROR: The same thing. It's not --
12 we're not here, you know -- sorry for the victim, but with all
13 the evidence and facts put before us, we're here to figure out
14 who's innocent or guilty. And I'm sorry for the victim, but
15 we have to leave that at the door and our judgments at the
16 door.

17 MS. RING: Mr. Deitz, do you know why I asked that
18 question?

19 PROSPECTIVE JUROR: Yeah. I mean I can see your
20 concern, if there's this unanswered question as to who did it,
21 if that's going to effect our judgment, you know, of who's
22 accused. I assume that's why you asked. I don't think it
23 should. We're not investigators, we're a jury, you know, to
24 determine whether the accused is guilty or innocent.

25 MS. RING: Mr. Harris, what do you think about that?

1 PROSPECTIVE JUROR: Can I have the question again?

2 MS. RING: The whole idea of, you know, if at the
3 end of the day, as a juror, you actually believe that it's
4 been proven that someone was indeed murdered, but the question
5 of who did it is not answered beyond a reasonable doubt?

6 PROSPECTIVE JUROR: Is not answered?

7 MS. RING: Yeah.

8 PROSPECTIVE JUROR: Well, from what the facts that
9 are given to us, that's what we have to make our decisions on.
10 So there's got to be an answer there or at the end of the day,
11 if we take everything that's been told to us and we process
12 that, we have to come up with an answer.

13 MS. RING: And I guess that my question really is
14 because we're talking about -- people use the word the gravity
15 of the first-degree murder accusation, that at the end of the
16 day, as a juror, is it okay to say, yes, they have proved this
17 person was murdered, but they didn't prove that Mr. Clark was
18 the one who did it and no one proved who did it, but -- so
19 my -- your verdict has to be what?

20 PROSPECTIVE JUROR: Well, we talking a hung jury
21 then? Or saying that we have got the facts, but we don't
22 think that he's done it?

23 MS. RING: Right.

24 PROSPECTIVE JUROR: Then you can't -- you can't
25 prosecute. You can't say that he did it then, so you have to

1 say not guilty.

2 MS. RING: Right. Mr. Smith, does that make sense?

3 PROSPECTIVE JUROR: I agree with what -- I
4 completely agree with that sentiment. I mean you have to find
5 not guilty if there's reasonable doubt. We are not here to
6 decide -- you know, to look for someone else or -- or to, you
7 know, find the Defendant guilty just because we can't find
8 someone that fits the bill. So, of course, we have to find
9 not guilty based on the facts.

10 MS. RING: Ms. Ringgenberg, does it make sense that
11 I'm asking this question? Because we're talking about
12 first-degree murder, and I would be concerned that jurors
13 would want an answer of who did it.

14 PROSPECTIVE JUROR: Well, I think that people would
15 be curious, but if the facts do not support beyond a
16 reasonable doubt, you have to say not guilty.

17 MS. RING: Mr. McDonald, what do you think?

18 PROSPECTIVE JUROR: I was just thinking about Perry
19 Mason cases where not only did the defense prevail, but he
20 found out who really did it.

21 MS. RING: I am not Perry Mason.

22 PROSPECTIVE JUROR: I'll be really disappointed if
23 you were. Anyway, we can't automatically assume because
24 there's been a homicide, say we have to presume him innocent
25 until somebody proves otherwise, and if there's a doubt, as

1 you -- you know.

2 THE COURT: Mr. McDonald, I'm having trouble hearing
3 you so...

4 PROSPECTIVE JUROR: I'm sorry, I'm cursed with a
5 monotone voice. I guess that I'm agreeing with what these
6 guys said. If there's a reasonable doubt -- just because
7 somebody is murdered, if there's a reasonable doubt in this
8 case, we have to declare him innocent or not guilty.

9 MS. RING: Ms. Pollard, what do you think about --

10 PROSPECTIVE JUROR: I sort of agree with everything
11 these last few people have said. It's unfortunate, you know,
12 I do think sometimes someone is not as proven not guilty as
13 they were. I mean afterwards I always say, Why, what
14 happened, did they find anybody, you know, I think that's
15 natural --

16 MS. RING: Right.

17 PROSPECTIVE JUROR: -- but I do believe you have to
18 prove a person guilty.

19 MS. RING: Mr. Gambescia.

20 PROSPECTIVE JUROR: Hi.

21 MS. RING: Hi. Enough coffee?

22 PROSPECTIVE JUROR: I don't drink coffee.

23 MS. RING: Whatever else to get your day started?

24 PROSPECTIVE JUROR: Yeah.

25 MS. RING: Okay. Does it make sense that I want to

1 talk to jurors about this, when we're not talking about, okay,
2 it's clear the bike was stolen. You know, you heard the bike
3 was there, they went back, the bike lock, the bolt was cut by
4 bolt cutters. And if, as a juror, you are left with the bike
5 was stolen, but we don't know who did it that -- I wouldn't be
6 as concerned about that as when we're saying at the end of the
7 day, you know, somebody was murdered, but you don't know who
8 did it.

9 PROSPECTIVE JUROR: I would say it would be easier
10 to make that decision.

11 MS. RING: Which one?

12 PROSPECTIVE JUROR: The bike being stolen rather
13 than murder.

14 MS. RING: Right. So if you end up on this jury and
15 that's where you end up at the end of hearing all the
16 evidence, will you be able to do that?

17 PROSPECTIVE JUROR: Yes.

18 MS. RING: Okay. Ms. Timms --

19 PROSPECTIVE JUROR: Yes.

20 MS. RING: -- you were on a civil jury?

21 PROSPECTIVE JUROR: Mm-hmm.

22 MS. RING: Anything come into your mind in terms of
23 the difference in that process versus this process?

24 PROSPECTIVE JUROR: This is a lot more serious than
25 that was. That was -- it was -- it was interesting, but it

1 did not have the magnitude that this does.

2 MS. RING: And you recall that the burden of proof
3 was significantly different in a civil case?

4 PROSPECTIVE JUROR: Yes, yeah. Yeah.

5 MS. RING: Mr. Powers, what do you think about the
6 bike theft versus murder issue?

7 PROSPECTIVE JUROR: A lot more weight to the murder
8 issue. I think that it would be harder to decide that versus
9 a lesser crime.

10 MS. RING: And so what do you do as a juror when
11 that's a reality, that that's harder?

12 PROSPECTIVE JUROR: I don't know.

13 MS. RING: Ms. Metzger.

14 PROSPECTIVE JUROR: I guess a bike theft isn't
15 facing possible life imprisonment, so I think that you really
16 have to -- it's a much, much, much heavier weight, but
17 ultimately it's still the same. You have to decide on the
18 facts and -- and go -- and just go with the facts and make
19 your decision based on what was presented in court and what is
20 true.

21 MS. RING: Anybody, as we're talking about this,
22 saying I'm not sure I can really do that. If at the end of
23 the day I have heard everything and I have no doubt this
24 person was murdered, but I don't think they have proven that
25 Michael Clark is the one, but I don't know who's the one, that

1 they are going to have a difficult time with that decision? I
2 mean they can't make that decision.

3 PROSPECTIVE JUROR: I think that the decision is
4 just difficult because you have an "A" or a "B" answer,
5 there's no "C" choice, it's guilty or not guilty --

6 MS. RING: Right.

7 PROSPECTIVE JUROR: -- and that's what makes it
8 difficult.

9 MS. RING: Right. But does it make sense? It's
10 supposed to be difficult, right?

11 PROSPECTIVE JUROR: (Juror nods head.)

12 MS. RING: The other Ms. Wilson. Ms. Wilson.

13 PROSPECTIVE JUROR: Yeah, I -- yeah, it's supposed
14 to be difficult, but I agree with what she said. I mean
15 you're either guilty or innocent and you have to prove beyond
16 a shadow of a doubt. There's not much more that can be said
17 than that.

18 MS. RING: Does anybody think like Mr. McDonald? I
19 don't think Mr. McDonald asked this of me, but then I'm
20 supposed to be Perry Mason.

21 PROSPECTIVE JUROR: Perry Mason, you could win every
22 case.

23 MS. RING: But, you know, the other thing about this
24 system, and it's different than that civil jury that you would
25 have sat on, Ms. Timms, is it's really all on them, right?

1 They are the government, they are the State, they brought the
2 accusation and if they don't prove it, Mr. Clark, Ms. Milfeld
3 and myself, we don't have any obligation to prove anything.
4 And I have a lot of jurors who say, You know what, I think
5 that -- Mr. Serenyi, yesterday you said after hearing the
6 presentation of both sides. And so I talk to a lot of juries
7 who say in my daily life I weigh both sides and I don't like
8 one side. And that I could sit down, I'm not going to, and
9 not talk to you the rest of the next two weeks. Can -- and
10 some people think that's not how you make decisions at home,
11 right? Is that fair, that that's not how when you were a
12 human resources person --

13 PROSPECTIVE JUROR: Absolutely.

14 MS. RING: So how do you do that in here?

15 PROSPECTIVE JUROR: Well, that's, you know, again,
16 um, I think really both sides need to be able to represent
17 their particular perspective. The prosecution has to prove
18 beyond a reasonable doubt that Mr. Clark committed the crime;
19 if they don't, then he's not guilty, and I don't know what
20 else I can tell you.

21 MS. RING: Ms. Sprigg, Mr. Serenyi still used that
22 word "both sides." I mean is that how you make decisions at
23 home, you try to hear both sides of what happened before you
24 make a decision, or at work, or wherever you're making your
25 decisions?

1 PROSPECTIVE JUROR: Most definitely. Being in
2 management I've had to find myself on that, I have made it --
3 thankfully years ago I made a jump too quickly and realized
4 that if I would have stopped and listened, I would have made a
5 better choice.

6 MS. RING: So if in here it's about this side and we
7 don't have a side to present, we're presumed innocent unless
8 they meet their burden, game over, can you do that?

9 PROSPECTIVE JUROR: Most definitely.

10 MS. RING: Okay. Mr. Webber, what do you think
11 about all of this?

12 PROSPECTIVE JUROR: Well, the person is on trial and
13 you make a logical decision relative to his evidence. You
14 have to make a decision, you can't think about the
15 ramifications of your decision, that's it.

16 MS. RING: Is it something you're feeling like you
17 can do?

18 PROSPECTIVE JUROR: It's my duty.

19 MS. RING: Well, but we also -- you know, I started
20 out this morning talking about not every case is right for
21 every person, so you can -- I believe that as a juror you can
22 come in and say, It's my duty and I am -- I want to do my
23 duty, but because of whatever reason this case isn't the right
24 case for me.

25 PROSPECTIVE JUROR: Just suck it up and do it and

1 listen to the evidence and don't think about the penalties and
2 all that, that's not your business.

3 MS. RING: Ms. Brock.

4 PROSPECTIVE JUROR: I agree, too, the State has the
5 burden, the burden of proof. Ultimately it's our job to weigh
6 the evidence or lack of evidence and make that decision.

7 MS. RING: Mr. Philipp.

8 PROSPECTIVE JUROR: I guess from my standpoint, yes,
9 the State has the first burden, and they have to prove to us
10 that there's no doubt. But if you didn't say a word, then
11 you -- then it may be that you can't rebut some of that and
12 create the fact that there is reasonable doubt back again.
13 So, obviously, you are going to probably say a lot to convince
14 us that there's reasonable doubt, if you didn't, then we're
15 going to be swayed by what they say because we don't have any
16 other options to consider. So, again, it's back to we need to
17 hear both sides.

18 MS. RING: And what you're saying makes absolute
19 sense to me. Where I -- I get concerned -- and when I have
20 talked to different jurors about this, it's the concept of,
21 okay, so we -- evidence is presented and the DA puts on their
22 5, 6, 7 witnesses and there's doubt, there's reasonable doubt.
23 Okay. And I decide strategically that there's clearly
24 reasonable doubt, so I'm not going to ask any questions
25 because I don't want to confuse the issue. And the concern is

1 there's a juror going, Well, I think that there's reasonable
2 doubt, but they haven't done anything, so all I have heard
3 from them so, you know, they quantify it so just -- they
4 presented more and that's enough, instead of focusing on it's
5 about we start with that -- we start with the presumption of
6 innocence, right?

7 PROSPECTIVE JUROR: Mm-hmm.

8 MS. RING: And if they don't meet that burden, it
9 doesn't matter what I do or say or don't do. Does that -- is
10 that consistent with what --

11 PROSPECTIVE JUROR: Yeah. I mean whether it's a
12 witness or whatever, we are going to hear what the witness
13 says and each of us are going to determine in our minds
14 whether there's doubt or no doubt, I would guess. And then,
15 you know, where you may believe that there should be some
16 doubt, you may have to -- you may have to ask some questions.
17 And if you don't think that there should be any doubt, all of
18 us should be thinking the same thing, then you probably won't,
19 I would guess.

20 MS. RING: Ms. Hutchins, what do you think about --

21 PROSPECTIVE JUROR: I don't know, that's a tough
22 one.

23 MS. RING: What part of it?

24 PROSPECTIVE JUROR: If they have to prove their case
25 and we listen to it, but we have any reasonable doubt, I don't

1 know. If you don't say anything, how -- I mean we don't know
2 that -- you know, that there's reasonable doubt. What if we
3 don't think that there is?

4 MS. RING: So that's my terminology, my language
5 being wrong, okay.

6 PROSPECTIVE JUROR: Right.

7 MS. RING: I mean, you know, I'm concerned about
8 somebody not focusing on the burden beyond a reasonable doubt.

9 PROSPECTIVE JUROR: Right.

10 MS. RING: And just saying, Well, I only heard from
11 them, and since I didn't hear their version, that's enough for
12 me, without doing the analysis that's required of jurors
13 saying this is what was presented and I have a reasonable
14 doubt. And so it has nothing to do with what the other side
15 did, didn't do, or what they said. It certainly -- if the
16 prosecution has proved the case beyond a reasonable doubt and
17 that's where you are as a juror, that's where you are. But it
18 goes back to this both sides thing that I think we all are so
19 used to in making judgments in our lives.

20 PROSPECTIVE JUROR: I kind of -- I need to hear both
21 sides.

22 MS. RING: That's why I asked the question.

23 PROSPECTIVE JUROR: I know.

24 MS. RING: Anybody having the same struggle that
25 Ms. Hutchins is having?

1 PROSPECTIVE JUROR: Kind of, yeah.

2 MS. RING: Mr. Pipp.

3 PROSPECTIVE JUROR: I don't have -- I don't know if
4 I'm having the same struggle, but everybody's perception of
5 reasonable doubt is different. So you may think that what
6 this witness said provides reasonable doubt, I may also, she
7 may not. I mean so a lot of times -- I mean our perceptions
8 are different and that's where it's at.

9 MS. RING: Right.

10 PROSPECTIVE JUROR: So that's where it helps if you
11 go up and further point to that -- that issue that someone may
12 be questioning and provide reasonable doubt for her if she
13 does not believe that.

14 MS. RING: But you bring up another interesting
15 topic and I'm going to try to ask everybody else. When you
16 hear the jury instruction for reasonable doubt, it's an
17 individual decision.

18 PROSPECTIVE JUROR: Yeah.

19 MS. RING: So you can go back in the jury room and
20 you don't have to agree on what the reasonable doubt is. If
21 you have a doubt and Mr. Krolick has a doubt and Ms. Toepfer
22 has a doubt and they are different doubts, that's fine.

23 PROSPECTIVE JUROR: Yeah.

24 MS. RING: Right. So let me go back to who --
25 Mr. Powers raised your hand about the struggle Ms. Hutchins is

1 having about hearing both sides.

2 PROSPECTIVE JUROR: I just kind of agree with that
3 perception.

4 MS. RING: Okay. But can you follow in the
5 courtroom that the judge is going to tell you that the burden
6 is solely on the prosecution and we don't have any burden?

7 PROSPECTIVE JUROR: I think that you try to do
8 what --

9 MS. RING: It's not easy.

10 PROSPECTIVE JUROR: Exactly.

11 MS. RING: Mr. Serenyi.

12 PROSPECTIVE JUROR: Well, you know, I think there is
13 an expectation on the part of the jury, or there should be,
14 that you and your associate do the best you can to defend your
15 client and, you know, if -- if you don't, I think that's
16 going to create some concern on the part of the jurors. So --
17 I mean, sure, it would be my expectation that you earn your
18 big bucks and do the best you can.

19 MS. RING: Wait until I tell everybody at home I
20 make the big bucks.

21 So let's say I'm not only Perry Mason, I'm a crappy
22 lawyer, I have no business doing this, okay. So I really ask
23 stupid questions. I aggravate all of you. You don't believe
24 I have my law degree, right.

25 PROSPECTIVE JUROR: It's still on them, right?

1 MS. RING: It's still on them, right.

2 PROSPECTIVE JUROR: Yeah, it's still on them.

3 MS. RING: That's hard, right?

4 PROSPECTIVE JUROR: Well, you know, if that's the
5 case, I think that the judge needs to call a mistrial.

6 THE COURT: Let me stop here because I need to be
7 real clear with everybody -- and I mentioned this the first
8 time we all got together in this courtroom in the afternoon.
9 The burden to prove this case rests squarely and only on the
10 prosecution, they have to present sufficient evidence to
11 convince a jury beyond a reasonable doubt that Mr. Clark is
12 guilty. Mr. Clark has no burden, no obligation to present any
13 evidence or to testify. And if he doesn't present any
14 evidence and/or if he doesn't testify, you cannot consider
15 that for any purpose, and particularly you cannot hold that
16 against him.

17 It may be human nature to want to hear both sides of
18 a story, but in a courtroom the defendant does not have to
19 present any evidence or, frankly, speak a single word. And if
20 they choose not to do that, for whatever reason, you cannot
21 consider that and you cannot hold it against the defendant.
22 You can only consider the evidence that's been presented and
23 the burden always remains on and only with the prosecution.

24 I'm sorry to interrupt.

25 MS. RING: Judge Mulvahill, what time did I start?

1 THE COURT: 8:38.

2 MS. RING: If I can just have a moment?

3 THE COURT: Sure.

4 MS. RING: Judge, I am going to let Ms. Milfeld

5 ask --

6 THE COURT: Okay.

7 MS. RING: -- some questions.

8 THE COURT: All right.

9 MS. RING: Thank you.

10 MS. MILFELD: I'm going to weed my way through this
11 obstacle course here.

12 So yesterday Mr. Brackley talked to you about
13 snitches and people with prior felony convictions. He brought
14 up the example of this woman who maybe stole from a bank to
15 feed her family 30 years ago and she's changed her life, she
16 hasn't done anything wrong since then, but what I want to know
17 is what's the difference between a snitch and a person like
18 this woman who's turned her life around, Mr. Raicer.

19 PROSPECTIVE JUROR: I'm not sure what -- what you're
20 really driving at. What do you mean by the difference between
21 a snitch and a person who's turned her life around? I mean
22 this woman who turned her life around is -- by definition she
23 is not a snitch, she was someone who had committed a crime
24 sometime in the past, so I'm not -- what are you driving at?
25 Try this again.

1 MS. MILFELD: Well, what's a "snitch" mean to you?

2 PROSPECTIVE JUROR: It's like -- as I said
3 yesterday, it's usually a derogatory kind of a term applied to
4 someone who is providing some information, most of the time I
5 think it's used for that individual to better his or her own
6 predicament. It has an -- that's what -- that's how it seems,
7 that particular term.

8 MS. MILFELD: So the snitch witness might have
9 something to gain?

10 PROSPECTIVE JUROR: It's plausible.

11 MS. MILFELD: Okay. And when you think about a
12 snitch versus the witness who maybe had a felony conviction in
13 the past, how do you judge their credibility?

14 PROSPECTIVE JUROR: That's a difficult question to
15 answer because you -- it goes to sort of judging the voracity
16 of what they are saying, how they present themselves,
17 actually, how the questions are asked of them. I don't really
18 know how to answer it any better than that.

19 MS. MILFELD: Does it make a difference to you, the
20 witness, if one of them has -- is a snitch with multiple
21 felony convictions versus this person who maybe had one
22 conviction 30, 40 years ago?

23 PROSPECTIVE JUROR: No.

24 THE COURT: Doesn't make a difference to you?

25 PROSPECTIVE JUROR: No, makes no difference to me.

1 MS. MILFELD: Does it make a difference to anybody?
2 Why does it make a difference to you?

3 PROSPECTIVE JUROR: In the case of someone who has
4 multiple convictions, they have -- they have to show the -- at
5 least what they have done. There's something different about
6 their character that they are not able to obey the law and,
7 therefore, they don't have as much respect for the law and
8 that type of thing. I mean someone can make a mistake and
9 then turn their life around and prove that they have, you
10 know, through their character, that they are not going to do
11 that again.

12 MS. MILFELD: So for you if you have a witness who
13 has multiple felony convictions, hasn't turned his or her life
14 around, that doesn't make a difference to you?

15 PROSPECTIVE JUROR: It does.

16 MS. MILFELD: Who agrees that would make a
17 difference? Mr. Clark.

18 PROSPECTIVE JUROR: Yeah, I agree, like he said,
19 there's character issues. They haven't been able to turn it
20 around and who knows if they are still lying.

21 MS. MILFELD: Ms. Brock, you also raised your hand.

22 PROSPECTIVE JUROR: I just -- I would have to take
23 into -- their credibility -- what they were saying into
24 account.

25 MS. MILFELD: And when I asked the question about

1 would that make a difference to you with multiple felony
2 convictions, what about that specifically makes a difference
3 for you?

4 PROSPECTIVE JUROR: It just shows a continuing
5 pattern.

6 MS. MILFELD: Mr. Pipp, you are also nodding your
7 head, you agree with Ms. Brock?

8 PROSPECTIVE JUROR: Sure, it's rehabilitation. If
9 someone committed a crime 30 years ago and served whatever,
10 they were punished for it and haven't done anything since, or
11 someone that's continuing to commit crimes, they -- they are
12 not following the law, they are clearly not rehabilitated, and
13 so to listen to what they have to say is much more difficult.

14 MS. MILFELD: Is there anyone that disagrees with
15 Mr. Pipp? I know that Mr. Raicer disagrees. Anyone else
16 holds the same view as Mr. Raicer and says, you know what,
17 they could have 20 felony convictions or one, and the person
18 has changed his or her life. Does anyone agree with
19 Mr. Raicer? Yes, Ms. Becker.

20 PROSPECTIVE JUROR: The person who has created
21 multiple felonies still may be able to tell the truth on any
22 given day, and the jury then will have to listen to the
23 prosecution and the defense and look at the body language,
24 consider the evidence and decide what the credibility is.

25 MS. MILFELD: Okay. And, Mr. Deitz, you are also --

1 PROSPECTIVE JUROR: I agree. I mean it's definitely
2 a character issue, but you have to look at it on a
3 case-by-case basis. I mean the point is brought up yesterday
4 that the worst of people can still be capable of telling the
5 truth, and who knows what their motivation is. Maybe they
6 are -- they do have horrible character, but they have a
7 motivation to do good morals or tell the truth.

8 MS. MILFELD: Did I miss anyone else on this side
9 that wanted to chime in with what Mr. Deitz, Ms. Becker and
10 Mr. Raicer were saying?

11 So there's a jury instruction that talks about
12 credibility of witnesses, and there's actually a jury
13 instruction that specifically deals with prior felony
14 convictions, that jury instruction tells you that the
15 credibility of a witness may be discredited by showing that
16 the witness has been convicted of a felony. So, Mr. Powers,
17 why do you think a jury instruction like that exists?

18 PROSPECTIVE JUROR: Can you repeat what the
19 instruction is?

20 MS. MILFELD: The credibility of a witness may be
21 discredited by showing that the witness has been convicted of
22 a felony.

23 PROSPECTIVE JUROR: I think that it talks to their
24 credibility.

25 MS. MILFELD: Okay. What -- Mr. McDonald, what do

1 you think about why that jury instruction exists?

2 PROSPECTIVE JUROR: Well, it can -- try to get to
3 the facts and some witnesses might be more credible than
4 others, but it helps a jury weigh that because you -- you
5 know, a lot of times when you make judgments about things and
6 decisions, you kind of have a history of knowing the people
7 and, like, the situation, but in this case you don't have
8 that, so maybe that helps give you a little bit of history of
9 the case. You said "may" instead of for sure.

10 MS. MILFELD: Yes.

11 PROSPECTIVE JUROR: So it's kind of up to us to make
12 that decision.

13 MS. MILFELD: Right.

14 PROSPECTIVE JUROR: Yeah.

15 MS. MILFELD: And how do you feel about that?

16 PROSPECTIVE JUROR: I think that that's the way it
17 should be rather than, you know, for us to decide. Because
18 there's multiple people on the jury and, you know, we'll
19 hopefully look at it from a lot of different angles, but it's
20 not a black and white, yes, you will do and -- and no.

21 MS. MILFELD: And where do you fall? Are you more
22 on Mr. Raicer's side or Mr. Clark's side? Are you more
23 thinking multiple prior felony convictions, those really
24 matter to me --

25 PROSPECTIVE JUROR: Yeah.

1 MS. MILFELD: -- or are you more with Mr. Raicer
2 saying, you know, that doesn't really bother me?

3 PROSPECTIVE JUROR: I do believe that everybody can
4 change, you know, like you were talking about a snitch -- I'm
5 sorry to change it up.

6 MS. MILFELD: You can change however you want.

7 PROSPECTIVE JUROR: A snitch, to me, is somebody who
8 is probably in the middle of whatever is happening, you know,
9 like, say it's something illegal or something, they are
10 probably in the middle and have, you know, information. And
11 then we decide what to -- um, whether or not to take it. You
12 know, but -- I mean I'm saying that they probably
13 have information that would help. I think I, um -- I'm, um --
14 I'm kind of, you know, um -- what Mr. Pipp was saying, he was
15 saying, um -- tell me his -- his -- what he -- tell me --

16 MS. MILFELD: Well, now --

17 PROSPECTIVE JUROR: I lost my train of thought.

18 MS. MILFELD: I think, Mr. Pipp, why don't you go
19 ahead and repeat what you said.

20 PROSPECTIVE JUROR: I talked about being
21 rehabilitated --

22 PROSPECTIVE JUROR: Yeah --

23 PROSPECTIVE JUROR: -- that's the reason, so...

24 PROSPECTIVE JUROR: -- the punishment.

25 MS. MILFELD: So you talked a little bit about a

1 snitch maybe being involved in some sort of illegal activity,
2 something to gain. In judging that person's credibility, if
3 that person has something to gain, how do you weigh that? How
4 does that factor in?

5 PROSPECTIVE JUROR: Well, that would really weigh
6 into it as well, I -- I guess that that's just something that
7 you would have to take into account when making our decision.
8 You know, it is -- you know, as -- I think I would have to --
9 I'm waffling, going I would just have to take it into account
10 as well and view both sides. I don't think that because
11 somebody has a prior conviction that we need to write them
12 off. Does that make sense?

13 MS. MILFELD: That makes sense.

14 PROSPECTIVE JUROR: Okay.

15 MS. MILFELD: Does anyone else think that if the
16 snitch has something to gain, that really makes a difference
17 for me, in addition to the felony convictions? If you want to
18 raise your hand.

19 Mr. Zeff, why does that make a difference to you?

20 PROSPECTIVE JUROR: Well, depending on the
21 situation, the -- if the snitch says something that is not
22 true, but it benefits him by reducing his sentence or -- or no
23 prosecution or something, I think that that gives him a lot of
24 incentive to be a snitch.

25 MS. MILFELD: Mr. Philipp, you raised your hand.

1 PROSPECTIVE JUROR: Yeah, especially if he has prior
2 felonies and now he is getting, you know, reduced -- I mean
3 he's more interested in benefitting himself than probably
4 anything else, so you have to take that into account.

5 MS. MILFELD: What do you think about that person's
6 credibility and that example?

7 PROSPECTIVE JUROR: It would be questionable, I
8 guess. I mean you would try to take what they said and really
9 try to -- and hope that they were being truthful, but in the
10 back of your mind, you know, human nature, you would be
11 thinking, you know, I wonder if they are saying this for the
12 benefit of themselves or because they have something against
13 the defendant.

14 MS. MILFELD: What if you already know that person
15 benefited from something?

16 PROSPECTIVE JUROR: Well, if they already benefited,
17 then I would think at this point that they would -- they
18 wouldn't have anything else to gain, so maybe -- maybe it
19 would be different.

20 MS. MILFELD: Mr. Powers, you also raised your hand.

21 PROSPECTIVE JUROR: Yeah.

22 MS. MILFELD: What do you think about that?

23 PROSPECTIVE JUROR: I mean I kind of agree with what
24 he is saying. I mean a snitch tends to just be a snitch
25 repeatedly, that's, like, their character and they probably

1 are trying to benefit themselves in some way.

2 MS. MILFELD: So I want to move on to a different
3 topic about gaps in evidence. So say, like, at the end of the
4 prosecution's case there are all these gaps and you have all
5 these questions, whose obligation do you think it is to fill
6 in those gaps? Ms. Wilson, either one.

7 PROSPECTIVE JUROR: The prosecution.

8 MS. MILFELD: And why is that?

9 PROSPECTIVE JUROR: They have the burden of proof.

10 MS. MILFELD: Ms. Wilson, two.

11 PROSPECTIVE JUROR: You can be one, too.

12 PROSPECTIVE JUROR: No, I'll be two. Um, yeah, it's
13 a prosecution to prove the -- the -- bring the facts forward
14 and prove beyond -- yeah.

15 MS. MILFELD: And, Mr. Raicer, how does that relate
16 to reasonable doubt, do you think?

17 PROSPECTIVE JUROR: If there are gaps and they
18 haven't been able to prove their case, to me, by definition
19 that would be a reasonable doubt.

20 MS. MILFELD: Mr. Montgomery, I know that you like
21 logic problems, so gaps in evidence, how do you feel about
22 that?

23 PROSPECTIVE JUROR: It's probably not a good thing.

24 MS. MILFELD: So it's what we defense attorneys
25 prefer.

1 PROSPECTIVE JUROR: I think that, as Mr. Raicer
2 said, obviously, the burden is on the prosecution to, you
3 know, provide a burden beyond a reasonable doubt, and if there
4 are any gaps that suggest otherwise, it's pretty clear.

5 MS. MILFELD: So I think this is a good segue into
6 talking about a topic that Ms. Ring sort of touched upon
7 earlier, which is whether or not Mr. Clark has to testify.
8 And you heard the judge tell you that Mr. Clark at no point
9 during this process has to testify, and he has the right to
10 sit, listen and remain silent and you can't hold it against
11 him. But a lot of people -- and I think that it's completely
12 natural and normal feel, you know what, if he just sits there
13 and doesn't say anything, I have got a problem with that and
14 that's because, based on my work and my personal experience or
15 my background, but I'm not going to sit well with that. And
16 the whole point of this process is to really define people who
17 are able to follow the law. This process also understands
18 that sometimes people have such strong beliefs and backgrounds
19 that that person might not be the right juror for this case.

20 And I know, Ms. Sprigg, you were nodding your head
21 when I was talking about this. Do you want to talk about --
22 more about wanting to hear both sides or whether or not you
23 feel comfortable if Mr. Clark decided not to testify?

24 PROSPECTIVE JUROR: No, I definitely would want to
25 hear both sides. I mean I can't imagine them stepping up and

1 saying bullet points and then, no -- you know, you guys not
2 saying anything, so that leaves a question in our minds.

3 I guess that I'm just kind of thinking what I would
4 do if it were me sitting over there. I mean I would be
5 screaming from the streets, Are you kidding me. So, you know,
6 I can't imagine not hearing both sides to make sure we balance
7 it out.

8 MS. MILFELD: So you really -- it's very hard for
9 you to relate to someone who wouldn't be screaming from the
10 street side saying, you know what, I didn't do it, I didn't do
11 it. It sounds like you can't really relate to that person
12 that chooses not to say anything?

13 PROSPECTIVE JUROR: If I were to go back to the bike
14 thing --

15 MS. MILFELD: Yeah.

16 PROSPECTIVE JUROR: -- that would be one thing, this
17 is bigger.

18 MS. MILFELD: And besides you -- how you, yourself,
19 respond in situations, what else about this -- or why do you
20 have that belief that you want to hear both sides?

21 PROSPECTIVE JUROR: To be able to have something
22 objectionable to look at. You know, if they present something
23 and you guys don't say anything about it, it -- with my mind,
24 I don't know, I would like to -- I would like to think that I
25 would be able to weigh all of that out, but not knowing what

1 they are going to present, I would not want to be caught in a
2 situation of, well, they presented this, but they didn't say
3 anything so could it be true?

4 MS. MILFELD: And, Ms. Hutchins, you had earlier
5 spoke to Ms. Ring about that. Do you agree with her as well?

6 PROSPECTIVE JUROR: Yeah.

7 MS. MILFELD: And --

8 PROSPECTIVE JUROR: I'm the kind of person that has
9 to have -- there's always two sides to a story and I need both
10 sides to be able to make a decision.

11 MS. MILFELD: So in your life if you don't hear one
12 side of the story, and we're not talking a courtroom,
13 somewhere else, what do you think?

14 PROSPECTIVE JUROR: I tend to believe the side
15 that -- that had said what they had to say.

16 MS. MILFELD: How long do you think that you've had
17 this belief for?

18 PROSPECTIVE JUROR: I don't know, probably always.

19 MS. MILFELD: Okay. And that sounds like
20 Ms. Sprigg, too, what you were also talking about, but you are
21 the kind of person that's always reacted like this.

22 So, Ms. Hutchins, you know, the judge earlier told
23 you that, you know, Mr. Clark is presumed innocent.

24 PROSPECTIVE JUROR: Right.

25 MS. MILFELD: And he does not have to testify, but

1 it sounds like from your own personal experience and the fact
2 that you've always had this belief that you want to hear both
3 sides, you would have a tough time presuming Mr. Clark
4 innocent if we didn't present evidence and he just sat down?

5 PROSPECTIVE JUROR: It would be tough, but if I was
6 told only -- there's only one side of it, then he would have
7 to prove to me -- they would have to prove to me that he did
8 it.

9 MS. MILFELD: How would you resolve in your mind
10 because you've had this really strong-held belief if we didn't
11 present any evidence?

12 PROSPECTIVE JUROR: I don't know. I'm kind of like
13 her, I -- I think that you would want to say, I didn't do
14 this.

15 MS. MILFELD: And that's okay because Ms. Sprigg
16 also talked about that, too, and it sounds like you've had
17 this belief for a really long time. And what I'm hearing from
18 you saying is that, you know, really I might not be the most
19 fair juror in this case because I want to hear both sides?

20 PROSPECTIVE JUROR: Right.

21 MS. MILFELD: And do you agree with me?

22 PROSPECTIVE JUROR: Yes.

23 MS. MILFELD: So you agree based on what you just
24 told me, that, you know, you aren't really going to be
25 impartial and you are going to have a bias if Mr. Clark

1 chooses not to testify?

2 PROSPECTIVE JUROR: I would try not to, but...

3 MS. MILFELD: But can't ignore who you are?

4 PROSPECTIVE JUROR: Right.

5 MS. MILFELD: And, Ms. Sprigg, how do you fall with
6 Ms. Hutchins?

7 PROSPECTIVE JUROR: That is really difficult, not
8 knowing what's getting ready to be presented. I would like to
9 say that I'm a very reasonable person and I think that I can
10 look at things very reasonably, but I don't know.

11 MS. MILFELD: Okay. And you could see how that
12 would concern us, because, you know, we want jurors who can
13 say I'm going to be fair and impartial, and if Mr. Clark
14 doesn't testify, I am fine with that. And it sounds like
15 you're not at that place at all?

16 PROSPECTIVE JUROR: Yeah, I can't answer that.

17 MS. MILFELD: Okay. And you can't answer that
18 because of this fact, that you've always had this belief that
19 if someone is accused of something, they need to be shouting
20 from the rooftops basically.

21 PROSPECTIVE JUROR: Presently something -- most
22 definitely.

23 MS. MILFELD: And it sounds like from what you were
24 saying and all the -- the reservations that you've had, that
25 really you would not be able to be fair to Mr. Clark.

1 PROSPECTIVE JUROR: I'm not saying that I don't
2 think that I could be fair to him, I think that I could be.
3 It would be more in that if it was a little -- if more of his
4 side came out, if something came out here.

5 MS. MILFELD: Mr. Serenyi, what do you think about
6 what Ms. Hutchins has been saying?

7 PROSPECTIVE JUROR: Well, I think to the judge's
8 point, even if Ms. Ring is a crappy lawyer --

9 MS. MILFELD: She is not a crappy lawyer, I can
10 assure you, she is a fantastic lawyer.

11 PROSPECTIVE JUROR: Which I am sure she is, but it's
12 still up to the prosecution to prove beyond a reasonable doubt
13 that, you know -- that -- that Mr. Clark did it. And, you
14 know, I could care less if Mr. Clark testified or not, but I
15 think that the point is that the prosecution still needs to
16 prove beyond a reasonable doubt that he did it.

17 MS. MILFELD: So going back to the hearing both
18 sides, what if we don't do anything, where do you stand on
19 that?

20 PROSPECTIVE JUROR: I would have a problem with
21 that. I mean if you guys just sat there during a whole trial,
22 did not do your best to defend.

23 MS. MILFELD: Did our nails.

24 PROSPECTIVE JUROR: You know, I -- I would have a
25 issue with that.

1 MS. MILFELD: And why specifically would you have a
2 problem with that?

3 PROSPECTIVE JUROR: Well, because I think that
4 Mr. Clark deserves the best possible defense that he can get,
5 he should get.

6 MS. MILFELD: And I notice you are nodding your
7 head.

8 PROSPECTIVE JUROR: Yeah, if you two were just bumps
9 on a log over there and not challenging anything, I -- I would
10 be concerned.

11 MS. MILFELD: How do you feel about what
12 Ms. Hutchins was talking about, how her need from her life
13 experience to hear both sides?

14 PROSPECTIVE JUROR: I don't align myself with her
15 thinking on that. It's my job, as directed, to listen to what
16 is presented to me and base my decision on that.

17 MS. MILFELD: So I know, Mr. Serenyi, you had talked
18 about how in your job you work in human resources.

19 PROSPECTIVE JUROR: Yes.

20 MS. MILFELD: There are two people who seem like
21 there is a dispute between two employees and Jack says Jill
22 got on my computer and hacked into it, and you go to Jill and
23 you said, I want to talk to you about this, and she doesn't
24 say anything at all, how do you feel about that?

25 PROSPECTIVE JUROR: Well, you know, in that case I

1 think that it would be easy enough to prove one way or the
2 other whether it happened or not. I mean I think that both
3 sides need to have a fair hearing and if person two says
4 nothing, I would have a way by going to my IT people and
5 saying, gee, can you check this out.

6 MS. MILFELD: Let's say that you don't have any IT
7 people.

8 THE COURT: I'm sorry.

9 PROSPECTIVE JUROR: Am I allowed to speak?

10 THE COURT: No, sorry.

11 PROSPECTIVE JUROR: Okay.

12 MS. MILFELD: Let's say that the State has cut all
13 your resources and you don't have any IT people so you can't
14 check that, and it's his word against hers and Jill does not
15 say anything.

16 PROSPECTIVE JUROR: Yeah, and I think, you know,
17 there you go back to the credibility issue. I think that
18 there's a reason for that jury directive, because my situation
19 is different from juries here. A jury here does not know any
20 of the people that are going to be testifying, so there's
21 really no way for us to, you know -- except on some case
22 outlining that directive, to make any kind of a decision
23 whether the person is credible or not. Now in my case, you
24 know, I have a history with these people so I have a little
25 better information.

1 MS. MILFELD: So you do have a Jack and Jill here.
2 Okay. Sorry, go ahead.

3 PROSPECTIVE JUROR: No, I mean that's basically it.
4 I mean what -- we're dealing with a different situation and I
5 think that it's really important that, you know, a person, per
6 that directive, has multiple felonies, you know over the
7 years. Yeah, I mean I would certainly take that into
8 consideration whether considering that person's credibility,
9 but beyond that, I really don't know anything about these --
10 about these witnesses.

11 MS. MILFELD: Ms. Glassner, I notice that when
12 Ms. Ring talked about hearing both sides that you had nodded
13 your head. Did you have anything to add about what
14 Ms. Hutchins or Ms. Sprigg had said?

15 PROSPECTIVE JUROR: I think that there are
16 situations that I experience where you only get one side and
17 you have to make the best judgment that you can with the
18 information that you have available. In an ideal world you
19 would like to have both sides, so you can appear to be fair,
20 but there are circumstances where you only have the one
21 option. And I think that this is a situation where,
22 obviously, the prosecution has to prove, and that's what I'm
23 going to be focused on if I am chosen on the jury.

24 MS. MILFELD: Can you think of a recent example that
25 you've had? It sounds like you have thought about it a little

1 bit.

2 PROSPECTIVE JUROR: Oh, gosh, a recent example. I
3 control the finances in our house and so my husband thinks
4 that he has a voice in what goes on, but really he doesn't.

5 MS. MILFELD: My husband doesn't, too.

6 PROSPECTIVE JUROR: So I look at everything and --
7 and figure out what has to happen one way or the other, and if
8 he chimes in, I consider what he says and go ahead and do
9 what's best for the household.

10 MS. MILFELD: Is there anyone else that heard what
11 Ms. Hutchins and Ms. Sprigg said and said, You know what, I
12 feel exactly the same way? If you want to raise your hand.
13 Anyone that feels exactly the opposite that wants to chime in
14 on this.

15 Mr. Harris.

16 PROSPECTIVE JUROR: Opposite of what?

17 MS. MILFELD: About hearing both sides?

18 PROSPECTIVE JUROR: Well, you know, it's -- the
19 burden of proof is on the prosecution and I'm sure your
20 challenges and rebuts will fill in anything that we needed.
21 We don't need to hear a side, no, I don't feel that.

22 MS. MILFELD: Ms. O'Harah.

23 PROSPECTIVE JUROR: I feel that the information that
24 would come forward is what it is that we are supposed to make
25 a community judgment for, and the burden of proof is on the

1 prosecution. So if there is no need to say anything here for
2 whatever reason, it's not my job to conger up a reason. It's
3 my job to sit and listen to all the information provided.

4 MS. MILFELD: Mr. Arenas, do you agree with
5 Ms. O'Harah?

6 PROSPECTIVE JUROR: Completely. I mean I know on
7 more than on occasion I have opened my mouth when I shouldn't
8 have and I'm better just staying quiet and I have still gotten
9 my point across. So I completely believe in the right to stay
10 silent and there's a reason for that right.

11 MS. MILFELD: And why do you think that? You said
12 that you have in situations like that, so why do you think
13 that someone would choose not to testify?

14 PROSPECTIVE JUROR: Because anything you say could
15 be held against you, whether or not you meant it to be held
16 against you.

17 MS. MILFELD: Sir, what do you think about that?

18 PROSPECTIVE JUROR: I'm a little bit more on the
19 ladies side because I think if I was personally charged with
20 something, I would be, like, trying to convince everybody on
21 the jury by getting up by myself and saying, you know, this is
22 exactly what happened, this is why, and trying to convince
23 everybody of the fact that I would be innocent if it was my
24 life.

25 MS. MILFELD: And you are also nodding your head.

1 Do you agree with Mr. Clark? So when you heard the judge talk
2 to you about that instruction, what did you think about that?

3 PROSPECTIVE JUROR: The instruction makes sense, but
4 just personally I would -- I just don't see how you wouldn't
5 want to do that, outside of, like, what the judge would say, I
6 would be -- I just don't see how you wouldn't want to get up
7 and let everything out about what happened so that you could
8 sincerely try to get across to the jury what happened.

9 MS. MILFELD: So based on the fact that you are that
10 type of person that would want to say something, that you
11 would want to show your sincerity, would you be able to follow
12 that instruction if the judge gave it?

13 PROSPECTIVE JUROR: Yeah. You could always follow
14 the directions that the judge gives you, but intuitively and
15 in your mind it's all how you -- it would still be difficult.
16 I mean that's just what I would come in here, you know --

17 MS. MILFELD: So --

18 PROSPECTIVE JUROR: -- a personal preference.

19 MS. MILFELD: So it would be -- you do have this
20 preference and you said it would be difficult. Do you think
21 that you really could follow the instruction because -- you
22 know, I think that a lot of people do want to hear both sides
23 and that's completely normal. I think that a lot of people
24 live their daily lives like that, but, you know, we need to
25 know, are you going to be able to follow that instruction, as

1 difficult as it might be?

2 PROSPECTIVE JUROR: I guess that I would -- it's
3 hard to say, I really don't know.

4 MS. MILFELD: Okay. And what would it depend on?

5 PROSPECTIVE JUROR: Actually getting in the
6 situation and doing it, I don't know. I don't know how I
7 would react. I said I would personally come up with those
8 preconceived notions coming into it.

9 MS. MILFELD: So -- and I know that I'm putting you
10 on the spot here, but you have all these preconceived notions,
11 you've had these long-held beliefs. It sounds like really you
12 are not going to be able to follow that instruction if
13 Mr. Clark chooses not to tell his side of the story?

14 PROSPECTIVE JUROR: I don't know. I just know that
15 I would be going off the wall trying to convince people that I
16 didn't do it.

17 MS. MILFELD: Mr. Philipp.

18 PROSPECTIVE JUROR: I can follow the judge's
19 instructions, but having raised three kids and dealt with a
20 lot of conflict with them and managing a lot of people, I
21 always want to hear both sides, if I can. And if you can't
22 and the instruction says you can't, you may not, I'll make the
23 best choice that I can based on what I hear. But in daily
24 life, it's something that -- there's an old adage there's
25 always two sides to every story, and I try not to make a

1 judgment until I hear both sides.

2 MS. MILFELD: I know. Ms. Sprigg, you are nodding
3 again when you heard Mr. Clark talk. You can't hide the nod,
4 it's okay.

5 PROSPECTIVE JUROR: There's three sides to a story.
6 I don't think there's any one of us who don't want to say,
7 yes, we don't want to do this for you. I mean this is
8 important and we have a lot of respect for why we are sitting
9 here, so that's the reason why I'm struggling with being able
10 to say that because, yes, I would want to fulfill my
11 responsibility and do it with great respect.

12 MS. MILFELD: So it sounds like you have been
13 thinking about that for a while while I have been going around
14 talking to people, and it sounds like from what you are
15 telling me you are having a really difficult time getting on
16 the same page where you can follow that judge's instruction.

17 PROSPECTIVE JUROR: I think that I can follow his
18 instruction, I definitely can. There's just that something in
19 the back of my mind that it would always be, gosh, why don't
20 he say something, why didn't they rebut that, why didn't they
21 do that, you know. So, no, I feel that I can very
22 respectfully follow his instructions, but --

23 MS. MILFELD: Ms. Ammon's, what do you think about
24 this.

25 PROSPECTIVE JUROR: I mean I think that as jurors

1 what we have to do is look at what's presented to us and
2 evaluate that because that's what we are going to get, and
3 while maybe I would have wanted to hear something more, that's
4 not what we were presented. So I think that we have to look
5 at whatever the facts are and go on what's presented.

6 MS. MILFELD: Ms. Phelan.

7 PROSPECTIVE JUROR: I think that's why there's 14 of
8 us, because you bring in human nature and you have to have --
9 that's why there's not 4 of us or 6 of us. You have to have a
10 broader pool to -- to take into effect people's personal
11 things.

12 MS. MILFELD: And when the judge read that
13 instruction about not holding it against Mr. Clark if he
14 doesn't have to testify, how did you feel about that or what
15 did you think about that?

16 PROSPECTIVE JUROR: I think that if that's what I
17 need to do, then that's what I'm going to do, that's the law.

18 MS. MILFELD: Is there anyone else that heard
19 Mr. Clark, Mr. Powers, everyone talk about wanting to hear
20 both sides that felt that they didn't get to say anything
21 about that?

22 PROSPECTIVE JUROR: Well, sometimes I like to hear
23 both sides, being in IT all my life, but sometimes the best
24 defense is no defense.

25 THE COURT: Mr. Zeff, you can step around if you

1 want to get some water.

2 Are you going to move onto a new subject area?

3 MS. MILFELD: Yes, quickly.

4 THE COURT: That's fine. I'm not trying to rush
5 you.

6 Mr. Clark and Ms. Hutchins, I need to clarify
7 something in my mind. You understand that the law says that
8 you cannot consider or hold against the defendant the fact
9 that he doesn't testify or if he doesn't present any evidence,
10 that's what the law says.

11 Do you understand that, Mr. Clark? Is that a yes?

12 PROSPECTIVE JUROR: Yes.

13 THE COURT: Ms. Hutchins, you understand that?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: So when it comes time to deliberating on
16 this case, can you follow that instruction? If the Defendant
17 doesn't testify or if he doesn't present any evidence, can you
18 promise me that you will not hold it against the Defendant or
19 you will not consider it for any purpose? That's sort of the
20 bottom line question, Mr. Clark.

21 PROSPECTIVE JUROR: It would -- it wouldn't make
22 sense to me in my head and it would be very difficult to
23 ignore that fact in my own mind.

24 THE COURT: So is that a no, you can't promise me
25 that?

1 PROSPECTIVE JUROR: I guess.

2 THE COURT: Okay. Ms. Hutchins, do you understand
3 what the question is?

4 PROSPECTIVE JUROR: Yes, I can.

5 THE COURT: Yes, you can?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: All right. Thank you. You can
8 continue.

9 MS. MILFELD: So last topic that I wanted to talk
10 about is DNA, and I know that we have two geneticists here.
11 What do you expect the DNA evidence to show in a case?
12 Mr. Valencia.

13 PROSPECTIVE JUROR: Scientific evidence tying --
14 indicating somebody to the crime.

15 MS. MILFELD: Ms. Glassner.

16 PROSPECTIVE JUROR: Reasonable connected --
17 connectivity to being there or having some -- some onus in the
18 situation.

19 MS. MILFELD: Mr. Pipp, do you agree with them?

20 PROSPECTIVE JUROR: Yes.

21 MS. MILFELD: The geneticists, Mr. Montgomery?

22 PROSPECTIVE JUROR: Well, what's the purpose of DNA
23 in a case? It absolutely puts somebody's personal being at --
24 wherever the scene is. Is that's -- that's what you're
25 referring to?

1 THE COURT: Ms. Kamens-Horton.

2 PROSPECTIVE JUROR: Yeah, I agree.

3 MS. MILFELD: Because it would be kind of weird if
4 it didn't show any connection to the crime, right? And I
5 think that everyone is nodding their head.

6 Judge, may we approach?

7 THE COURT: Yes.

8 (Whereupon, counsel for the parties and the reporter
9 approached the bench and the following proceedings were had
10 out of the hearing of the jury.)

11 MS. RING: Judge, I think that the Court's
12 clarifying questions are pretty clear that you realize that we
13 were going to challenge Mr. Clark and Ms. Hutchins.

14 THE COURT: Well, folks, I -- if you could keep it
15 down just a little bit, please.

16 MS. RING: I would suggest at this point that
17 Mr. Clark very clearly answered your question that he couldn't
18 follow that instruction, so we are challenging Mr. Clark for
19 cause. I understand you clarified with Ms. Hutchins and she
20 said that she could. I still think that based on how her
21 answers and how difficult that she said that it would be, that
22 we are still challenging Ms. Hutchins for cause.

23 And when you were talking to Mr. Clark and
24 Ms. Hutchins, Ms. Sprigg was in the back nodding her head.
25 And I don't know that nodding her head told us which person

1 she was agreeing with in terms of whether you could follow the
2 instructions, but she said -- kept saying that she could
3 respectfully follow your instructions, but she said that she
4 needed to hear both sides. She would be screaming up and
5 down. So those things are inconsistent with both following,
6 um, not burden-shifting and also the right to remain silent.

7 THE COURT: The People's response with respect to
8 Mr. Clark.

9 MR. BRACKLEY: No objection.

10 THE COURT: All right. With respect to Ms. Hutchins
11 and Ms. Sprigg.

12 MR. BRACKLEY: Judge, Ms. Hutchins very clearly when
13 she was actually asked whether she could follow the law stated
14 that she could follow the law. I think that the interesting
15 thing about the questions by Ms. Milfeld to Ms. Hutchins
16 were -- and she actually said in your life, not here in your
17 courtroom, she actually qualified it as that. And later when
18 she asked Ms. Sprigg to consider Ms. Hutchins questions, she
19 said her need from life, it's from her life experiences to
20 hear both sides. But when you actually focus her on the rules
21 of this courtroom and Ms. Milfeld started talking to other
22 jurors about that, I think that Ms. Ring did , the rules of
23 law that apply in the courtroom that may not necessarily apply
24 in life. When asked directly could you follow the law, she
25 said that she could follow the law. It was interesting that

1 Mr. Clark was actually given those opportunities by
2 Ms. Milfeld to say could you follow the law, Ms. Hutchins
3 wasn't. When Your Honor gave it to her, she quite clearly
4 stated that she could follow the law.

5 THE COURT: With respect to Mr. Clark, he'll be
6 excused for cause. He has clearly indicated he could not
7 follow the instructions of law.

8 With respect to Ms. Hutchins, I think the
9 distinctions of what she is talking about in terms of her
10 expectations in life as opposed to her expectations in the
11 courtroom, and then her confirmation that she can clearly
12 follow the law, I will deny the challenge for cause. I think
13 that she has indicated that she will and -- can and will
14 follow the law, particularly when it comes to the defense
15 having no burden to present evidence or testify.

16 With respect to Ms. Sprigg, I also observed her
17 nodding her head and reacting to a conversation that
18 Ms. Milfeld was having primarily with Mr. Clark, but on the
19 heels of the head-nodding Ms. Milfeld went to Ms. Sprigg to
20 talk about -- to her about that and Ms. Sprigg clearly stated
21 that she could follow the law. And, again, I think that this
22 is a distinction where a juror is talking about what their
23 personal expectations would be in life and what the life
24 experiences have been. And they are able to -- and they have
25 articulated the ability to distinguish between their personal

1 preferences and their personal experiences as opposed to what
2 the law requires and their obligation to follow the law, so I
3 will deny the challenges for cause to Ms. Hutchins and
4 Ms. Sprigg.

5 We'll replace Mr. Clark at this time. Ms. Milfeld
6 were you otherwise finished with your voir dire?

7 MS. MILFELD: Yes.

8 THE COURT: So we'll replace Mr. Clark with Kevin
9 Connelly, and I'll give each side about 5 minutes or so to
10 talk to that replacement juror.

11 MS. RING: Does that make Mr. Connelly, whoever
12 takes Mr. Clark's spot, one of the alternates?

13 THE COURT: Mr. Connelly then becomes -- he's the
14 highest numbered juror in the box. If he remains after
15 peremptory challenges are exercised, yes, he would be an
16 alternate.

17 MS. RING: And Defendant's also 14 and 13, so it
18 would be --

19 THE COURT: Mr. Pipp.

20 MS. RING: Okay. I just want to make sure.

21 THE COURT: Mr. Kellner had indicated he thought
22 that the alternates were designated as the 13th and 14th
23 jurors in, but it's the last in the box of 38. The last two
24 in the box of 38, so we'll replace Mr. Clark.

25 (Whereupon, the following proceedings were had in

1 the presence and the hearing of the jury.)

2 THE COURT: All right. At this time, Mr. Clark, I'm
3 going to excuse you for cause. I appreciate your time, but
4 you're excused from the panel.

5 For those of you sitting in the wooden benches, this
6 is that circumstance that I talked about at the beginning.
7 We're going to call on one of you to take Mr. Clark's seat,
8 and I'll ask Ms. Batchelder to call that person now.

9 BAILIFF: Kevin Connelly.

10 THE COURT: Mr. Connelly.

11 THE COURT: Mr. Clark, make sure you remember all
12 your belongings.

13 BAILIFF: Mr. Clark, do you need confirmation?

14 THE COURT: Thank you, sir.

15 PROSPECTIVE JUROR: Thank you.

16 THE COURT: Mr. Connelly, how are you?

17 PROSPECTIVE JUROR: I was better.

18 THE COURT: I appreciate the honest answer. I
19 turned down the master volume, so -- I'm sorry.

20 Mr. Connelly, you've been able to listen to the voir
21 dire of the other 37 perspective jurors; is that true?

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: All right. Is there anything that any
24 one of those jurors said in response to a question or made a
25 comment or an observation that you thought to yourself, Hey, I

1 think that's important or my position on that would be a
2 little different?

3 PROSPECTIVE JUROR: No, I don't think that I do.

4 THE COURT: Okay. Are you able to follow the law as
5 I give it to you?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: You wouldn't let your own personal
8 judgment get in the way?

9 PROSPECTIVE JUROR: No.

10 THE COURT: Okay. And is there anything that you
11 think we need to know, whether we have asked it or not, that
12 reflects on your ability to be a fair and impartial juror in
13 this case?

14 PROSPECTIVE JUROR: I don't believe so.

15 THE COURT: Okay. Well, this is going to seem a
16 little bit like you are in the spotlight, but I'm going to
17 allow each of the attorneys about five minutes or so to talk
18 directly with you about your views and observations and some
19 of the same things that they talked to other jurors about.
20 Okay.

21 PROSPECTIVE JUROR: All righty.

22 THE COURT: On behalf of the People, Mr. Brackley.

23 MR. BRACKLEY: Thanks, Judge. Good morning
24 everybody.

25 Mr. Connelly, just as you were out there hoping to

1 not hear your name, we were all kind of hoping not to have to
2 bring any other folks in because it's just a hard position for
3 us to sort of talk to one person without getting input from
4 others and without sharing experiences and sharing thoughts
5 with other jurors, and it's mostly hard on you because you
6 have no one to help you, you have no one to nod along with
7 you, you have no one to say, you know, I agree with that
8 person.

9 I talked about a lot of things yesterday. When you
10 were sitting out there, you were paying attention. Were you
11 sitting out there saying, you know, I wish I could respond to
12 that?

13 PROSPECTIVE JUROR: No, not really.

14 MR. BRACKLEY: Mr. Connelly, do you think it matters
15 in this trial what I think about the evidence?

16 PROSPECTIVE JUROR: Pretty much.

17 MR. BRACKLEY: Why does that matter?

18 PROSPECTIVE JUROR: Because you are the one
19 prosecuting the case.

20 THE COURT: Mr. Connelly, maybe it's that chair. I
21 need you to keep your voice up.

22 PROSPECTIVE JUROR: You are the one that has to make
23 sure all of us know the facts and everything about the case
24 and can make a judgment.

25 MR. BRACKLEY: Okay. So it's my job to present

1 evidence to you, right?

2 PROSPECTIVE JUROR: Mm-hmm.

3 MR. BRACKLEY: It's my job to -- to, um -- to
4 actually say, I call this witness and ask questions of that
5 person, right?

6 PROSPECTIVE JUROR: Sure.

7 MR. BRACKLEY: The decisions that I make from this
8 point forward are really what kind of time are you aware
9 because you make the decisions now, right?

10 PROSPECTIVE JUROR: Sure.

11 MR. BRACKLEY: You decide who's credible and you
12 decide whether there's reasonable doubt, correct?

13 PROSPECTIVE JUROR: Right.

14 MR. BRACKLEY: Does it really matter whether I think
15 that there's proof beyond a reasonable doubt?

16 PROSPECTIVE JUROR: I would think so.

17 MR. BRACKLEY: Okay. Why? Why does that matter to
18 you once you are back there in the jury room without me?

19 PROSPECTIVE JUROR: Just the -- the way you
20 presented your case and how much in depth and -- and what you
21 went into it to make us believe what you were saying about the
22 truth and to make a decision on that.

23 MR. BRACKLEY: Okay. But ultimately you and the
24 other jurors, you're the ones who decide whether I have met my
25 burden, right? Because I'm not going to be back there with

1 you making decisions, and Ms. Ring and Ms. Milfeld, they are
2 not going to be back there with you either. It's your job,
3 right?

4 PROSPECTIVE JUROR: Mm-hmm.

5 MR. BRACKLEY: I make some arguments and I may ask
6 you to consider certain evidence as -- as that evidence
7 creates inferences or as that evidence creates direct evidence
8 or circumstantial evidence, but ultimately are you comfortable
9 with the fact that it's your decision and not mine as to what
10 happens at the end of this trial in terms of a jury's
11 decision?

12 PROSPECTIVE JUROR: Sure, that's why we were chosen.
13 We have to decide the guilt or innocence, that's why we're
14 here.

15 MR. BRACKLEY: Given that, Mr. Connelly, is there
16 anything that you want to tell us about you, given everything
17 that we've talked about, about this concept of -- of memory
18 and passage of time, DNA, and reasonable doubt and whether or
19 not jurors are actually going to hear two sides, is there
20 anything about you or some life experience that you've had
21 which you might have wanted to share with us if -- if you were
22 part of this group yesterday and this morning when we were all
23 kind of sharing experiences and kind of ripping on each other,
24 is there anything that you would want us to know about you?
25 Because I can't go through everything again, I only have

1 5 minutes, so I'm not even going to try. I'm going to throw
2 it out to you and I'm going to say, tell us, is there anything
3 about you that you have heard or you want us to know?

4 PROSPECTIVE JUROR: No, not that I can think about
5 about it. It's all new to me, you know, so it's going to be a
6 big experience.

7 MR. BRACKLEY: Are you willing to serve on this
8 jury?

9 PROSPECTIVE JUROR: You bet.

10 MR. BRACKLEY: Be fair and impartial?

11 PROSPECTIVE JUROR: Yes.

12 MR. BRACKLEY: Are you willing to -- are you hoping
13 to come out of this at the end and say I was privileged to be
14 part of a jury in this county?

15 PROSPECTIVE JUROR: I hope that I'm privileged.

16 MR. BRACKLEY: Thank you, sir. I have no further
17 questions.

18 THE COURT: Pass the jury for cause?

19 MR. BRACKLEY: I do, Your Honor.

20 THE COURT: On behalf of Mr. Clark, Ms. Ring.

21 MS. RING: Thank you. Hi, Mr. Connelly.

22 PROSPECTIVE JUROR: Good morning.

23 MS. RING: You were not born in New Jersey.

24 PROSPECTIVE JUROR: No, Nebraska.

25 MS. RING: That's why you talk slower. May I start

1 over?

2 THE COURT: No.

3 PROSPECTIVE JUROR: May I be dismissed?

4 MS. RING: Smith and Wesson just told me I'm done.

5 What did you think when you got home last night?

6 PROSPECTIVE JUROR: Well, I thought that I got a
7 good chance to go in today and be out by noon.

8 MS. RING: And so how do you feel now?

9 PROSPECTIVE JUROR: Well, you know, it's not what I
10 thought would happen, but I'm here and I think that I can do a
11 good job.

12 MS. RING: So you said this was new to you, never
13 served on a jury before?

14 PROSPECTIVE JUROR: No, I haven't.

15 MS. RING: Never participated in a jury in any way?

16 PROSPECTIVE JUROR: No.

17 MS. RING: Points yesterday or today that you were
18 like this questioning, this process makes sense, it doesn't
19 make sense, anything?

20 PROSPECTIVE JUROR: It seemed like it went on for
21 quite a while, but I guess that for someone to get a fair
22 trial and impartial jury, that's what has to happen.

23 MS. RING: It seemed to me that one of the
24 difficult -- most difficult concepts that was talked about
25 this morning was this whole wanting to hear both sides when

1 you make decisions in your life on a daily basis and that
2 really not being how it works in here. Did that strike a cord
3 with you at all?

4 PROSPECTIVE JUROR: Well, it -- you know, it made
5 some sense, but, you know, when you are facing what is
6 important to you and make a decision from that and both sides
7 and -- no, I don't think so.

8 MS. RING: So even more specifically than the not
9 hearing from both sides and it being the prosecution's burden,
10 this idea that, you know, people were saying, well, if that
11 was me in that seat where Mr. Clark is sitting next to me, I
12 would want to jump up and down and not exercise my right to
13 remain silent.

14 PROSPECTIVE JUROR: Right.

15 MS. RING: Where do you come out on? You know,
16 Mr. Arenas told us that he could think of a number of reasons
17 when he had opened his mouth and wished that he hadn't and why
18 it would be very prudent to exercise your right to remain
19 silent. Where do you fall in that?

20 PROSPECTIVE JUROR: Maybe it's the best not to say
21 anything, and it is the burden of the prosecution to, you
22 know, change your mind otherwise.

23 MS. RING: So sounds like that's not a real concern
24 for you?

25 PROSPECTIVE JUROR: No.

1 MS. RING: So, like, maybe his crappy lawyers are
2 telling him to keep his mouth shut, right?

3 Mr. Brackley just asked you about whether or not it
4 mattered to you what he thought, what Mr. Brackley, the
5 prosecution thought about his case. And I'm not -- since
6 you're the juror, it's a presumption of innocence, and they
7 have to prove it to you. I'm interested in hearing more about
8 what you were saying to Mr. Brackley about caring about what
9 he thought about his evidence.

10 PROSPECTIVE JUROR: Well, I believe that he'll put
11 forth his best game and evidence to make us believe in the
12 guilt of the Defendant, and we have to decide what side to
13 believe.

14 MS. RING: Well, let's say Mr. Brackley is a really
15 good lawyer and he puts forth his best game, what does that
16 have to do with whether or not he's proven the charges beyond
17 a reasonable doubt?

18 PROSPECTIVE JUROR: Well, I think that it just --
19 all the evidence and everything that is put forward will open
20 my mind and our minds, make a judgment of guilt or innocence.

21 MS. RING: The reasonable doubt concept, that one
22 make sense to you, difficult, easy?

23 PROSPECTIVE JUROR: Mm-hmm. There's always doubt,
24 it raises a question.

25 MS. RING: And Mr. Pipp -- when Mr. Pipp and I were

1 talking about the fact that since it's your decision as an
2 individual juror, are you comfortable with deciding what you
3 think is reasonable doubt, and even if you have got a
4 different opinion than the rest of the people that you are
5 sitting on the jury?

6 PROSPECTIVE JUROR: You bet, that's part of the jury
7 process is everybody sticks their head together and finds out
8 what everybody thinks, and take it from there.

9 MS. RING: What if everybody thinks differently than
10 you think?

11 PROSPECTIVE JUROR: Well, then I guess I have to
12 listen and then rethink my thinking and -- and stick with my
13 guns.

14 MS. RING: Thank you, Mr. Connelly.

15 THE COURT: Pass the juror for cause?

16 MS. RING: Yes.

17 THE COURT: And the panel?

18 MS. RING: Yes.

19 THE COURT: All right. Ladies and gentlemen of the
20 jury, the next phase of jury selection involves the attorneys
21 exercising their peremptory challenges. This is where each
22 side gets to excuse 12 of you without any explanation to me or
23 to you. So this part of the process doesn't involve me and it
24 doesn't involve you. They are going to be exercising their
25 challenges between each other for right now. So it's probably

1 going to take 20 or 25 minutes. You can talk amongst
2 yourselves quietly. If you want to stand and stretch, you can
3 do that. I'll let you know as soon as the peremptory
4 challenges have been completed and at that time I'll be able
5 to tell you the 14 jurors that will be serving for this trial.

6 PROSPECTIVE JUROR: Judge, can we use the restroom?

7 THE COURT: Let me see counsel at the bench real
8 quickly, off the record.

9 (A brief discussion was had off the record.)

10 THE COURT: That's a great point, Mr. Pipp.

11 Ladies and gentlemen, why don't we go ahead and take
12 a recess. We'll recess until 10:40. While we're on recess,
13 remember, don't talk to anybody about the case. Don't do any
14 outside research on the case. Don't read or listen to any
15 news reports about the case. When you come back at 10:40,
16 please take your exact same seat. While you're on recess, the
17 attorneys and I are going to be working on the peremptory
18 challenges.

19 (Whereupon, counsel for the parties and the reporter
20 approached the bench, and the following proceedings were had
21 out of the hearing of the jury.)

22 THE COURT: Ms. Ring.

23 MS. RING: I was just trying to make sure this was
24 right going through my calendar -- I mean that chart, and I
25 realize that I crossed off the wrong Wilson.

1 THE COURT: Okay. Well, and you already exercised
2 your 12, I gather. So -- so you meant to strike Julie Wilson
3 and instead you struck Rebecca Wilson. I think what you can
4 do -- what we can do is unstrike Ms. Wilson. You can unstrike
5 your 12th, and then you can correct it. And I can --

6 MR. BRACKLEY: I mean what I would ask to do is
7 unstrike all the way back to the 9th, just to the 9th. And it
8 may be an exercise in futility, but I also want to say this.
9 Ms. Wilson has been sitting there -- when we had the paper she
10 is staring at us, she is staring at you. And one point we
11 made eye contact with her.

12 THE COURT: This was after she was stricken.

13 MR. BRACKLEY: And I said to take a look to
14 Ms. Wilson, look how worried she looked, and we both looked at
15 her and she smiled at me.

16 THE COURT: Maybe she thinks that you are cute.

17 MR. BRACKLEY: But I just want to put that on the
18 record. There was definitely some personal contact.

19 THE COURT: Well, I'm not trying to -- and I don't
20 think anybody else is reading body language.

21 MR. BRACKLEY: I'm just saying.

22 THE COURT: Okay.

23 MS. RING: Sorry.

24 THE COURT: Mechanically.

25 MS. RING: It's the left to right thing.

1 MR. BRACKLEY: All right.

2 THE COURT: I'm going to hang out.

3 MR. BRACKLEY: Another suggestion for Mr. Kellner
4 here is why don't they finish and then we just get the last
5 pick. Meaning we get -- unstrike someone and pick someone
6 else, something like that.

7 THE COURT: Well, let me -- let me do this. I'm
8 going to give you a clean strike. People exercise the same
9 strikes through 9.

10 MR. BRACKLEY: Okay.

11 THE COURT: The Defendant, you exercise the same
12 strikes through 8.

13 MS. RING: Right.

14 THE COURT: And from that point on, then after
15 you -- after the People have struck the -- restruct the same
16 9, then the defendant will restrike the 8, and then we can go
17 from there. Okay.

18 (Whereupon, the following proceedings were had in
19 the presence and the hearing of the jury.)

20 THE COURT: Ladies and gentlemen, the following 14
21 of you have you been selected to serve as jurors in the case.
22 If I read your name, you will be a juror. Jo Ringgenberg,
23 Michael Lacopo, Colleen O'Harah, Russell Harris, Mary Timms,
24 Robert Raicer, Kevin Connelly, Ted McDonald, Enrique Arenas,
25 Kathleen Metzger, Rebecca Wilson, Scott Deitz, James Krolick,

1 and Kevin Pipp. We read those 14 names again. Joe
2 Ringgenberg, Michael Lacopo, Colleen O'Harah, Russell Harris,
3 Mary Timms, Robert Raicer, Kevin Connelly, Ted McDonald,
4 Enrique Arenas, Kathleen Metzger, Rebecca Wilson, Scott Deitz,
5 James Krolick, and Kevin Pipp. Those are our 14 jurors.

6 With respect to the rest of you, thank you very,
7 very much for your time and participation in this process.
8 You have satisfied your obligation for jury service and you
9 are excused with the thanks of the Court. If you need a
10 service certificate verifying that you were here for jury
11 selection, Ms. Batchelder has that form and you can pick it up
12 from her on your way out of the courtroom. I'm going to ask
13 the 14 jurors to remain seated. The rest of you are excused
14 with the thanks of the Court.

15 All right. With respect to our 14 jurors, ladies
16 and gentlemen, I have another oath to give you. I'm going to
17 ask you to stand and raise your right hand.

18 (The jury oath was administered.)

19 THE COURT: Please be seated.

20 Couple of things mechanically need to happen. I'm
21 going to excuse you for what's going to be an extended lunch
22 break and it's earlier than normal. I'm going to have, first
23 of all, you step back into the jury room, let you get oriented
24 with that. That jury room is essentially your office for the
25 rest of this trial. You are welcome to use that during the

1 breaks, early in the morning, you are welcome to stay in there
2 at recesses. Don't feel obligated to stay there, but we'll
3 have coffee and tea for you back there. You can bring reading
4 materials, you can take care of personal matters and business
5 while back in the jury room.

6 When you come back, I'm going to have you come back
7 at 12:30, so this is an early lunch, but when you come back I
8 will give you further jury instructions and at that time we'll
9 take the opening statements from the attorneys. When you come
10 back this courtroom it's going to look markedly different. We
11 are going to have to move all the chairs out of here, slide
12 the tables back around, get the podium back in. I need you to
13 select one of the 14 jurors that's going to be across the two
14 back rows. This is the witness stand right here between the
15 jury box and my bench, so that's where most of the testimony
16 is going to be taken. Think about where you want to sit
17 relative to that witness stand. There are going to be two
18 chairs over by Mr. Harris that are going to be sitting a
19 little lower than the normal jury chairs. So if you are tall,
20 it might give you a little bit of extra leg room and you might
21 be still able to see the witness stand. Once you select a
22 seat when you come back, that's your chair for the rest of the
23 trial. So think carefully about that.

24 So every time we take a recess, you are going to see
25 me hold up this card. This is an admonition that I have to

1 give you now and at every recess. The instructions apply at
2 every recess whether it's mid morning, mid afternoon, the
3 noontime recess or evening recess until the trial is over.

4 You must not communicate about or discuss this case
5 with anyone by any means, this includes members of your
6 family, people involved in the trial, other jurors or anyone
7 else. If someone approaches you and tries to discuss the
8 trial with you, let me know about it immediately. You must
9 not read or listen to any news reports of the trial, you must
10 not consult any outside reference materials, including a
11 dictionary, the encyclopedia or the internet.

12 Finally, remember it is especially important that
13 you do not form or express any opinion on the case until it is
14 finally submitted to you.

15 Two final remarks. When you come back at 12:30, if
16 you want to bring a beverage or a cup of coffee, a can of
17 soda, a bottle of Power Aid, you are welcome to do that as
18 long as it doesn't disturb your neighbor or the proceedings.

19 The second thing is in terms of what our normal work
20 day will be, you can expect that we'll start at 9:00 in the
21 morning, we should be done around 5:00 in the evening. I say
22 about because if it makes sense to go an extra 5, 10,
23 15 minutes to finish a particular part of testimony or
24 evidence, I may do that, but you can expect 9:00 to 5:00.
25 I'll try to give you an hour to hour-and-a-half for lunch.

1 We'll also take a 15-minute recess mid morning or mid
2 afternoon. So our work day is essentially 9:00 to 5:00.

3 At this time I'm going to ask the jurors to step out
4 of the courtroom with Ms. Batchelder, and we'll see you back
5 here in the jury room at 12:30. And we should be ready for
6 you at that time. Thank you.

7 Counsel, before we recess, we had discussed
8 yesterday whether or not the parties wanted an instruction to
9 the jurors about the use of prior testimony to either refresh
10 and/or impeach. Is there an agreed upon instruction?

11 MR. KELLNER: Your Honor, I sent something to
12 Ms. Milfeld this morning. I haven't spoken to her about it,
13 so can we talk about that over the break here.

14 THE COURT: Okay. But I need to know by 12:30
15 because that's when I'm going to give it, the other
16 introductory instruction.

17 Anything else to take up on the record before we
18 recess on behalf of the People?

19 MR. BRACKLEY: No, Your Honor.

20 THE COURT: On behalf of the Defendant?

21 MS. RING: No.

22 THE COURT: All right. We'll be in recess until
23 12:30.

24 (The noon recess was taken.)

25

P R O C E E D I N G S

The trial in this matter recommenced on the afternoon of October 10th, 2012, before the Honorable Thomas Mulvahill, Judge of the Boulder District Court, and a jury of 12 persons, and the following proceedings were had.

* * * *

THE COURT: Back on the record in 12 CR 222. Are there any matters to take up before we bring the jury back?

Do you want to bring the jury in?

(The jury entered the courtroom.)

THE COURT: Mr. Lacopo and Mr. Pipp, if it's easier to walk in front of the jury box, you are welcome to do that to get around your chairs.

All right. Welcome back, ladies and gentlemen of the jury. When we recessed we were in the middle of the direct examination of Ms. Swider.

Mr. Brackley, you make continue.

MR. BRACKLEY: Thank you, Judge.

DIRECT EXAMINATION

BY MR. BRACKLEY:

Q. So, Ms. Swider, when we last -- before the break we were -- you were describing being at the dinner table with Marty Grisham and conversations beyond that involving the checks and his children.

And I wanted to approach and show you what I have

1 marked as People's 6, 7 and 8.

2 MR. BRACKLEY: I have shown 6, 7 and 8 to counsel,
3 and I will show 9 to counsel. And let me come up there, with
4 the Court's permission.

5 THE COURT: Yes.

6 Q. (By Mr. Brackley) And I'll start with 6, 7 and 8.
7 And if you could take a look at 6, 7 and 8 and let me know
8 when you are ready to answer some questions about...

9 A. Okay.

10 Q. Okay. What is 6?

11 A. This is the dining area in Marty's apartment.

12 Q. Okay. And is that a fair and accurate depiction of
13 that back on November 1st, 1994?

14 A. I believe so.

15 Q. Okay. What about 7?

16 A. The same, a different viewpoint.

17 Q. So a different viewpoint in the apartment?

18 A. Yes.

19 Q. Okay. And is that the way it appeared back on
20 November 1st of 1994?

21 A. To the best of my recollection.

22 Q. And, finally, 8?

23 A. Another viewpoint of the apartment.

24 Q. Okay. Is that a fair and accurate depiction of that
25 scene back in November --

1 A. Yes.

2 Q. -- of 1994?

3 A. Yes.

4 MR. BRACKLEY: Your Honor, I would move to admit
5 People's 6 and 7 and 8.

6 THE COURT: Objection or voir dire?

7 MS. RING: No objection or voir dire. Thank you.

8 THE COURT: 6, 7 and 8 are admitted.

9 (People's Exhibit 6 through 8 were admitted into
10 evidence by agreement of the parties.)

11 Q. (By Mr. Brackley) Okay. And one more. Housework
12 here. Let me show you what is People's 9. And I'll turn that
13 from the jury until we talk about it a little bit.

14 Before coming into court, um, not necessarily today,
15 but did you see this diagram?

16 A. Yes.

17 Q. And what is that?

18 A. To scale, roughly, of Marty's apartment.

19 Q. Okay. And is that -- does that show the relation of
20 the walls to the doors, to the windows, to the -- to the
21 kitchen area, to the dining area?

22 A. That's correct.

23 Q. And does it show those relationships as they
24 appeared back in November of 1994?

25 A. Yes.

1 MR. BRACKLEY: Your Honor, I would move to admit
2 People's 9 into evidence.

3 THE COURT: Objection?

4 MS. RING: No objection.

5 THE COURT: 9 will be admitted.

6 (People's Exhibit 9 was admitted into evidence by
7 agreement of the parties.)

8 Q. (By Mr. Brackley) Okay. Let me --

9 MR. BRACKLEY: Can I stay up here for a moment?

10 THE COURT: Sure.

11 Q. (By Mr. Brackley) So there's a pointer in front of
12 you, and if you would press the red button, a red laser comes
13 out. And be very careful to keep it on the board.

14 Can you show the jurors --

15 MR. BRACKLEY: And can everybody see?

16 THE JURY: Yes.

17 Q. (By Mr. Brackley) Can you show the jurors where the
18 front door was?

19 A. This would be the doorway right there.

20 (The witness indicated.)

21 Q. Okay. And what's behind the doorway there?

22 A. This is a patio sliding door.

23 Q. Okay. And where was the dining area where you and
24 Marty Grisham were?

25 A. This is the table, Marty was on this side, I -- I

1 was on this side.

2 (The witness indicated.)

3 Q. Okay. And can you show us where the telephone was
4 in the apartment?

5 A. It's right over here. There's like a -- this is
6 like a pass-through area from the kitchen to the living room
7 area, and this is like a divider.

8 (The witness indicated.)

9 Q. Okay. And by the "divider," it's by where the phone
10 is marked and where the desk is?

11 A. That's correct.

12 Q. Okay. We'll talk more specifically about it in a
13 moment, but from where you were sitting, could you see the
14 front door of Marty Grisham's apartment?

15 A. No.

16 MR. BRACKLEY: And if I could publish People's 6.

17 THE COURT: Permission granted.

18 MR. BRACKLEY: And I will also publish 7 and 8.

19 THE COURT: Granted.

20 Q. (By Mr. Brackley) What are we looking at there?

21 A. This is the dining room, as I said, I was sitting
22 against the wall and Marty was in the seat here. There's the
23 stack of CDs that we were talking about, Christmas CDs. We --
24 he had cleared the dishes away from dinner.

25 (The witness indicated.)

1 Q. Okay. People's 7, what's that? What are we looking
2 at there?

3 A. I'm assuming this would be from the front doorway or
4 just inside looking across to that dining area. You can
5 see -- shall I use the pointer?

6 Q. Please.

7 A. You can see the phone here on the wall, and this is
8 the dividing wall I was talking about and the pass-through
9 area from the kitchen to the living room.

10 (The witness indicated.)

11 Q. And is that dividing wall, the wall that -- where
12 the telephone is?

13 A. Yes, this wall here.

14 (The witness indicated.)

15 Q. Okay. And could you see where you were sitting,
16 generally, in that particular photo?

17 A. No, Marty was sitting here and I would have been
18 like right back behind that wall.

19 (The witness indicated.)

20 Q. Okay. So from that vantage point you wouldn't have
21 been able to see you back there?

22 A. Correct.

23 Q. Okay. And People's 8?

24 A. This is the view -- how do you say -- opposite,
25 toward the patio doors. The living room area.

1 Q. And that's Marty's TV there?

2 A. Correct.

3 Q. Okay. So tell us what happened at this point
4 after -- well, what happened -- was there a knock on the door?
5 Let's start there.

6 A. Yes, we had been just talking, his feet were up on
7 the table and there was a knock on the door. It was a fairly
8 hard, concise knock and he just kind of looked with a raised
9 eyebrow, like, Who would this be, and we didn't say anything.

10 He stood up, walked to the door and everything was
11 quiet. And I'm assuming I heard his hand on the door and
12 there was a pause, and I don't recall if there was a peephole
13 in the door or not, I believe there was and that he looked
14 through it. And then I could not see him.

15 And then he -- with his hand on the door still, he
16 stepped back and looked directly at me. He stepped out of the
17 way of that dividing wall and looked directly at me with a
18 very serious look. I don't know quite how else to describe
19 it. And then he turned back and opened the door fully and at
20 that point I heard three shots.

21 Marty then fell against the patio door, the cat
22 carrier. And I recall smelling what I thought was like
23 fireworks, or -- I thought is this a joke or what is this.
24 And then coming around the table and seeing Marty on the floor
25 and seeing some blood and as I walked that way, then I went

1 back in and got the phone and dialed 911.

2 And Marty was laying there and was -- had a very
3 hard time breathing. And I remember thinking, I have to call
4 911, but I can't. I won't remember his address or I won't
5 remember his phone number, and are they going to be able to
6 help me. And then 911 came on and they just asked if you are
7 at this address and I said, yes, Marty Grisham has been shot
8 and I need help. They asked some, you know, exact questions,
9 is this the phone number, is this the, um, address. What
10 happened, I said that he had been shot. I'm sure I was
11 somewhat frantic about, Please, I need help, get someone here
12 quickly.

13 At one point the phone was cutoff. And there were
14 no cell phones or anything back then, so this was a corded
15 line that I had pulled all the way over -- I was holding
16 Marty's hand, I was talking to them, I was saying to Marty,
17 Stay with me, we'll get help. Again, his breathing was very
18 labored. And at one point the phone got disconnected, whether
19 it came unplugged or what, I don't know.

20 I remember looking up at the glass patio window and
21 it was dark and I remember thinking, there could be someone
22 there pointing a gun at me. And then I quickly looked back at
23 Marty and then I looked to the side and the door was still
24 wide open and I thought anybody could come in. And then
25 the -- a man was in the doorway with his hands up and he said

1 I'm studying EMT -- or not practicing, but a learning EMT or
2 something, and I said, I don't know what to do, and he came
3 in.

4 And then I believe shortly after that somebody --
5 someone else -- people were beginning to gather and someone
6 else came in and handed me a portable phone that said you're
7 connected with 911 again, and I spoke with them some more and
8 they were asking some more technical questions. And the
9 apartment manager was telling me what to say and he said,
10 There's three bullet holes, two in his chest and one in his
11 cheek. And, again, if that call got disconnected or I pressed
12 a button, I don't know. I kind of put the phone -- probably
13 dropped the phone and at that point Marty was with this EMT
14 person and his breathing stopped at one point, but then it
15 started again.

16 And then I walked into the bedroom and picked up my
17 jacket and my purse and his daytimer, which is like a
18 calendar. It had all of his information in it, phone numbers,
19 appointments, things like that. I figured that it would have
20 the most information to give to the police. I came back out
21 and put them on the futon.

22 I think then the police had arrived and they had
23 brought in the wheeled gurney, or whatever it's called, and
24 picked him up. Well, actually, the EMT had said when I said I
25 don't know what to do, he said, We should straighten him out.

1 And so we gently, as gently as we could because he was slumped
2 up against the patio doors, as gently as we could we laid him
3 flat. So then when the police -- the police and the
4 paramedics came, they took over. And a policeman took me
5 aside, back to the dining room area, and started to interview
6 me there. I was, like, aren't I going with them, and they
7 said, No, we need to talk to you here.

8 Q. Let me take you all the way back to that moment of
9 time when you heard the knock on the door. Did Marty Grisham
10 say anything about that knock on the door?

11 A. He did. When he looked at me quizzically, he said,
12 That's sound like a Loren knock.

13 Q. Okay. And by "Loren," you mean -- you took that to
14 mean Marty Grisham's son?

15 A. His son, correct.

16 Q. Did you know from conversations with Marty Grisham
17 where Loren was supposed to be on November 1st, 1994?

18 A. I believe Marty thought that he was in Glenwood
19 Springs.

20 Q. Glenwood Springs, Colorado?

21 A. Yes.

22 Q. Can you characterize -- you talked about that knock
23 as a forceful knock. Can you characterize it further for the
24 jury what kind of knock that was?

25 A. Something like that.

1 (The witness indicated.)

2 Q. For the record, the witness had knocked on the
3 wooden witness box.

4 And what did Marty do after saying that sounds like
5 a Loren knock?

6 A. Got up and walked to the door.

7 Q. Okay. Could you see him when he got to the door?

8 A. No.

9 Q. Okay. As you sit here today, do you remember one
10 way or another whether there actually was a peephole in Marty
11 Grisham's apartment door?

12 A. I don't remember today.

13 Q. Okay. You stated you assumed that he looked through
14 the peephole. What's the basis of that?

15 A. There was a pause in the timing from when he walked
16 to the door -- and, again, it was quiet and I thought that I
17 heard his hand on the doorknob, but then a pause.

18 Q. Was there any conversation between you and Marty
19 Grisham from the time he got up from the table and went over
20 to the door?

21 A. No.

22 Q. Was there any conversation between you and Marty
23 Grisham after he sort of stepped away from the door prior to
24 opening the door?

25 A. No.

1 Q. Did he have any words or conversation with anyone on
2 the other side of the door?

3 A. No.

4 Q. Did you hear anyone saying anything to him from the
5 other side of the door?

6 A. No.

7 Q. Can you specifically describe for the jury what
8 Marty Grisham did after disappearing behind that wall, you
9 know, at the door and then coming back and looking at you?
10 Well, not coming back and looking at you, but describe for the
11 jurors how he looked at you after he went to the door?

12 A. It just was a very serious look, I don't know that
13 it said anything. It was sort of like, Okay, here we go, or
14 just this dropped jaw dead serious look.

15 Q. Okay. And was that when Marty Grisham opened the
16 door?

17 A. He did, he opened it full wide and that's when I
18 could see the door come open all the way around. I could see
19 that piece of the door.

20 Q. Could you see who was on the other side of that
21 door?

22 A. No.

23 Q. Was there any conversation between Marty Grisham and
24 whoever was on the other side of that door?

25 A. No.

1 Q. Did the person on the other side of the door say
2 anything to Marty Grisham?

3 A. No.

4 Q. Did you hear anything?

5 A. No.

6 Q. How quickly did you hear those shots once that door
7 was opened?

8 A. Quickly, right away.

9 Q. So no dialogue, nothing said?

10 A. That's correct.

11 Q. Did you ever see anyone try to come into the
12 apartment?

13 A. No.

14 Q. Did you see Marty Grisham being in physical contact
15 with anyone?

16 A. No.

17 Q. Did you see anyone make an effort to make physical
18 contact with Marty Grisham?

19 A. No.

20 Q. Did you see anyone try to make contact with anything
21 inside of the apartment?

22 A. No.

23 Q. Any of Marty Grisham's possessions?

24 A. No.

25 Q. How would you characterize the time it took you to

1 get from where you were sitting at the table to where Marty
2 Grisham was?

3 A. From the time that I first saw him --

4 Q. Right.

5 A. -- laying down? Um, perhaps as much as 30 seconds,
6 but maybe not that long. It took a while to realize what had
7 happened. I think that I smelled the gunpowder first and then
8 realized that he was laying there, that he wasn't in the
9 doorway or -- you know, then just seeing him, so probably 15
10 to 30 seconds.

11 Q. And did you stop at the telephone first or did you
12 go straight to Marty Grisham?

13 A. I believe I went to him first and then quickly
14 grabbed the phone and went back to him.

15 Q. Okay. Is it fair to say that you ran into that
16 smell of gunpowder or firecrackers or whatever you
17 characterized it to be?

18 A. Yes.

19 Q. Do you remember seeing or feeling or sensing smoke
20 in that particular location of the apartment?

21 A. I do not.

22 Q. Okay. But you were able to smell it from the
23 kitchen area, from the dining room table area?

24 A. Yes.

25 Q. Okay. When you turned around and went back to get

1 the telephone, did you bring the phone then back with you to
2 where Marty Grisham was?

3 A. Yes.

4 Q. And you called 911?

5 A. Yes.

6 Q. If I can show you what is marked People's 11 for
7 identification.

8 MR. BRACKLEY: And if I can approach, Your Honor?

9 THE COURT: Yes.

10 Q. (By Mr. Brackley) Prior to coming into court, and
11 not necessarily today, did you have an opportunity to listen
12 to the call that you made --

13 A. I did.

14 Q. -- to the police back on November 1st, 1994?

15 A. Yes.

16 Q. Okay. And is that it, what you are holding there,
17 People's 11 --

18 A. Yes.

19 Q. -- for identification? How do you know it's the
20 particular call that you listened to?

21 A. I initialled and dated it.

22 Q. Okay. And is that the phone call that you made in
23 various -- the first call and then the second call when
24 someone else handed you a phone?

25 A. That's correct.

1 MR. BRACKLEY: Okay. Your Honor, if I could admit
2 People's 11 into evidence.

3 THE COURT: Objection or voir dire?

4 MS. RING: No, thank you.

5 THE COURT: 11 is admitted.

6 (People's Exhibit 11 was admitted into evidence by
7 agreement of the parties.)

8 MR. BRACKLEY: And I think at this time I will
9 publish that to the jury.

10 THE COURT: Go ahead.

11 Q. (B Mr. Brackley) Ms. Swider, while we are setting
12 that up, I notice that you had the document that I brought up
13 to you before. If I could just turn that over, the one that's
14 right in front of you.

15 A. This one.

16 Q. Yeah. Just turn that over, and if you ever need to
17 look at it, let us know that you are looking at it. Okay.

18 (The DVD was played off the record.)

19 Q. You testified that you heard three shots. Is that
20 your recollection today, hearing three shots?

21 A. Yes.

22 Q. And is that also your recollection of what you told
23 the police investigators back on November 1st of 1994 and also
24 November 2nd of 1994?

25 A. Yes, I believe so.

1 Q. Do you recall going to the Boulder Police Department
2 later that evening, November 1st of 1994?

3 A. Yes.

4 Q. And being interviewed by the police --

5 A. Yes.

6 Q. -- for the first time?

7 A. Yes.

8 Q. And do you recall police detectives or police
9 officers taking swabs of your hands?

10 A. Yes.

11 Q. And you understood that to be something to detect
12 the presence of gunshot residue or gunshot residue in the air?

13 A. Yes.

14 MR. BRACKLEY: Okay. At this time, Judge, I have no
15 further questions for Ms. Swider.

16 THE COURT: All right. Do you want to turn off
17 those speakers?

18 MR. BRACKLEY: I got it, Judge.

19 THE COURT: Cross-examination, Ms. Ring.

20 MS. RING: Thank you.

21 **CROSS-EXAMINATION**

22 **BY MS. RING:**

23 Q. Good afternoon, Ms. Swider.

24 A. Good afternoon.

25 Q. You and I have seen each other before in the

1 courtroom?

2 A. Yes.

3 Q. About a month or so ago?

4 A. Yes.

5 Q. Okay. And when you and I were in a courtroom
6 together about a month or so ago, prior to that you had met
7 with the District Attorney?

8 A. Correct.

9 Q. And when you met with them -- so this would have
10 been maybe sometime in August or early September when you met
11 with the District Attorney before that hearing --

12 A. Yes.

13 Q. -- right? You reviewed the -- the transcripts from
14 those November 1994 interviews that you did?

15 A. That's correct.

16 Q. Okay. And prior to you meeting with the District
17 Attorney and having the opportunity to review the transcripts,
18 an investigator from my office came and interviewed you?

19 A. Yes.

20 Q. And when that investigator was talking to you
21 sometime in August of this year, it was difficult for you to
22 remember a lot of the details of what happened in 1994?

23 A. Yes.

24 Q. And once you were able to review the transcript of
25 your interviews from back in 1994, some of those details came

1 back?

2 A. Absolutely.

3 Q. Okay. And do you recall that actually you and I
4 talked about in court that when you met with my investigator,
5 you didn't remember certain things?

6 A. Yes.

7 Q. And then after having the opportunity to review the
8 transcripts, it refreshes your memory?

9 A. Yes.

10 Q. Okay. I mean that makes sense, this happened 18
11 years ago --

12 A. Yes.

13 Q. -- right? And I'm sure as you listened to that 911
14 tape, it brings back a lot of the emotion back in 1994?

15 A. Yes.

16 Q. But when my investigators called to interview you in
17 August of 2012, it wasn't something that you thought about
18 every single day?

19 A. That's correct.

20 Q. And so you didn't remember all of the details until
21 you were able to review the transcripts?

22 A. Yes.

23 Q. Okay. Just to kind of characterize your
24 relationship with Marty Grisham a little bit more, I think
25 that you told us you actually specifically recalled meeting

1 him on August 31st of 1994?

2 A. That's correct.

3 Q. And the way you can remember that date, it's because
4 that's when you started in that divorce group?

5 A. Yes.

6 Q. Okay. And that was the first time you had ever met
7 him?

8 A. Yes.

9 Q. And at that point you met him because he was a
10 facilitator at the group?

11 A. Yes.

12 Q. He had done the group previously --

13 A. Yes.

14 Q. -- which is how he became a facilitator?

15 A. Yes.

16 Q. Okay. And most of September of 1994, your
17 relationship with Marty Grisham is through the group?

18 A. Correct.

19 Q. And through the relationship of him being a
20 facilitator and you being a participant?

21 A. Yes.

22 Q. And it's not until the end of that month, the end of
23 September of 1994, that your relationship with Marty Grisham
24 starts to take a different direction?

25 A. Correct.

1 Q. And you told us it would have been sometime at the
2 very end of September 1994 or very early October of 1994 that
3 Marty stopped being a facilitator --

4 A. Yes.

5 Q. -- of your group? And you and Marty Grisham start a
6 relationship?

7 A. Yes.

8 Q. Okay. So your relationship with Marty is really
9 only through the month of October of 1994?

10 A. That's correct.

11 Q. Okay. So because you really only had been in a
12 relationship for about a month, not surprising, you hadn't met
13 his son, Loren, right?

14 A. That's correct.

15 Q. You hadn't met his daughter, Kristen?

16 A. I had not.

17 Q. You hadn't met his ex-wife, Pam?

18 A. No.

19 Q. Okay. And I think you told us that more of --
20 although Marty had talked about his family with you, more of
21 your conversations were about things in the present and things
22 you had in common?

23 A. Yes.

24 Q. Mr. Brackley asked you about the check, how Marty
25 finds out about the checks, et cetera, right?

1 A. Yes.

2 Q. Okay. So Marty Grisham was shot and killed on
3 November 1st of 1994 --

4 A. Yes.

5 Q. -- right? So the night before was Halloween?

6 A. Yes.

7 Q. Okay. And on Halloween, on October 31st of 1994
8 Marty came over to your house at some point that evening?

9 A. That's correct.

10 Q. And spent the night at your house that evening?

11 A. Yes.

12 Q. Okay. You were in school at that time and had a lot
13 going on. So you and Marty did not have dinner on
14 October 31st, 1994?

15 A. That's correct.

16 Q. He would have come over a little bit later, about
17 9:00 or 9:30 that evening?

18 A. Yes.

19 Q. Okay. And that was the night, October 31st, 1994,
20 when Marty first noticed some checks being missing at his
21 house?

22 A. Yes.

23 Q. And you and Marty would have talked about him
24 noticing the checks being missing when he came over later that
25 evening on October 31st, 1994?

1 A. It's possible, I don't remember at this time.

2 Q. Okay. You do specifically recall on the -- the next
3 day, on November 1st, 1994, the discussion on the checks being
4 at least a significant part of that day?

5 A. Yes.

6 Q. Okay. That was certainly the first time that as far
7 as you knew Marty Grisham had gone to the police about the
8 checks?

9 A. Yes.

10 Q. And based on how Marty was talking to you about
11 finding out about the checks, you had no reason to think that
12 he knew anything about it before going to the police on
13 November 1st of 1994?

14 A. That's correct.

15 Q. Okay. Mr. Brackley talked to you about if you
16 recall that you took care of Marty's cat on the weekend of
17 October 22nd, 1994?

18 A. Yes.

19 Q. Okay. And so Marty had given you a key to his
20 apartment in order for you to do that?

21 A. Yes.

22 Q. So in -- on November 1st of 1994 you had a key to
23 Marty's apartment?

24 A. I did.

25 Q. It was your understanding that at least his

1 daughter, Kristen Grisham, had a key to his apartment?

2 A. Yes.

3 Q. And it was also your understanding that Marty kept
4 an extra key to his apartment in his Honda?

5 A. Correct.

6 Q. Okay. And those were the keys that you were aware
7 of?

8 A. Yes.

9 Q. Mr. Brackley also asked you and played that message,
10 the voice mail message that you heard when you and Marty got
11 back to his apartment on November 1st of 1994. Your
12 understanding was that Marty was hoping Kristen was going --
13 his daughter, Kristen, was going to have dinner with you and
14 Marty that evening?

15 A. Yes, that's what we were planning on.

16 Q. Okay. Your memory is that Kristen had canceled at
17 least once or twice before that evening?

18 A. Yes.

19 Q. Okay. And that Marty wasn't happy when he couldn't
20 get ahold of Kristen and she didn't end up coming to dinner?

21 A. I believe that's correct.

22 Q. Okay. And your response to Marty was, Kristen's a
23 19-year-old girl, right?

24 A. Yes.

25 Q. And the idea that she might not want to have dinner

1 with her dad and his new girlfriend when you are 19, you
2 didn't find that odd?

3 A. That's what I said --

4 Q. Okay.

5 A. -- yes.

6 Q. And that's what -- I mean you were saying to Marty
7 what you were thinking about?

8 A. Yes, that -- that when I was 19, I wouldn't want to
9 spend time with my parents, I wanted to be with my friends.

10 Q. Okay. And Marty -- in terms of your name change,
11 you were very close to being divorced as -- in November 1st of
12 1994?

13 A. Yes.

14 Q. The paperwork was already done?

15 A. As far as the paperwork was already submitted and as
16 far as I knew, it could have been -- even been granted, but we
17 hadn't been notified yet. It was very close.

18 Q. Okay. But Marty was your first relationship since
19 your marriage?

20 A. Yes.

21 Q. Okay. But you knew that Marty had been divorced for
22 a couple of years?

23 A. Yes.

24 Q. And that he had actually had a significant
25 girlfriend after his divorce before he was in a relationship

1 with you?

2 A. Yes.

3 Q. Mr. Brackley also asked you some questions about
4 what Marty told you about his relationship with Kristen and
5 Loren, his kids?

6 A. Yes.

7 Q. And that evening, in particular, when you got back
8 to Marty's apartment at about -- sometime after 6:00, you said
9 Marty talked a little bit more about his history with Loren
10 and Kristen?

11 A. That's correct.

12 Q. And he talked a fair amount about some pretty
13 significant difficult history with Loren years prior?

14 A. Yes.

15 Q. And concerns that he had had with Loren?

16 A. Yes.

17 Q. But the things were getting -- he thought that
18 things were getting better with Loren at that point?

19 A. Very much so.

20 Q. Okay. And you talked about both of his kids, I
21 think, when you answered one of Mr. Brackley's questions,
22 stealing things from him in the past. Do you remember that it
23 was really Loren who was the one who had taken CDs and had
24 issues with credit cards as opposed -- to that it was
25 predominantly Loren as opposed to Kristen, or do you not

1 remember that now?

2 A. I don't remember that now. If that's what's in
3 here, I believe that what I said at that time was what I knew
4 then to be true.

5 Q. But you did recall on November 1st of 1994 and going
6 to the police department, that Marty was talking about both
7 Kristen and Loren at that point?

8 A. That's correct.

9 Q. Mr. Brackley asked you a lot of questions about
10 describing exactly what happened leading up to Marty being
11 shot. So nothing else odd occurred that evening in terms of
12 when you got home to the apartment or when you were preparing
13 dinner or anything like that?

14 A. I don't believe so.

15 Q. Okay. And by the time you're both sitting there
16 having dinner, I think you told us earlier that Marty had
17 seemed to be able to set aside the check issue for the time
18 being and actually enjoy his dinner with you?

19 A. Yes.

20 Q. And throughout your dinner that was not the focus of
21 the consideration?

22 A. Correct.

23 Q. And Marty was engaged in his conversation with you,
24 or certainly seemed he was throughout dinner?

25 A. Yes.

1 Q. And it was during dinner that he brought out the
2 Christmas CDs and was talking about Christmas in the future?

3 A. It was after dinner, it was after he had moved the
4 dishes away.

5 Q. Okay. But is it fair to describe the evening as at
6 some point Marty stopped focusing on the check issue and what
7 was going on with that and focused on you and the relationship
8 you had going forward?

9 A. Yes.

10 Q. And it didn't come back up prior to that knock on
11 the door?

12 A. No.

13 Q. Okay. And I think you describe Marty as sitting at
14 the table with his feet propped up?

15 A. Yes.

16 Q. And that's when you heard the knock?

17 A. Yes.

18 Q. Okay. And if I understand you correctly, the only
19 words that Marty said to you from the time there was a knock
20 on the door until he was shot was, That sounds like a Loren
21 knock?

22 A. That's correct.

23 Q. Okay. You describe that his initial response to the
24 knock was kind of raising his eyebrow and looking at you
25 somewhat quizzically?

1 A. Yes.

2 Q. And then after that, as he was getting up he would
3 have said, That sounds like a Loren knock?

4 A. Yes.

5 Q. Okay. And then you seem to have this very vivid
6 memory of him getting to the door and you actually thinking
7 you heard him put his hands on the doorknob?

8 A. Yes.

9 Q. Okay. And it appears that you vividly remember him
10 not opening the door right away?

11 A. That's correct.

12 Q. And that you remember in that time of there being
13 this pause and that he steps back and looks at you again?

14 A. Yes.

15 Q. Okay. And it's fair that that's what makes you
16 think that there was probably a peephole in that door?

17 A. Yes.

18 Q. Because it seemed like there was some pause and some
19 recognition of what might be on the door and then he turns to
20 look at you?

21 A. Yes.

22 Q. Okay. And that he opens the door?

23 A. Yes.

24 Q. Of course, you weren't looking at a clock when all
25 this was going on?

1 A. No.

2 Q. Okay. So the best you can tell us is that you
3 recall -- sounds like you kind of recall hearing the noise,
4 but you really recall smelling this smoke?

5 A. I do.

6 Q. Okay. And not really right away being able to know
7 what the smoke is?

8 A. I'm assuming that there was -- my mind just didn't
9 process that quickly what had happened.

10 Q. Okay. And I think you also told us earlier that it
11 was almost like you thought it was that smoke related to
12 fireworks --

13 A. Yes.

14 Q. -- was the thought that popped into your head?

15 A. Yes.

16 Q. So you don't know how long that lasted, but there
17 was some kind of disconnect between whatever the scent was and
18 the noise was and realizing that Marty had been shot?

19 A. Yes.

20 Q. Okay. And as soon as you make that connection, your
21 memory is that you initially went to Marty?

22 A. Yes.

23 Q. Okay. And then you realized, I need to call 911?

24 A. Yes.

25 Q. And you would have had to go back from where Marty

1 was at the door, back to where the phone was?

2 A. Yes.

3 MS. RING: May I approach, Judge?

4 THE COURT: Yes.

5 Q. (By Ms. Ring) So I think that the phone is here --

6 A. Yes.

7 Q. -- right? Marty is here?

8 (Counsel indicated.)

9 A. A little more towards the cat carrier.

10 Q. This is the cat carrier -- no, that's the cat
11 carrier?

12 A. Yes, he's slumped against that.

13 Q. Okay. So you would have -- you were here?

14 (Counsel indicated.)

15 A. I was.

16 Q. Here?

17 A. Here.

18 (The witness indicated.)

19 Q. Right. So you went to Marty?

20 A. Yes.

21 Q. You can use the red pointer thing if it's easier for
22 you.

23 A. So I would have walked around here, went to Marty,
24 realized that I needed to step back, grabbed the phone and
25 went back.

1 Q. Okay. Thank you.

2 And then when you listened to that 911 call today,
3 that's what you recall in terms of being on the phone and then
4 losing the connection?

5 A. Yes.

6 Q. And then a neighbor bringing you a phone?

7 A. Yes.

8 Q. The District Attorney asked you something about -- I
9 can't remember exactly how he phrased it -- Marty's
10 relationship with his children maybe being difficult
11 previously?

12 A. Yes.

13 Q. Okay. And is it fair that in your conversations
14 with Marty, he had actually expressed to you that he had had
15 some difficulties with anger and that piece of his personality
16 previously?

17 A. Yes.

18 Q. And specifically with his children?

19 A. Yes. I don't remember exactly when, but, yes, those
20 conversations, we had them.

21 Q. Okay. And you know he had kind of acknowledged to
22 you that he intended to be a pretty authoritative person with
23 his children?

24 A. Yes.

25 Q. And maybe that even being his demeanor in his

1 marriage as well?

2 A. I don't remember about his marriage, we didn't talk
3 about that.

4 Q. But you remember that he talked to you -- he was
5 trying to change kind of his whole demeanor and -- and that
6 you were seeing a person who was different than maybe the old
7 Marty might have been?

8 A. I would say that he had already changed. He was a
9 very different person, he was very upbeat, very, um, funny.
10 Um, I don't know if carefree is the right word, but not an
11 authoritative-type person towards me and most of the people
12 who knew him then, I believe.

13 Q. Okay. But your impression from talking to Marty was
14 that that was something that Marty was working on in being the
15 kind of person that you were seeing Marty as then?

16 A. I thought that he was genuine. I don't know that he
17 was still working on it, I don't know.

18 MS. RING: So if I may approach.

19 Q. (By Ms. Ring) I'm going to approach with the
20 transcript of the interview that you did back in November 2nd
21 of 1994. Okay. And I'm on page 1545 of that transcript.
22 Beginning of that.

23 MS. RING: May I approach?

24 THE COURT: Yes.

25 Q. (By Ms. Ring) So what I'm showing you is -- that

1 says the date of the interview was November 2nd of 1994, and
2 it indicates that the interview involved you, being Barbara
3 Burger then, a Jojo Field and a Detective Greg Testa. Does
4 that --

5 A. Correct.

6 Q. Okay. And you're talking about Marty here, and they
7 are asking about radical changes in Marty and you answer, The
8 understanding that I had, Marty -- Marty's own words were
9 I've -- I used to be an asshole. I got the sense that he was
10 a very authoritative parent at some point?

11 A. Yes.

12 Q. Does --

13 A. That's correct.

14 Q. Okay. I'm sorry -- I'm jumping around a little bit.
15 I want to go back to when you got home and there was the
16 answer, the message from Kristen on the voice -- on the
17 machine, and Mr. Brackley asked you about the call coming in
18 at 4:00 in the afternoon. Right?

19 A. Yes. Okay.

20 Q. And I think that maybe Marty -- or somehow it kind
21 of had conversation like, Why would Kristen be calling home at
22 4:00 in the afternoon. Does that ring a bell?

23 A. Yes. Yes.

24 Q. Okay. You talked about going to Marty's work that
25 day and you taking him to the police department, right?

1 A. Yes.

2 Q. And then bringing him home?

3 A. Correct.

4 Q. Do you also recall that you were aware that Marty
5 had an appointment that day at 4:00 with a woman named Nina?

6 A. Yes.

7 Q. And it was a couple's type appointment of some kind?

8 A. Again, to me that appointment is very unclear.

9 Q. Okay.

10 A. Whether that person was a counselor or someone with
11 the city, I'm -- I don't know. I know that he had an
12 appointment, I heard the words -- something about work on my
13 mission or something like that. Again, whether it was
14 work-related, personal, health, mental health, I could not
15 say --

16 Q. Okay.

17 A. -- but he did have a meeting --

18 Q. Okay.

19 A. -- and that was at 4:00.

20 Q. Okay.

21 A. And that was at some place other than his work, it
22 was a different building.

23 Q. Right. So for what you know about Marty's day on
24 November 1st, 1994, at 4:00 he wouldn't have been in his
25 office?

1 A. Correct.

2 Q. He would have been at this appointment?

3 A. Yes.

4 MS. RING: If I could just have a minute?

5 THE COURT: Yes.

6 Q. (By Ms. Ring) I always hate to say this is the last
7 topic I want to ask you about, because sometimes I do that and
8 then your answers make me ask more questions, but I think that
9 this is the last brief topic.

10 I started out talking to you about your relationship
11 with Marty and how long you knew him?

12 A. Yes.

13 Q. Right. And we talked about that Marty left the
14 group as a facilitator in what would have been either the end
15 of September, early October of 1994?

16 A. Yes.

17 Q. And so that's when really you started to let your
18 relationship with Marty Grisham develop some?

19 A. Yes.

20 Q. And you know it was a new relationship, right?

21 A. Correct.

22 Q. So the first thing -- it wasn't the first thing that
23 you did was go tell everybody that Marty and I are now dating?

24 A. That's correct.

25 Q. And it was pretty close in time to November 1st,

1 1994. It was the end of October when you and Marty had
2 started sharing with other people in the group and friends
3 that you actually were dating?

4 A. Yes.

5 MS. RING: Nothing further. Thank you.

6 THE COURT: Mr. Brackley, redirect.

7 MR. BRACKLEY: Very briefly, Your Honor.

8 **REDIRECT EXAMINATION**

9 **BY MR. BRACKLEY:**

10 Q. Ms. Ring talked to you about a conversation -- well,
11 talked to you about Halloween that night before, which would
12 be October 31st of 1994, and that Marty Grisham had come over
13 to your place at some point that evening. Do you recall that?

14 And this -- well, let me ask you if you have a
15 memory, as you sit here today, what Marty was doing that
16 evening and why it was that you didn't come over earlier or
17 why you didn't have dinner together?

18 A. As I said, I was in school, but I believe that he
19 was helping some friend move some large piece of equipment,
20 some sort of tool or something. I'm not exactly certain what
21 it was. I was in school, he was doing that. And then I think
22 that he had a little time before he knew I was home from
23 school, so we stopped at his apartment and I think that he
24 wanted to write some checks, and that's when the -- he
25 discovered that he couldn't find this one checkbook.

1 Q. And do you remember the next day in that first phone
2 call in the afternoon Marty Grisham essentially saying things
3 started to click in my mind about that checkbook from the
4 night before?

5 A. Yes.

6 Q. And that's when he made the decision to go to the
7 police?

8 A. Yes.

9 Q. Ms. Ring asked you about the investigators from her
10 office who came over to talk to you. Did they meet with you
11 in person?

12 A. Yes.

13 Q. Okay. And it's fair to say that they treated you
14 with respect?

15 A. Yes.

16 Q. And they were professional?

17 A. Yes.

18 Q. And they talked to you for a couple of hours, right?

19 A. Yes, I was surprised that it was a Sunday afternoon
20 at my home. I had just come from the swimming pool, so I was
21 just, oh, caught off guard.

22 Q. In other words, there was no appointment?

23 A. No.

24 MS. RING: Judge, may we approach?

25 THE COURT: Yes.

1 (Whereupon, counsel for the parties and the reporter
2 approached the bench and the following proceedings were had
3 out of the hearing of the jury.)

4 MR. BRACKLEY: Ms. Ring asked a series of questions
5 about her ability to remember things prior to her or the
6 investigators were at her house. They talked to her. She
7 didn't remember a lot, but after she met with us she
8 remembered a lot. I just want to ask her whether they showed
9 her transcripts or gave her the opportunity to show her
10 transcripts, that's the basis of the question. It's in direct
11 redirect to an area Ms. Ring went into. It's relevant because
12 she questioned her about it.

13 THE COURT: There was a preface to her contact with
14 the defense investigators. It didn't go into this much
15 detail. Finish up this line of questioning. I mean it is
16 marginally relevant, at best.

17 MR. BRACKLEY: But the line of questioning was that
18 she couldn't remember things, so I can ask whether or not --
19 whether or not they showed her transcripts and gave her the
20 opportunity to review that. That's simply it.

21 MS. RING: I'm going to object to that question, if
22 that had been the first question.

23 THE COURT: You know, you can finish the line of
24 questioning.

25 (Whereupon, the following proceedings were had in

1 the presence and the hearing of the jury.)

2 Q. (By Mr. Brackley) And the investigators spoke to
3 you for a couple of hours at your place on that Sunday
4 afternoon?

5 A. I believe that's correct.

6 Q. And they asked you to recall and remember incidents
7 and events and conversations from your relationship with Marty
8 Grisham back in 1994?

9 A. Yes.

10 Q. Did they offer to show you a transcript of your
11 words from back in 1994?

12 A. No.

13 Q. Did they even tell you that they had one?

14 A. No.

15 Q. Ms. Ring had read a sentence of your statement back
16 on November 2nd of 1994, specifically page -- from what was
17 page 1545, and I just wanted to approach and ask you if -- if
18 we can read the entire sentence. It began with, I got the
19 sense that he was a very authoritative parent at some point,
20 um, I don't know... Extremely different than the person he
21 is -- was now... And that's the only person I knew... Was
22 this very upbeat -- some more dots -- very friendly, very
23 giving, caring, interested -- some more dots -- person,
24 wanting to do it all. It was as if he was getting in away --
25 in away a childhood now that he never had, and I know he spoke

1 about his parents and stuff.

2 And it continues on when he talks about his parents.

3 A. That's correct.

4 Q. All right. So when he was talking about being an
5 authoritative person, he was talking about at some point in
6 the past?

7 A. Very much so, yes.

8 Q. Do you remember that night talking -- Marty Grisham
9 talking to you about how excited he was about where Loren was
10 in his life --

11 A. Yes.

12 Q. -- in November of 1994?

13 A. Yes.

14 Q. What was he telling you about Loren?

15 A. He was very hopeful and excited because Loren was in
16 school and he was in, um, Glenwood Springs. And I don't know
17 if it was a phone call or if he actually saw Loren in person,
18 he said that -- no, I believe that it was a letter. Loren had
19 written him a letter saying that he had seen all these
20 beautiful colors in the trees changing, and Marty was very
21 excited about this, that Loren would even notice this. Um, I
22 know it was meaningful to Marty because Marty loved October.
23 He just -- he loved the colors, he loved the weather, and he
24 was happy that his son had noticed that the leaves were
25 changing.

1 Q. And it was shortly thereafter that Marty Grisham
2 died thinking that very son stole his checks?

3 A. It's possible.

4 MR. BRACKLEY: No further questions.

5 THE COURT: Okay. Any recross?

6 MS. RING: No, thank you.

7 THE COURT: All right. Ms. Swider, you may step
8 down.

9 THE WITNESS: Thank you.

10 THE COURT: May this witness be excused?

11 MR. BRACKLEY: She may, Your Honor.

12 THE COURT: All right. Thank you, Ms. Swider.

13 THE WITNESS: Thank you.

14 THE COURT: Would the prosecution call their next
15 witness.

16 MR. BRACKLEY: Judge, we would. And if we can
17 approach very, very briefly before I do that.

18 THE COURT: Yes.

19 (Whereupon, counsel for the parties and the reporter
20 approached the bench and the following proceedings were had
21 out of the hearing of the jury.)

22 MR. BRACKLEY: Judge, a couple of things. She has
23 been subpoenaed by the defense, I don't know if we want to
24 release the witnesses who have been subpoenaed by both parties
25 kind of contemporaneously with their first appearance. It's

1 just important to them. They want to know whether they need
2 to stay or not make plans, or anything.

3 THE COURT: I'm assuming that when I ask if the
4 witness can be excused, if the defense needs to have them
5 retained.

6 MS. RING: I would speak up.

7 MR. BRACKLEY: Okay. I think that excusing them
8 from my subpoena, but not hers. I just want to say because
9 it's very important to them. They asked us, Do I need to stay
10 for the whole week. And I say if you hear both parties say
11 this -- so I just -- it's important to them.

12 Second thing, Your Honor, is it's 4:00, we have
13 three more witnesses lined up for today -- four more
14 witnesses. I expect we will absolutely get through three of
15 them, the fourth is Dr. Meyer. I'm wondering if we can just
16 let him go at this point. I don't think that we are going to
17 finish before 5:00, but we may, but I don't want Dr. Meyer to
18 have to stand out there.

19 THE COURT: You are telling me three witnesses are
20 going take up the next 40 to 45 minutes?

21 MR. BRACKLEY: It's the -- basically the crime scene
22 officers, it's very possible.

23 THE COURT: How long is Dr. Meyer's testimony?

24 MR. BRACKLEY: Probably no more than 20 minutes.

25 THE COURT: Where are we in terms of your estimate

1 of progress of the case to this point?

2 MR. BRACKLEY: Dr. Meyer was on the schedule for
3 today.

4 THE COURT: So we would be one witness behind?

5 MR. BRACKLEY: We would be one witness -- well, two,
6 another guy is in Vegas. We would be two witnesses behind,
7 but we would not have done all of them today.

8 MS. RING: Frankly, our cross of Dr. Meyer is not
9 going to be very long, so in terms of what they were
10 anticipating.

11 THE COURT: Why don't you say he needs to stay until
12 5:00.

13 MR. BRACKLEY: And another issue -- and I apologize
14 to both the Court and Ms. Ring -- we've been trying to talk
15 about this, and if you notice when the jury came in, we were
16 still trying to followup. This is the CAD report, it's going
17 to come in through the next witness. There's a lot of
18 superfluous stuff in here that I think should be redacted, I
19 just haven't had the time to bang out what the redaction would
20 be.

21 I'm thinking of -- my idea would be to put it into
22 evidence now, but not publish anything to the jury, other than
23 the relevant questions which are, What time was the call made,
24 What time did the first responder get there, and, What time is
25 Mr. Grisham taken to the hospital.

1 THE COURT: Before that is published or made
2 available to the jury, it would be redacted?

3 MR. BRACKLEY: In all other respects that Ms. Ring
4 and I agree on, but I think that those are the only things
5 that are relevant. I mean we would negotiate relevance, of
6 course.

7 MS. RING: So my only concern is I can see us not
8 agreeing on what the redacted version would be and, therefore,
9 I would be arguing that the exhibit shouldn't go back to the
10 jury because we can't agree. And as long as everybody is okay
11 with that caveat, that it may be an exhibit that won't go back
12 if we can't agree to a redacted version.

13 THE COURT: It would be admitted with that
14 understanding.

15 MR. BRACKLEY: Right, but -- right. And I -- and I
16 would just expect that we -- in good faith believe in there
17 what's relevant and supported and substantiated.

18 THE COURT: Another way to handle it is I can make a
19 determination about what's relevant and admissible --

20 MR. BRACKLEY: Okay.

21 THE COURT: -- and, if necessary, what is not, and I
22 can determine that.

23 MR. BRACKLEY: Okay. I would leave it up to the
24 Court's good hands and good judgment, which --

25 THE COURT: Yeah.

1 MR. BRACKLEY: -- is marginal.

2 THE COURT: That's on the record, by the way.

3 MR. BRACKLEY: It is marginal at 4:00.

4 (Whereupon, the following proceedings were had in
5 the presence and the hearing of the jury.)

6 THE COURT: Would you call your next witness.

7 MR. BRACKLEY: The People are calling Theresa
8 Hilleary.

9 THE COURT: Okay. Would you step forward, please,
10 ma'am. Come all the way up here to the witness chair.

11 **THERESA HILLEARY,**
12 a witness herein, having been first duly sworn, was examined
13 and testified on her oath as follows:

14 THE COURT: Please have a seat. Go ahead,
15 Mr. Brackley.

16 **DIRECT EXAMINATION**

17 **BY MR. BRACKLEY:**

18 Q. Good afternoon, ma'am. Can you state your name and
19 spell your last name for the record.

20 A. My name is Theresa Hilleary, H-i-l-l-e-a-r-y.

21 Q. Are you currently employed?

22 A. Yes.

23 Q. With?

24 A. The Boulder Police Department.

25 Q. How long have you been with the Boulder Police

1 Department?

2 A. Since December of 1999.

3 Q. And what are you current duties and responsibilities
4 with the Boulder Police Department?

5 A. I am a supervisor in the communications section.

6 Q. And what is the communications section?

7 A. We're the 911 center for the city of Boulder. We
8 take all the incoming emergency and non-emergency calls from
9 the public.

10 Q. And as the supervisor for that group, what do you
11 do? What are your current --

12 A. I receive daily operations, make sure we are
13 following protocols and procedures, make sure staffing is
14 adequate to handle call volume, write employee evaluations,
15 that sort of thing.

16 Q. How long has the Boulder Police Department had a
17 communications division of its own?

18 A. It was established in 2000.

19 Q. What did the Boulder Police Department do for radio
20 communications prior to 2000?

21 A. Prior to that they utilized the Boulder Regional
22 Communications Center, which was a joint center for the
23 Boulder Sheriff's Department, Boulder police, Louisville,
24 Lafayette, it was a regional 911 center.

25 Q. And prior to working -- and is that known as the

1 BRCC?

2 A. Yes.

3 Q. Prior to working with the Boulder Police Department,
4 were you with the BRCC?

5 A. Yes.

6 Q. Okay. How long did you work the BRCC for?

7 A. Just over six years, I started in June of '93.

8 Q. Okay. So you were with the BRCC back in November of
9 1994?

10 A. Yes.

11 Q. And what did you do with the BRCC?

12 A. When I worked for them, I was a dispatcher.

13 Q. Okay. And that's a person who picks up the phone
14 when someone calls 911?

15 A. Yes. We would take the incoming 911 calls, the
16 non-emergency calls and communicate with police, fire and EMS
17 services over the radio.

18 Q. Are 911 calls recorded?

19 A. Yes, all the incoming phone lines.

20 Q. Do -- does data from 911 calls get entered into a
21 computer?

22 A. Yes.

23 Q. And what is the -- that program called or that
24 process?

25 A. It's called Computer Aided Dispatch and we refer to

1 it as CAD. So when a call comes in, as we're talking to the
2 person on the phone and I am taking the information, we enter
3 it into that system so that it's available to all the
4 dispatchers in the room.

5 Q. Okay. So when you hear a 911 call in progress and
6 you hear keyboard clicking, that's the dispatcher entering
7 things into the CAD --

8 A. Yes.

9 Q. -- computer? Okay. Are -- do the CAD reports or
10 does the CAD report -- does the CAD computer timestamp calls
11 that are made to 911?

12 A. Yes.

13 Q. Can the system in place -- well, does the system
14 record or identify where a particular call is coming from?

15 A. Yes. When you call 911 you're location and phone
16 number on a hardline phone is transmitted from the phone
17 company and populates into the CAD system where it's recorded.

18 Q. Let me show you what's marked, oddly enough at this
19 point, People's 50 for identification.

20 MR. BRACKLEY: And I have previously showed a copy
21 of this to Ms. Ring, and I have approached the witness and I
22 have handed her what's marked as People's 50.

23 Q. (By Mr. Brackley) Prior to coming into court today
24 did you review that, People's 50, in its entirety?

25 A. Yes.

1 Q. And what is that?

2 A. It's a CAD report from an incident November 1st,
3 1994.

4 Q. Okay. And is there a particular -- without telling
5 us what it is -- is there a particular address or caller or
6 name of a person who lived at that address associated with
7 that particular call?

8 A. Yes.

9 Q. Okay. And is that a CAD report?

10 A. Yes.

11 Q. And is that CAD report -- was that CAD report back
12 prior to 2000 a record that was generated by a 911 dispatcher?

13 A. Yes.

14 Q. And would that record have been generated
15 contemporaneously with a 911 dispatcher being on the phone
16 with someone?

17 A. Yes.

18 Q. And would that report have been generated along with
19 times that calls were made?

20 A. I'm sorry, can you repeat that?

21 Q. Would it have been generated along -- would it
22 include times that particular calls were made?

23 A. Yes.

24 Q. And would it include times that dispatchers, um,
25 dispatched police units or ambulances?

1 A. Yes.

2 Q. And does it include times that responding units
3 would call in or identify themselves?

4 A. Yes.

5 Q. And would all of that be recorded in that CAD report
6 at or about the time that those things were happening?

7 A. Yes.

8 Q. So when you hear that click, click, click of the
9 keyboard, that's going right into that document in front of
10 you?

11 A. Yes.

12 Q. Is that a document that was kept in the ordinary
13 course of business by the BRCC back in 1994?

14 A. Yes.

15 Q. Does the Boulder Police Department still have a CAD
16 report?

17 A. Yes.

18 Q. And they are still kept in the ordinary course of
19 business?

20 A. Yes.

21 Q. And is it the ordinary business of 911 dispatchers
22 to make those entries into that CAD report?

23 A. Yes.

24 Q. And is that such a report that you have in front of
25 you, People's 50, for identification?

1 A. Yes.

2 MR. BRACKLEY: Your Honor, I would move to admit
3 People's 50 as evidence.

4 THE COURT: Objection or voir dire?

5 MS. RING: No, Judge.

6 THE COURT: 50 will be admitted, subject to the
7 prior discussion.

8 (People's Exhibit 50 was admitted into evidence by
9 agreement of the parties.)

10 Q. (By Mr. Brackley) Let me ask you, um, three or four
11 questions. What time was the first call into 911 from 5640,
12 apartment 13, on November 1st of 1994?

13 A. The call started at 9:34 p.m.

14 MS. RING: Judge, I'm going to ask that the record
15 reflect the witness was actually reading from the reports,
16 so -- if that's where the information is coming so the record
17 is accurate.

18 THE COURT: Okay. The record will so reflect.

19 Q. (By Mr. Brackley) And you weren't the dispatcher
20 back in 1994, on November 1st, 1994?

21 A. No.

22 Q. And anything that you can tell us is from your
23 review of that CAD report --

24 A. Yes.

25 Q. -- from that particular night?

1 Do you know from reviewing that report in front of
2 you what time units were dispatched out to this location,
3 5640 Arapahoe Avenue, apartment 14?

4 A. It indicates the first units were sent at 9:36 p.m.

5 Q. Okay. And were there more than one unit?

6 A. Yes, it looks like four units initially responded.

7 Q. Okay. And there are -- where it says unit
8 recommendation, are those the responding units?

9 A. No. Where it says "unit recommendation" is where
10 the dispatcher initially looks at the call and is trying to
11 find officers to respond, but they all have a "B" in front of
12 their unit number, which indicates those particular units were
13 busy.

14 Q. So then there's a list of one in route and then four
15 in route, so those are the units that would have been
16 identified as available to go?

17 A. Yes.

18 Q. Does it say what time the first unit would have
19 arrived at apartment 13 (sic), specifically, as opposed to the
20 area?

21 A. At -- sorry, just a moment. The first unit that I
22 see, arrival is at 9:51 p.m.

23 Q. Okay. And prior to 9:51 p.m., do other units arrive
24 in the area of 5640 Arapahoe Avenue?

25 A. Yes, several.

1 Q. Okay. At about what -- starting at what time?

2 A. The first unit in the area looks like at 21:38
3 there's a unit arriving at the Boulder Dinner Theatre.

4 Q. Okay.

5 A. And then at 9:39 is the first unit in the area of
6 the Arapahoe address.

7 Q. Okay. At 9:39?

8 A. Mm-hmm.

9 Q. Okay. And is there a notation -- and I'll direct
10 your attention, so you don't have to look through line-by-line
11 of the second page there, as to when the run or a trip to the
12 hospital was made?

13 A. Yes, at 9:47 p.m. there was a unit at the hospital.

14 Q. And one final question. If there are multiple calls
15 from different phones at a particular address, would that
16 report reflect, say, if one person calls and gets hung up and
17 then another person in the same apartment building makes a
18 call, would it reflect the fact that different calls are being
19 made from different numbers, or is it just the fluid
20 information that's received from those callers?

21 A. Generally it's just the fluid information.
22 Sometimes a dispatcher might make a notation that a party in
23 apartment "X," "Y," "Z," called, generally, though, it's just
24 the descriptive information that they are giving.

25 Q. And that would be something that the person who's

1 tapping away while on the phone would put in if -- or not put
2 in?

3 A. Yes.

4 MR. BRACKLEY: Thank you, ma'am. One moment.

5 THE WITNESS: Mm-hmm.

6 MR. BRACKLEY: Thank you, ma'am.

7 THE COURT: Cross-examination, Ms. Ring?

8 MS. RING: Thank you.

9 **CROSS-EXAMINATION**

10 **BY MS. RING:**

11 Q. Is it fair that Mr. Brackley showed you this CAD
12 report prior to you testifying today?

13 A. Yes.

14 Q. So that's not the first time you have seen it?

15 A. Right.

16 Q. Okay. And, again, I think that you already told us
17 when you were answering Mr. Brackley's questions that you
18 didn't take this dispatch call?

19 A. No.

20 Q. So the information that you are giving us is only
21 what's from this report?

22 A. Yes.

23 Q. Okay. But you were employed as -- with dispatch in
24 November of 1994?

25 A. Yes.

1 Q. Okay. So since you had the ability to look at this
2 report prior to testifying today, you would agree with me that
3 there's nothing in the report that talks about a call being
4 dropped or being disconnected?

5 A. Not that I can see.

6 Q. And there's nothing in that report that notes a call
7 coming in related to this incident from a different phone
8 number?

9 A. Not that I have seen that specifically indicates a
10 different phone number.

11 Q. Right. So the only phone number relayed in this
12 report as a phone call coming in from -- is that number at the
13 very top under the address for 5640 Arapahoe Road on the first
14 page, correct?

15 A. Let me just scan it real quick.

16 Q. Okay. Sure.

17 A. Okay. Based on this, I would say that's correct.

18 Q. That there's no notation that another call came in
19 related to this incident from a different phone number?

20 A. Correct.

21 Q. And nothing -- when you reviewed it again for me
22 just now, nothing to indicate that there was a 911 call that
23 was dropped at any point during --

24 A. Not that I see.

25 MS. RING: Okay. Nothing further. Thank you.

1 THE COURT: All right. Any redirect?

2 MR. BRACKLEY: Yes, just to clarify.

3 **REDIRECT EXAMINATION**

4 **BY MR. BRACKLEY:**

5 Q. So up at the top Ms. Ring was directing your
6 attention to the -- there's a space for an address location,
7 correct?

8 A. Correct.

9 Q. And it's more than just 5640 Arapahoe Avenue. It's
10 actually apartment 413?

11 A. Correct.

12 Q. And it's also caller's name, address, caller's
13 phone, and it states Grisham, Marty J.?

14 A. Correct.

15 MR. BRACKLEY: Thank you.

16 THE COURT: Any recross?

17 MS. RING: No, thank you.

18 THE COURT: All right. Ma'am, you can step down.

19 Can this witness be excused?

20 MR. BRACKLEY: She may, Your Honor.

21 MS. RING: Yes.

22 THE COURT: All right. You are excused, thank you.

23 Would the People call their next witness.

24 MR. KELLNER: Your Honor, the People call Detective
25 Sergeant Tom Trujillo.

1 MS. RING: Judge, can we approach briefly?

2 THE COURT: Yes. Detective, would you step forward,
3 please.

4 **THOMAS TRUJILLO,**
5 a witness herein, having been first duly sworn, was examined
6 and testified on his oath as follows:

7 THE COURT: Please have a seat.

8 Go ahead, Mr. Kellner.

9 MR. KELLNER: Thank you, Judge.

10 **DIRECT EXAMINATION**

11 **BY MR. KELLNER:**

12 Q. Good afternoon, Detective. Please state your name
13 and spell your last name for us.

14 A. It's Thomas Edward Trujillo, T-r-u-j-i-l-l-o.

15 Q. How are you employed, sir?

16 A. I'm a detective sergeant with the Boulder Police
17 Department.

18 Q. And how long have you been with the Boulder Police
19 Department?

20 A. Almost 27 years now.

21 Q. So can you give the jury just a brief sort of
22 thumbnail sketch of your career over your 27 years at the
23 Boulder Police Department?

24 A. Sure. Start out, did seven years in patrol as a
25 patrol officer, during that time I became a CSI collateral

1 duty crime scene investigator. I went then to the bureau of
2 detectives. I did 9 years as a detective and then from there
3 I got promoted 2 years as patrol sergeant, and then came back
4 and I spent the rest of my time as a detective sergeant.

5 Q. So your current rank is detective sergeant?

6 A. Yes, sir.

7 Q. And what is your actual assignment or your billet
8 within the Boulder Police Department?

9 A. I'm actually a detective sergeant in charge of the
10 major crimes unit.

11 Q. How long have you been in that role?

12 A. For four years now.

13 Q. What is the major crimes unit?

14 A. Our major crimes unit, the eight detectives, two of
15 them are responsible for robberies and assaults, six of them
16 are responsible for investigating sex assaults, death
17 investigations, major cases and homicides.

18 Q. I want to turn your attention to November of 1994.
19 What was your assignment at that time?

20 A. I was actually a detective in charge of
21 investigating crimes against person cases.

22 Q. Did you do any other sort of detective work at the
23 time or was it just crimes against persons?

24 A. Pretty much just crimes against persons.

25 Q. And in November of 1994, about how long have you

1 been a detective at this point?

2 A. Almost two years.

3 Q. What, um -- what are your general responsibilities
4 as a detective in, um, the capacity of investigating crimes
5 against persons?

6 A. Basically I'm assigned a case, so I review a case.
7 The -- assigned a case, I go through the case, read the entire
8 case, go out and complete interviews with people, complete
9 interviews with witnesses, victims and suspects, and then go
10 ahead and hopefully charge the case.

11 Q. I'm going to direct your attention to November 1st
12 of 1994. Did you receive a call that night to respond to a
13 crime scene for a homicide investigation?

14 A. I did.

15 Q. All right. And who called you?

16 A. Commander -- then Commander Joe Pelle. He is now
17 the Sheriff of Boulder County, but he was the commander in
18 charge of the death section at this time.

19 Q. And approximately what time did you respond to this?

20 A. I received a call phone about 10:15 that evening,
21 and I responded right after I got the call.

22 Q. Do you recall the location of the crime scene?

23 A. I do. The location is -- actually, it's an
24 apartment complex at 55th and Arapahoe, the exact address is
25 5640 Arapahoe. Marty Grisham's apartment is actually number

1 413.

2 Q. So when you responded to Marty Grisham's apartment,
3 number 413, who else was already there?

4 A. When I arrived Commander Pelle was already there and
5 there were several patrol officers. Commander Pelle was the
6 first person I actually contacted.

7 Q. When you contacted Commander Pelle, did he give you
8 any particular assignment that night?

9 A. He did, he basically put me in charge of the case
10 investigation as a lead investigator.

11 Q. All right. So as the lead investigator on
12 November 1st, 1994, did you actually walk through the crime
13 scene, Marty Grisham's apartment?

14 A. I did.

15 Q. What are you looking for when you walk through a
16 crime scene for the first time?

17 A. Generally I want to get a layout of what the scene
18 is about, how big the scene is, um, what evidence that you
19 might see and just a gross examination. It's not a real
20 finite look at everything in detail. I wanted to give a
21 general overview what that scene actually looks like.

22 MR. KELLNER: Your Honor, may I approach the witness
23 with what I have marked as People's Exhibits 12 through 19. I
24 had previously shown a copy to defense counsel.

25 THE COURT: Yes.

1 Q. (By Mr. Kellner) Detective Sergeant, will you
2 please take a look at 12 through 19. Those are photographs.
3 And then we'll walk through them one-by-one.

4 A. Okay.

5 MR. KELLNER: Actually, can I approach again. I
6 need to grab that pointer.

7 THE COURT: Yeah.

8 MR. KELLNER: Thanks.

9 Q. (By Mr. Kellner) All right. Let's talk about
10 People's Exhibit 12. Do you recognize that picture?

11 A. I do.

12 Q. How do you recognize it?

13 A. That's the apartment complex, 5640 Arapahoe. It's,
14 actually, you can see where Marty's apartment would be and the
15 apartment right next door.

16 Q. What else do you see in that picture that you
17 recognize from the November 1st?

18 A. Couple of things are the, um -- there's placards
19 that you can just barely see in the photo to the right side of
20 the staircase. You can see the staircase going up above and
21 the -- call it a deck area above his front door.

22 Q. And is People's Exhibit 12 a fair and accurate
23 depiction of what the exterior of Marty Grisham's apartment
24 looked like on November 1st, 1994, in the evening?

25 A. Of the building, yes.

1 MR. KELLNER: Judge, I would ask to admit People's
2 Exhibit 12.

3 THE COURT: Any objection or voir dire?

4 MS. MILFELD: No objection, no voir dire. Thank
5 you.

6 THE COURT: 12 will be admitted.

7 (People's Exhibit 12 was admitted into evidence by
8 agreement of the parties.)

9 MR. KELLNER: May I publish it to the jury?

10 THE COURT: Permission granted.

11 MR. KELLNER: Thank you, sir.

12 Q. (By Mr. Kellner) All right. Detective Sergeant,
13 you indicated that there was some placards visible. What
14 specifically are you referring to?

15 A. You can see on the right side of the photograph that
16 looks like little yellow -- they are actually tents that are
17 plastic placards. The very one on the far side has 3 on it,
18 the second one from right to left has the number 4 on it.
19 There's actually two more you can just barely see, um,
20 underneath the staircase to the left side of the picture
21 there.

22 THE COURT: Detective, let me give you a laser
23 pointer, that might make it easier for you.

24 A. Sorry, I forgot mine.

25 So, again, we're talking these little placards here

1 3, 4 and then two right here. There's another one here that
2 you can't see, but there's these four.

3 (The witness indicated.)

4 Q. (By Mr. Kellner) Um, I'm going to turn your
5 attention now to People's Exhibit 13. Do you recognize that
6 picture?

7 A. I do.

8 Q. How do you recognize that?

9 A. Again, that's a little bit closer picture than the
10 one that's up on the screen. It shows Mr. Grisham's front
11 door that's open. It shows the 413, his apartment number. It
12 also shows the other apartment number and shows the -- all
13 five of the placards that you can't quite see in the picture
14 here.

15 Q. And do you recognize that picture as a fair and
16 accurate depiction of what you saw that night?

17 A. Yes.

18 MR. KELLNER: Judge, I would ask to admit 3.

19 MS. MILFELD: No objection, no voir dire.

20 THE COURT: 13 will be admitted.

21 (People's Exhibit 13 was admitted into evidence by
22 agreement of the parties.)

23 MR. KELLNER: And publish to the jury.

24 THE COURT: Granted.

25 MR. KELLNER: Thank you, Judge.

1 Q. (By Mr. Kellner) Detective Sergeant Trujillo,
2 there's a number of placards depicted in this picture. Do you
3 recall what those placards actually indicate?

4 A. Yes.

5 Q. Okay. And can you tell the jury what they are for?

6 A. These are actually evidence placards, we use them to
7 mark individual pieces of evidence on a scene. And in this
8 case, these -- that's what they are, they are marking five
9 different pieces of evidence.

10 Q. Now as the lead investigator, at this point your job
11 isn't actually to collect that evidence on the scene, is it?

12 A. No.

13 Q. Were there CSIs, other -- other people present
14 processing the scene?

15 A. Yes, there were. And they would actually be
16 responsible for placing these placards out, photographing,
17 diagraming it and collecting the evidence.

18 Q. Was Officer Ralph Smith one of the crime scene
19 investigators on the scene that night?

20 A. He was.

21 Q. Let's go ahead and take a look at People's
22 Exhibit 14. Do you recognize that picture?

23 A. I do.

24 Q. How do you recognize it?

25 A. That's actually looking into the front of

1 apartment 413, Mr. Grisham's apartment.

2 Q. Is it a fair and accurate depiction of the entryway
3 of Mr. Grisham's apartment?

4 A. It is.

5 MR. KELLNER: Judge, I would ask to admit People's
6 Exhibit 14.

7 MS. MILFELD: No objection, no voir dire.

8 THE COURT: 14 will be admitted.

9 (People's Exhibit 14 was admitted into evidence by
10 agreement of the parties.)

11 MR. KELLNER: Publish, please.

12 THE COURT: Granted.

13 Q. (By Mr. Kellner) Please walk the jury through what
14 you can see in this picture related to the crime scene
15 investigation.

16 A. Okay. As you can see this lot -- this wall right
17 here is the outside wall of the apartment building itself, the
18 apartment itself. This right here is the front door of -- the
19 red front door. As you are looking straight in, this is
20 actually a piece of, um, tape that the crime scene folks --
21 the criminalists -- excuse me -- the CSIs have actually put
22 down to mark what I would call a defect right here in the
23 wall. That's about it. There's some other stuff right here
24 on the carpet that you can see it better on another picture.

25 (The witness indicated.)

1 Q. We'll see it better on some following pictures.

2 Detective Sergeant Trujillo, do you see what appears
3 to be a peephole in that door?

4 A. Yes, right up here.

5 (The witness indicated.)

6 Q. Now you mentioned that crime scene tape on the wall
7 and showing what's a defect --

8 A. Yes.

9 Q. -- what you call a defect. Can you take a look at
10 People's Exhibit 15. Do you recognize that picture?

11 A. I do.

12 Q. And what's it depict?

13 A. It's actually a little bit closer. When we are
14 doing crime scene photographs, we start on the outside and
15 kind of work our way in towards the specific piece of
16 evidence. In this case, this is an overview picture, number
17 15 is just a little bit closer. It shows the tape and it
18 shows what I would call the defect.

19 (The witness indicated.)

20 Q. And is it a fair and accurate depiction of what you
21 saw on that wall in Marty Grisham's apartment on the night of
22 the murder?

23 A. It is.

24 MR. KELLNER: Your Honor, I would ask to admit
25 People's Exhibit 15.

1 MS. MILFELD: No objection, no voir dire.

2 THE COURT: 15 will be admitted.

3 (People's Exhibit 15 was admitted into evidence by
4 agreement of the parties.)

5 MR. KELLNER: Publish, please.

6 THE COURT: Granted.

7 Q. (By Mr. Kellner) All right. Detective
8 Sergeant Trujillo, what you call a "defect" in the wall,
9 what's that actually appear to be?

10 A. I call it a defect, but I also know what's on the
11 other side of the wall, and based on what's on the other side
12 of the wall, it's a bullet hole.

13 Q. Can you tell the jury what's on the other side of
14 the wall?

15 A. Basically on the other side of the wall is a closet.
16 It's a one-bedroom apartment, it's a fairly small apartment.
17 You walk into the main living area, you turn to the right,
18 there's a dining room and kitchen area. As you move back
19 around and just opposite this wall is a closet off of a
20 bedroom. On the other side of the wall, um, there's basically
21 a -- another corresponding hole in the wall. And we also
22 located a bullet sitting on the -- on a box in there.

23 (The witness indicated.)

24 Q. Okay. Take a look at People's Exhibits 16 and 17,
25 please. Do you recognize those pictures?

1 A. Yes.

2 Q. And how do you recognize them?

3 A. This is the living room area of Mr. Grisham's
4 apartment.

5 Q. And People's Exhibit 17?

6 A. Basically the same thing, a little bit closer. It's
7 now got the scales in there.

8 Q. Are they fair and accurate depictions of what you
9 saw the night during your walk through?

10 A. They are.

11 MR. KELLNER: Your Honor, I would ask to admit
12 People's Exhibit 16 and 17.

13 MS. MILFELD: No objection, no voir dire to either
14 exhibit.

15 THE COURT: 16 and 17 will be admitted.

16 (People's Exhibit 16 and 17 were admitted into
17 evidence by agreement of the parties.)

18 MR. KELLNER: May I publish.

19 THE COURT: Yes.

20 Q. (By Mr. Kelner) Detective Sergeant Trujillo, safe
21 to say this is a picture of what you saw if you walked in the
22 door and turned to the left?

23 A. It is. Again, this is the front door, you can see
24 that it's red, um, hallway would be directly to your left
25 here. If you walk straight across that, the -- the chair that

1 you were able to see in some of the previous pictures sitting
2 there with the TV stand behind it, foil on the TV antenna and
3 the eagle are to the right of the chair, and that chair is
4 visible in the evidence.

5 Q. And when you first arrived at Marty Grisham's
6 apartment that night, was he still there?

7 A. He was not, he had been transported to Boulder
8 Community Hospital.

9 Q. Do you know what that is, um, on the ground there by
10 the door?

11 A. Talking this red stuff?
12 (The witness indicated.)

13 Q. Yes, I am.

14 A. That's all blood.

15 Q. And People's Exhibit 17.

16 A. Yes.

17 Q. This is a close-up of what you saw in People's
18 Exhibit 16.

19 A. It is, difference being we have now got the scales
20 in place, and they are put in place by the crime scene
21 processors.

22 Q. And that's the little cat carrier to the right?

23 A. This would be the cat carrier to the right. These
24 are the drapes that were covering the sliding glass door.
25 That's actually the cat door that you can see visible there.

1 (The witness indicated.)

2 Q. And does that door by the cat door, does it lead out
3 to a patio?

4 A. It does.

5 Q. So will you please take a look at People's 18 and
6 19. Do you recognize those pictures?

7 A. I do.

8 Q. And how do you recognize those?

9 A. This is a closet area that I eluded to earlier that
10 was on the backside of that wall with the bullet hole in it.

11 Q. And are they fair and accurate depictions of the
12 closet area with the bullet hole you saw that night?

13 A. Yes, they are.

14 MR. KELLNER: Your Honor, I would ask to admit
15 People's 18 and 19.

16 MS. MILFELD: No objection, no voir dire to either
17 exhibit.

18 THE COURT: 18 and 19 will be admitted.

19 (People's Exhibit 18 and 19 were admitted into
20 evidence by agreement of the parties.)

21 MR. KELLNER: May I publish them?

22 THE COURT: Yes, sir.

23 Q. (By Mr. Kellner) All right. Detective
24 Sergeant Trujillo, I know pretty much you already talked to us
25 about what we are looking at here, but just a brief recap.

1 Can you point out with the laser pointer where the bullet was
2 found?

3 A. Okay. This is a -- picture 18, um, again, with the
4 scale in it; depicted in the wall, then, is a bullet hole
5 because of -- on top of this box right here, on top of this
6 plastic box this is a close-up picture. Number 19, this metal
7 box here is actually this box here, the difference being is
8 the two drill motors have been removed, they have been taken
9 out of the picture so you can clearly see that item right
10 there, which is a 9mm bullet.

11 Q. Now, Detective Sergeant Trujillo, after you did your
12 walk through on November 1st, took a look at the crime scene,
13 did you attempt to locate any possible suspects that night?

14 A. I did.

15 Q. Okay. Who did you try to locate?

16 A. As an agency we tried to locate two key people, and
17 then a third person's name came up during the two initial
18 names that came up.

19 Q. Now the two people you are talking about, who are
20 they?

21 A. The daughter and the son of the victim, Kristen
22 Grisham and Loren Grisham.

23 Q. And the third name, who was that?

24 A. Michael Clark.

25 Q. And how did the third name come up?

1 A. Michael Clark came up as an associate of Kristen
2 Grisham.

3 Q. Now did you try to locate Michael Clark on
4 November 1st?

5 A. I did.

6 Q. And where did you go to try to locate him?

7 A. By actually using the law enforcement resources, our
8 computer resources, I located an address that I thought would
9 be good for him. I responded out to that address.

10 Q. All right. And did you find him at this address?

11 A. He was not there, no.

12 Q. Okay. Who was there?

13 A. His father.

14 Q. So it was his parents home?

15 A. Yes.

16 Q. Did he know where Michael Clark was?

17 A. He did not know.

18 Q. Did you followup with any other investigative leads
19 that night?

20 A. I did not.

21 Q. Okay. What about the next day, did you actually
22 attend the autopsy of Marty Grisham?

23 A. I did.

24 Q. All right. And that's November 2nd, 1994?

25 A. Yes.

1 Q. Where was the autopsy?

2 A. That autopsy was performed at Boulder Community
3 Hospital in the basement of the morgue.

4 Q. And do you recall who the forensic pathologist was?

5 A. It was -- it was actually the coroner, John Meyer.

6 Q. Now do you always go to the autopsies when you are
7 assigned as the lead investigator?

8 A. I try to, yes.

9 Q. What's the purpose of a law enforcement officer
10 going to the autopsy as well?

11 A. Again, we're gaining information on the
12 investigation itself. We're finding out, um, from that --
13 from the coroner, the pathologist actually doing the autopsy
14 cause and manner of death, which they are going to provide to
15 us, but we're also going to see what injuries occurred, how
16 that occurred, what other defects, um, that may have been
17 found in clothing, that sort of stuff.

18 Q. When you -- well, did you bring any evidence -- any
19 clothing belonging to Marty Grisham from the police department
20 to the autopsy?

21 A. I did.

22 Q. What did you bring with you?

23 A. A red Polo shirt. Again, when somebody's
24 transported to the hospital in a trauma situation like
25 Mr. Grisham was, um, the paramedics cut their clothes off to

1 expose the body so the doctors can work on the patient. In
2 this case his clothing was all cut off, because of what we
3 believe -- what we have seen the previous evening at the ER,
4 the emergency room, the pathologist asked to see his red shirt
5 that he was wearing.

6 Q. And you actually brought that red polo shirt with
7 you?

8 A. I did.

9 Q. Can you pull that up?

10 MR. KELLNER: Your Honor, may I approach the witness
11 and move the easel?

12 THE COURT: Yes.

13 MR. KELLNER: Can I put it here?

14 THE COURT: Sure.

15 MR. KELLNER: Thank you.

16 Q. (By Mr. Kellner) All right. Detective
17 Sergeant Trujillo, you mentioned that you brought a red polo
18 shirt with you to the autopsy. Do you recognize that polo
19 shirt?

20 A. Yes.

21 Q. Do you recognize it as the polo shirt that you
22 brought to the autopsy belonging to Marty Grisham?

23 A. I do.

24 MR. KELLNER: Your Honor, I would like to mark that
25 as People's Exhibit 49 and ask that it be admitted.

1 THE COURT: Any objection or voir dire to 49?

2 MS. MILFELD: No objection, no voir dire.

3 THE COURT: 49 will be admitted.

4 (People's Exhibit 49 was admitted into evidence by
5 agreement of the parties.)

6 Q. (By Mr. Kellner) All right. Detective
7 Sergeant Trujillo, when you were at the autopsy did you
8 observe the body of Marty Grisham?

9 A. I did.

10 Q. And did you see what appeared to be gunshot wounds
11 on Marty Grisham?

12 A. I did.

13 Q. And where were they located?

14 A. He had two to his chest and two to his head.

15 Q. What did you do with that red polo shirt in relation
16 to the wounds that you saw on him?

17 A. Actually, in conjunction with Dr. Meyer, um --
18 Dr. Meyer was specifically looking for the defects in the
19 shirt to match up with the bullet holes in the body.

20 Q. Why? Why do you do that?

21 A. Basically to show that he was wearing this shirt at
22 the time that he was shot.

23 Q. Did you see any defects on that shirt?

24 A. I did.

25 Q. All right. And can you --

1 MR. KELLNER: Judge, may the witness step out of the
2 box?

3 THE COURT: Yes.

4 Q. (By Mr. Kellner) You know, I noticed that there was
5 a glare on here, so I'm going to try to locate this a little
6 bit for the jury.

7 THE COURT: Maybe can you slide it back a little
8 bit, too.

9 MR. KELLNER: I'll try.

10 Q. (By Mr. Kellner) Okay. Detective
11 Sergeant Trujillo, can you show us what defects you noticed on
12 the front of the shirt?

13 A. Okay. First of all, can I explain, this shirt looks
14 really bad. The shirt is all cut up. You can see the cut
15 marks, these cut marks, and these cut marks, that was a
16 medical thing. They cut the shirt off the victim to expose
17 his body at the hospital to do some medical intervention.

18 And one of the things we noted is this defect right
19 here. It's this one right here, um, just above this, um -- or
20 what I would call a blood stain. And then the second one is
21 this defect right here, right through the blood stain here.
22 Again, there was also some other stuff around his left collar,
23 along the left collar areas. The collars -- it's a little
24 hard to see because the collar is pulled up. If you fold the
25 collar down like a regular shirt fold across, you can see the

1 defects there.

2 (The witness indicated.)

3 Q. Okay. Now you mentioned the defects on the collar.
4 Did you see any sort of corresponding wounds to that area of
5 Marty Grisham's body?

6 A. He did, he had a wound to the left side of his face.

7 Q. And did those two defects, those bullet holes, match
8 up with the gunshot wounds on Marty Grisham --

9 A. He did.

10 Q. -- on his body?

11 A. Two gunshot wounds basically right here and here on
12 his body and, you know, in the pictures and stuff, but that's
13 the general areas. The right side of the chest below the
14 right nipple.

15 (The witness indicated.)

16 Q. And we'll hear from Dr. Meyer later, but I would
17 like to turn that exhibit around and show the backside now.

18 A. Okay.

19 Q. Detective Trujillo, when you were at the autopsy and
20 looking at the shirt, did you see any corresponding exit
21 wounds or holes, rather, in the shirt from the bullets?

22 A. I did, it's this one right up here on the left
23 shoulder. It's this area right here that you can barely see.

24 (The witness indicated.)

25 Q. Now you can take a seat, sir, thank you.

1 Is there a corresponding exit hole for the wounds to
2 the chest?

3 A. He did. On his left shoulder just below the
4 shoulder blade there's an exit wound.

5 Q. Now there was two holes, two gunshot wounds, in the
6 front. Were there two exit holes on the shirt in the back?

7 A. No.

8 Q. Why is that?

9 A. Again, what I can tell you is a bullet hole
10 is because during the autopsy Dr. Meyer found underneath the
11 skin on the back a -- a bullet.

12 MR. KELLNER: Your Honor, may I approach with what's
13 been marked as People's Exhibit 20 and 21.

14 THE COURT: Yes.

15 Q. (By Mr. Kellner) Detective Sergeant Trujillo, can
16 you recognize People's Exhibit 20 and 21?

17 A. Yes.

18 Q. How do you recognize People's Exhibit 20?

19 A. 20 is a photograph that was taken at the autopsy of
20 the bullet that was removed from the back of Marty Grisham.

21 Q. And what is People's 21?

22 A. 21 is a packaging -- first of all, this is the
23 packaging part, it has my initials on it. It was collected at
24 the autopsy. And in the second bag is the bullet depicted in
25 that picture and I...

1 Q. Once you collected that bullet that was found in
2 Marty Grisham's back, you know, we see a manila envelope.
3 What do you do with the bullet?

4 A. It was basically photographed, took the bullet and
5 placed it into a container, a hard container with cotton
6 around it so that it doesn't bounce around, put that into
7 the -- sealed into the envelope and then sealed it with
8 evidence tape with my initials on it.

9 MR. KELLNER: Detective Sergeant, I don't have any
10 further questions at this time, but you will be subject to
11 recall recognizing that you have more roles down the line in
12 this case.

13 THE WITNESS: Okay.

14 THE COURT: Cross-examination, Ms. Milfeld.

15 MS. MILFELD: Thank you.

16 MR. KELLNER: Judge, may I approach to remove the
17 exhibit?

18 THE COURT: Yes. Go ahead, Ms. Milfeld.

19 **CROSS-EXAMINATION**

20 **BY MS. MILFELD:**

21 Q. Sergeant Trujillo, when you got to the apartment,
22 you immediately met with Sergeant Pelle?

23 A. Commander Pelle, yes.

24 Q. When you met with Commander Pelle, he was the one
25 that showed you the crime scene?

1 A. Yes, we walked in together.

2 Q. He was the one that pointed out to you where things
3 were in Mr. Grisham's apartment?

4 A. I believe so, yes.

5 Q. You had just testified about the different
6 observations, Mr. Kellner had showed you pictures about that.
7 Sergeant Pelle was the one who pointed out to you that on the
8 wall on the east side of the living room that there appeared
9 to be a bullet hole?

10 A. Commander Pelle, but, yes.

11 Q. I'm just so used to saying sergeant.

12 A. I understand.

13 Q. Commander Pelle was the one that pointed out to you
14 that there also appeared a bullet hole in a closet in the
15 bedroom?

16 A. Yes.

17 Q. So when you were talking about the different
18 observations, Sergeant Pelle was the one took you around and
19 was showing you where the things were?

20 A. Right, as we were walking through the apartment.

21 Q. When you got to the apartment -- and I'm referring
22 to People's 12, which is right in front of you.

23 A. Mm-hmm.

24 Q. You testified that when you arrived there, that's
25 how the front of the apartment appeared?

1 A. Yes.

2 Q. The picture shows that there is yellow crime scene
3 tape that's sort of in front of the stairway --

4 A. Yes.

5 Q. -- in the picture, and also what you observed was
6 that the entire area was sort of lit up?

7 A. Yes.

8 Q. There appears to be a porch light that's lighting up
9 the entire area?

10 A. Yes.

11 Q. In the pictures as well, there are also two officers
12 that are standing there, one going up the stairs, one in front
13 of the stairwell?

14 A. Yes.

15 Q. Those officers are also -- also have flashlights on
16 them, what appears in the photo?

17 A. Yes.

18 Q. You testified before that when you got there there
19 are already several other officers that were there?

20 A. Correct.

21 Q. Those officers included Sergeant Matthews?

22 A. Yes, he was there.

23 Q. Officer Alexander?

24 A. I had to think about who was all there. Ron
25 Alexander was there.

1 Q. And Officer Smith was there?

2 A. Yes.

3 Q. Your role at that time wasn't to canvass and process
4 the scene?

5 A. No.

6 Q. And to be clear, so the jury knows what that means,
7 you weren't in charge of collecting the evidence, placing what
8 you had called the placards in front of the evidence?

9 A. Correct.

10 Q. Someone else was in charge as well of taking the
11 photos?

12 A. Yes.

13 Q. Someone else was also in charge of making sure all
14 that evidence was documented in some way?

15 A. Yes.

16 Q. You arrived at the apartment about 30 minutes after
17 you received a phone call from Commander Pelle?

18 A. Between 30 and 45 minutes, I do not know exactly
19 what time I got there, until I got the call at 10:15 and I
20 actually went into the apartment at about 11:18. Um, when I
21 got there I met with Joe -- or Commander Pelle -- I'm sorry --
22 for a short time out in the, um -- the -- just off the parking
23 lot between the buildings before we went into the apartment.

24 Q. So --

25 A. So it was probably 30 to 45 minutes.

1 Q. But you weren't the first one that got there?

2 A. No, I was not.

3 Q. There were other detectives that were at the crime
4 scene before you got there --

5 A. Yes.

6 Q. -- including Commander Pelle?

7 A. Yes.

8 Q. Joe? Those officers that were there documenting,
9 canvassing the scene, there were also officers that came the
10 next day?

11 A. Um, they were there, I'm not sure if next day or
12 several days later, yes.

13 Q. So there were other officers that came back to the
14 scene after that?

15 A. Yes.

16 Q. So from the time in which Mr. Grisham had been shot
17 and a few days later numerous officers had already been at the
18 scene?

19 A. Yes.

20 Q. You testified that after you were at the apartment
21 you went over to John Clark's residence?

22 A. Correct.

23 Q. You said that you had received that information from
24 someone else?

25 A. Right.

1 Q. Someone else told you that a detective needed to go
2 talk to Mr. Clark to talk about Michael Clark?

3 A. And what we got is that his name came up, ran him
4 through law enforcement databases and that's the address that
5 came as belonging to him, so I went out there.

6 Q. You went to that address?

7 A. Yes.

8 Q. After you had done your walk through of the
9 apartment?

10 A. Yes.

11 Q. When you got to that address, you found out that he
12 didn't live there?

13 A. Correct.

14 Q. You indicated in your testimony to the prosecutor
15 that you didn't followup on that that night?

16 A. I didn't have any place else to look for Mr. Clark,
17 no.

18 Q. But you didn't try to figure out that night where
19 else he lived?

20 A. No.

21 MS. MILFELD: Thank you. That's it for now.

22 THE WITNESS: Okay.

23 THE COURT: All right. Any redirect, Mr. Kellner?

24 **REDIRECT EXAMINATION**

25 **BY MR. KELLNER:**

1 Q. You asked Mr. Clark's parents where he was; am I
2 right?

3 A. Yes.

4 Q. Did they know?

5 A. They did not.

6 MR. KELLNER: And, Judge, I neglected to offer
7 People's 20 and 21.

8 THE COURT: Any objection or voir dire to Exhibits
9 20 and 21? It's the photo and the physical item.

10 MS. MILFELD: No, no objection to that or voir dire.

11 THE COURT: All right. 20 and 21 will be admitted.

12 (People's Exhibit 20 and 21 were admitted into
13 evidence by agreement of the parties.)

14 THE COURT: Any recross, Ms. Milfeld?

15 MS. MILFELD: No, Judge.

16 THE COURT: All right. Detective, you can step
17 down. You are subject to recall.

18 All right. Ladies and gentlemen of the jury, it's
19 5:00. You've had a full day, so we are going to take the
20 evening recess. Remember the admonition that I have given you
21 previously. You are going to get tired of seeing this, but
22 the fact I hold it up is to reinforce how important the
23 admonition is. Don't communicate about or discuss this case
24 with anyone, this includes member of your family, people
25 involved in the trial, other jurors or anyone else. If

1 someone approaches you and tries to discuss the trial with
2 you, let me know about it immediately. You must not read or
3 listen to any news reports of the trial. You must not consult
4 any outside reference materials, including a dictionary, the
5 encyclopedia or the internet.

6 Finally, remember that it is especially important
7 that you do not form or express any opinion on the case until
8 it is finally submitted to you.

9 If you would please take all of your materials with
10 you back into the jury room, leave them there, they will be
11 secure over night. We'll reconvene tomorrow morning at 9:00.
12 If you could be here a few minutes before that, we should be
13 ready for you at 9:00. Please have a good evening and we'll
14 see you tomorrow morning.

15 (Jury exited the courtroom.)

16 THE COURT: All right. The record should reflect
17 that the jury has left the courtroom. Are there any matters
18 we need to discuss on the record before we recess for the
19 evening on behalf of the People?

20 MR. BRACKLEY: Your Honor I believe that there's a
21 record that needs to be made at the request of Ms. Ring. I'm
22 not sure we need to do that now.

23 THE COURT: How long is it going to take?

24 MR. BRACKLEY: Seconds, and I think that Mr. Kellner
25 is going to make it.

1 THE COURT: We have got a few minutes. Ms. Ring.

2 MS. RING: So I think that the -- what I think
3 Mr. Brackley is referring to is --

4 MR. KELLNER: You wanted me to put on the record the
5 travel arrangements and how essentially Mr. Berring and
6 Mr. Stackhouse got here. Is that my understanding?

7 MS. RING: And Mr. Moore, because of my concerns
8 about people being in custody.

9 MR. KELLNER: Right.

10 MS. RING: Those witnesses being in custody in other
11 states and how they were getting transported, how that was
12 arranged in terms of any kind of impeachment information.

13 MR. KELLNER: And I'm happy to make a record to that
14 effect, Judge.

15 THE COURT: Why don't you go ahead and do that.

16 MR. KELLNER: Your Honor, with respect to
17 Mr. Berring, as Your Honor knows, you signed off on an
18 out-of-state subpoena that was served on Mr. Berring in
19 Florida, actually, at the time he was in custody it turned out
20 for a misdemeanor battery case. I contacted the local
21 prosecutor there, Ms. Maria Weeks, asked her what the status
22 of the case was. She said that she was going to not prosecute
23 before I ever called her because the victim or alleged victim
24 in the case could not be located, so he was going to be
25 released from custody before I had even called.

1 In order to I guess effect the release, we sent --
2 and recognizing Mr. Berring is somewhat transient, we sent our
3 own investigator there to make sure that when he essentially
4 walked out of the jail after they no pros their case, um, that
5 we would have someone to bring him here, that's how he came to
6 be here. I can provide the Court and defense counsel the
7 letter that the prosecutor had sent to the victim to my
8 contact indicating that she was going to no file it, if you
9 feel that that's necessary. I'm happy to do so. It's in my
10 e-mail.

11 With respect to Mr. Stackhouse --

12 MS. RING: So I would like the letter.

13 THE COURT: Okay, you are willing to give her the
14 letter.

15 MR. KELLNER: Absolutely.

16 THE COURT: Okay.

17 MS. RING: There was another conversation we had
18 about Mr. Berring wanting to do some drug program that he was
19 doing in the jail, was my understanding, and I'm not even sure
20 I understood that correctly, and his concern about being able
21 to do that program and.

22 MR. KELLNER: So Mr. Berring had a probation
23 complaint based on the new charge, as I understand it. He was
24 going to be doing an inpatient inside the jail substance abuse
25 thing. And Mr. Berring, I think, has that issue, as probably

1 reflected in his criminal history, of substance abuse and he
2 wanted -- when he spoke to us he wanted to know if he would be
3 able to actually do that.

4 THE COURT: And your response was?

5 MR. KELLNER: My response was I don't know. We'll
6 try to help you out and make sure that you can do your
7 substance abuse treatment, but that actually, as I understand
8 it, is not even an option since they were not processing the
9 case.

10 THE COURT: Okay.

11 MR. KELLNER: So...

12 MS. RING: So right now --

13 MR. KELLNER: I'm comfortable saying that I have
14 made no promises to Mr. Berring in any way.

15 MS. RING: So Mr. Berring is on probation right now,
16 but there's no complaint pending because the only complaint
17 pending on the probation that you know of was based on the new
18 case that's subsequently been not filed.

19 MR. KELLNER: That is my understanding, yes.

20 MS. RING: Okay.

21 THE COURT: Okay. So does that take care of
22 Mr. Berring?

23 MR. KELLNER: I believe so.

24 THE COURT: And then there were -- were there two
25 other people, one being Mr. Moore. What about Mr. Moore?

1 MR. KELLNER: I'll defer to Mr. Brackley on that.

2 MR. BRACKLEY: Mr. Moore, um -- since April
3 Mr. Moore had an outstanding warrant. It was a
4 non-extraditable warrant for a marijuana charge -- marijuana
5 related charge in Reno, Nevada. At some point -- I was trying
6 to get my dates correct, but at some point in September
7 Mr. Moore was taken by a bounty hunter from here in Boulder
8 County and transported to Reno, Nevada, on that warrant. His
9 sentencing was scheduled for October 10th, today, of this
10 year, 2012. Um, I made a phone call to the DA by the name of
11 Diane Drinkwater in Reno, Nevada, and I essentially said, you
12 know, what do I need to do to get a writ to bring Mr. Dion
13 Moore back here to Boulder? We spoke with the local jail in
14 Reno, Nevada, we asked our sheriff's department to communicate
15 with the local jail in Reno, Nevada, and we asked them, um, to
16 set up a transport scenario so that we could go to the Nevada
17 county jail and get Mr. Berring -- I mean, Mr. Dion Moore and
18 bring him back. Since Mr. Moore was not -- had not been
19 sentenced on that case yet, um, we couldn't do an extradition
20 as we would normally do had he be serving a sentence in either
21 county jail or state facility.

22 I asked Ms. Drinkwater what his sentence would be,
23 which is to say, um, on October 10th is it possible that he is
24 going to get sentenced to probation and he will be able to
25 come back home to Boulder, Colorado. He lives here in

1 Boulder. She said had he been sentenced back in April,
2 probation was the likelihood, but since he didn't come back
3 for sentencing in April, she had no idea what was going to
4 happen. She did say I am not going to let him out prior to
5 sentencing because he's already fled once, he might flee
6 again.

7 I said, well, what if I send an investigator to pick
8 him up, bring him to Boulder, set up a system where Dion Moore
9 is going to check in with us, and as soon as his appearance
10 here in court was over, that investigator would fly back to
11 Reno, Nevada, with him and put him right back into the Reno,
12 Nevada, jail where she took him out of. Would that be okay.
13 She stated that would be, and they released him on I believe a
14 PR bond.

15 I've been trying to catch up with my investigator to
16 get that information. They got back late last night, but I
17 assume at this point it's a PR bond so that he could be taken,
18 escorted, but not in handcuffs or not in a jail type scenario
19 to Boulder. He's staying at his home in Boulder. He'll be
20 escorted back to Reno, Nevada, when he completes his testimony
21 here where he will face sentencing.

22 I have not spoken to Mr. Moore about this, I haven't
23 spoken to anyone associated with Mr. Moore about any promises
24 or favors. What he will do -- what we'll do for him or to him
25 or anything to that extent. The only person that I know who's

1 had any contact with Dion Moore from our office was the
2 investigator who picked him up, brought him to the airport and
3 brought him to his home here in Boulder.

4 THE COURT: And who was that investigator.

5 MR. BRACKLEY: That was Jane harmer, the chief
6 investigator from the DA's office.

7 THE COURT: Okay. Is she going to generate a report
8 based on her contact with and transportation of Mr. Moore?

9 MR. BRACKLEY: I will ask her to generate a report
10 as soon as possible. I'll ask her to be available to Ms. Ring
11 and any investigator from Ms. Ring or Ms. Milfeld's office to
12 be interviewed, and I will sit down with her, too, Judge.

13 I will tell the Court that I learned that she was in
14 route back to Boulder yesterday, but I also learned that she
15 was ill from a stomach thing yesterday. So I haven't seen her
16 and I just haven't had a chance to talk to her or interview
17 her.

18 THE COURT: Okay. All right. And who's the third
19 witness?

20 MR. BRACKLEY: It would be Mr. Stackhouse.

21 THE COURT: Mr. Stackhouse.

22 MR. BRACKLEY: And I think that he was a sentenced
23 prisoner in the California Department of Corrections. Your
24 Honor signed an interstate warrant for him and the sheriff's
25 office here in Boulder assisted us in doing more of a

1 traditional extradition via a -- I'm not sure. We called it a
2 *habeas corpus* test, I think that is what it was called, in
3 order to produce or something along those lines. But it was
4 essentially done by court order on both sides, here in
5 Colorado, but also in the local DA's office in the local
6 whatever the court would be in California. That particular
7 judge brought Mr. Stackhouse in, gave him an opportunity to be
8 heard as to whether he would consent to being transported, I
9 believe that he consented to being transported and he was
10 transported. He is in the Boulder County jail.

11 THE COURT: Okay. Is that the record and offer you
12 were looking for? All right. Thank you.

13 Any other matters to take up before we recess,
14 Ms. Ring?

15 MS. RING: Judge, I don't know that we need to do it
16 now, nor do I think that it's the right time to do this. But
17 I know that the District Attorney is planning on using a
18 redacted version of my client's interview from April 15th of
19 2011. I was handed a copy of their redacted -- they proposed
20 redacted interview last Friday and when I looked it over over
21 the weekend, we have objections to the redactions. So at some
22 point prior to that happening we need to have a discussion
23 about that, and we don't need to -- I don't think we need to
24 do it now. I don't think that it's happening for --

25 MR. BRACKLEY: Not until Monday or Tuesday.

1 THE COURT: That -- that discussion has the
2 potential to be lengthy.

3 MS. RING: That's why I think that I want to tell
4 you about it now, and the next time we have extra time or
5 break we'll create time between now and then when it makes
6 sense to have that conversation.

7 THE COURT: So you are trying to lessen the blow, is
8 what you're --

9 MR. BRACKLEY: Did you listen to the recording or
10 just the transcript with the arrows and stuff like that?

11 MS. RING: You didn't give me a transcript of arrows
12 and stuff.

13 MR. BRACKLEY: So you listened to the recording?

14 THE COURT: Okay. So in a perfect world there would
15 be an agreement. If there's not, I'm going to need to see the
16 redacted transcript and recording so that I can look at it.
17 And I'm also going to need the original transcript so I can
18 make a comparison between the original and the redactions, so
19 I can have some context for the objections and the arguments
20 that are going to be made.

21 MR. BRACKLEY: Judge, I --

22 THE COURT: If you can get that to me sooner rather
23 than later, I'll take a look at it.

24 MR. BRACKLEY: We can get you that sooner, but I
25 think that it would be most efficient also if Ms. Ring could

1 produce a -- generate what she feels either should come out or
2 so that you have -- have the defense suggestions. The
3 People's -- the People have already produced this and also the
4 original.

5 THE COURT: Well, I had assumed that the -- has
6 there been any conversation between counsel about those
7 redactions?

8 MR. BRACKLEY: There was a brief conference -- there
9 was a brief conversation about it, and I -- I thought -- I
10 think that we were heading in the right direction. I'm not
11 surprised, but I am surprised, and I'm certainly not common of
12 Ms. Ring that -- I don't think that -- I don't know if there's
13 a huge objection. I haven't heard the nature of it, but I
14 would like to know what their discussions are or aren't
15 because we may very well say sure.

16 MS. RING: So I don't think I have ever had this
17 objection before, but I -- I am concerned that much of what's
18 redacted I think takes away from the whole context of the
19 interview. Typically I'm asking for more to be redacted
20 because it's prejudicial. I think that there's one thing that
21 I wanted redacted was a line about shoplifting, which I talked
22 to Mr. Kellner about two Fridays ago. But our position is
23 that they have redacted so much that it changes the whole
24 context of the interview, the whole idea that it was a ruse,
25 which the officers have agreed it was a ruse. This is the

1 interview about we are looking at Dion Moore and the guns, and
2 our position is that the redacted version takes it out.

3 THE COURT: Is this the first con -- contact by
4 Agent Grusing? Okay. So can you -- can you give the
5 prosecution some idea of what it is that you want in or out?

6 MS. RING: Yeah.

7 THE COURT: And then if you are not able to resolve
8 all of the issues, then I'll make some rulings, but in order
9 to do that, again, I'm going to need the original transcript
10 and redacted transcript, the recording will be helpful. So we
11 don't need to take that up right now, in fact, we can't,
12 but -- okay.

13 MS. RING: You want us back here at?

14 THE COURT: Well, I -- I have got an 8:15 docket,
15 but it's not long. I don't know that you are going to need me
16 on the record prior to 9:00, but -- let me put it this way.
17 Why don't you plan to be here about 8:45, so if we do have
18 anything that we need to take up on the record, we can do it
19 at this time. If not, you can be getting set up and we should
20 be ready to go right at 9:00. Does that work for everybody?

21 MS. RING: Mm-hmm.

22 MR. BRACKLEY: Your Honor, can we keep some stuff in
23 the courtroom?

24 THE COURT: You know, let me --

25 MS. RING: Are you doing your docket here or in your

1 courtroom.

2 THE COURT: I think that I can do it over in H, so
3 that you guys don't have to pack up and get everything out of
4 here. Are you going to lock the door as soon as everybody's
5 gone and it will remain locked until tomorrow morning.

6 MR. KELLNER: With respect to the physical evidence,
7 the bullet, the shirt, those --

8 THE COURT: I'll need to work on that with the court
9 reporter right now, maybe with a little help from --

10 MR. BRACKLEY: Everything is here and in order.

11 THE COURT: So 8:45.

12 MS. RING: Mm-hmm.

13 MR. BRACKLEY: Yes, Your Honor. Thank you.

14 THE COURT: We'll be in recess.

15 (Court adjourned.)

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2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 10,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

1 I N D E X

2 WITNESSES FOR THE PEOPLE: PAGE

3	KIRK MAGILL,	
	Direct Examination by Mr. Brackley	49
4	Cross-Examination by Ms. Milfeld	66
	Redirect Examination by Mr. Brackley	68
5		
	BARBARA SWIDER,	
6	Direct Examination by Mr. Brackley	69
	Voir Dire Examination by Ms. Ring	82
7	Direct Examination (cont'd) by Mr. Brackley	84

8 EXHIBITS FOR THE PEOPLE: OFFERED ADMITTED

9	1 - Photo	54	54
	2 - Photo	54	55
10	3 - Photo	56	56
	4 - Photo	55	55
11	5 - Photo	55	55
	10 - Voicemail	82	83

13

14

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25 REPORTER'S CERTIFICATE * * * * * 94

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

2 (The following proceedings occurred in the
3 afternoon.)

4 THE COURT: We're on the record. This is 12CR222
5 People versus Michael Clark. Mr. Clark is present with his
6 counsel, prosecutors are present, the jury is not.

7 I had received via e-mail a pair of agreed upon
8 instructions to read to the jury as an introductory matter
9 explaining the use of prior statements to refresh
10 recollection or impeach a witness' testimony. These
11 preliminary instructions are agreed upon by the parties; is
12 that correct, Mr. Kellner?

13 MR. KELLNER: Yes, Judge.

14 THE COURT: Ms. Milfeld?

15 MS. MILFELD: Yes.

16 THE COURT: I'll read those then. We'll give the
17 jury those when they come in.

18 Anything else that we need to take up before we
19 bring the jury in on behalf of the People?

20 MR. KELLNER: Judge, People have two motions in
21 limine.

22 THE COURT: Okay.

23 MR. KELLNER: Your Honor, the first deals with the
24 admissibility of any evidence regarding the defendant's
25 criminal history or lack of criminal history after 1994. I

1 know it's come up a little bit over time throughout the
2 course of these proceedings, it's been mentioned. Of course
3 it was taken into account when you set bond in this case.

4 But if you look at *People v. Goldfuss*, Judge,
5 which is a Colorado Court of Appeals case, clearly states
6 that evidence that a defendant had not been convicted of a
7 criminal offense was not admissible. And in this case
8 *Goldfuss* is a prosecution for a third degree assault. It's
9 simply not relevant information to be presented. And while
10 it may never come up, I thought it would be appropriate to
11 raise that now.

12 THE COURT: Response on behalf of Mr. Clark,
13 Ms. Ring.

14 MS. RING: Well, this is the first I heard that
15 they're raising this as a motion in limine, so I'm thinking,
16 Judge.

17 I certainly would suggest that we get to and it
18 certainly will come out to the jury that Mr. Clark was
19 investigated off and on throughout the last 18 years.

20 And I mean, if what they're saying is trying to
21 limit us from asking the last question of whether or not
22 they found any evidence that my client committed any other
23 crimes and it's just that one question -- you know, frankly
24 right now I'm trying to think about interviews that were
25 done with my client in April of 2011 where clearly that

1 comes up in terms of the people that are interviewing my
2 client said, you know, we looked into your history, we know
3 you haven't gotten in any trouble.

4 And right now I can't think of how that's an issue
5 in terms of playing those interviews if those end up getting
6 played for the jury. I certainly don't see how it's
7 prejudicial to the district attorney in any way that that
8 comes in.

9 It certainly -- like I said, if anything it's
10 throughout the discovery investigation done by the Boulder
11 Police Department and the District Attorney's Office. It's
12 mentioned throughout there that that's part of their
13 investigation.

14 THE COURT: Well, I think the concern is not
15 necessarily prejudice to the district attorney. It's just
16 on general relevance. And I'm not sure why that evidence
17 would be relevant to any of the issues that we're looking at
18 in this case.

19 On the other hand, I do recall from reviewing some
20 of the recorded interviews with Mr. Clark that those
21 questions were asked. Now, are those questions, not
22 necessarily statements, are those included in recordings
23 from those interviews that are going to be played?

24 MR. KELLNER: They are not, Judge.

25 THE COURT: Okay. Well, then let me say this, I

1 think as a preliminary matter that evidence is properly
2 excluded. But Ms. Ring or Ms. Milfeld, if you feel that the
3 evidence that's presented makes the context of his prior
4 criminal history between 1994 and now relevant, ask to
5 approach, I'll look at it in the context of the other
6 evidence, okay?

7 MR. KELLNER: Thank you, Judge.

8 THE COURT: Anything else?

9 MR. KELLNER: Yes, sir. The second motion as we
10 were preparing here we were reviewing the preliminary
11 hearing transcript. And Ms. Ring was asking some questions
12 of a witness regarding the charging decision or lack of
13 bringing forward charges in 1994, 1995 based on the evidence
14 they had at the time.

15 And Your Honor sustained an objection at that time
16 but said something to the effect of that's not relevant for
17 preliminary hearing. I don't know, it may be relevant
18 later. And that part concerns me, Judge.

19 What I would like is to raise the issue now that
20 any questioning of witnesses with respect to district
21 attorney's decision or credibility determinations made by
22 other people back in 1994 and '95 when they made a decision
23 at that time not to proceed with this case is not relevant
24 and admissible evidence.

25 Frankly, it would be you serving the role of the

1 fact finder to determine both credibility of evidence that
2 we present to them because they are ultimately the ones who
3 should determine whether or not we've proven the defendant's
4 guilt beyond a reasonable doubt.

5 So any questioning of witnesses, police officers,
6 detectives, about someone else's decision to not proceed at
7 an earlier day is simply not relevant.

8 THE COURT: Response on behalf of the defendant?

9 MS. RING: I don't disagree with that.

10 THE COURT: Okay. I'll grant that motion in
11 limine.

12 Anything else?

13 MR. BRACKLEY: Judge, I want to renew -- and I
14 spoke with Ms. Ring about that and I kind of -- just before
15 we started this morning I gave her a heads up I would be
16 doing this. I wanted to renew for the record the People's
17 motion to preclude certain alternate suspect evidence where
18 this Court has not found a nexus between that evidence and
19 the crime that was committed.

20 And that motion was made originally in the
21 interests of efficiency and judicial economy, but also in
22 the interests of fairness.

23 What I'm concerned about, what I was concerned
24 about then and what I'm concerned about now, is the fact
25 over the course of an 18-year police investigation and

1 mostly information that was developed within the first
2 couple of days, which is to say a tip that was given to the
3 police about a certain car driving out of the parking lot or
4 a sketch that was done by a person who was there in the
5 courtyard sometime that night, although unclear whether that
6 person was there during the shooting, the police identified
7 who was driving that particular car, they identified that
8 person as a tenant of the apartment complex, they identified
9 that person as someone who was late for band practice, the
10 police identified the person in the sketch as a person who
11 lives in that apartment. That person's been endorsed by the
12 defense. And as of our last conversation with him the
13 defense is calling him. But ultimately that person will say
14 that is me in that sketch.

15 And neither of these incidents, neither of these
16 persons have any nexus between -- to the crime in this case.
17 And to put on evidence of them would just require the People
18 on rebuttal, and it's probably going to be after some delay
19 or effort to bring these witnesses in, but essentially to
20 call witnesses to rebut evidence which is completely
21 irrelevant because it has no nexus to the crime to rebut
22 evidence which has been proven by the discovery, and I don't
23 know of any reason to believe otherwise at this point,
24 people or things or tips or notions that have no nexus to
25 the crime in this case.

1 So I'm going to make the motion again to ask the
2 Court to make an inquiry of the defense as to whether there
3 are alternate suspects that they plan on presenting to the
4 jury, and I'm going to ask this Court again to make a
5 finding of whether this is actually a nexus between that
6 evidence and the crime in this case.

7 THE COURT: Ms. Ring.

8 MS. RING: Judge, I told Mr. Brackley previously
9 and I think he understands that there are some obvious
10 potential alternate suspects that Mr. Brackley is aware of
11 in relation to children, family members. And that's not
12 what he's talking about.

13 Certainly we're here saying Mr. Clark didn't
14 commit this murder, and certainly that opens the question
15 who did because everyone's clear here that Marty Grisham was
16 murdered. So we're not going to be saying it was this other
17 person, so --

18 THE COURT: A specifically identified alternate
19 suspect?

20 MS. RING: Right. But certainly we get to talk
21 about investigation evidence and whether or not the police
22 followed up on certain leads. Then the DA gets to decide
23 what they want to do with us putting that question out
24 there, but --

25 THE COURT: I think as a general principle,

1 Ms. Ring, I agree with you.

2 I'm not sure what more I can do at this point,
3 Mr. Brackley, other than to tell you that my previous ruling
4 stands. I think that Ms. Ring's statement of relevant
5 evidence and proper procedure allows them to ask certain
6 questions.

7 If there is a line of questioning that you think
8 is improper, then the way to deal with it is with a
9 contemporaneous objection and I'll rule at that time.

10 To the extent that you're worried about being able
11 to prepare for and present rebuttal evidence, I'll certainly
12 allow proper rebuttal evidence. But you should not count on
13 some sort of a delay in these proceedings.

14 MR. BRACKLEY: Well Judge, if it's something that
15 in our preparation of the case is just something that
16 absolutely is irrelevant or has no nexus to the case whereby
17 we just would never have thought of it, I think we'd be
18 entitled to a delay I think in the interest of fairness.

19 THE COURT: You don't want to be arguing right now
20 about getting a delay in these proceedings.

21 MR. BRACKLEY: I'm not asking for a delay.

22 THE COURT: Don't anticipate.

23 MR. BRACKLEY: I'm not asking for -- in the
24 interest of fairness sometimes delay is necessary. And I'm
25 only saying that right now when they ask for it and I

1 can't -- I'm -- I'm at a loss to understand why the Court
2 would say without knowing what that would be.

3 THE COURT: I'm at a loss to understand to tell me
4 that you're preparing for a delay when you don't even know
5 what it is.

6 MR. BRACKLEY: It's my job, Judge.

7 THE COURT: So my point to you is I'll certainly
8 allow proper rebuttal evidence. You should not expect that
9 there will be a delay in the proceedings to be able to
10 prepare that. If it's fair and necessary, then I'll allow
11 it.

12 MR. BRACKLEY: That's exactly what I'm asking for,
13 Your Honor.

14 THE COURT: But --

15 MR. BRACKLEY: That's exactly what I'm asking for.

16 THE COURT: -- it depends on the circumstances.

17 MR. BRACKLEY: That's fair.

18 THE COURT: Okay. Anything else preliminarily?

19 MR. BRACKLEY: No.

20 THE COURT: All right. Would you bring the jury
21 in?

22 (The jury returned to the courtroom.)

23 THE COURT: There's one chair on the floor that's
24 all the way down at the end. Thanks, Mr. Lacopo. You're a
25 perfect size for that position.

1 All right. Please be seated. Welcome back,
2 ladies and gentlemen of the jury. You heard my earlier
3 remarks to the panel, and now that you've been accepted by
4 counsel and sworn as the jury to try this case, I have some
5 additional introductory remarks and some instructions
6 regarding procedure that we're going to be following during
7 this trial.

8 With respect to the process itself, initially
9 we'll have what we call opening statements by counsel.
10 These opening statements are not evidence and they're not
11 arguments. They're made to give you some idea as to what
12 the case is about.

13 The prosecuting attorney may make an opening to
14 the jury concerning the evidence to be produced in support
15 of the charge. Then the defendant may make an opening
16 statement concerning the evidence to be produced, or they
17 can reserve the right to do so until the completion of the
18 prosecution's evidence.

19 After you've heard those opening statements, then
20 the prosecuting attorney must offer evidence in support of a
21 charge in the complaint. The prosecution will call
22 witnesses to testify and ask them questions on direct
23 examination to develop the testimony and evidence to support
24 the charge against the defendant.

25 The defendant is then entitled to cross-examine

1 each witness that the prosecution calls to testify. If the
2 defendant cross-examines a witness, then the Court will
3 allow the prosecution to conduct redirect examination of the
4 witness in an effort to clarify or explain a witness'
5 answers on cross-examination. And then finally I may allow
6 the defendant further recross-examination of that same
7 witness.

8 Once the prosecution has called all of their
9 witnesses in support of their case, they will rest their
10 case. And the defendant may then offer evidence in his
11 defense. But remember, as I told you previously, he is not
12 obligated to present any evidence whatsoever.

13 The burden is always on the prosecution to prove
14 every element of the offense charged beyond a reasonable
15 doubt. The law never imposes on the defendant in a criminal
16 case the burden of calling any witnesses or introducing any
17 evidence.

18 If the defendant chooses to call any witnesses or
19 present any evidence, then the Court will follow the same
20 procedure of allowing the prosecution to cross-examine the
21 defendant's witnesses, allowing the defendant to conduct
22 redirect examination, and then perhaps allowing the
23 prosecution to conduct recross.

24 So for each witness there's a possibility of a
25 direct examination, a cross-examination, a redirect

1 examination, and then a recross examination.

2 Once the defendant has presented all of his
3 evidence if he chooses to do so, then he will rest his case.
4 If the defendant has presented any testimony or evidence,
5 the prosecuting attorney may, but is not required, to offer
6 evidence to rebut the defendant's evidence.

7 Once the prosecution has presented all of their
8 rebuttal evidence, they will rest their case again. And at
9 that time the jury will have heard all of the evidence which
10 may be considered in the case.

11 After all of the evidence has been presented I
12 will instruct you orally and in writing concerning the law
13 which is applicable to this case. I will read those
14 instructions to you. You will each have your own copy of
15 the instructions. And you'll be allowed to take those
16 written instructions back with you to the jury room and
17 refer to them during your deliberations.

18 Once you've been instructed as to the applicable
19 law, then the prosecuting attorney may make a closing
20 argument and deliver an argument to you for conviction based
21 on the evidence and the law.

22 The defense may then make a closing argument and
23 deliver an argument for an acquittal or other verdict based
24 on the evidence and the law. If the defendant makes a
25 closing argument, the prosecuting attorney may then make a

1 final reply to any closing argument made by the defense.
2 The prosecution is allowed the last argument because they
3 have the burden to prove beyond a reasonable doubt that
4 Mr. Clark is guilty.

5 Once those closing arguments have been completed,
6 then the jury will retire to the jury room and you'll
7 deliberate upon your verdict.

8 Your purpose as jurors is to find and determine
9 the facts. Under our system of criminal justice you are the
10 sole judges of the facts.

11 It is especially important that you perform your
12 duty of determining the facts diligently and
13 conscientiously. You are to determine the facts from the
14 testimony you hear and the other evidence introduced in
15 court. It's up to you to determine the inferences which you
16 feel may properly be drawn from the evidence.

17 The law that I give you constitutes the only law
18 for your guidance. And it is also your duty to accept and
19 follow that law, even if you disagree with it. It is your
20 duty to apply the rules of law that I give you in the
21 instructions to the facts as you find them to be from the
22 evidence in the case. And that's how you would arrive at
23 your verdict.

24 Let me talk to you a little bit about your conduct
25 during the trial. I have to give you certain admonitions

1 that remain in effect throughout the trial. The first one
2 is that you're not to discuss the case among yourselves
3 while the evidence is being presented to you.

4 The first time you'll be allowed to discuss the
5 case among yourselves is after you've heard all the
6 evidence, the instructions of the Court, the arguments of
7 counsel, and have then retired to the jury room and selected
8 your foreperson. Then and only then should you begin to
9 discuss and deliberate on this case.

10 The reason for the rule that you're not to discuss
11 this case while the evidence is being presented to you is
12 that you might commit yourself one way or the other before
13 you've had an opportunity to hear all of the evidence, the
14 instructions of law and the arguments of counsel as well as
15 having discussion with the other jury members.

16 Therefore, you're not to discuss the case until
17 you've heard all of the evidence, the Court's instructions
18 and the arguments of counsel.

19 The second admonition that I need to give you is
20 that you're not to discuss this case with anyone else, any
21 third party, until your verdict is delivered and you've been
22 relieved of your duties as a juror.

23 Now, one of the things that I should have told you
24 prior to the recess but I will tell you now is that your
25 employers and your family and your loved ones are going to

1 need to know where you're at for the next two weeks. And
2 what you can tell them is that you are on a jury, it is in
3 the Boulder District Court, and it's going to take about two
4 weeks and that's it. You can't tell them what kind of case
5 it is. You can't tell them what it's about. You can't tell
6 them what the proceedings are, what the procedure has been.

7 And the reason that I tell you that is because
8 people always want to offer their own opinion, their own
9 insight, their own suggestions about what you as a juror
10 should or shouldn't do. And they're not people who have
11 been privy to the evidence and the instructions of law and
12 the other information that you've received in this
13 courtroom. So that's why I tell you that you cannot discuss
14 this case with anyone else.

15 Now, you're going to pass by the attorneys and
16 Mr. Clark and other members that you see sitting in the
17 gallery, you're going to pass by them in the hallway. The
18 attorneys and Mr. Clark and the witnesses are all instructed
19 that they can't have any contact with you. They can't even
20 say hello.

21 And that's not because they're mean, it's not
22 because I'm trying to be oppressive. But even if you're
23 just having a casual friendly conversation with someone in
24 the hallway someone viewing it from a distance may not
25 realize that it's just a casual, friendly conversation.

1 They may draw the wrong conclusion about your conversation
2 with one of the attorneys or Mr. Clark or someone involved
3 in this case. So that's why I say to you again, you can't
4 talk to anyone else about this case.

5 If someone does try to talk about this case with
6 you, tell them that you're not allowed to discuss the case
7 and then report it to me immediately please.

8 Don't read or listen to any news accounts or
9 discussions of this case that are reported by newspapers or
10 other publications or by television or radio.

11 Don't do any outside research on the case. And
12 specifically you can't consult any outside reference
13 materials, no dictionary, no encyclopedia, nothing on the
14 internet.

15 You're not allowed to visit or view the premises
16 or place where the crime charged here was allegedly
17 committed or any other premises or place that's involved in
18 the case unless it's under the direction of the Court, and
19 in which case we would take you out there as a group to view
20 whatever the premises or place is.

21 What you should be able to tell from these
22 instructions is that you're not to be investigators in this
23 case. All the evidence and the law that you'll have to
24 decide the case will be presented to you as a group in court
25 or under court supervision.

1 As jurors you have the power to accept everything
2 as being true, to accept only part of it as true or to
3 reject all of it. That evidence and the Court's
4 instructions should be the only basis for your verdict.

5 The attorneys will be allowed to speak to you in
6 this case particularly during opening statements and closing
7 arguments. And you should listen to them to see what
8 comments they have about the evidence. But the statements
9 and comments of counsel are not evidence. And you may not
10 rely on their statements as evidence or proof of anything.

11 As I mentioned earlier, during recesses and
12 adjournments of this court you're going to be free to
13 separate, you're free at lunch, you're free to go home at
14 the end of the day. But again, during those recesses don't
15 discuss the case with anyone.

16 If you have any questions or concerns during the
17 trial what I'd ask you to do is to write it down on a piece
18 of paper, give it to the bailiff. She'll provide it to me,
19 and I'll talk to the attorneys about the proper way to
20 respond to the question.

21 You'll hear witnesses testify during this trial
22 about things that they saw, heard or did. You may have to
23 decide what testimony to believe. You should carefully
24 consider all of the testimony given and the circumstances
25 under which each witness has testified.

1 Consider each witness' knowledge, motive, state of
2 mind, demeanor and manner while on the stand. Consider the
3 witness' means of knowledge, ability to observe and strength
4 of memory.

5 Consider also any relationship each witness may
6 have to either side of the case, the manner in which each
7 witness might be affected by the verdict, and the extent to
8 which, if at all, each witness is either supported or
9 contradicted by other evidence in the case.

10 You should consider all facts and circumstances
11 shown by the evidence which affects the credibility of a
12 witness' testimony. You may believe all of the testimony of
13 a witness or part of it or none of it.

14 During the trial a witness may not remember making
15 a prior statement or may deny that he or she ever made the
16 statement. This is especially true in a case in which the
17 prior statement was made a long time ago.

18 In order to elicit the prior statement an attorney
19 may refresh the witness' memory or impeach the witness.
20 This may be done by using a prior written statement, a
21 police report, a transcript, a recording, calling the
22 witness to whom the statement was made, or anything else
23 that might help the witness remember.

24 Where a witness has made a previous statement
25 inconsistent with his testimony at the trial or cannot

1 remember ever making the statement, the previous statement
2 may be shown by any otherwise competent evidence such as a
3 prior written statement, police report, transcript,
4 recording or testimony by a witness to whom the statement
5 was made.

6 This evidence is admissible not only for the
7 purpose of impeaching the testimony of the witness, but also
8 for the purpose of establishing a fact to which his
9 testimony and the inconsistent statement relate.

10 You each should have received a notebook and some
11 paper and pen. You can use these materials to take notes
12 during the trial. You're not required to take notes.

13 Let me tell you up front that you should not
14 anticipate receiving transcripts of any of the witnesses'
15 testimony during this trial. The process to get a
16 transcript prepared, to have it made accurate, it's not only
17 time consuming and expensive under the time constraints that
18 we have in this case, I'm simply not going to be able to
19 provide you with transcripts of any witness' testimony.

20 So you may want to take notes. If you do take
21 notes you shouldn't allow your note taking to detract from
22 your close attention to the testimony and conduct of each
23 witness and all other evidence received during the trial.

24 It's suggested that you take notes sparingly and
25 not to -- not try to summarize all testimony. But notes can

1 be particularly helpful when you're dealing with
2 measurements, times, distances, identities and
3 relationships.

4 Whether you take notes or not, you should rely on
5 your own memory as much as possible and not upon your notes
6 or the memory or notes of another juror. Any notes that you
7 take should be used to refresh your own individual memory.

8 During the trial when you leave the courtroom I'd
9 ask you to take your notebooks and your writing materials
10 with you. Those materials should remain in the jury room
11 until you return to the courtroom.

12 When you retire to the jury room for your
13 deliberations you can take with you any notes that you've
14 made and use them for purposes of refreshing your memory.

15 No one is going to be allowed to review your
16 notes, not during the trial, not after the trial. I promise
17 you that once this trial is completed and you've been
18 discharged as jurors we'll collect your notes and they'll be
19 placed in a confidential recycling bin. No one will look at
20 them, not even me.

21 Couple of other things I wanted to mention to you.
22 During the course of the trial I may ask a question of a
23 witness. If I do it doesn't indicate in any way that I have
24 an opinion about the facts of the case. My question would
25 be intended only to help bring out or clarify the testimony.

1 And the answers that witnesses give to my
2 questions carry no greater weight than answers that a
3 witness gives to questions from the attorneys.

4 You may see me up here occasionally working on my
5 computer. I have other cases that I'm responsible for, and
6 I have staff in the back. So I may need to communicate with
7 them during the course of the trial. But trust me, I won't
8 be so distracted that I'm not able to pay full attention to
9 what's going on here.

10 I mentioned to you during jury selection that
11 there are going to be occasions when the attorneys need to
12 come up to the bench for a conference. I'll use that when I
13 think that the matter to be discussed is going to be
14 relatively brief, no more than a few minutes.

15 If I think that the conversation is going to take
16 longer than that, then I would excuse you and let you go
17 back to the jury room.

18 But while I'm having conferences with the
19 attorneys at the bench, please don't try to listen in. They
20 are intended to be private. We'll try and keep our voices
21 down. And if you think that you can hear us talking, just
22 distract yourself please.

23 I mentioned to you the sort of normal structure of
24 our trial day. I think we'll start with that normal
25 structure tomorrow. Now I understand that we're a little

1 bit out of schedule today, but part of that had to do with
2 the remodeling that we had to do over the lunch break.

3 With those remarks at this time I would call on
4 the prosecution for their opening statement. Mr. Kellner.

5 MR. KELLNER: Thank you, Your Honor.

6 They can't charge me because they'll never find
7 the gun. That's what the defendant said just days after he
8 shot and killed Marty Grisham at the door step of Marty
9 Grisham's own apartment on November 1, 1994.

10 This case is about Marty Grisham in many ways.
11 This is Marty Grisham. On Tuesday November 1, 1994 he woke
12 up in his apartment just off of the corner of 55th and
13 Arapahoe here in Boulder. He's 48 years old at the time.

14 He was a long-time Boulder resident. He was a
15 person who actually worked for the City of Boulder. He was
16 the director of information services here. And like many
17 people in Boulder, he was an avid cyclist.

18 That morning he got up and he biked into work at
19 the City building, and he began to prepare for just any
20 other day.

21 Now, about 20 years earlier Marty Grisham, he
22 served as an officer in the army. And when he got out of
23 the army he came back to Boulder and he met a woman named
24 Pam Grisham. They were married and they had two children,
25 twins actually, Kristen on the left here and Loren.

1 Now, throughout the course of this trial you're
2 going to hear a lot of testimony about Marty Grisham's
3 relationship with those two children. Loren and Marty
4 Grisham it's no secret had a rocky relationship at times.
5 But in the last year of Marty's life Loren had moved on to
6 college in Glenwood Springs, and things were really
7 improving in their relationship.

8 Kristen, she remained here in Boulder. She was
9 taking classes at Front Range and living with her mother in
10 Louisville.

11 Now, Marty Grisham and Pam Grisham's marriage
12 ended in divorce in 1991. And at this point in 1994 Marty
13 Grisham had begun a relationship with a woman named Barbara
14 Swider, his new girlfriend. They'd been dating for about
15 two months at this time. They were excited.

16 They were making plans together because Marty
17 Grisham was leaving the City service in just about a couple
18 months. He was moving on to different things, he was
19 retiring, he was planning a bike trip to Alaska. And that
20 night Pam Grisham (sic) and Marty had plans, they were going
21 to have dinner at his apartment.

22 Now, as Marty Grisham sat in his office as the
23 director of information services on November 1, 1994, he
24 received a phone call from a man named Jeff Gore. Jeff Gore
25 was an employee at the credit union, the Boulder Municipal

1 Employees Federal Credit Union where Marty kept his bank --
2 where he did his accounts.

3 Jeff Gore called Marty Grisham because Jeff Gore
4 had received this phone call from an unknown person claiming
5 to be Marty Grisham. This unknown person called and asked
6 about the account balance on Marty's checking account. When
7 Jeff Gore challenged this unknown caller asking a security
8 question as you would typically do on the phone, the unknown
9 caller hung up.

10 Jeff Gore felt like maybe Marty Grisham just hung
11 up on him, so he dialed him back at his work and told him
12 about what had happened. Marty immediately went to his bank
13 and found out that checks, checks that he kept in a desk
14 drawer in his apartment, had been stolen, and at least 13
15 checks had been forged in his name totaling over about
16 \$4300.

17 At this point Marty Grisham left his bike behind,
18 he called his girlfriend Barbara Swider, and they went to
19 the Boulder Police Department where he made the tough
20 decision at this point to file a complaint to let the
21 authorities know that his checks were gone.

22 And Marty Grisham knew that very limited people
23 had access to his apartment where his checks were kept. He
24 knew his girlfriend Barbara Swider did, but she was not a
25 person that he suspected. And the reason why it was tough

1 making this report is because the other two people were his
2 children, Kristen and Loren.

3 Now, he listed Kristen and Loren as possible
4 suspects in this check forgery. But he also listed a third
5 person, person named Michael Clark, the defendant, because
6 he knew that Kristen, his daughter, was friends with Michael
7 Clark and that Michael Clark had recently had some trouble
8 with the law.

9 Now, after he filed this report with the report
10 technician named Barb Lennon, who is going to testify here
11 later in this trial, Barbara Swider, his girlfriend, and
12 Marty went back to his apartment to try to put this whole
13 unpleasant thing behind them.

14 They made dinner together in his apartment, they
15 listened to music, sat at this table drinking wine. Then
16 there was a knock at the door, a loud knock. Barbara stayed
17 seated in that chair closest to the wall. Marty Grisham got
18 up, went to the door.

19 The next thing that Barbara Swider heard was
20 gunshots. She rushed over to Marty. He had been shot
21 multiple times. He was slumped on the ground and bleeding.
22 She called 911 immediately. It was 9:34 at night on
23 November 1, 1994.

24 (The 911 recording was played in open court.)

25 MR. KELLNER: It's the doorway where Marty Grisham

1 was standing when he was shot, blood on the ground where he
2 laid.

3 Now, it took just minutes, just minutes before the
4 police and the emergency medical personnel arrived. They
5 rushed him to Boulder Community Hospital. He'd been shot
6 twice in the chest, twice in the head. There was nothing
7 could be done, and he died just minutes later.

8 Now, as I said, Boulder police officers and
9 detectives basically descended on this scene. They came
10 within a matter of minutes. They set up a crime scene area
11 and began to look for evidence.

12 Some of the things that they collected here you
13 can see these placards 1, 2, 3 and 4. They collected shell
14 casings, four of them, and ultimately they collected three
15 bullets and a bullet fragment. These were 9mm bullets and
16 they were ball ammunition. It's an important thing to
17 remember throughout this case.

18 They also found this Carmex container. Carmex is
19 a lip balm container. It was just outside the doorway of
20 Marty Grisham's apartment.

21 Both the shell casings and the Carmex container
22 were dusted for fingerprints. None were found.

23 Now, back at the police department Barb Lennon was
24 listening to that radio traffic, and she heard the shots --
25 or the call-out of the shots being fired at 5640 Arapahoe at

1 Marty Grisham's apartment. She remembers it to this day.
2 And immediately her mind flashed back to just a couple hours
3 earlier when she had taken that report about the forgery.
4 And instantly the people who were the suspects in the
5 forgery became the suspects in this murder.

6 So about 20 minutes after Marty Grisham was shot,
7 Officer Goodard from the Louisville Police Department showed
8 up in Louisville at Pam Grisham's house. Inside he found
9 Pam Grisham and her daughter Kristen. They'd been inside
10 that night watching a movie together.

11 Meanwhile, at the same time a deputy from the
12 Glenwood Springs Police Department is looking for Loren.
13 That deputy, Deputy Don Briar, he'll also testify in this
14 trial, found Loren at 11:20 that night, less than two hours
15 after the murder, in Loren's dorm room.

16 Loren had spent the entire day with his friends
17 and with his girlfriend in Glenwood Springs, which is at
18 least a three-hour drive from Boulder. He was quickly ruled
19 out as a suspect.

20 At the same time detectives went to Michael
21 Clark's known residence; frankly, the residence of his
22 parents. They went and they couldn't find him. In fact, it
23 would be over two days before the police located Michael
24 Clark.

25 In 1994 Michael Clark was 19 years old. He

1 graduated from Boulder High School. And people that come to
2 this trial will describe him as a guy who had a chip on his
3 shoulder, a guy who had a chip on his shoulder because some
4 people had more than him, some of his classmates, some of
5 his friends were the haves, and he was a have not.

6 He went to college actually in Pueblo for a year.
7 But it didn't work out, and he ended up back in Boulder. He
8 ended up back in Boulder, but he didn't have a place to
9 stay. He was having trouble with his parents. And he was
10 basically moving from place to place, couch to couch.

11 But he had a plan to get out of Boulder. He had a
12 plan, he had a dream of joining the Marine Corps. In fact,
13 you'll hear from witness after witness in this trial that
14 Michael Clark wanted to join the Marine Corps so badly he
15 would wear a Marine T-shirt all the time, that he had Marine
16 Corps sticker on his old Jeep, even kept his hair in a high
17 and tight.

18 And his recruitment in the Marine Corps was
19 actually on track. He had met with the local Marine
20 recruiter, a guy named Sgt. Ron Weyer. Sgt. Weyer had
21 processed his paperwork and things were looking good, he was
22 on the way getting out of Boulder until September 22, 1994.

23 His recruitment in the Marine Corps was completely
24 derailed on September 22, 1994. Michael Clark was arrested
25 for stealing a motorcycle. He was arrested for stealing

1 this motorcycle which instantly stopped his recruitment.

2 Sgt. Weyer went to bat for Michael Clark. He went
3 and tried to make a deal with the district attorney so that
4 he could still progress with his recruitment. But
5 Sgt. Weyer made it absolutely clear he was on thin ice.
6 Anymore trouble at all, he was out, no question about it.

7 Now, on November 1, 1994 when they couldn't find
8 Michael Clark at his parents' house, officers began to
9 continue to look for him. They spoke to Sgt. Ron Weyer the
10 next day.

11 Sgt. Ron Weyer said that just the week prior to
12 the murder Michael Clark came into the recruiting office and
13 showed him a pistol. He called this pistol chrome or
14 silver, a cheap gun.

15 Sgt. Weyer being a Marine did the thing that he
16 was first trained to do whenever taking a weapon from
17 somebody, checked to see if it was loaded. He dropped the
18 magazine out of Michael Clark's pistol and saw 9mm bullets,
19 ball ammunition.

20 Sgt. Weyer took one of those bullets out of the
21 magazine. The defendant became nervous, grabbed that bullet
22 back from him, actually wiped it down saying he was
23 concerned about leaving fingerprints on the bullet.

24 This obviously heightened to the extreme the
25 Boulder Police Department's desire to try and locate this

1 man right away. Then they began to receive these checks
2 from the bank, checks from Marty Grisham's account made out
3 to Michael Clark, one after the other. And the spotlight
4 shown even greater on Michael Clark.

5 Finally, on November 3, 1994 Boulder Police
6 Department officers and detectives located Michael Clark.
7 They found him standing at an apartment on Gunbarrel Avenue,
8 frankly just a couple miles away from Marty Grisham's
9 apartment. They found him inside that apartment.

10 They arrested him, they took him to the police
11 department and they questioned him. They questioned him
12 about these checks.

13 Now, you may or may not know, September 24, 1994
14 was a big day in CU football history. This is a day when
15 Kordell Stewart, the quarterback for the CU Buffaloes, threw
16 a hail marry pass on the last play against Michigan to win a
17 big game in Ann Arbor, Michigan.

18 Kristen Grisham went to that game, and Marty
19 Grisham was out of town that weekend. So Kristen asked
20 Michael Clark to look after Marty Grisham's cat while they
21 were both out of town.

22 The defendant admitted that over that weekend,
23 September 24th, September 25th, that he stole the checkbook
24 out of Marty Grisham's apartment and that he forged these
25 checks.

1 When they confronted the defendant about the 9mm
2 pistol that Sgt. Weyer had seen, the defendant told him an
3 incredible story.

4 He told them that he went to Montbello about three
5 weeks earlier, that's a place around Denver, and he went to
6 this apartment complex in Montbello looking to buy some
7 stereo equipment. He met a random man named Luis, and Luis
8 got into Michael Clark's Ford Mustang. And as they were
9 going to look at this stereo equipment, this man Luis pulled
10 out a gun. It was a 9mm pistol.

11 They went to look at the stereo equipment.
12 Michael Clark decided not to buy anything, and he drove back
13 to Boulder. And he all the sudden realized that this man
14 Luis had left his 9mm pistol in Michael Clark's Mustang.

15 So the defendant told detectives that he went back
16 to Montbello a few days later, couldn't find this man named
17 Luis, and just gave the gun to a random person, drove back
18 to Boulder.

19 After he was questioned he went into the Boulder
20 County Jail. That's November 3, 1994. There he came across
21 a man named Walter Stackhouse. Walter Stackhouse was in the
22 Boulder County Jail at the same time for the same thing, he
23 was booked on charges of check fraud.

24 Now, Walter Stackhouse and the defendant ended up
25 being cellmates. They talked about their cases. And the

1 defendant told Walter Stackhouse can't charge me with this
2 because they'll never find the gun. When Walter Stackhouse
3 asked him well, did you do it, the defendant never answered
4 yes or no, he just nodded his head and again said they'll
5 never find the gun.

6 The defendant during his interview he also told
7 detectives that on November 1, 1994 he was actually at a
8 soccer game with his friends Jamie Uhlir and Dion Moore.
9 Now, Jamie Uhlir and the defendant have played soccer
10 together at Boulder High School.

11 So they were going to a game out in Lakewood.
12 Jamie Uhlir was attending Metro at the time, and he lived
13 just off of University Boulevard and I-25. Jamie Uhlir says
14 that the defendant left his apartment between 8:50 and
15 9:00 the night of the murder.

16 And the defendant said that when he got back to
17 the apartment in Gunbarrel or on Gunbarrel Avenue he called
18 two girls, Allyson Hackman and Kristin Baulsir. So
19 detectives followed up on their story. Could he have made
20 the drive? Could he have been at Marty Grisham's apartment
21 at 9:34?

22 Two detectives back in 1994 took unmarked patrol
23 cars, no lights, no sirens, and they drove this route from
24 Jamie Uhlir's apartment north on I-25, west on 36, up
25 foothills, then a right on Arapahoe to Marty Grisham's

1 apartment.

2 The officer that left at 8:50, he arrived at Marty
3 Grisham's apartment at 9:22. The officer that left at
4 9:00 arrived at Marty Grisham's apartment at 9:32.

5 Now, keeping in mind that Barbara Swider placed
6 the phone call to 911 at 9:34 just after Marty Grisham was
7 shot, the detectives waited until 9:35, then they drove to
8 the apartment on Gunbarrel Avenue. They both arrived at
9 approximately 9:43.

10 And you will hear testimony from Allyson Hackman
11 that back in 1994 she did get a phone call from the
12 defendant. She thinks it was between 9:45 and 10:00. And
13 she thought it was an unusual time, it was a late phone call
14 for her to receive from the defendant.

15 Now, to an extent -- to an extent the defendant
16 was right, he wasn't charged with this crime in 1994. They
17 didn't find the gun, and this case at times languished, at
18 times would collect dust. And every couple years some other
19 detective would open it up and take a crack at it. But it
20 was cold.

21 It was cold until December 2009. That's when
22 Detective Chuck Heidel of the Boulder Police Department, one
23 of their most experienced detectives, the man sitting right
24 here, was assigned to this case.

25 He brought a renewed interest, a renewed passion.

1 He put his time into this case. One of the first things he
2 did was follow up on the defendant's story about Luis. And
3 he found that it was a complete fabrication.

4 He found out that in fact Dion Moore, the
5 defendant's high school friend, and the defendant purchased
6 two 9mm pistols from ABC Pawn -- it's a pawn shop on Colfax
7 in Denver -- on October 19, 1994.

8 And they used what's called a straw purchaser.
9 They didn't buy the guns themselves. They found someone
10 else to do it for them. That person whose name is David
11 Berring, David Berring was given some money for his trouble,
12 and gave the guns to Dion and Michael Clark.

13 Detective Heidel found the make and model of that
14 gun, a 9mm Bryco-Jennings gun, sold to David Berring, so he
15 tracked down David Berring. Detective Heidel found David
16 Berring sleeping on a beach in Florida. He confirmed that
17 he did buy these guns, one for Dion, one for the defendant.

18 Detective Heidel also asked the Colorado Bureau of
19 Investigation to look into whether or not a Bryco-Jennings
20 9mm could have fired the bullets that killed Marty Grisham.

21 So an expert in 2011 reviewed the manufacturer,
22 Bryco-Jennings, as well as the unique characteristics that
23 are found on every single bullet fired from a gun. And they
24 determined after running it through an FBI database that the
25 bullets that killed Marty Grisham could have been fired from

1 a Bryco-Jennings 9mm pistol.

2 The next thing Detective Heidel did was he looked
3 at the evidence that they found at the scene. This Carmex
4 container had been dusted for prints in 1994, but had never,
5 ever been submitted for DNA. So 2011 Detective Heidel sent
6 it to the Colorado Bureau of Investigation and had it
7 searched for DNA.

8 In the interior of this Carmex container found
9 outside of Marty Grisham's apartment door the expert found a
10 DNA profile. That DNA profile was a partial match to the
11 defendant. In fact, that expert will testify that over
12 99 percent of people in this world could be excluded, but
13 not the defendant.

14 What I've gone over here is really just a fraction
15 of the evidence that you're going to see in this case.

16 What the evidence will show when Mr. Brackley and
17 I are done, have completed giving you our evidence in this
18 case, the evidence will show that the defendant had the
19 means to kill Marty Grisham with that 9mm Bryco-Jennings
20 handgun, he had the opportunity when he left Jamie Uhler's
21 apartment in Denver to have gotten to Marty Grisham's
22 apartment by 9:34 and back to the apartment in Gunbarrel in
23 time to try and create an alibi.

24 And I'll show that his recruitment into the Marine
25 Corps was hanging by a thread. The defendant had a motive

1 to kill Marty Grisham because those checks and that check
2 fraud was coming to life. And he knew anymore trouble and
3 he was out, his dream of joining the Marine Corps was done.

4 Ladies and gentlemen, at the conclusion of our
5 case we're going to ask you to apply your common sense,
6 we're going to ask you to look at all the evidence and
7 return a verdict that supports the truth in this case,
8 return a verdict that's consistent with the facts and the
9 evidence without bias or sympathy or prejudice for anyone.

10 I'm going to ask you to return a verdict of guilty
11 as charged to First Degree Murder in the murder of Marty
12 Grisham on November 1, 1994.

13 THE COURT: Thank you, Mr. Kellner.

14 On behalf of the defendant. Ms. Milfeld.

15 MS. MILFELD: Thank you.

16 The Boulder Police Department and the District
17 Attorney's Office have pulled out all the stops to
18 investigate Michael Clark. They wiretapped his phone,
19 interviewed all of his family, consulted with the FBI, and
20 even placed a GPS unit on his car.

21 For many years they had desperately sought
22 evidence that will tie Michael Clark to the murder. And
23 what did they get from all of their effort? One would
24 expect that if he committed the crime they would be able to
25 come up with some definitive proof; that if you focus

1 relentlessly and wholeheartedly on one person and that
2 person is guilty you would have this indisputable evidence.

3 Instead, their unusually thorough and creative
4 investigation had left them with evidence that simply does
5 not add up. It does not add up because Michael Clark did
6 not murder Marty Grisham.

7 It's no secret that Michael Clark made poor
8 decisions in 1994. He stole a motorcycle and he forged
9 checks to buy a flashy car. He was a 19-year-old who
10 engaged in irresponsible behavior. But who he was not was a
11 cold-blooded, calculated killer.

12 On November 1st Michael Clark went over to the
13 apartment of his best friend, Jamie Uhlir, to pick him up to
14 watch a soccer game. It was a big play-off game which many
15 of their friends were playing. And they wanted to go to
16 cheer them on. Mike went over to his friend's apartment and
17 they hung out for a few hours, including with one of his
18 best friends, Dion Moore.

19 After Jamie got home from school they left for the
20 soccer game. It was a circuitous drive. At the time Jamie
21 Uhlir lived on South University Boulevard in Denver, and the
22 game was in Lakewood. To get to the game they had to take
23 two different highways as well as a maze of residential
24 streets.

25 During the game Michael and Jamie just watched the

1 game normally, Michael acted completely normal, chatted with
2 Jamie, cheered on all of his friends. He didn't act
3 anxious, he didn't act scared, he didn't act nervous. He
4 didn't act like he was about to commit a cold-blooded,
5 calculated murder because he did not murder Marty Grisham.

6 Jamie and Michael watched the game from start to
7 finish. After the game got over they went back to Mike's
8 car that was in the parking lot. They weren't in any hurry
9 and, in fact, they couldn't be even if they wanted to
10 because Jamie was on crutches from having knee surgery a few
11 weeks before. Michael didn't have to be anywhere.

12 They went back to Jamie's apartment reversing the
13 same winding way that they came. When they got back to
14 Jamie's apartment Mike went in and chatted with him for a
15 few minutes. He chatted with him because he wasn't in any
16 rush. He wasn't about to commit a murder.

17 Michael Clark then drove to Bob Mann's townhome in
18 Gunbarrel where he'd been temporarily staying. At 9:45 he
19 called his girlfriend, Allyson Hackman. They talked for 45
20 minutes to an hour and had a completely normal conversation.

21 When she picked up that phone he didn't sound out
22 of breath, he didn't sound anxious, he didn't sound scared.
23 He didn't sound at all like a person who had just committed
24 a murder because he did not murder Marty Grisham.

25 Meanwhile, something else was happening at the

1 Fairway Apartments where Marty Grisham lived. Around 9:30
2 Tanya Jerome walked out of her apartment and across the
3 parking lot to go do laundry. As she made her way across
4 the parking lot she saw someone who scared her. He scared
5 her because he passed very close to her, too close for her
6 comfort, and she will say closer than most people normally
7 passed. To this day that is the only stranger that had ever
8 made her hair stand on end.

9 At 9:34 Marty Grisham answers a knock on the door,
10 he turns to Barbara Burger who is sitting at the dining room
11 table and he says you know what, that sounds like a Loren
12 knock. Remember, Loren is his twin son. He goes to the
13 door, opens the door, and as he opens it wider he's shot
14 four times in cold blood.

15 The police came to the scene immediately. They
16 responded and secured everything. And within hours the
17 entire scene had been canvassed and processed.

18 The officers talked to neighbors who lived there,
19 people who worked nearby. And in those first few hours
20 there were reports of suspicious cars there. None of those
21 cars have ever been linked to Michael Clark. Michael Clark
22 at the time drove a 1960s blue Ford Mustang. No one who
23 lived there, who worked nearby ever reported ever seeing
24 this car because it wasn't there.

25 At 5:00 a.m. the next morning Sgt. Pelle called a

1 detective meeting. All the detectives came in at 7:00 a.m.,
2 and he assigned them with different tasks. One of the
3 things that he wanted to follow up on was this forged check
4 complaint that Marty Grisham had made the day before, he
5 made a complaint about some checks being stolen.

6 At that time he was killed, Marty Grisham did not
7 know who stole the checks, and the police didn't know
8 either. Sgt. Pelle assigned Detective Kithcart with
9 following up on this complaint.

10 In that afternoon he received copies of those
11 forged checks. They were all made to and endorsed by
12 Michael Clark. Detective Kithcart passed that information
13 along to other detectives who went about trying to find
14 Michael Clark.

15 One of the first things they did was trying to see
16 what cars were registered to him to see if they could locate
17 him that way. They found that he had the 1960s Ford
18 Mustang, a car that all of his friends saw him with. And
19 the next day they were able to find that car parked outside
20 of Bob Mann's townhome, the place where he'd been living.

21 Officers at around 2:00 set up a surveillance
22 outside of the townhome waiting for him to come out. At
23 2:38 Michael Clark walked out of the townhome, opened the
24 door to his car, and as he did that he was arrested.

25 For the next six hours Michael Clark was with

1 detectives. Throughout that entire time he was completely
2 cooperative. They asked him if he would do an interview
3 with them. He agreed. They asked if they could search the
4 townhome areas he had access to. He agreed. They asked if
5 they could search all parts of his car, and he agreed to
6 that as well. He agreed to that because he had nothing to
7 hide.

8 Throughout all of the detectives' exhaustive
9 searches they did not find anything relevant to the murder.
10 They didn't find anything because Michael Clark did not
11 murder Marty Grisham.

12 After they talked to Mr. Clark they took him to
13 the police department where they interviewed him. Now, this
14 is a homicide investigation, so they're going in with some
15 strategy. They're not just going in and asking him whatever
16 questions they want. They talk about what they're going to
17 ask and they go in there with topics that each detective is
18 going to follow up on.

19 They start out with a forged check complaint.
20 Michael Clark immediately admits that he forged the checks.
21 He admitted that he did that because he did.

22 For the next three hours the detectives take turns
23 questioning him about his involvement in the murder. They
24 trick him, they accuse him of lying, they confront him with
25 evidence real and not real. Michael Clark tells them the

1 truth. He tells them I didn't have anything to do with the
2 murder.

3 After the interview Michael Clark became the main
4 focus of the investigation, and he's remained that way for
5 the past 18 years.

6 The police department has pulled out all the stops
7 in trying to get evidence in this case. What have they
8 done? They've interviewed his family, his entire family.
9 They interviewed Michael Clark himself multiple times, first
10 in 1994 and then in 2011.

11 When they interview him in 2011, after the
12 interview they decide to wiretap his phone and place a GPS
13 unit on his car because they think that if they listen in to
14 his phone conversations and follow his movements that after
15 all these really intense interviews he's going to show them
16 some type of evidence or say that he was involved in some
17 way in the murder.

18 The police department talks to two national
19 agencies, they talk to the FBI and the ATF. They employ
20 them to help interview Michael Clark. They employ them to
21 try and figure out where the gun is.

22 They also talk with forensic psychologists to see
23 what they think about the interviews that he has done as
24 well as other witnesses. They send evidence to the CBI, the
25 Colorado Bureau of Investigation. They're doing all of

1 these things to try to come up with new evidence that will
2 tie him with the murder.

3 So after everything that they've done one would
4 expect that if Mr. Clark committed the crime that they would
5 have indisputable evidence, definitive proof. But what have
6 they come up with? That there is a partial match on the
7 inside of a Carmex container, that they found David Berring
8 in Florida, and the third thing is Michael Clark's changed
9 story about the gun. From all of their hard work this is
10 what they've got. And that evidence does not add up.

11 You will hear evidence about -- you will hear
12 testimony about the 9mm gun in this case. You will hear
13 that Michael Clark had a 9mm gun, and that the gun was a 9mm
14 gun. This isn't some crazy coincidence because the
15 prosecution's own expert will testify to and tell you that
16 9mm guns are extraordinarily common and are a dime a dozen.

17 The other evidence, the Carmex, Mr. Kellner talked
18 about how the Carmex was found outside of Marty Grisham's
19 apartment. But you will see pictures, and the pictures
20 clearly show it was found underneath a stair at the very
21 bottom. It was found the day after Marty Grisham was
22 killed, after detectives had been there with flashlights and
23 the entire area lit up. It wasn't in a place that was easy
24 to find.

25 The prosecution's expert from the Colorado Bureau

1 of Investigation will tell you that the DNA on the outside
2 does not match our client. That is definitive. She will
3 tell you that the DNA that's found on the outside is in such
4 a large quantity that it's likely to have come from a robust
5 source.

6 What does that mean? That means that whoever's
7 DNA is on the outside is likely the person that owned the
8 Carmex container, the person that used it everyday.

9 She'll also tell you that the DNA on the inside is
10 a partial match. What that means in practical terms is that
11 it could be someone else. It's a mixture. There are
12 actually at least two different people in that Carmex
13 container.

14 She will tell you that we don't know if another
15 woman's DNA is in there. She will tell you that we don't
16 even know if there are three people's DNA. But what's most
17 important about what she'll tell you is that they were only
18 able to test 4 out of 16 locations that they normally test,
19 the reason being is because the quantity of the DNA was so
20 degraded at that point.

21 This snitch, Walter Stackhouse, Walter Stackhouse
22 has committed multiple felonies. He's committed multiple
23 felonies in two different states. Walter Stackhouse had a
24 lot to lose when he was an inmate at the Boulder County
25 Jail. He was married, he owned a hardware store and

1 properties, and he was about to lose all of his income
2 because he was brought back in jail.

3 Walter Stackhouse was on probation at the time for
4 a felony. And he violated that probation by using cocaine.
5 He didn't just use it that once. He had used cocaine since
6 he was first put on probation. But he had tricked the
7 system by diluting his urine.

8 Walter Stackhouse was good at tricking people.
9 When he got to the jail he knew that he could provide
10 information that would better himself, and ultimately that's
11 what it did for him. He was given another chance even
12 though he violated probation and put back on probation with
13 work release.

14 The information that Walter Stackhouse gave to the
15 police wasn't anything novel, wasn't anything unsurprising
16 because the information that he gave could have easily been
17 crafted from information that was already in the paper.

18 The changed story. Michael Clark told police in
19 1994 a nonsensical story. No one believed the story that
20 he'd gone to Montbello Apartments and got a gun from a guy
21 named Luis. Detectives at the time didn't believe it, no
22 one else believed it.

23 Well, why would he tell a story like that? See,
24 Michael Clark was a white kid from Boulder who knew that
25 Dion Moore was the real deal. Dion Moore was running guns

1 from Boulder to Chicago. And he knew that if he told
2 detectives about that, that that could hurt him. And he was
3 scared of Dion.

4 So it made sense in 2011 when he talked to the
5 police again that he told them I got the gun from Dion.
6 That's because he wasn't scared anymore. He didn't have a
7 reason to be because at that point detectives and the
8 police, they already knew the whole story about Dion.

9 Underlying all of this is the idea that Michael
10 Clark killed Marty Grisham to cover up the check forgery.
11 What doesn't make sense about that is at the time that Marty
12 Grisham --

13 MR. KELLNER: Objection, Your Honor. What doesn't
14 make sense about all this is clearly argument.

15 THE COURT: Sustained.

16 MS. MILFELD: The evidence will show that at the
17 time Marty Grisham was murdered he didn't know who had
18 stolen the checks. The police didn't know who stole the
19 checks. And certainly Michael Clark didn't know that Marty
20 Grisham knew.

21 Michael Clark made the checks out to and endorsed
22 them to himself. He clearly knew that he was going to get
23 caught.

24 For the last 18 years the Boulder Police
25 Department and the District Attorney's Office have invested

1 thousands of hours and put a tremendous amount of resources
2 in trying to tie Michael Clark to the murder. They have
3 desperately sought this indisputable evidence, some type of
4 evidence that will have definitive proof.

5 After pulling out all of the stops, what they're
6 left with is evidence that does not add up. It does not add
7 up because Michael Clark did not murder Marty Grisham.

8 THE COURT: Thank you, Ms. Milfeld.

9 Would the prosecution please call their first
10 witness?

11 MR. BRACKLEY: We call Mr. Kirk Magill.

12 THE COURT: Sir, would you step forward please?
13 Come on all the way up here. Before you sit down would you
14 face me and raise your right hand.

15 KIRK MAGILL,
16 called as a witness on behalf of the People, having been
17 first duly sworn, was examined and testified as follows:

18 THE COURT: Please have a seat.

19 Go ahead.

20 MR. BRACKLEY: Thank you, Judge.

21 DIRECT EXAMINATION

22 BY MR. BRACKLEY:

23 Q Good afternoon, sir. Can you for the record state
24 your name and spell your last name for the court reporter?

25 A Richard Kirk Magill, M-A-G-I-L-L.

1 Q And do you go by the name Kirk?

2 A I do.

3 Q Are you currently employed?

4 A Yes.

5 Q With whom? What do you do?

6 A I'm a technology coordinator for a school district
7 in Iowa.

8 Q How long have you lived in Iowa for?

9 A 13 years.

10 Q Married?

11 A Yes.

12 Q Children?

13 A Yes.

14 Q How many?

15 A Five.

16 Q What did you do or where did you come from prior
17 to moving to Iowa?

18 A We spent almost five years in Florida. Prior to
19 that lived in Boulder.

20 Q Can you tell us what years you lived in Boulder?

21 A I know we left in -- that's -- sorry to do the
22 math backwards. Would have been '91 through '95 I think.

23 Q When you were in Boulder where did you live?

24 A We lived a couple of places. We lived off of Iris
25 for about three months, and then we moved to the Arapahoe --

1 Fairway Apartments on Arapahoe.

2 Q And can you tell the jurors a little more
3 specifically where the Fairway Apartments on Arapahoe were?

4 A 55th and Arapahoe. It's on the southeast corner.

5 Q While living at the Fairway Apartments on Arapahoe
6 and 55th did you have a particular job there?

7 A Yeah. We were the on-site managers.

8 Q What did it mean to be the on-site managers there
9 at the Fairway Apartments?

10 A We did everything from the maintenance of the
11 grounds to the pre-lease and leasing of the apartments and
12 turn-around of the apartments, also cleaning, painting.

13 Q And when you say we, who were you referring to?

14 A My wife and I.

15 Q Can you give the jurors an idea of the nature and
16 character of the Fairway Apartments back in 1994?

17 A Sure. When we were there we were off campus. We
18 primarily marketed to young professionals. We had quite a
19 few retired folks that lived there and grad students.

20 Q So did your duties and responsibilities while
21 being the on-site manager, did that include getting
22 particular persons in for rentals in that unit?

23 A Can you repeat that?

24 Q Do you have to -- did people apply for rental
25 units through you and your wife at that time?

1 A Yes.

2 Q Did that include doing maintenance there on the
3 site at the Fairway Apartments?

4 A Yes.

5 Q Did you get -- did you get to know the residents
6 and the different folks who lived there at the Fairway
7 Apartments during your time as the on-site manager?

8 A Relatively speaking, yes.

9 Q Did you ever come to meet a fellow named Marty
10 Grisham back there in around 1994?

11 A Yes.

12 Q And who was Marty Grisham?

13 A He was a tenant, but he was also more than just a
14 casual acquaintance. We had gone on a couple of bike rides
15 together, and he shared his expertise with the bike helping
16 me with -- he had tools to repair bikes. And so I worked on
17 my bike with him as well.

18 Q And do you recall approximately how long Marty
19 Grisham lived there at the Fairway Apartments?

20 A I can't recall exactly. We were there for better
21 than three years, and I know he was there for part of that
22 time.

23 Q Okay. And just one -- one other question. Can
24 you describe how many buildings there were at the Fairway
25 and whether there was any common areas that tenants could

1 use or enjoy?

2 A You bet. There were four buildings and a fifth
3 one that was a professional building. They were all owned
4 by Mock Realty at the time, and they were all part of what
5 we were responsible for maintaining and leasing aside from
6 leasing the commercial property. Those were done by the
7 main office.

8 And there was a courtyard area as well as a shared
9 laundry facility. And the courtyard area oftentimes we
10 would do, you know, like a Friday night activity where maybe
11 some of the locals that had musical experience and such
12 would bring their music and we would also, you know, provide
13 a grill and do some grilling and stuff like that.

14 Q So it's fair to say that you got to know sort of
15 who would come and who would go from the Fairway Apartments
16 back around 1994 in that time that you were working there?

17 A Yeah. Yeah.

18 MR. BRACKLEY: Your Honor, if I may approach with
19 a number of exhibits? I've showed them to Ms. Ring. She's
20 reviewing them at this time.

21 THE COURT: Yes, permission granted.

22 (Pause.)

23 Q (By Mr. Brackley) Mr. Magill, I'm going to
24 approach with what I've pre-marked People's 1, 2, 3, 4 and
25 5. And I'm going to ask you to take a look at them all,

1 then I'll ask some specific questions about each one.

2 Referring to People's 1, let's start with 1. What
3 is People's 1?

4 A Look like it's an overhead picture of I would
5 consider this the south edge of the property.

6 Q And is that a fair and accurate depiction of that
7 property, the Fairway property as the buildings relate to
8 each other and as the buildings relate to the streets and so
9 forth?

10 A Yeah. As I recall it, yes.

11 MR. BRACKLEY: I would move to admit People's 1
12 into evidence.

13 THE COURT: Any objection?

14 MS. MILFELD: No objection, Judge.

15 THE COURT: 1 is admitted.

16 Q (By Mr. Brackley) What is People's 2?

17 A Looks like a wider, just a higher up picture
18 showing the area and both surrounding blocks.

19 Q Is that a fair and accurate depiction of where the
20 Fairway Apartments were situated to the major roadways and
21 thoroughfares around that particular location?

22 A Yes.

23 MR. BRACKLEY: Your Honor, I would move to admit
24 People's 2 into evidence.

25 MS. MILFELD: No objection.

1 THE COURT: 2 is admitted.

2 Q (By Mr. Brackley) Why don't you take a look at
3 People's 4 and 5 while we're on this particular theme. What
4 is People's 4 and 5?

5 A It looks like the entrance to the 5640 apartment,
6 which was building 4.

7 Q Okay.

8 A This looks like it was probably the one and two
9 stairwell.

10 Q Okay. And what's the difference if you could say
11 well, People's 4 is different than People's 5? How are they
12 different?

13 A Aside from the angle of the picture it just looks
14 like 4 does not have the -- looks like the leaves in the
15 entryway primarily.

16 Q Are those -- are People's 4 and 5 fair and
17 accurate depictions of the way that those buildings appeared
18 back in 1994?

19 A Yes.

20 MR. BRACKLEY: Your Honor, I had move to admit
21 People's 4 and 5 into evidence.

22 MS. MILFELD: No objection.

23 THE COURT: 4 and 5 will be admitted.

24 Q (By Mr. Brackley) And finally, what is People's
25 Exhibit 3?

1 A It's a picture of Marty.

2 Q Is that a fair and accurate depiction of the Marty
3 Grisham back there in 1994 more less?

4 A As I remember him, yes.

5 MR. BRACKLEY: Your Honor, I move to admit
6 People's 3 into evidence.

7 MS. MILFELD: No objection.

8 THE COURT: 3 will be admitted.

9 MR. BRACKLEY: If I may, I'm going to publish
10 People's 2.

11 THE COURT: Permission granted.

12 MR. BRACKLEY: And I'm going to do that via the
13 screen to the right of the jurors.

14 Q (By Mr. Brackley) Mr. Magill, if you could kind
15 of -- I'm going to give you one of these pointers.

16 MR. BRACKLEY: If I may approach, Your Honor?

17 THE COURT: Sure.

18 Q (By Mr. Brackley) If you could kind of give us a
19 tour of the area there as it relates to the Fairway
20 Apartments?

21 A You want something in specific or --

22 Q Well, start with the Fairway Apartments and --

23 A Here is the Fairway Apartments. And as the --
24 this was building 1, 2, 3 and 4. This was the commercial
25 building owned by the same realty company.

1 This was primary parking for the entire -- that's
2 kind of the horseshoe shape. And there's a main entrance
3 here off of Arapahoe and one off of 55th. And there was
4 another parking lot that serviced a lot of folks that lived
5 in building 4 back in here behind what used to be a vet
6 clinic. I don't know what it is now. But there was also a
7 gated entrance here. And then this was the common space and
8 this was a row of mailboxes.

9 Q Okay. Can you just identify for us Arapahoe
10 Avenue?

11 A Sure. This is Arapahoe.

12 Q And 55th Street?

13 A Here.

14 Q Okay. And let me show you what's been marked as
15 People's No. 1 up there. And probably should have saved
16 some of my questions for People's 1, but I'll ask them
17 again.

18 Okay. You started with -- you mentioned a
19 horseshoe parking lot. Do you see that in this photo?

20 A Yeah. It's up here.

21 Q Okay. And you mentioned a -- an entrance to the
22 parking lot via 55th Street. Can you see that in this
23 particular photo as I displayed it to you?

24 A No. It would be further up here.

25 Q Where would that entrance that you showed us

1 before on 55th -- I'm sorry, on Arapahoe Avenue be?

2 A It would be up over here somewhere.

3 Q Okay. So sort of up in that direction of where
4 that horseshoe parking lot goes?

5 A Yeah.

6 Q Can you show the jurors the building that Marty
7 Grisham lived in?

8 A Right here.

9 Q Okay. And can you show the jurors that other
10 parking lot that you talked about?

11 A This space here.

12 Q And where would the -- the gate between Marty's
13 apartment and that other parking lot, where would that be?

14 A It was right here. This is the mailboxes. And
15 then there was a small gate pass. Looks like there was a
16 tree here. It was just right in that space.

17 Q And can you show the jurors where you lived at
18 this time?

19 A We were in the lower unit here, so we were -- we
20 had a front apartment here that was the leasing office. The
21 laundry room facility was on the first floor there. And we
22 lived in the -- at the time it was apartment 213 which was
23 right here on the first floor.

24 Q Just for historical purposes is the building that
25 you used to live in still there?

1 A To my knowledge it caught fire in the last couple
2 years. I don't know. I haven't been there.

3 Q Okay. Let's look at People's 3 -- well, since
4 we're on People's 5 we'll look at that. What's People's 5?

5 A That's the entrance to -- looks like that was
6 probably Marty's apartment here, and then apartment 1 here.

7 Q And where was the specific entrance to
8 Mr. Grisham's apartment?

9 A It was underneath the stairs. There's a door that
10 you can't really see, but it's to the left of this window --

11 Q Okay.

12 A -- on this wall.

13 Q And if we could just show People's 4, is that just
14 a closer view of that particular entryway and staircase?

15 A Yeah. That shows the door to the -- the opposing
16 apartment here. You can see the other door there.

17 Q So you had just kind of ran that red dot up and
18 down. That would be where Mr. Grisham's apartment door
19 would have been?

20 A Yeah, the only entrance right here.

21 Q And if we could see People's 3, is that Marty
22 Grisham?

23 A Yes.

24 Q Do you recall as you sit here today, Mr. Magill,
25 November 1, 1994, the day that Marty Grisham was killed?

1 A Yes.

2 Q Do you recall a conversation that you had with
3 Marty Grisham that afternoon sometime?

4 A Yes.

5 Q And what was the -- what was the purpose --
6 without giving us specifics, what was the purpose of the
7 conversation that you had with Marty on the afternoon of
8 November 1, 1994?

9 A He asked me to change some locks on his apartment.

10 Q Okay. And do you recall without any further
11 detail at this point when that was on November 1, 1994? Was
12 it early in the morning or in the afternoon or just sometime
13 during the day?

14 A Sometime during the day. It had to be during
15 office hours because I remember he came into the leasing
16 office to ask.

17 Q As a result of that conversation with Marty
18 Grisham did you end up changing the locks prior to his
19 murder?

20 A No.

21 Q Is that -- you just hadn't gotten around to it
22 yet?

23 A We usually kept lock sets on-site, but we didn't
24 have any at the time, so --

25 Q Do you recall without any further detail about

1 what he said what his demeanor was or how he was acting when
2 he told you or he asked you that he needed his locks
3 changed?

4 A He didn't seem extremely concerned, just something
5 he wanted to get done.

6 Q Did -- is it something that he wanted to get done
7 pretty quickly?

8 A Well, yeah. I think it was something he would
9 like to get done, you know, within a couple of days.

10 Q So let's talk about later that night, November 1,
11 1994 after about 9:30. Do you remember something unusual
12 happening for the environment there at the Fairway
13 Apartments in Boulder?

14 A Absolutely, yeah. I remember studying for a test,
15 and sounded like someone banging on my door with a hammer,
16 literally four bangs. And I went out, went to the door to
17 discover no one there, went outside to see other people had
18 been alarmed by the same sounds and ended up heading over to
19 his apartment.

20 Q If I can show People's 1. So when you came out of
21 your building can you tell the jurors where you -- where the
22 first place you went was?

23 A My entrance was inside the building here. And I
24 came out and went over this direction. And you know,
25 obviously in the discovery process coming out there were

1 many people standing out on their balconies, which you can
2 see there were balconies that were outside of every
3 apartment. And easily I was pointed in that direction
4 towards Marty's apartment, which is -- was here.

5 Q And you said you went over to Marty's apartment.
6 Why did you go to Marty's apartment?

7 A I think combination of people outside pointing
8 that direction, but also I guess in my mind it just clicked.

9 Q When you say it just clicked, what just clicked?

10 A Well, the fact that he'd come to me earlier asking
11 for his locks to be changed, and I can't really explain it
12 further than that.

13 Q When you got to Marty's apartment what did you
14 see?

15 A Well, the door was closed. I knocked on the door,
16 and someone inside asked who it was. And I identified
17 myself and at that point let myself in. And upon entering
18 the apartment I saw Marty laying on his back propped against
19 the sliding glass door with obvious gunshot wounds I would
20 say at the time.

21 Q At the time you had mentioned you were studying.
22 What were you studying for?

23 A I was studying for my EMT certificate.

24 Q Would that be emergency medical technician?

25 A Yes.

1 Q When you got to Marty Grisham did you take any
2 action towards him?

3 A Immediately laid him supine on the ground and
4 assessed his wounds.

5 Q Was Marty still alive?

6 A He was in what would be considered agonal
7 breathing and he was still alive.

8 Q Was Marty able to communicate with you?

9 A No. He was -- if -- if he was trying to
10 communicate it was in groans. That was it.

11 Q Was anyone else there at the scene with Marty?

12 A Yes.

13 Q Who was there?

14 A There was a lady there with him.

15 Q And what was she doing?

16 A I -- at the moment I guess they were probably
17 eating dinner.

18 Q Well, what did you see her doing in relation to
19 Marty Grisham who was laying on the ground?

20 A In my mind I can't remember. She was -- she was
21 definitely panicked.

22 Q Okay. Do you recall ever instructing someone or
23 whether you found out that 911 had been called?

24 A I can't.

25 Q You had said this woman was in panic. Can you

1 describe for the jurors what her demeanor was when you saw
2 her?

3 A I think she was terrified, I mean realistically
4 because of the circumstances. She was distraught and very
5 concerned obviously for her own safety as well. And I think
6 that's -- you know, when I came in she -- she was a little
7 nervous at first, but then realized I was there to offer
8 assistance.

9 Q Do you recall emergency folks arriving at the
10 location?

11 A Yes.

12 Q Do you recall both emergency medical people and
13 also law enforcement?

14 A Yes.

15 Q Now, can you characterize for the jurors how much
16 time passed between hearing that loud noise that brought you
17 out of your apartment to the time you heard that -- were you
18 inside your apartment at the time?

19 A Yes.

20 Q How much time passed between the time you first
21 heard that noise and the time you got to Marty Grisham's
22 apartment?

23 A Five minutes or less.

24 Q Do you have any recollection or ability to
25 characterize how long it took from that point for first

1 responders to arrive?

2 MS. MILFELD: Objection, Judge, outside the scope
3 of his knowledge.

4 THE COURT: Overruled.

5 Q (By Mr. Brackley) Do you remember how long it took
6 first responders to arrive?

7 A 15, 20 minutes.

8 Q And that's while you were there attending to Marty
9 Grisham?

10 A Yes.

11 Q With the woman who was in his apartment also?

12 A Yes.

13 Q So let me show you again People's 4. You had
14 mentioned that part of your duties as a resident on-site
15 manager of the building was sort of being responsible for
16 the general upkeep of the units there at the Fairway
17 Apartments. Is that essentially like maintenance work?

18 A Yes.

19 Q Kind of cleaning up work?

20 A Um-hmm.

21 Q Gardening?

22 A Yes.

23 Q Can you describe your practice back in '94, your
24 practice as a resident building manager how you would
25 address say the upkeep of the apartment in terms of garbage

1 or rubbish laying about?

2 A Well, daily we would walk around and clean, you
3 know, pick up trash and stuff like that. This time of year
4 obviously with the leaves we would run a leaf blower through
5 the entryways top to bottom and walk the buildings.

6 Q Did you do that -- did you do your general
7 maintenance work as far as cleaning up the place according
8 to a particular schedule, or was it as needed?

9 A More or less as needed.

10 Q Was it something that you would try to do
11 everyday?

12 A It was. I think it was just an ongoing process
13 because we lived there, you know, you get up, you go around,
14 you -- you know, we just took care of it.

15 Q That was your job?

16 A Yeah.

17 MR. BRACKLEY: No further questions at this time.

18 THE COURT: All right. Cross-examination,
19 Ms. Milfeld.

20 (Pause.)

21 CROSS-EXAMINATION

22 BY MS. MILFELD:

23 Q Officer -- officer? Why did I just say that? I
24 don't know. I was going to say you remember talking to an
25 officer at the time?

1 A Sure.

2 Q An officer talked to you about what you had
3 observed when you went in to help Mr. Grisham?

4 A Yes.

5 Q He asked you questions about what had happened?

6 A I'm sure he did, yes.

7 Q When he talked to you, you never told him that it
8 took about 15 to 20 minutes for the first responders or the
9 police to get there?

10 A I don't recall.

11 Q So you don't recall ever making that statement to
12 an officer?

13 A Correct.

14 Q The same officer, Officer Witson that you spoke
15 to, you never told him that it took you about five minutes
16 to get from your place to Mr. Grisham's apartment?

17 A I don't recall.

18 Q So you don't remember making that statement to the
19 officer?

20 A No.

21 Q When you talk about 15 to 20 minutes, today 18
22 years later what you're really giving is an estimate?

23 A Sure.

24 MS. MILFELD: No further questions.

25 THE COURT: Any redirect, Mr. Brackley?

1 REDIRECT EXAMINATION

2 BY MR. BRACKLEY:

3 Q And your estimate today is just based on your
4 memory from back on November 1, 1994?

5 A Yes.

6 Q You haven't reviewed any computerized print-outs
7 from the 911 system for instance?

8 A No.

9 MR. BRACKLEY: Thank you, sir.

10 THE COURT: All right. Sir, you can step down.
11 Can this witness be excused?

12 MR. BRACKLEY: He may, Your Honor.

13 THE COURT: All right. Thank you, Mr. Magill.
14 Would the People call their next witness?

15 MR. BRACKLEY: People call Ms. Barbara Swider.

16 THE COURT: Would you step forward please? Come
17 on all the way up here all the way up by that witness chair.
18 If you would please face me and raise your right
19 hand.

20 BARBARA SWIDER,
21 called as a witness on behalf of the People, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please have a seat.

24 Go ahead, Mr. Brackley.

25 DIRECT EXAMINATION

1 BY MR. BRACKLEY:

2 Q Good afternoon, ma'am.

3 MR. BRACKLEY: Your Honor, if I can approach and
4 pick up whatever exhibits are there?

5 THE COURT: Yes.

6 Q (By Mr. Brackley) Can you state your name and
7 spell your last name for the court reporter?

8 A It's Barbara Swider, S-W-I-D-E-R.

9 Q Ms. Swider, were you ever known as Barbara Burger?

10 A Yes.

11 Q And was that a married name?

12 A That was a married name.

13 Q And were you known as Barbara Burger back in the
14 time frame leading up to November 1 of 1994?

15 A Yes, that's correct.

16 Q Ms. Swider, are you currently employed?

17 A Yes.

18 Q And who do you work for and what do you do?

19 A I'm in the credit and collections department for
20 Xcel Energy.

21 Q How long have you done that for?

22 A 32 years.

23 Q Were you doing that back in November of 1994?

24 A Actually, I'm sorry, I worked reading meters for
25 22 years, and for the last 10 years have been in credit and

1 collections.

2 Q All for Xcel?

3 A Xcel Energy, yes.

4 Q And you're that dreaded person who knocks on the
5 door and --

6 A That's correct.

7 Q -- collects --

8 A Turns off the power when the bills are not paid.

9 Q Do you currently live in Colorado?

10 A I do.

11 Q What part of Colorado do you live in?

12 A I'm in Louisville, Colorado.

13 Q How long have you been a Colorado resident for?

14 A Almost 40 years, 1973.

15 Q Where are you from?

16 A Chicago area originally.

17 Q Do you know or did you know Marty Grisham?

18 A I did.

19 Q If you can turn over that piece of paper there in
20 front of you which is People's 3 in evidence, is that Marty
21 Grisham?

22 A Yes, it is.

23 Q Okay. How did you know Marty Grisham? Tell us
24 how you met him.

25 A I first met Marty I believe it was August 31,

1 1994. He was a facilitator for a divorce seminar, and he
2 was a participant.

3 Q What does that mean, a facilitator in a divorce
4 seminar?

5 A They're usually volunteers. They work -- they
6 take small groups of people and have them work through
7 different issues of their divorce. There might be little
8 homework assignments, there might be -- there's a lot of
9 phone calls of support between the participants.

10 Q Did there come a time that you developed a
11 relationship with Marty Grisham outside of the divorce
12 group?

13 A Yes. That was about a month later.

14 Q Okay. And how did that happen? Tell us about
15 that.

16 A It was just rather natural. As we talked, him
17 being a facilitator, myself a participant, you know, we
18 would talk in phone calls and with other people in the group
19 as well. We came to find out that we had some similarities
20 in outdoor activities.

21 The outdoors was very important to me. I love
22 skiing and bicycling and hiking and backpacking, and he had
23 some of those interests as well. So it developed around
24 that mostly, just the outdoors, the love of the outdoors.

25 Q And did there come a time where in your

1 relationship you began to date Marty Grisham?

2 A We did.

3 Q And once that began to progress did Marty Grisham
4 stay as a facilitator in the divorce group that you were
5 involved in?

6 A No, he left. He left the group. He wanted me to
7 have the time to process my divorce, to work on my issues,
8 anything that I needed without him interfering in those.

9 MS. RING: Judge, I'm going to object. This is
10 basically hearsay. I hear Ms. Swider talking about this is
11 what Marty wished for her, and I don't --

12 THE COURT: Could you please approach?

13 (The following proceedings occurred at the bench
14 out of the hearing of the jury.)

15 MR. BRACKLEY: I'm -- she did say -- it was in the
16 transcripts that you found admissible.

17 THE COURT: I thought there was an agreement to
18 the admissibility. Is this something that you think is
19 beyond the transcripts?

20 MS. RING: I don't think it was beyond the
21 transcripts. My concern is she was talking about Marty
22 wished. I think it was both non-responsive, and I don't
23 recall it being part of the transcript. But I mean, it was
24 the way Mr. Brackley asked the question didn't think -- you
25 know, frankly I thought it was non-responsive and was, you

1 know, what Marty wished for me is different than --

2 MR. BRACKLEY: Again, I -- the way I heard the
3 answer was these were things that she told law enforcement
4 back in 1994 that -- sort of that shift from -- what I would
5 like to say is I'll just move on.

6 MS. RING: Okay.

7 THE COURT: So along the same page, the statements
8 that were presented at the hearing in the transcript --
9 either in transcript or through her testimony are
10 admissible. To the extent there's a statement outside of
11 that, then I understand there would be an objection.

12 I think what I can do, why don't I say I'll
13 sustains the objection, I'll allow you to rephrase the
14 question and continue your examination. Does that work?

15 MR. BRACKLEY: Sure.

16 THE COURT: It's somewhat non-responsive. Okay.
17 Thank you.

18 (The following proceedings occurred in open
19 court.)

20 THE COURT: I'll sustain the objection as
21 non-responsive and allow Mr. Brackley to continue your
22 examination.

23 MR. BRACKLEY: Your Honor, could I turn off the
24 audio speaker? I'm hearing that it's making some --

25 THE COURT: Sure. Which speaker you want off?

1 Q (By Mr. Brackley) So let me rephrase the question
2 so that we can be more efficient.

3 There came a time when Marty Grisham stopped being
4 a facilitator in the divorce group so that you and he could
5 actually have a relationship?

6 A That's correct.

7 Q And did you in fact go on to start a serious
8 relationship with Marty Grisham?

9 A Yes.

10 Q And at the time you were with Marty Grisham back
11 in the late summer into the fall of -- or into the fall of
12 1994 did you -- what did he do for a living?

13 A I believe his title was director of information
14 services for the City of Boulder.

15 Q Something to do with computers?

16 A I believe so. Back then I didn't know very much
17 about computers.

18 Q Did Marty Grisham talk to you at or around that
19 time about his plans for retirement?

20 A Yes.

21 Q Was he about to retire?

22 A He was. I believe it was about six months or so.

23 Q Was he making plans and taking actions in
24 preparation for his retirement?

25 A Yes.

1 Q What kind of things was he doing?

2 A He had lots of maps of Alaska. He bought a new
3 four-wheel drive truck that he wanted to drive up there. He
4 was interested in taking pictures, photography, and had
5 never been to Alaska. And he seemed very excited about
6 wanting to do this.

7 Q And as of this point in the beginning of the
8 relationship with him were you hoping to be included in his
9 plans for the future?

10 A We talked about it as a possibility. I was in
11 school at the time, and I -- we talked about that I wouldn't
12 join him right away, but that he wanted to go up for a
13 while, and then as time permitted if I had vacation time
14 perhaps I would join him.

15 Q You mentioned you were in school. What were you
16 studying back then?

17 A At first I was studying nutrition. Xcel Energy
18 offers to pay tuition. And at first I was studying
19 nutrition. We have a wellness program. I'm very interested
20 in food. But then our wellness program was -- wellness
21 program was not done by the company anymore, so I switched
22 to just associate of arts degree.

23 Q Do you remember November 1, 1994 certainly in the
24 evening?

25 A Absolutely.

1 Q Was there a dinner -- did you and Marty have a
2 plan to have dinner that night?

3 A Yes, we did.

4 Q Okay. And was there a particular occasion or
5 reason for dinner on that night?

6 A Marty wanted me to meet his daughter Kristen.

7 Q Prior to that night, November 1, 1994 had you ever
8 met Marty's daughter Kristen?

9 A I had not.

10 Q Did you know whether Marty had other children
11 besides Kristen?

12 A I knew that she had a brother Loren. They were
13 twins.

14 Q Had you ever met Loren before?

15 A No.

16 Q Prior to November 1st of 1994 had you met anyone
17 in Marty Grisham's family?

18 A No.

19 Q Do you recall in the afternoon of 1994 receiving a
20 telephone call from Marty Grisham generally and roughly
21 about your plans for dinner that night?

22 A Yes, I do.

23 Q And do you recall what Marty said to you at the
24 beginning of that telephone conversation?

25 A I do. He said -- he opened with something about I

1 love you, I'm okay, but I don't think my kids are.

2 Q And did you have a discussion with him after he
3 said that?

4 A I don't remember if we had the discussion, the
5 full discussion right then, but we -- either then or later
6 in the evening he asked me to come and pick him up.

7 Q Let me back up just a little bit, and then we'll
8 talk about your discussion. Marty had asked you to pick him
9 up. Was he a fellow who would ride his bike to work?

10 A Yes. He had ridden a bike to work, and he didn't
11 want to deal with the bike. So he had an errand to run and
12 asked me to come get him.

13 Q Okay. And do you remember talking with the police
14 on not only November 1st sometime into the evening 1994, but
15 also the following day?

16 A Yes.

17 Q And do you remember talking to the police about
18 the substance of the telephone call that you had with Marty
19 Grisham that afternoon on November 1, 1994?

20 A Yes.

21 Q If I showed you a transcript containing your words
22 of that conversation or of what you told the police let's
23 say on November 2, 1994, would that help you recall whether
24 you spoke with Marty about the substance -- whether you
25 talked to Marty about his kids on the telephone call or

1 later on that evening?

2 A Yes.

3 Q Okay. Let me show you --

4 MR. BRACKLEY: And it's discovery pages 1563
5 through 1572. I'm actually going to start with a transcript
6 from November 1, 1994, and that would be beginning discovery
7 page 1520.

8 Q (By Mr. Brackley) Why don't you read a page or two
9 of that.

10 Does that refresh your recollection as to whether
11 or not Marty in that telephone call in the afternoon of
12 November 1, 1994 told you more of the -- more of what he was
13 worried about?

14 A Yes, it absolutely refreshes my memory.

15 Q Okay. Can you tell the jurors what Marty told you
16 in that telephone call that afternoon?

17 A He was concerned that his children were stealing
18 checks from him. He had noticed that the evening before
19 when he tried to pay some bills, he went to get another
20 checkbook and found -- or thought it might be missing,
21 couldn't find it, but was busy that night and so didn't pay
22 too much attention to it.

23 What he told me in this phone call was that the
24 next day the credit union had called him asking if he had
25 just called the credit union to verify his balance, and he

1 said no, he hadn't, why were they asking him. And they told
2 him that somebody had just called asking about the balance,
3 and when they asked for verification they gave a wrong
4 address. Marty's checks had a different address than where
5 he was actually living.

6 And they couldn't verify the proper address, so
7 they asked for a second verification of his social security
8 number, and it's unclear to me if the person could not give
9 it or just hung up.

10 And so when that happened the credit union called
11 Marty asking about, you know, did he call and he said no.
12 And this is what he had told me in this phone conversation
13 of why he wanted to go to the police department and report
14 these missing checks.

15 Q So did there -- in this particular telephone
16 conversation do you recall whether Marty Grisham shared with
17 you why he would think his children were involved in
18 stealing these checks?

19 A They had previously supposedly stolen checks or
20 things from him. So he assumed they had taken the checks as
21 well.

22 Q And in that telephone conversation or beyond until
23 the time that there was no more conversation with Marty did
24 he ever tell you that he knew for certain, he knew these
25 things to be true in terms of his children being involved in

1 stealing his checks on this occasion?

2 A He didn't know if that was true or not on this
3 occasion.

4 Q Do you recall Marty's -- Marty's testimony how
5 this was making him feel or how he sounded as a result of
6 telling you that he got this call from the credit union and
7 he suspected his children of stealing from him?

8 A I think he was upset. He was calm. He wasn't
9 ranting, but I think he was upset by it. I think perhaps
10 disappointed, but concerned, very concerned.

11 Q So did you go pick Marty Grisham up from work or
12 from where he was?

13 A I picked him up from a meeting. And then we went
14 back to his office where he left his bicycle and picked up
15 his briefcase.

16 Q And from there did you go to the police
17 department?

18 A We did.

19 Q And did you meet with the police with him, or did
20 you wait for him outside or in a lobby area?

21 A I waited for him in the lobby area.

22 Q And where did you go from there?

23 A We stopped at a grocery store and then went to his
24 apartment.

25 Q Do you recall around what time you got back to

1 Marty Grisham's apartment?

2 A I'm thinking roughly 6:00 p.m.

3 Q Do you recall once in Marty Grisham's apartment
4 having a conversation with him about his daughter coming to
5 dinner that night or receiving a voice message from his
6 daughter?

7 A Yes. When we got back to the apartment there was
8 at least one message on the answering machine, and it was
9 his daughter. It was a very short message saying hi dad,
10 give me a call, and that was all.

11 Q As a result of that message, without telling us
12 what at this moment, did you have conversation with Marty
13 Grisham about his daughter and some dynamics with his
14 daughter?

15 A He was concerned that --

16 Q Let me just ask -- I'll get to that. So I don't
17 lose my place, let me just -- did you have that conversation
18 with him, without telling us what it was?

19 A Yes.

20 Q Let me approach and show you what I have marked as
21 People's 10 for identification.

22 MR. BRACKLEY: May I approach, Judge?

23 THE COURT: Yes.

24 Q (By Mr. Brackley) Prior to coming into court today
25 did you at some point have an opportunity to listen to a

1 voice message from Kristen Grisham?

2 A Yes, I did.

3 Q And do you know People's 10 in front of you to be
4 that voicemail?

5 A Yes.

6 Q How do you know it to be that? Did you mark it in
7 a certain way?

8 A I initialed and dated it.

9 Q Okay. And by dated, you mean the date that you
10 listened to it?

11 A Yes.

12 MR. BRACKLEY: Your Honor, I would move to admit
13 People's 10 into evidence.

14 THE COURT: Any objection?

15 MS. RING: May I voir dire briefly?

16 THE COURT: Yes.

17 VOIR DIRE EXAMINATION

18 BY MS. RING:

19 Q Ms. Swider, you before you testified today with
20 somebody from the District Attorney's Office listened to
21 what's on that CD?

22 A Yes.

23 Q And then you initialed and dated it today or
24 whenever you did that with the District Attorney's Office?

25 A That's correct.

1 Q Okay. And what you were able to say when you
2 listened to that message was it's your recollection that's
3 the same message you heard on Marty Grisham's answering
4 machine back on November 1st of 1994?

5 A Yes.

6 Q Okay. I think you told Mr. Brackley previously
7 you had never met Kristen Grisham?

8 A That's correct.

9 Q You'd never spoken with her?

10 A That's correct.

11 Q So you actually can't tell us what Kristen
12 Grisham's voice sounded like in 1994?

13 A That's correct.

14 Q Or what it sounds like today?

15 A That's correct.

16 Q Okay. What you could tell us was that you were
17 there when Marty Grisham was listening to that answering
18 machine message?

19 A Yes.

20 Q And based on the contents of the message and Marty
21 telling you it was his daughter, that's why you believe it's
22 his daughter?

23 A Yes.

24 MS. RING: Okay. No objection.

25 THE COURT: 10 will be admitted.

1 MR. BRACKLEY: Your Honor, if I may publish that
2 and approach --

3 THE COURT: Yes.

4 MR. BRACKLEY: -- and pick it up and publish it?

5 THE COURT: You need to turn the speaker on.

6 (The recording was played in open court.)

7 THE COURT: Ladies and gentlemen of the jury,
8 could you hear that?

9 JUROR: No.

10 MR. BRACKLEY: Let me play it again.

11 THE COURT: Turn it up.

12 (The recording was played in open court.)

13 THE COURT: Okay. Was everybody able to hear
14 that? All right. Thank you.

15 DIRECT EXAMINATION (cont'd)

16 BY MR. BRACKLEY:

17 Q So did that short and fairly innocuous voice
18 message have a -- evoke some reaction from Marty Grisham?

19 A It did. He was surprised she called at home at
20 that time, that she would know he was at work.

21 Q Okay. And do you recall the conversation that you
22 had with Marty about that sort of -- his statement and your
23 responses to him?

24 A Well, he was concerned that something was going on
25 that he didn't know about and just wondered what it was,

1 because we had tried to meet for dinner twice before and it
2 hadn't happened. And so this was the third time, and here
3 it was again he didn't know what was going on. I said well,
4 she's 19 years old. Maybe she doesn't want to meet with her
5 parents -- with her father and his date for dinner and, you
6 know, give her some slack maybe.

7 Q Was Marty a guy by his own description of himself
8 to you someone who had experienced giving his kids slack?

9 A Probably not in the past what he talked about, no.

10 Q And we'll follow up with that in a little bit.

11 Do you recall Marty calling Kristen back, trying
12 to call Kristen back?

13 A I believe he called her back and just left a
14 message saying I'm home, call me back.

15 Q And do you recall generally approximately what
16 time it was that Marty Grisham called Kristen back?

17 A Roughly I would say between -- if we arrived there
18 at 6:00, 6:30 maybe.

19 Q So sometime after 6:00?

20 A I believe so.

21 Q And did they have a conversation or did he leave
22 her a message?

23 A He left a message.

24 Q So do you recall additional conversations with
25 Marty Grisham that night as he processed through these

1 missing checks and his children?

2 A Yes.

3 Q Okay. And is it fair to -- well, answer me --
4 well, tell us, had you had sort of these types of
5 conversations with Marty Grisham about his children prior to
6 November 1, 1994 since the time you met him earlier that
7 year?

8 A We might have had some discussion. We were just
9 new dating. So you know, conversation about family and, you
10 know, things like that, we had conversations like that.
11 That wasn't all we talked about. Like I said, we were more
12 about enjoying the outdoors. So although I knew some of his
13 past with his children, I certainly didn't know everything.
14 And we had more conversation that evening before we had
15 dinner.

16 Q Did he repeat his thought that perhaps his
17 children were involved in stealing checks?

18 A Yes. He was concerned. He didn't want to go back
19 to the way they lived before. He said that I thought the
20 horror was over.

21 I don't know everything about how he -- his
22 parenting skills. I think there might have been some tough
23 love situations or things like that. But he said that he --
24 he just didn't want to go back to that, he thought things
25 had improved and things were improving and moving on and

1 getting better and that he didn't want to go back to that.

2 Q And at this point in time what -- the only
3 indication that he had or he could talk about of things
4 going back to that was the fact that someone had stolen his
5 checks and he thought it was his children?

6 A That's correct.

7 Q And was that something that just gave him a lot of
8 anguish that night?

9 A I think he was upset about it, yes.

10 Q Did Marty say anything that night about someone
11 who he just referred to as Kristen's boyfriend possibly
12 being involved?

13 A I believe he said something like that.

14 Q Do you recall talking to the police right after --
15 well, do you recall talking to the police on November 1,
16 1994 after Marty Grisham had been murdered?

17 A Yes.

18 Q And you did your first interview with the police
19 at that time?

20 A Yes.

21 Q And do you recall telling the police that Marty
22 Grisham had suspected possibly among others, meaning his
23 children, Kristen's boyfriend?

24 A Yes.

25 Q Do you recall in your conversation with Marty how

1 it was that he expressed that possibility?

2 A I don't recall offhand. If it's in this
3 transcript I believe that to be true what I said at that
4 time that he said. Again, I don't recall exactly right now.

5 Q Is it fair to say moving forward that you do
6 remember telling the police that he had made that comment
7 about perhaps Kristen's boyfriend?

8 A Yes.

9 Q Do you recall knowing -- or an occasion in the
10 month or month and a half prior to November 1, 1994 Marty
11 Grisham going out of town and needing someone to watch his
12 apartment for him?

13 A Yes.

14 Q And as you sit here today do you recall that being
15 the weekend before November 1st, not that Sunday --
16 Saturday, Sunday immediately before, but the one before
17 that?

18 A I believe that's true.

19 Q And as you sit here today do you recall the exact
20 date of that weekend?

21 A Perhaps October 22nd.

22 Q Do you recall Marty Grisham asking you to help him
23 out in watching his apartment or his cat?

24 A Taking care of his cat, yes.

25 Q Okay. And do you recall Marty Grisham's cat?

1 A Yes.

2 Q What was his cat's name?

3 A John Lee.

4 Q Did John Lee become your cat after November 1,
5 1994?

6 A Yes.

7 Q For how long?

8 A 12 years.

9 Q Did you in fact help Marty take care of his cat
10 that weekend of October 22, 1994?

11 A Yes.

12 Q Okay. What did you do in reference to John Lee,
13 the cat, and Marty's apartment?

14 A It wasn't very much. As I walked up to the door
15 there was a newspaper outside, so I picked that up. He had
16 given me the key, so I just went in and it was just to make
17 sure that there was fresh water and some -- he had a -- some
18 sort of cat food timer that would release some dry food, but
19 then to also give the cat some wet food and make sure the
20 litter box was clean. And I spent a little time with the
21 cat, maybe a half an hour in all, not more than that. And I
22 believe that was on a Saturday.

23 Q When you were in Marty Grisham's apartment did you
24 also pick up some newspapers or anything that would have
25 been outside his apartment and bring it in?

1 A I did bring the newspaper in, yes.

2 Q Did you notice anything unusual in that regard
3 about Marty Grisham's apartment that you spoke to the police
4 about back in 1994?

5 A I can't remember if it was that Saturday or Sunday
6 if I went back to take care of the cat again, but there was
7 a second newspaper on the couch area. And I thought that
8 was odd because I had already picked up the newspaper. And
9 here was a second one and some other flat piece of paper
10 like a flyer or something that I had not brought in.

11 Q And that's just something you thought was weird?

12 A Yeah, that perhaps someone else had been in there.

13 Q Did the place appear to be ransacked like it had
14 been burglarized?

15 A No.

16 Q Other than these pieces of paper that you didn't
17 bring in, was there anything out of the ordinary or unusual
18 about the apartment?

19 A Nothing that I noticed at the time.

20 Q Do you recall the weekend before earlier than the
21 weekend of October 22, 1994 where Marty had gone out of town
22 and needed someone to watch his apartment?

23 A I'm unclear of the exact dates, but there were two
24 weekends when he was out of town, yes.

25 Q Do you recall Marty telling you that Kristen was

1 going to watch his apartment on the other -- the prior
2 occasion, the one that you didn't watch his apartment?

3 A Yes.

4 Q What do you recall about -- about -- about that
5 weekend from what Marty had told you?

6 A Nothing other than Kristen was going to take care
7 of the cat when he was away for the weekend.

8 Q Did you ever know about through conversations with
9 Marty whether or not Kristen actually did take care of the
10 cat on that prior weekend?

11 A I don't know.

12 Q Do you recall where -- withdrawn.

13 So let's talk about November 1st of 1994. Through
14 the evening getting up to about 9:30 p.m. had you had dinner
15 at this point?

16 A Yes.

17 Q Okay. And were you in the kitchen area of Marty
18 Grisham's apartment?

19 A We were in the dining room area. We had dinner
20 there, table and chairs, had dinner and were just relaxing,
21 talking.

22 Q And had you had your conversations about Loren --
23 about Marty's Grisham's children Kristen and Loren and times
24 past and that comment you described as I thought the horror
25 was over, I'm not going to go back to that, those things?

1 A Yes, that was finished while we were making
2 dinner. I don't believe we talked about it anymore once we
3 sat down to eat dinner. It was like okay, that's over,
4 let's have a nice dinner here and enjoy dinner.

5 And we were just having conversation, then
6 afterwards he had taken the dishes off the table and were
7 just having conversation about the future and about
8 Christmas together.

9 And he had brought out some CD's about -- I enjoy
10 Christmas very much and it was very big in my family. And
11 he had brought out some CD's saying oh, you will have to
12 hear these. And we were just relaxed having a nice
13 conversation.

14 THE COURT: So we've been going for a little over
15 two hours, so I need to interrupt. We're going to take the
16 mid-afternoon recess. We're going to be in recess for 15
17 minutes. We'll reconvene at 3:00 and continue with your
18 testimony, Ms. Swider.

19 Ladies and gentlemen of the jury, I want to remind
20 you again that until the trial is completed you must not
21 communicate about or discuss the case with anyone by any
22 means. This includes members of your family, people
23 involved in the trial, other jurors or anyone else.

24 If someone does approach you and tries to discuss
25 the trial with you, please let me know about it immediately.

1 Don't read or listen to any news reports of the
2 trial. Don't consult any outside reference materials or do
3 any independent research.

4 Remember, it is especially important that you do
5 not form or express any opinion on the case until it is
6 finally submitted to you.

7 We'll be in recess until 3:00.

8 (This reporter's portion of the trial concluded
9 for the day.)

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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 12th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----
2 **DISTRICT COURT**
3 **BOULDER COUNTY**
4 **COLORADO**
5 1777 6th Street
6 Boulder, CO 80302
7 -----

8 **Plaintiff:**

9 People of the State of Colorado

10 **Defendant:**

11 Michael Martin Clark

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! ***FOR COURT USE ONLY***
!
! Case No. 12CR222
! Division 6
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12 -----
13 The matter came on for jury trial on October 11th,
14 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
15 Boulder District Court, and a jury of 12 persons, and the
16 following proceedings were had.
17 -----

1 **P R O C E E D I N G S**

2 The matter came on for jury trial on October 11th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: 12 CR 222, People versus Michael Clark.
8 Mr. Clark is present with his counsel, the prosecution is
9 present.

10 Anything to take up on the record before we bring
11 the jury in?

12 MR. BRACKLEY: Just very briefly, Your Honor. The
13 second and -- I'm sorry, the third and fourth witnesses this
14 morning are Ms. Pam Grisham and Kristen Grisham, the ex-wife
15 and daughter of Marty Grisham. They have not determined
16 whether or not they would wish to stay in the courtroom
17 through any further proceedings at all, however, they would
18 like that option. I can tell the Court that I don't expect
19 them to stay after their testimony this morning, and I
20 explained the next couple witnesses would be directed at their
21 testimony and perhaps it would be better to not, but that is
22 their right.

23 THE COURT: Right. The VRA trumps the statutory
24 rule regarding sequestration, so if they choose to remain, I
25 would allow them to do that.

1 Ms. Ring, for the record.

2 MS. RING: So, Judge, I'm not clear that they
3 actually fall under the VRA based on some of the investigation
4 early on, especially Kristen Grisham.

5 THE COURT: They are family members of the deceased,
6 so they clearly fall under the definition for victim -- for
7 VRA purposes.

8 MS. RING: Well, I would have to believe that if the
9 family member of the deceased was the person who was an
10 alternate suspect or something like that, they wouldn't be
11 allowed to sit in, that would change their definition.

12 MR. BRACKLEY: Give me the --

13 MS. RING: In an abundance of caution, especially as
14 to Kristen Grisham, who was interviewed multiple times, I
15 don't want to be in the position where --

16 (The jury entered the courtroom.)

17 THE COURT: Good morning, ladies and gentlemen.
18 Welcome back, I hope you all had a good evening. When we
19 recessed yesterday evening, the People were in the middle of
20 the presentation of their evidence, the case-in-chief.

21 Would the People call their next witness.

22 MR. KELLNER: Your Honor, the People call Officer
23 Ralph Smith.

24 THE COURT: Officer Smith, would you step forward
25 please, sir. Come all the way up here.

1 **RALPH SMITH,**
2 a witness herein, having been first duly sworn, was examined
3 and testified on his oath as follows:

4 THE COURT: Please have a seat. Go ahead,
5 Mr. Kellner.

6 MR. KELLNER: Thanks.

7 **DIRECT EXAMINATION**

8 **BY MR. KELLNER:**

9 Q. Good morning, Officer Smith. Can you please state
10 your name and spell your last name for the jury, please.

11 A. Ralph Smith, S-m-i-t-h.

12 Q. This may seem like a silly question, considering
13 what you are wearing. What do you do for a living?

14 A. I'm a Boulder police officer.

15 Q. How long have you been a police officer with the
16 Boulder Police Department?

17 A. Twenty-eight years.

18 Q. You say Boulder police officer, have you been with
19 the Boulder Police Department that entire 28 years?

20 A. Yes, I have been with the Boulder Police Department
21 for approximately 28 years.

22 Q. Officer Smith, can you give the jury just a brief
23 outline, I guess, of your career in those 28 years with the
24 Boulder Police Department?

25 A. As a member of the Boulder Police Department I've

1 been a crime scene investigator, a school resource officer,
2 juvenile detective, master police officer, member of the honor
3 guard, and a few other assignments over the last 28 years.

4 Q. What's your current assignment?

5 A. My current assignment is patrol officer, watch I,
6 day watch.

7 Q. Now as a, you know, officer, you are in for 28
8 years, do you rotate through different assignments over the
9 years?

10 A. Most of the assignments are voluntary assignments
11 and we do rotate. We apply for positions and we accept
12 them -- get accepted for them or not. We do rotate different
13 shifts and everything else.

14 Q. Officer Smith, I want to talk to you about your
15 assignment -- your assignment in November of 1994. Do you
16 recall what that was?

17 A. I was -- assignment at that time was patrol officer,
18 midnight watch.

19 Q. Did you have duties as a crime scene investigator as
20 well?

21 A. Yes, I did.

22 Q. What were your responsibilities as a crime scene
23 investigator or CSI?

24 A. My responsibilities was a photographer, take photos
25 of evidence, collect evidence, and place evidence and property

1 in evidence.

2 Q. So as a CSI, did you respond to a homicide
3 investigation on November 1st of 1994 at 5640 Arapahoe?

4 A. Yes.

5 Q. Apartment 413?

6 A. Yes, I did.

7 Q. Approximately what time did you get to that
8 apartment?

9 A. Around approximately 11:00.

10 Q. And what was your assignment? What were you
11 supposed to do at the scene?

12 A. At the scene I was tasked to take photographs of the
13 evidence that was located and to collect it and to place it in
14 property and evidence.

15 Q. I would like to show you what's been previously
16 admitted as People's Exhibit 13.

17 MR. KELLNER: If I could just publish it to the jury
18 at the same time, Judge?

19 THE COURT: Sure.

20 Q. (By Mr. Kellner) Officer Smith, go ahead and take a
21 look behind you at People's Exhibit 13. Do you recognize that
22 photo?

23 A. Yes, I do.

24 Q. And how do you recognize it?

25 A. It's a photograph that I had taken of the entryway

1 of the apartment complex.

2 Q. Now we have heard some testimony about the picture,
3 but can you tell the jury specifically what is being labeled
4 with those placards 1, 2, 3 and 4?

5 A. The placards -- what's labeled is a location of the
6 shell casings that were found at the entryway at this
7 location.

8 Q. And what is placard 5?

9 A. I think that placard 5 is a part of the bullet
10 fragment.

11 MR. KELLNER: Your Honor, may I approach the witness
12 with --

13 THE COURT: Yes.

14 MR. KELLNER: -- People's 22 through 26 that I have
15 previously shown a copy to the defense.

16 THE COURT: Yes.

17 Q. (By Mr. Kellner) Officer Smith, can you just take a
18 minute and review People's 22 through 26, please.

19 A. Yes.

20 Q. Do you recognize the pictures in People's
21 Exhibits 22, 23 and 24 and 25?

22 A. Yes, I do.

23 Q. How do you recognize them?

24 A. It's photographs that I took of the shell casings in
25 front of the residence.

1 MR. KELLNER: Your Honor, I would ask to admit
2 People's 22, 23, 24 and 25.

3 THE COURT: Any objection or voir dire?

4 MS. RING: No objection, no voir dire. Thank you.

5 THE COURT: 22 through 25 will be admitted.

6 (People's Exhibits 22 through 25 were admitted into
7 evidence by agreement of the parties.)

8 Q. (By Mr. Kellner) And do you recognize People's 26?

9 A. Yes, I do.

10 Q. How do you recognize it?

11 A. That's a photograph that I took of a bullet fragment
12 that was located in front of the residence.

13 Q. And is that fragment located at placard 5?

14 A. That would be placard 5.

15 MR. KELLNER: Your Honor, I would ask to admit
16 People's 26.

17 THE COURT: Any objection or voir dire?

18 MS. RING: No, thank you.

19 THE COURT: 26 will be admitted.

20 (People's Exhibit 26 was admitted into evidence by
21 agreement of the parties.)

22 MR. KELLNER: Judge, with your permission, may I
23 publish those pictures to the jury?

24 THE COURT: Yes.

25 Q. (By Mr. Kellner) So, Officer Smith, the first

1 photograph we're looking at here is People's 22. Would that
2 be the shell casings located at placard 1; and 23, 24 and 25,
3 those are the shell casings you picked up at placard 1, 2, 3
4 and 4?

5 A. Yes, sir.

6 Q. And People's 26?

7 A. The same one I picked up and collected.

8 Q. That's the bullet fragment at placard 5?

9 A. Yes, the bullet fragment.

10 MR. KELLNER: Your Honor, at this time I would ask
11 to approach the witness with what's been marked as
12 People's 28, 29, 30, 31, 32 and 33.

13 THE COURT: Yes.

14 Q. (By Mr. Kellner) All right. Officer Smith, take a
15 moment and look at 28, 29, 30, 31 and 32.

16 A. Yes, I have reviewed them.

17 Q. After you take photographs of those bullet
18 casings -- or shell casings and the bullet fragment, what's
19 your responsibility as a CSI?

20 A. My responsibility is to collect them and protect
21 them, place them in secure envelopes and deliver them to the
22 property and evidence division for the Boulder Police
23 Department.

24 Q. And what are People's Exhibit -- well, those first
25 four exhibits there?

1 A. These are exhibits of the envelopes that the shell
2 casings were placed in with my signature and the report
3 numbers and item number identifying wording on the packages.

4 Q. And are People's 28, 29, 30 and 31 the shell casings
5 you collected and actually placed into evidence?

6 A. It appears to be all the shell casings I placed in
7 property and evidence.

8 MR. KELLNER: Your Honor, I ask to admit People's 28
9 through 31.

10 THE COURT: Any objection or voir dire?

11 MS. RING: No, Your Honor.

12 THE COURT: 28, 29, 30 and 31 will be admitted.

13 (People's Exhibits 28 through 31 were admitted into
14 evidence by agreement of the parties.)

15 Q. (By Mr. Kellner) And what about People's 32? Do
16 you recognize that -- I'm sorry -- I know I gave you a bunch
17 of things up there.

18 A. Item 32 is the same as the other items that I
19 collected, except with this item is the bullet fragment that
20 was collected by the front entryway door.

21 Q. And do you recognize your handwriting on that manila
22 envelope?

23 A. Yes, it's my handwriting and my initials on the
24 envelope.

25 Q. Would you have actually written on that envelope

1 similar to the shell casings envelopes when you actually
2 collected that evidence?

3 A. Yes, it is the same similar -- the same writing and
4 it was collected at the same time as the other evidence.

5 MR. KELLNER: I ask to admit People's 32.

6 THE COURT: Objection or voir dire?

7 MS. RING: No, thank you.

8 THE COURT: 32 will be admitted.

9 (People's Exhibit 32 was admitted into evidence by
10 agreement of the parties.)

11 Q. (By Mr. Kellner) When you're -- you're processing a
12 crime scene like this, do you take any sort of precautions to
13 protect the evidence?

14 A. Yes, we do.

15 Q. What precautions do you take?

16 A. We wear protective gloves, um, try not to handle the
17 evidence because of possible fingerprints, so we are very
18 careful with handling it and placing it into envelopes or
19 protective coverings.

20 Q. Now I know that I just said processing the scene,
21 but what was your responsibility at the scene that day?

22 A. Upon my arrival at the scene, I spoke with the
23 sergeant that was in charge at that time and he directed me to
24 take photographs and to collect the shells -- shell casings
25 and evidence that was identified by him and other

1 investigators at that time.

2 Q. Were you assigned to further search the scene or
3 just take pictures and collect the evidence?

4 A. Just to take pictures. I was assigned to take
5 pictures and collect evidence that was identified previously.

6 MR. KELLNER: Your Honor, may I approach the witness
7 with People's 27 and 34?

8 THE COURT: Yes.

9 Q. (By Mr. Kellner) I'm going to retrieve these and
10 get them out of your way.

11 Officer Smith, did you collect any evidence from
12 inside the crime scene as well, inside Marty Grisham's
13 apartment?

14 A. Yes, I did, I collected evidence from inside the
15 residence.

16 Q. And did you collect any bullets from inside the
17 residence?

18 A. I collected one bullet that was located near the
19 closet that was sitting on top of a metal cabinet, a metal,
20 um, case or container near the closet.

21 Q. And do you recognize People's 27, that photograph?

22 A. Yes, I do.

23 Q. What is that photograph?

24 A. A bullet fragment, a bullet that was located inside
25 the residence, and that photograph is item --

1 Q. Is that the bullet you stated was inside a closet?

2 A. Yes, sir.

3 MR. KELLNER: Your Honor, I ask to admit

4 People's 27.

5 THE COURT: Objection or voir dire?

6 MS. RING: No. Thank you.

7 THE COURT: 27 will be admitted.

8 (People's Exhibit 27 was admitted into evidence by
9 agreement of the parties.)

10 Q. (By Mr. Kellner) Now after you photographed the
11 bullet from inside the closet, did you, in fact, collect it as
12 evidence?

13 A. Yes, it was collected and placed into property and
14 evidence.

15 Q. Did you use the same sort of process as in wearing
16 gloves and sealing it in a manila envelope?

17 A. The same procedure, collecting with the glove,
18 labeling the envelope, sealing the envelope and placing it in
19 property and evidence.

20 Q. Take a look at People's 33. Do you recognize that
21 manila envelope?

22 A. Yes, it's similar to the other envelopes with my
23 signature, my employees number and the case report number.

24 Q. And what is actually contained in People's 33?

25 A. The bullet that was collected, item -- Exhibit 27,

1 that was located in the bedroom of the residence.

2 Q. Inside the closet?

3 A. Inside the closet.

4 MR. KELLNER: Your Honor, I would ask to admit
5 People's 33.

6 MS. RING: No objection.

7 THE COURT: 33 will be admitted.

8 (People's Exhibit 33 was admitted into evidence by
9 agreement of the parties.)

10 MR. KELLNER: May I publish 27 to the jury?

11 THE COURT: Yes.

12 Q. (By Mr. Kellner) Officer Smith, is that People's 27
13 on the screen behind you there?

14 A. Yes, it is.

15 Q. And does that show the picture of the bullet found
16 inside the closet on top of the metal case?

17 A. Yes, it does.

18 Q. Now go ahead and turn your attention, please, to
19 People's 34.

20 A. Yes.

21 Q. Do you recognize that document?

22 A. Yes, this is the Boulder police property report.

23 Q. How do you recognize that particular property
24 report?

25 A. It's a property report that I completed for all the

1 evidence that I collected and presented to the property
2 department, to property and evidence that was submitted, that
3 I had collected and transported to the Boulder Police
4 Department.

5 Q. You say you transported it to the Boulder Police
6 Department?

7 A. Yes.

8 Q. Where do you put it inside the Boulder Police
9 Department?

10 A. I place it into property and evidence in a secure
11 locker once I arrive at the Boulder Police Department.

12 Q. When you drop it off there, is there always someone
13 to receive it or is it a lock drop box? Can you just describe
14 the property room, I guess, to the jury, please.

15 A. Sometimes someone may be there to receive it. If
16 not, it's locked in a cabinet where no one has access to it
17 except the property and evidence people.

18 Q. Now with respect to People's 34, do you recognize
19 the handwriting on that document?

20 A. Yes, it is my handwriting on the document.

21 Q. And is that property report something you fill out
22 as part of your regular duties as a CSI and as a police
23 officer?

24 A. Yes. Whenever we collect evidence, we fill out a
25 property report CSI indicating what was collected, crime scene

1 investigator, and place it into property and evidence.

2 MR. KELLNER: Your Honor, I would ask to admit
3 People's 34.

4 THE COURT: Objection or voir dire?

5 MS. RING: No, thank you.

6 THE COURT: 34 will be admitted.

7 (People's Exhibit 34 was admitted into evidence by
8 agreement of the parties.)

9 MR. KELLNER: Can I publish it to the jury, please?

10 THE COURT: Yes.

11 Q. (By Mr. Kellner) Officer Smith, is that People's 34
12 your property sheet in your handwriting?

13 A. Yes, it is.

14 Q. And it reflects the four shell casings as well as
15 the bullet fragment and bullet that you placed into evidence?

16 A. Yes, it does.

17 MR. KELLNER: May I have a moment, please?

18 THE COURT: Yes.

19 MR. KELLNER: Thanks, Officer Smith. I have no
20 further questions.

21 THE COURT: Cross-examination, Ms. Ring.

22 MS. RING: Would you actually mind leaving that up.
23 Yeah, thanks.

24 **CROSS-EXAMINATION**

25 **BY MS. RING:**

1 Q. Officer Smith, you just told us that those were the
2 items that you collected from the crime scene that evening?

3 A. Yes, ma'am.

4 Q. Okay. And certainly if you had collected anything
5 else, it would have been on that log, or there would be
6 another log that you pulled out?

7 A. Yes, ma'am.

8 Q. So that's what you found, what you collected at the
9 crime scene that night and what you delivered to property and
10 evidence?

11 A. Yes, ma'am, on the sheet, yes.

12 Q. Okay. And I think you told us that you got to the
13 crime scene about 11:00 p.m. that evening?

14 A. Yes, I did. Yes, ma'am.

15 Q. Okay. And your guys specific role when you get to
16 the crime scene?

17 A. Yes, ma'am.

18 Q. And you are assigned that role by officers that are
19 actually in charge of the overall investigation?

20 A. Yes, ma'am.

21 Q. Okay. And do you recall that that night initially
22 the person who was in charge was then Detective Pelle and now
23 he is our sheriff?

24 A. He was one of the people, yeah, I think so.

25 Q. Okay. And then Detective Trujillo also got there at

1 some point and was also directing the investigation?

2 A. I think so, ma'am.

3 Q. It's been a long time?

4 A. Yes.

5 Q. Okay. But you would agree with me that there were
6 certain officers who were in charge of the overall
7 investigation?

8 A. Yes, ma'am.

9 Q. And they would be the ones giving you directions
10 about what they wanted done at the crime scene?

11 A. Yes, ma'am.

12 Q. And you follow their directions in terms of what
13 you're photographing and what you are collecting?

14 A. Yes, ma'am.

15 Q. Okay. And if you saw anything else that caught your
16 attention, what you would first do is tell one of those
17 officers or detectives, Here's what I saw, What do you want me
18 to do?

19 A. Yes, ma'am.

20 Q. Okay. And you followed that protocol that evening
21 when you were at the crime scene?

22 A. Yes, ma'am.

23 Q. Okay. Do you recall how long you were at the crime
24 scene that night?

25 A. Only based on what my report may state. I can't

1 tell you exactly how long I was there, long enough to collect
2 evidence as directed.

3 Q. Okay. One of the things you would have done that
4 evening or you would have been part of is there would have
5 been a crime scene log that was kept?

6 A. Yes, ma'am.

7 Q. That's part of typical protocol?

8 A. Mm-hmm.

9 MS. RING: May I approach?

10 THE COURT: Yes.

11 MS. RING: And I'm on page 292 and 293.

12 Q. (By Ms. Ring) So does that look like one of the
13 crime scene logs I was talking about?

14 A. Yes, ma'am, it looks similar to the screen log.

15 Q. And it's a Boulder Police Department --

16 A. Yes, ma'am.

17 Q. And your name shows up a couple of times --

18 A. Yes.

19 Q. -- there, right?

20 A. Yes, ma'am.

21 Q. Talking about what you're doing at the crime scene
22 and who's coming in and out of the crime scene?

23 A. Yes, ma'am.

24 Q. Okay. I'm going to have you look at the second page
25 for me. So that indicates that the scene was secured and

1 turned over to you at 2:15 in the morning?

2 A. Yes, ma'am.

3 Q. Is that what that says?

4 A. Mm-hmm.

5 Q. So we know at a minimum you were still there at 2:15
6 in the morning?

7 A. Yes, ma'am.

8 MS. RING: Okay. Thank you. I have no other
9 questions. Thank you.

10 THE COURT: All right. Redirect examination,
11 Mr. Kellner.

12 MR. KELLNER: No, thank you, Judge.

13 THE COURT: Officer, you can step down.

14 THE WITNESS: Thank you.

15 THE COURT: May this witness be excused?

16 MS. RING: Yeah.

17 MR. KELLNER: He may.

18 THE COURT: All right. You are excused. Thank you.

19 THE WITNESS: Thank you, sir.

20 THE COURT: The People's next witness.

21 MR. KELLNER: Your Honor, the People call Dr. John
22 Meyer.

23 THE COURT: Sir, would you step forward, please.

24 **JOHN MEYER, M.D.,**

25 a witness herein, having been first duly sworn, was examined

1 and testified on his oath as follows:

2 THE COURT: Please have a seat.

3 Go ahead, Mr. Kellner.

4 MR. KELLNER: Thank you.

5 **DIRECT EXAMINATION**

6 **BY MR. KELLNER:**

7 Q. Good morning, Dr. Meyer.

8 A. Good morning.

9 Q. Please state your name and spell your last name for
10 us.

11 A. John Meyer, M-e-y-e-r.

12 Q. Dr. Meyer, what do you do for a living?

13 A. I'm a pathologist.

14 Q. How long have you been a pathologist?

15 A. I have been a pathologist certified since 1979 in
16 general anatomic and clinical pathology, and was certified in
17 forensic pathology in 1983.

18 Q. Where do you currently work?

19 A. Currently I work at Boulder Community Hospital in
20 the Department of Pathology.

21 Q. Before you worked in the Department of Pathology at
22 Boulder Community Hospital, how were you employed?

23 A. I've worked at the hospital since 1982, but at the
24 same time I have worked with the Boulder County coroner's
25 office also since 1982. I started out in '82 as a consultant

1 with the coroner's office, and in 1986 was elected coroner and
2 served four terms until 2002 when the term limits did not
3 allow me to run anymore. And then I continued on as the chief
4 pathologist and medical examiner in the coroner's office for
5 the then new coroner from 2002 to 2010.

6 Q. What does it mean to be the coroner for a county?

7 A. Well, the coroner's responsible for investigating
8 the cause and manner of death in a variety of different types
9 of cases, unexpected death and mainly deaths that are due to
10 unnatural causes.

11 Q. And can you tell the jury, generally speaking, what
12 is forensic pathology?

13 A. Well, forensic pathology is that branch of pathology
14 that does investigate unnatural deaths, deaths that occur
15 under suspicious circumstances, deaths that occur in
16 individuals who don't have previous medical history.

17 Q. And you mentioned that you were certified as a
18 forensic pathologist, I believe that it was in 1983. What
19 sort of training did you have to undergo to become certified
20 as a forensic pathologist?

21 A. Well, you first have to have four years of general
22 pathology, including clinical pathology and anatomic pathology
23 and that certifies you, if you pass the certification exam, to
24 practice in a hospital and to do general pathology. And then
25 at least another year in general pathology subspecialty

1 training in forensic pathology allows you to then be eligible
2 to take board examinations in forensic pathology.

3 Q. I assume you also went to medical school prior to
4 that?

5 A. Yes. Yes, four years of medical school before that.

6 Q. Where did you go to school, Doctor?

7 A. I went to school at the University of Missouri in
8 Columbia, Missouri, and did -- then did an internal medicine
9 internship actually at George Washington University, and spent
10 a couple years in the Indian Health Services as a medical
11 officer before I came back to Denver to the University of
12 Colorado Health Science Center to do my pathology training, my
13 general pathology. And then forensic pathology I did in the
14 Denver coroner's office.

15 MR. KELLNER: Your Honor, at this time I would ask
16 the Court to recognize Dr. Meyer as an expert in the field of
17 forensic pathology.

18 THE COURT: Objection or voir dire?

19 MS. MILFELD: No objection or voir dire.

20 THE COURT: Dr. Meyer will be qualified as an expert
21 in the area of forensic pathology and allowed to offer such
22 opinions pursuant to Rule 702.

23 You may continue your direct examination.

24 MR. KELLNER: Thank you, Your Honor.

25 Q. (By Mr. Kellner) Doctor, I would like to draw your

1 attention to November 2nd, 1994. Did you perform an autopsy
2 on the body of a man identified as Marty Grisham?

3 A. Yes.

4 Q. Where did you perform that autopsy?

5 A. That was performed in the morgue at Boulder
6 Community Hospital.

7 Q. Do you recall who else was present during the
8 autopsy?

9 A. It's my autopsy assistant, individuals from the
10 coroner's office, investigator from the coroner's office, I
11 believe was Dan Pruitt, as well as several law enforcement
12 officers who had been investigating the situation.

13 Q. Dr. Meyer, generally speaking, what's the purpose of
14 an autopsy?

15 A. Well, the first purpose is to determine the manner
16 or the cause of death and then also the manner of death. The
17 cause of death being that, um, disease process or physical
18 force that actually ends up causing the death. The manner of
19 death refers to the circumstances surrounding the death.

20 There are essentially five manners of death.
21 There's natural death, homicide, suicide, accident, and then
22 the fifth one is a general term. We sometimes would classify
23 deaths as being undetermined, and that's if you can't
24 determine whether it's one of the other four then you put it
25 under that kind of broad classification of undetermined.

1 Q. Can you tell the jury, generally speaking, what
2 injuries did you observe on the body of Marty Grisham?

3 A. Yes, Marty Grisham had four gunshot wounds, two in
4 the head and two gunshot wounds in the chest.

5 MR. KELLNER: Your Honor, may I approach with
6 People's 35 through 42? I have shown a copy to the defense.

7 THE COURT: Yes.

8 Q. (By Mr. Kellner) Now you mentioned he had four
9 gunshot wounds. Do you label those gunshot wounds in any
10 particular order as you're looking for injuries in the body?

11 A. No, no specific order. They are numbered in the
12 autopsy report arbitrarily.

13 Q. I want to talk to you about what you listed as
14 gunshot wound 1. Will you take a look at People's Exhibit 35.
15 Do you recognize that picture, sir?

16 A. Yes.

17 Q. And what is it? Well, how do you recognize it?

18 A. This is a picture from the autopsy of Mr. Grisham
19 and it depicts the wounds, the defects caused by gunshot
20 wound 1 as referred to in the autopsy report.

21 MR. KELLNER: Your Honor, I would ask to admit
22 People's 35 and request permission to publish to the jury.

23 THE COURT: Objection or voir dire?

24 MS. MILFELD: No objection.

25 THE COURT: 35 is admitted.

1 (People's Exhibit 35 was admitted into evidence by
2 agreement of the parties.)

3 Q. (By Mr. Kellner) Dr. Meyer, can you describe to the
4 jury gunshot wound 1? There's a laser pointer up there to
5 help you explain to the jury sort of the path of that.

6 A. Yeah. This is the entrance wound from gunshot
7 wound 1 on the left cheek. The pathway of this wound entered
8 the face here, tunneled through this -- this soft tissue
9 beneath the skin and then exited through this kind of
10 tangential wound of the neck here and then actually re-entered
11 here in the -- what we call the trapezius muscle or the top of
12 the shoulder muscle, re-entered the body here, and then
13 continued to go through the soft tissue here and then
14 re-exited in another defect in the back here, which is not
15 visible in this particular photograph.

16 (The witness indicated.)

17 Q. Doctor, in your experience, is it unusual for a
18 bullet to take sort of a pathway like that, that may actually
19 sort of change directions?

20 A. No, I wouldn't -- no, I wouldn't say that this
21 changed directions.

22 Q. What's the angle of this wound?

23 A. This direction was, obviously, from front towards
24 the back, slightly -- slightly -- well, it was medial to
25 lateral. It went from the midline outward towards the more

1 lateral part of the body, the left side of the body and down,
2 slightly downward as well.

3 Q. Doctor, would you consider this wound alone to have
4 been fatal?

5 A. Probably not, no. This -- this would not have been
6 considered an intrinsically fatal wound.

7 Q. Doctor, do you -- when you were examining
8 Mr. Grisham, did you notice any sort of evidence of medical
9 intervention?

10 A. Yes. Well, he had a variety of different things.
11 This endotracheal tube, I believe, in the -- in the mouth here
12 and then some catheters. These are catheters that are placed
13 in the chest to determine whether the individual has a
14 collapsed lung and also to drain fluid if there's fluid in the
15 lungs sometimes.

16 Q. Doctor, I would like to turn your attention to the
17 next exhibit, People's 36, and also People's 37. Would you
18 take a moment and look at those pictures, please.

19 A. Okay.

20 Q. Do you recognize those pictures?

21 A. Yes.

22 Q. And how do you recognize them?

23 A. These are the autopsy photos of the wounds -- the
24 two wounds of the chest.

25 Q. And what numbers did you label the wounds to the

1 chest in your arbitrary sort of numbering system you talked
2 about?

3 A. They were labeled wounds 2 and 3.

4 MR. KELLNER: Your Honor, I would request permission
5 to admit People's 36.

6 MS. MILFELD: No objection.

7 THE COURT: 36 will be admitted.

8 (People's Exhibit 36 was admitted into evidence by
9 agreement of the parties.)

10 MR. KELLNER: And publish, please.

11 THE COURT: Sure.

12 Q. (By Mr. Kellner) Can you generally describe,
13 because we are going to show some closer pictures of 2 and 3,
14 what this picture is to the jury, please.

15 A. This is a picture of Mr. Grisham's body looking from
16 the right side, the right arm, head and neck up here, abdomen
17 here, and this is the chest here. These -- this picture
18 denotes wounds 2, which is right here in there, hole right
19 here, and wound 3.

20 (The witness indicated.)

21 Q. Okay. And do you see some other evidence of medical
22 intervention as well?

23 A. Well, yes. The -- these -- this pad here, this pad
24 here are EKG leads that the paramedics used to determine
25 viability and heartbeat, and then, again, these catheters that

1 are inserted into the chest here.

2 (The witness indicated.)

3 Q. Now gunshot wound 2, is that what you described in
4 the lower anterior right chest?

5 A. Yes.

6 Q. And can you just point that one out for the jury
7 again, please.

8 A. That's this one up here.

9 (The witness indicated.)

10 Q. And where did you describe the location of gunshot
11 wound 3?

12 A. This is on the lateral or the -- lateral part of the
13 right chest here, that's wound 3.

14 (The witness indicated.)

15 Q. Can you tell the jury the pathway of gunshot wound 2
16 and where that crossed through Mr. Grisham's body?

17 A. Wound 2 entered that anterior front part of the
18 chest and proceeded in a -- from the right side to the left
19 side, went through the chest wall, through the left lobe of
20 the liver, through the stomach and shattered the spleen as
21 well, and then went into the outside part of the left chest
22 and exited -- exited through the left chest or the left side
23 of the chest towards the back.

24 Q. Doctor, why don't you just take a look at
25 People's 37, 38 and 39 and tell us if you recognize those

1 pictures.

2 A. I'm sorry, which numbers?

3 Q. 37, 38 and 39.

4 A. Okay. Yes. These, again, are autopsy photos of the
5 back -- well, first of all, 37 is of the right side of the --
6 of the front of the body, 38 is the overall view of the back,
7 and then 39 is, again, the picture of the front depicting
8 wound 2.

9 MR. KELLNER: Judge, at this time I would ask to
10 admit People's 37 through 39.

11 MS. MILFELD: No objection.

12 THE COURT: 37 through 39 will be admitted.

13 (People's Exhibits 37 thru 39 were admitted into
14 evidence by agreement of the parties.)

15 MR. KELLNER: May I publish?

16 THE COURT: Yes.

17 Q. (By Mr. Kellner) Doctor, what is the jury looking
18 at here in People's 39?

19 A. This is the re-exit wound on the back. I mentioned
20 that that wound from the face went -- entered again after it
21 passed through the left cheek and entered the top of the
22 shoulder, left shoulder, and then re-exited the back through
23 this wound here.

24 (The witness indicated.)

25 Q. Can you also see in your pictures the exit wound for

1 gunshot wound 2?

2 A. Yes, that -- that is here. This is -- that's a
3 little bit better depicted in another photo, but this is the
4 exit wound here for wound 2.

5 Q. So gunshot wound 2 goes through the right chest
6 through a variety of organs and exits through the back?

7 A. Yes.

8 Q. Would you consider that -- would you have considered
9 gunshot wound 2 to have been fatal?

10 A. Yes, this would be.

11 Q. Let's talk about gunshot wound 3.

12 A. This is gunshot wound 3 on the lateral part of the
13 right chest, lower chest, and this wound entered into the
14 chest cavity, passed through this side of the chest cavity and
15 perforated or went through the right lobe of the liver, which
16 sometimes sticks up in this area, and then re-entered the
17 left -- the right side of the chest towards the midline. So
18 it went from outside here through the liver and then
19 re-entered the chest and then went out through the back of the
20 chest or the right side of the chest and was lodged -- the
21 bullet was lodged in the tissue beneath the skin on the
22 bottom -- towards the bottom of the back.

23 Q. And, Doctor, gunshot wound 3 --

24 A. Three --

25 Q. -- as you call it, um, going through the liver and

1 part of the lung, generally the middle of the body, would you
2 have considered that one to have been fatal as well?

3 A. Yes.

4 THE COURT: Mr. Kellner, which exhibit number is
5 this that they are looking at?

6 MR. KELLNER: Judge, this picture is --

7 A. That's 37.

8 THE COURT: Okay.

9 Q. (By Mr. Kellner) Doctor, please take a look at the
10 photograph I have handed you that's marked People's 40.

11 A. Yes.

12 Q. Do you recognize that picture?

13 A. Yes. This is a postmortem x-ray that was performed
14 prior to the autopsy.

15 MR. KELLNER: Judge, I would ask to admit
16 People's 40.

17 THE COURT: Any objection?

18 MS. MILFELD: No objection.

19 THE COURT: 40 will be admitted.

20 (People's Exhibit 40 was admitted into evidence by
21 agreement of the parties.)

22 Q. (By Mr. Kellner) Dr. Meyer, what do you see
23 depicted in this x-ray?

24 A. This x-ray depicts the chest -- an x-ray of the
25 chest, the heart being in the middle here, and these being the

1 lungs and then, of course, the ribs, and it denotes this
2 density here, this opaque area here, it represents a bullet
3 fragment. These two opacities up here are -- areas up here
4 represent the metal on those EKG leads.

5 Q. You know, realizing that gunshot wound 3, the
6 bullet, didn't exit the body, did you actually remove that
7 bullet during the autopsy?

8 A. Yes.

9 Q. And what did you do with it once you had removed it?

10 A. I handed that over to law enforcement agencies.

11 Q. Doctor, I would like to turn your attention to
12 People's 41 and 42 now. Do you recognize those pictures?

13 A. Yes. These, again, are autopsy photos depicting
14 wounds -- the two wounds from the -- in the head.

15 MR. KELLNER: Judge, I would ask to admit People's
16 41 and 42.

17 MS. MILFELD: No objection.

18 THE COURT: 41 and 42 will be admitted.

19 (People's Exhibits 41 and 42 were admitted into
20 evidence by agreement of the parties.)

21 MR. KELLNER: And publish them?

22 THE COURT: Yes.

23 MR. KELLNER: Thank you.

24 Q. (By Mr. Kellner) Doctor, is this a picture of
25 People's 41?

1 A. This is 41, yes, and it depicts, again, the wound in
2 the cheek here, the entrance, the exit, the re-entry, and then
3 the re-entry wound here on the shoulder.

4 Q. And where do you -- use that laser pointer. Could
5 you show the jury where gunshot wound 4 is on this head?

6 A. Well, 4, the entry wound is on the top of the head
7 here, but this little slit light area right here in front of
8 the ear is actually the exit wound from wound 4, which entered
9 in the top of the head.

10 (The witness indicated.)

11 Q. All right. Can you tell the jury the pathway of the
12 bullet from gunshot wound 4 in the top of the head?

13 A. Bullet 4, as I said, it entered the top of the head,
14 went through the left cerebral hemisphere and through the
15 temporal lobe, essentially through the left side of the brain,
16 and then went through the floor of the cranial lobe.

17 If you look inside the skull, the -- the brain sits
18 on a floor and the wound -- or the bullet went through the
19 brain and then downward through the floor above the head and
20 tunnelled kind of through the soft tissue along the -- this
21 side of the neck and exited -- at least a portion of it exited
22 through this slit, like after going through the skull into the
23 skull and through the brain and out of the skull and through
24 the soft tissue.

25 (The witness indicated.)

1 Q. Now, Doctor, would you have considered this gunshot
2 wound through the brain to have been fatal as well?

3 A. Yes.

4 Q. Looking at gunshot wounds 2, 3 and 4, which you have
5 describe previously as fatal, approximately, if you can say,
6 how long would somebody you think survive with those types of
7 wounds?

8 A. Oh, that's hard to say. I mean I -- a person having
9 sustained all three of those fatal wounds, you're talking
10 about, you know, a matter of a minute or two, perhaps. The
11 heart might continue to beat -- since it wasn't directly
12 impacted by the gunshot wounds, the heart may continue to beat
13 for, you know, maybe a minute or two. I would suspect that
14 term of consciousness would be lost immediately after the head
15 wound for sure, the wound from -- from the top of the head,
16 and probably fairly quickly from the blood loss resulting from
17 the other two wounds in the chest.

18 Q. Thank you, Doctor. I'm now going to publish to the
19 jury People's 42. Doctor, can you tell the jury what -- what
20 is stippling?

21 A. Stippling is caused by gunpowder that comes out of
22 the barrel of the gun that is hot, burning, and as it impacts
23 the skin it causes just small abrasions on the skin that are
24 kind of rust colored or red colored as these particles of hot
25 gunpowder exit the barrel of the gun and hit the skin. And

1 that's depicted by these little dot like purple or reddish,
2 rust colored dots, if you will. This wound -- this is the top
3 of the head wound. So to orient you, this is the front --
4 this would be face up here, the front of the head, the back of
5 the head, the right, left. So this is almost directly on the
6 top of the head and had a little bit of stippling which we
7 found on the head here, on this side of the head, and also
8 some on the -- on the right side of the neck as well.

9 (The witness indicated.)

10 Q. Doctor, is stippling -- and sort of the spread or
11 effect of stippling, is that something you study as a forensic
12 pathologist?

13 A. We certainly want to note that if there is stippling
14 present, yes.

15 Q. Now can you tell anything about the distance of the
16 shooter from Mr. Grisham based on the stippling that you see?

17 A. You can get a very general idea. I don't think that
18 you can be very specific, but we tend to think of gunshot
19 wounds in terms of the distances of the gun from the victim in
20 terms of contact wounds and then close range wounds,
21 intermediate range wounds, and then distant wounds. And we
22 can get an idea of where to classify these by looking at --
23 not just at the wound itself, but also whether there are the
24 products of combustion of the gunpowder that are left on the
25 skin.

1 So if you have a contact wound, meaning the barrel
2 of the gun is firmly against the bone, say the head, most of
3 what comes out of the barrel of the gun goes into the body,
4 goes into that so there is no deposits of anything around --
5 on the skin around that wound.

6 If a close range wound, a very close range wound
7 will have deposits of what we call soot, which is basically
8 smoke that comes out of the barrel of the gun, and it will
9 also have some stippling, some of this burned and not
10 completely burned gunpowder that impacts the skin surrounding
11 the wound.

12 And the further a way you get from -- the muzzle
13 gets from the body, the less you see of those products that
14 impact the skin, okay, because they fall off. If somebody is
15 shot from across the room, a distant wound, things still come
16 out of the barrel, but they don't have enough velocity to get
17 to where the person is who is ultimately hit by the bullet.

18 So generally what we try to do is say if there's
19 soot around the wound and stippling, that's a close range
20 wound. I mean a gun barrel has to be pretty close. If there
21 is no soot, but there is stippling, then we put it into an
22 intermediate range. Soot isn't as heavy as the stippling or
23 the burning gunpowder, so it doesn't travel as far. So in an
24 intermediate range, the soot has already fallen off, but the
25 burning gunpowder keeps going and impacts the wound, so we

1 would consider this an intermediate wound. And when we have
2 no soot or stippling, that indicates a more distant wound, so
3 we classify this as probably an intermediate range wound.

4 And, again what that means depends really on the
5 type of gun, the type of ammunition and that sort of thing.
6 The best way of testing that is to -- if there is a weapon is
7 to test fire the weapon and see what kind of deposit it leaves
8 on a target at various distances. But, in general, we can say
9 this was an intermediate range wound, probably the barrel
10 being a foot, two feet away perhaps, but certainly not -- not
11 a close -- not a contact wound, not a really close range wound
12 and not one that was from across the room, for example.

13 Q. Now, Doctor, after having performed the autopsy on
14 Marty Grisham, did you form an opinion about the manner and
15 cause of death?

16 A. Yes.

17 Q. What was your conclusion?

18 A. We determined the cause of death was multiple
19 gunshot wounds of the head and chest, and the manner of death
20 was homicide.

21 Q. Doctor, I want to talk to you about the two shots to
22 the chest, and then what you previously described as a
23 downward path of the shots to the head and the face.

24 Give you a hypothetical. If someone were shot twice
25 in the chest, are the bullet wounds, the top of the head and

1 in the cheek, consistent with someone maybe being doubled over
2 as -- after they have been shot in the chest?

3 A. It would be consistent with that, sure.

4 MR. KELLNER: Doctor, thank you for your time. I
5 have no further questions.

6 THE COURT: Cross-examination.

7 MS. MILFELD: No questions for this witness. Thank
8 you.

9 THE COURT: All right. Doctor, you may step down.
10 May this witness be excused?

11 MR. KELLNER: He may, Your Honor.

12 MS. RING: Yes.

13 MS. MILFELD: Yes.

14 THE COURT: Doctor, you are excused.

15 MS. RING: Sorry.

16 THE COURT: Thank you.

17 THE WITNESS: Thank you.

18 THE COURT: Would the People call their next
19 witness.

20 MR. BRACKLEY: The People call Ms. Pam Grisham.

21 THE COURT: All right. I'm going to ask you,
22 Mr. Brackley, would you get those exhibits off of the witness
23 stand and leave them with the court reporter.

24 MR. BRACKLEY: Absolutely, Judge.

25 THE COURT: Ms. Grisham, do you want to come all the

1 way up to the witness stand.

2 **PAMELA GRISHAM,**

3 a witness herein, having been first duly sworn, was examined
4 and testified on her oath as follows:

5 THE COURT: Please have a seat.

6 Go ahead, Mr. Brackley.

7 And once you get settled, Ms. Grisham, would you
8 pull that microphone just a little bit closer to your mouth.

9 There you go. Thank you.

10 Go ahead, Mr. Brackley.

11 MR. BRACKLEY: Thank you, Judge.

12 **DIRECT EXAMINATION**

13 **BY MR. BRACKLEY:**

14 Q. Good morning.

15 A. Good morning.

16 Q. Can you state your name and spell your last name,
17 please.

18 A. Pamela R. Grisham, G-r-i-s-h-a-m.

19 Q. Ms. Grisham, where are you currently living?

20 A. Louisville.

21 Q. And how long have you been in Louisville for?

22 A. Twenty-one years.

23 Q. Do you know Ms. Kristen Grisham?

24 A. Yes.

25 Q. And who is she to you?

1 A. She's my daughter.

2 Q. And did you know Loren Grisham?

3 A. Yes.

4 Q. And how did you know Loren Grisham?

5 A. He was my son.

6 Q. Is he still alive?

7 A. No.

8 Q. When did Loren Grisham die?

9 A. 2007.

10 Q. And how did he die?

11 A. Suicide.

12 Q. Okay. At your home?

13 A. Yes.

14 Q. Did you know Marty Grisham?

15 A. Yes.

16 Q. And how did you know Marty Grisham?

17 A. I was married to him.

18 Q. Okay. What years were you married to Marty Grisham
19 for?

20 A. '71 to '91.

21 Q. Did you have a divorce with Marty Grisham in 1991?

22 A. Yes.

23 Q. After the divorce with Marty Grisham, what was the
24 extent of your relationship with him?

25 A. Extremely minimal, basically just, you know,

1 discussing children.

2 Q. Okay. Did you ever see Marty Grisham after that or
3 did you telephone?

4 A. I mean not see him per se. We did talk on the phone
5 occasionally when he would call to talk to the kids or
6 something.

7 Q. Can you describe the relationship that your children
8 had with Marty Grisham, and starting with Kristen towards the
9 end of Marty Grisham's life?

10 A. They had a relationship. They would do things
11 together and she would spend time with him.

12 Q. Okay. What about with Loren?

13 A. Pretty much the same, but I think that he was, um,
14 not quite as much time as, like, with Kristen.

15 Q. Did Loren and Marty have a -- kind of a rough time
16 when Loren was younger?

17 A. Yes.

18 Q. Okay. Were there incidents where Loren would steal
19 from Marty?

20 A. I can only imagine from a third-party situation
21 that, but, yeah.

22 Q. From a third-party situation. Do you know that
23 Marty was very tough on Loren?

24 A. Yes.

25 Q. Okay. He was a tough love kind of dad?

1 A. Yes.

2 Q. And that wasn't something that was always popular
3 with his children?

4 A. I'm sorry?

5 Q. That wasn't something that went over well with
6 either Loren or Kristen?

7 A. I mean I can't speak for them, but I would think
8 not.

9 Q. After your divorce with Marty Grisham, were you
10 ever -- did you ever interact with Marty and either of your
11 children?

12 A. No.

13 Q. To any extent?

14 A. No.

15 Q. Do you recall November 1st, 1994, the day -- the
16 night that Marty was murdered?

17 A. I recall the day -- well, vaguely, yeah. I know I
18 was at home all day sick.

19 Q. Okay. Do you remember officers in uniform from the
20 Louisville Police Department coming over -- coming over to
21 your house?

22 A. At night, yes, that night.

23 Q. Okay. How did that happen? What do you remember as
24 you sit here today about your interaction with the Louisville
25 police officer?

1 A. I got a knock on the door and I answered it.

2 Q. Did they come into your house or did they wait
3 outside?

4 A. No, they came into the house.

5 Q. Okay. Had they been waiting outside prior to
6 knocking on the door?

7 A. I recall going to the living room and seeing the
8 police car parked down the street and wondering what was going
9 on, but as far as waiting outside the door, that's all I know.

10 Q. As you sit here today, do you recall whether the
11 police officers told you what was going on as soon as they
12 came into the house or did that happen at a later time?

13 A. I honest to god don't remember. I have to assume
14 that they would tell me that they were there because of Marty
15 being killed.

16 Q. Okay. Were you -- you say you were home sick that
17 day. What job were you doing at this time?

18 A. I worked for NOAA.

19 Q. Okay. And what did you do there?

20 A. I was in their finance. I was an accounting
21 technician at that time, yeah.

22 Q. How long did you work there for?

23 A. For finance?

24 Q. Yeah.

25 A. Twenty years.

1 Q. Okay. When did you retire?

2 A. 2008.

3 Q. Do you recall if Loren was home on November 1st,
4 1994?

5 A. Loren?

6 Q. Or --

7 A. Loren was at school in Glenwood.

8 Q. And where did Loren go to school?

9 A. Colorado Mountain College.

10 Q. And do you know whether he was home in Boulder on
11 that particular day, November 1st, 1994?

12 A. No. No.

13 Q. Did you later speak with Loren that evening?

14 A. Yeah, I called him to let him know what had happened
15 to his dad.

16 Q. Okay. Do you recall if Kristen was home on
17 November 1st, 1994?

18 A. I remember, well, thinking that she was home with me
19 all day.

20 Q. Do you recall speaking with police detectives later
21 that night about not only Marty, but also Kristen?

22 A. What do you mean about Kristen?

23 Q. Right. Do you remember -- do you remember later
24 that night police interviewing you?

25 A. Yeah, they came in -- okay.

1 Q. And the police interviewed you about where you were
2 that day?

3 A. Yeah, they asked that night.

4 Q. And do you remember police interviewing you about
5 where Kristen was that day?

6 A. That I don't specifically remember, no.

7 Q. Okay. Do you remember telling the police when they
8 interviewed you that day that Kristen had come home about
9 2:30?

10 A. Well, I don't remember it, but if that's what you --
11 you've got for your information, then I have to assume that's
12 correct.

13 MR. BRACKLEY: May I approach, Your Honor?

14 THE COURT: Yes.

15 Q. (By Mr. Brackley) Do you remember the detective or
16 the police officer that you were talking to, do you remember
17 that officer's name?

18 A. No.

19 Q. Do you remember if it was a male or a female?

20 A. No.

21 Q. I want to refer to discovery pages generally
22 beginning on page 1929, but specifically 1934 and 1935.

23 A. Don't ask me to read anything, I don't have my
24 glasses.

25 Q. Well, if you could start kind of on the bottom there

1 and go to the next page.

2 A. Okay. Okay. As far as it said, she came home at
3 2:30, yeah.

4 Q. But does reading that now make you say, Oh, yes, I
5 remember that?

6 A. I -- no, I still can't say that I remember it, but
7 if that's the information that you have, then -- I mean it's
8 been 18 years.

9 Q. So my formal question to you would be having read
10 that, do you remember saying that Kristen came home about
11 2:30?

12 A. I can't say that I really remember it --

13 Q. Do you remember that Kristen --

14 A. -- but she was home with me, yeah.

15 Q. Of course. Do you remember that Kristen was there
16 when the police came over to your house?

17 A. Yes, she was.

18 Q. And do you remember the police interviewing not only
19 you, but also Kristen there in your house?

20 A. I'm sure they did.

21 Q. Okay. Do you remember the police asking your
22 permission to look through every room of the house?

23 A. Yes.

24 Q. And do you remember them doing that?

25 A. Yes.

1 Q. Do you remember a time when Loren called from
2 Glenwood Springs?

3 A. Maybe after I -- I don't remember a -- specifically,
4 but I'm thinking that he probably did return my call. I may
5 not have been able to get ahold of him when I called him
6 originally.

7 Q. And when he called you, did he tell you where he
8 was?

9 A. I'm sorry?

10 Q. Did he tell you where he was when he called?

11 A. He was at school.

12 Q. Were police officers -- do you remember if police
13 officers were there when Loren called in from Glenwood
14 Springs?

15 MS. MILFELD: Objection.

16 A. I don't --

17 THE COURT: Hold on. Hold on. What's the
18 objection?

19 MS. MILFELD: Outside the scope of her knowledge,
20 Judge, she wouldn't be able to know that.

21 THE COURT: I'll sustain that objection.

22 Q. (By Mr. Brackley) Do you remember if the police
23 were there when Loren called?

24 MS. MILFELD: Objection, same question, Judge.

25 THE COURT: I'll sustain that objection.

1 Q. (By Mr. Brackley) Did there come a time when Loren
2 called your house?

3 A. Yes.

4 Q. And you spoke to him?

5 A. I did speak to him that night, yes.

6 Q. Were there police officers in the room when you were
7 speaking with -- to him?

8 A. I can't tell you, I don't remember. I really don't
9 remember specifically.

10 Q. You don't remember?

11 A. No.

12 Q. Do you remember how Loren reacted to his father's
13 murder?

14 A. He was really surprised, shocked I guess is a better
15 way to put it.

16 Q. What about Kristen?

17 A. We were, um -- she was pretty shocked and dismayed
18 at that, too.

19 Q. Do you remember back in the early 90's, particularly
20 1994, knowing a fellow named Michael Clark?

21 A. I knew Michael, yes.

22 Q. How did you know Michael?

23 A. He was an acquaintance of Kristen's.

24 Q. When you say "acquaintance," can you describe what
25 you understood their relationship to be?

1 A. That they were not close -- good close friends, but
2 that they would spend time together occasionally.

3 Q. Do you know if they had gone to school together?

4 A. Yes, that's where they met, actually, while one of
5 Kristen's good friends had been a friend of Michael's and he
6 introduced them.

7 Q. And did Kristen go to Boulder High School?

8 A. Yes.

9 Q. And is that where she met Michael Clark?

10 A. Yes.

11 Q. Would you recognize Michael Clark today if you were
12 to see him?

13 A. No.

14 Q. Do you recall ever meeting Michael Clark back in the
15 day?

16 A. Excuse me -- yes.

17 Q. On how many occasions and under what types of
18 circumstances?

19 A. I can't speak to the -- how many, but he would be --
20 usually when he would come to the house to -- to pick Kristen
21 up or to see her.

22 Q. Do you remember as you sit here today that just
23 prior to Marty Grisham's murder, knowing about or talking with
24 the Defendant or interacting with Michael Clark about a key to
25 Marty's apartment?

1 A. I remember him coming to my office for some reason,
2 and I'm assuming that -- at this time that it was about the
3 key.

4 Q. And would that be to give back the key to Marty's
5 apartment?

6 A. To give him a key to Marty's apartment, yes.

7 Q. And was that because Kristen wasn't available?

8 A. That's right.

9 Q. Do you remember back in 1994 talking with the police
10 about Michael Clark's interest in joining the Marines?

11 A. I do not remember.

12 Q. Let me show you, again, that same interview that you
13 did on November 2nd, 1994. Do you remember specifically
14 talking to the police about an incident involving Michael
15 Clark and a motorcycle?

16 A. I do not remember.

17 Q. Do you remember as you sit here today an incident
18 involving Michael Clark and Kristen and a motorcycle?

19 A. That subjects been discussed, but I did not remember
20 it until it had been discussed.

21 Q. Okay. But you have no independent memory of that --

22 A. No.

23 Q. -- issue today?

24 A. No, I do not.

25 Q. Do you remember telling the police detective back on

1 November 2nd, 1994, that -- the motorcycle business and the
2 possibility of that keeping him out -- keeping him from going
3 into the Marines scared the bajabbers out of him?

4 A. I do not remember that.

5 Q. Because he really does want to get into the Marines?

6 A. I do not remember that.

7 Q. And you didn't think that based on his desire to go
8 to the Marines, he would be involved in stealing checks from
9 Marty?

10 A. I certainly didn't think that he would, whether the
11 Marine thing was an issue or not, I did not think that he was
12 that type of person.

13 Q. So as you sit here today you have no recollection of
14 saying that to the police detective?

15 A. Yes, that's correct.

16 MR. BRACKLEY: Thank you, ma'am. I have no further
17 questions for this witness.

18 THE COURT: Cross-examination, Ms. Milfeld.

19 MS. MILFELD: Thank you, Judge.

20 **CROSS-EXAMINATION**

21 **BY MS. MILFELD:**

22 Q. Ms. Grisham, we haven't met before, right?

23 A. No.

24 Q. You testified before on direct about your
25 relationship with Marty?

1 A. Yes.

2 Q. You divorced him in 1991?

3 A. Right.

4 Q. In 1994, you had been divorced from him for about
5 three years?

6 A. Right.

7 Q. You actually separated from him before you were
8 divorced?

9 A. Yes, in December of '90.

10 Q. So by the time 1994, November, you really hadn't had
11 any communication with him for almost four years?

12 A. Yes.

13 Q. After the divorce, you personally did not want to
14 see Marty Grisham?

15 A. That's correct.

16 Q. You didn't want to see him at all in person?

17 A. No.

18 Q. In fact, your contact with him was extremely limited
19 during those four years?

20 A. That's correct.

21 Q. It was limited to you and him talking on the phone?

22 A. Yes.

23 Q. In those four years, you only talked to him a few
24 times on the phone?

25 A. Yes.

1 Q. When you talked to him on the phone, it was always
2 having to do something with the children?

3 A. Yes. Generally, yes.

4 Q. You didn't call him to chitchat?

5 A. No. No. No. No. No.

6 Q. You didn't call him to chitchat or talk about any
7 other personal things because your relationship --

8 A. No.

9 Q. -- was not amicable?

10 A. That's correct.

11 Q. After the divorce, Kristen lived with you?

12 A. That's correct.

13 Q. It would be fair to say that your relationship with
14 Kristen, you were closer with her than she was with her
15 father?

16 A. I can't answer that for her, but my feeling is yes.
17 Yes.

18 Q. Okay. So your impression was that you and Kristen
19 had a closer relationship than she did with her dad?

20 A. Yes.

21 Q. Kristen saw her dad usually once or twice a month?

22 A. I really can't address that. I can't remember how
23 often it was, but there were times I know that she spent -- we
24 would go on vacations with him and be with him for weeks so...

25 Q. But it wasn't something that was super often,

1 Kristen hanging out with her dad?

2 A. I don't remember how often it was.

3 Q. The prosecutor had talked to you about you speaking
4 with detectives and police officers shortly after Marty
5 Grisham was killed?

6 A. Okay. Yes.

7 Q. You met with detectives the day -- November 1st as
8 well as November 2nd?

9 A. Yes.

10 Q. During that conversation you told detectives that
11 Kristen Grisham actually only talked to her dad a few times a
12 month?

13 A. I don't remember.

14 Q. In that same conversation you also said that Kristen
15 spent time with her dad really just because he was her dad?

16 A. I don't remember saying that.

17 Q. And the reason why she spent time with him, because
18 it was her dad, is because they were not particularly close?

19 A. I don't recall that.

20 Q. You talked about Loren's relationship with his dad,
21 Marty Grisham. You just told the prosecutor --

22 A. Yes. Yeah. Yeah.

23 Q. -- about that. Okay. You talked about how they had
24 problems in the past?

25 A. Yes.

1 Q. In fact, they had pretty big problems growing up?

2 A. Yes.

3 Q. You talked about how Marty was tough on the
4 children?

5 A. Yes.

6 Q. He was especially tough on Loren?

7 A. Yes.

8 Q. They didn't get along at all when Loren was growing
9 up?

10 A. That's pretty fair, yes.

11 MS. MILFELD: No further questions. Thank you,
12 Judge.

13 THE COURT: Okay. Any redirect, Mr. Brackley?

14 MR. BRACKLEY: No, Your Honor. Thank you.

15 THE COURT: Ma'am, you can step down.
16 May this witness be excused?

17 MR. BRACKLEY: She may.

18 MS. MILFELD: Yes, Judge.

19 THE COURT: All right. Ms. Grisham, you are
20 excused. Thank you.

21 Would the People call their next witness.

22 MR. BRACKLEY: Ms. Kristen Grisham

23 MS. RING: Judge, can we approach?

24 THE COURT: Yes.

25 (Whereupon, counsel for the parties and the reporter

1 approached the bench and the following proceedings were had
2 out of the hearing of the jury.)

3 MS. RING: Mr. Brackley talked about Pam and Kristen
4 wanting to stay. He said that they weren't going to stay
5 today to get through the witnesses that would be testifying
6 about what is relevant to their testimony. And now
7 Ms. Grisham is sitting in the courtroom.

8 THE COURT: I see Pam Grisham has remained in the
9 courtroom. She is a victim as defined under the Victim Right
10 Amendment. And while I understand your concerns, the fact of
11 the matter is court's have ruled that a victim, as identified
12 under the VRA, has a right despite any sequestration order in
13 the court to remain in court after they have testified. So
14 she's here. I don't know how long she is going to stay, but
15 she is allowed to be here. But I understand your objection
16 and for purposes of the record I think that it's clear what's
17 going on.

18 MR. BRACKLEY: Judge, my -- my record before was
19 that they would -- the two witnesses after them at the very
20 least I know that they wouldn't be there for. I just
21 didn't -- I didn't specify that she would stay to support her
22 daughter.

23 THE COURT: Well --

24 MR. BRACKLEY: I thought that was -- I kind of
25 thought that that was obvious.

1 THE COURT: Well, frankly, it's Pam Grisham's choice
2 not the District Attorney's, not mine, not defense counsel
3 so...

4 MS. RING: Our objection is noted.

5 THE COURT: It is. Thank you.

6 (Whereupon, the following proceedings were had in
7 the presence and the hearing of the jury.)

8 THE COURT: Ms. Grisham, would please face me and
9 raise your right hand.

10 **KRISTEN GRISHAM,**
11 a witness herein, having been first duly sworn, was examined
12 and testified on her oath as follows:

13 THE COURT: All right. Mr. Brackley.

14 MR. BRACKLEY: Thank you, Judge.

15 **DIRECT EXAMINATION**

16 **BY MR. BRACKLEY:**

17 Q. Good morning.

18 A. Good morning.

19 Q. Can you state your name and spell your last name,
20 please.

21 A. It's Kristen Grisham, G-r-i-s-h-a-m.

22 Q. Ms. Grisham, where are you currently living?

23 A. I live in New Jersey.

24 Q. And how long have you lived in New Jersey?

25 A. Seven years.

1 Q. Okay. And where did you grow up?

2 A. I grew up in Boulder, Colorado.

3 Q. And can you tell the jurors just sort of
4 geographically where you have been between growing up in
5 Boulder, Colorado and living in New Jersey?

6 A. I grew up in Boulder, born and raised. I moved to
7 Denver, Colorado in maybe 1997. I lived in Denver for many
8 years until I moved to Seattle. I lived in Seattle for one
9 year and that was about 2001. In 2002, I moved to New York
10 City. I lived in the city for about two years and I moved to
11 New Jersey with my now partner.

12 Q. Do you have any children?

13 A. I have no children.

14 Q. Are you currently employed?

15 A. Yes.

16 Q. Okay. What do you do?

17 A. I work in patient services for a specialty
18 veterinary hospital.

19 Q. And how long have you done that for?

20 A. About two years.

21 Q. Okay. And what other types of jobs have you had?

22 A. Prior to that I was in banking, I was an assistant
23 banking manager for maybe six or seven years until I chose to
24 get out of it. Prior to that, when I first moved to New York,
25 I was assistant manager at a group of salons in the city. In

1 Seattle I worked just odd jobs, I was only there for a short
2 period of time. And when I was living in Denver I worked for
3 Saint Marks coffee shop. That was -- that would take me back
4 to that period of time.

5 Q. Okay. Do you still have any family here in Boulder
6 County?

7 A. My mother lives in Louisville.

8 Q. And that would be your mom, Pam Grisham?

9 A. Yes.

10 Q. And does she still live in the house that you lived
11 in way back in the '90s?

12 A. Yes.

13 Q. Did you go to Boulder High School here?

14 A. Yes.

15 Q. Did you graduate?

16 A. No.

17 Q. When did you leave Boulder High School?

18 A. The last semester of my senior year.

19 Q. Okay. What happened?

20 A. I was a competitive athlete at the time and I was
21 devoting more time to that than I was to school, which led to
22 an argument, as you can imagine, with my mother and she said
23 no more athletics, and I said, fine, no more school. So it
24 was, obviously, a stupid choice that I regretted for many
25 years, but it was the case so...

1 Q. What sport were you involved in?

2 A. Fencing.

3 Q. Okay. And did Boulder High have a fencing program?

4 A. No, it was an outside club.

5 Q. And did you tell your friends and family that you
6 were still in school?

7 A. Yes.

8 Q. Okay. Why did you do that?

9 A. I was ashamed. It wasn't something that I wanted to
10 admit. I realized when I did it that it was a mistake.

11 Q. Okay. Did you tell friends and family that you were
12 continuing your -- continuing your education elsewhere?

13 A. Yes, absolutely.

14 Q. What kind of things did you tell people to -- sort
15 of your --

16 A. When --

17 Q. -- your cover?

18 A. When I was approaching my senior year of high
19 school, because I was very successful at fencing, I had some
20 operative scholarships, so I basically let that story stick.
21 I was going to college and I would be on a scholarship and
22 that was it.

23 Q. Why did you do that?

24 A. I was ashamed. I wasn't ready to tell people the
25 truth, that, you know -- that I had dropped out, so it was

1 easier just to let them continue believing that than deal with
2 it.

3 Q. Were you a good student at Boulder High School?

4 A. I was an okay student.

5 Q. Did you go on to continue your education eventually?

6 A. Yes, I did.

7 Q. Okay. Where and to what extent? What type of
8 degree?

9 A. I went to Front Range to get my GED, and then I went
10 to John Jay out in New York City. That was one of the reasons
11 I went out to John Jay, um --

12 Q. Okay.

13 A. -- so...

14 Q. And what did you study at John Jay?

15 A. Forensic psychology.

16 Q. Was Marty Grisham your father?

17 A. Yes, he was.

18 Q. And can you tell the jury about your relationship
19 with your father growing up?

20 A. It was a very difficult relationship. We had a very
21 difficult family life. My father was at times very wonderful
22 and at times very horrible so... it was a very, um,
23 dysfunctional family relationship.

24 Q. Tell us why you say that word "horrible"?

25 A. My father was very emotionally abusive to my mother,

1 to my brother, to me, and it was just very hard to deal with.
2 There were a lot of problems in the family.

3 Q. Was he an authoritarian father?

4 A. That would be an accurate description.

5 Q. Was he a very driven person in his own career?

6 A. Yes.

7 Q. Did he expect his -- his kids to be very driven in
8 their lives as well?

9 A. Absolutely.

10 Q. And if that didn't work out, he wasn't the kindest
11 father?

12 A. That's correct.

13 Q. And did that cause some rebellion amongst you and
14 your brother?

15 A. I would say, yes, definitely with my brother, I just
16 learned to avoid him. I did my best and tried to stay out of
17 his way as much as possible.

18 Q. Okay. When you say -- well, did your -- how was
19 your relationship with your father closer to the time when he
20 was murdered?

21 A. It wasn't great, but we basically just didn't see
22 much of each other. He was living his life and I was living
23 mine. I lived with my mother, so we occasionally saw each
24 other, but it wasn't close.

25 Q. Did your father try to establish more contact with

1 you in the later years or month of his life?

2 A. Yes.

3 Q. Okay. And what ways and what was your reaction?

4 A. Well, he would call occasionally or ask me to come
5 over for dinner, and my reaction was generally to give him an
6 excuse not to go. I just wasn't prepared to be around him at
7 this point in time.

8 Q. How old were you when your father was murdered?

9 A. I was 19.

10 Q. Can you talk about that other side of your father in
11 the last couple years of his life. Were there any good times?

12 A. There were good times, absolutely.

13 Q. Were there vacations?

14 A. Mm-hmm. We took a very nice backpacking trip
15 together where it was just him and me, um, and we had a great
16 time, it was absolutely wonderful. And those are the -- those
17 are the things that were complicated with our relationship,
18 you know, that he could be this really wonderful person and
19 then, you know, the Jackal and Hyde. It's like the next day
20 he would be just a horrible individual that I didn't want to
21 be around so...

22 Q. And that would be because he was kind of a
23 tough-love German father?

24 A. I -- he was just -- he was belittling to -- to my
25 mother, belittling to me, you know, some things that you don't

1 always want to put up with or be around.

2 Q. Okay. What about your father's relationship with
3 your brother, Loren?

4 A. Mm-hmm.

5 Q. In the last years of your father's life?

6 A. It was better than it ever had been.

7 Q. And tell us about that.

8 A. My brother had made a lot of changes in his life, he
9 was going to school. I know Marty was also reaching out to
10 him and he was much more receptive to that. They spoke, you
11 know, on a regular basis. And I think Loren still really
12 wanted his approval, and I think that he was working hard to
13 get that.

14 Q. Was Loren back in school in the fall of 1994?

15 A. Yes.

16 Q. Where was he in school?

17 A. Colorado Mountain College.

18 Q. Okay. And was that out in Glenwood Springs?

19 A. Yes.

20 Q. Can you talk about your relationship with Loren
21 around the time your father was murdered?

22 A. Our relationship was good. We would talk on the
23 phone while he was away at college. He would occasionally
24 write a letter. And it was just kind of a general
25 brother/sister relationship so...

1 Q. And what about your relationship with Loren at or
2 about the time that Loren died?

3 A. We were still close. I, obviously, live in New
4 Jersey and he lived here. He had -- was having a lot of
5 financial problems at that time and -- but outside of that,
6 our relationship was fine. I mean we would speak every now
7 and then. I was trying to help him write a resume to go job
8 hunting, you know, things of that nature.

9 Q. Okay. Where was he living in the last few years of
10 his life?

11 A. He was living at my mother's house in Louisville.

12 Q. Let me show you what is marked People's 43 for
13 identification and ask you to take a look at that. Tell us
14 what that photo is?

15 A. This is a picture of my brother and me and what
16 looks like, from the artwork, my room at the time.

17 Q. Okay. That's when you guys were teenagers?

18 A. That's when we were teenagers.

19 Q. Fair and accurate depiction of you and Loren as
20 teenagers back in the early 90's?

21 A. Yes.

22 MR. BRACKLEY: Your Honor, I would move to admit
23 that as People's 43 into evidence.

24 THE COURT: Any objection or voir dire?

25 MS. RING: No.

1 THE COURT: 43 will be admitted.

2 (People's Exhibit 43 was admitted into evidence by
3 agreement of the parties.)

4 Q. (By Mr. Brackley) Okay. If you could just hold
5 that up for the jurors so that they could have a look at it
6 and... Can you -- for the record, can you give us a more
7 specific time range as to when that photo would have been
8 taken of Loren and you?

9 A. I would say maybe when we were 15 or 16.

10 Q. Okay. Do you -- um, do you know the name Michael
11 Clark?

12 A. Yes.

13 Q. Okay. And how do you know the name Michael Clark?

14 A. I went to high school with Michael Clark.

15 Q. When is the last time you saw Michael Clark?

16 A. Before my father died.

17 Q. Okay. When and under what circumstances did you see
18 Michael Clark before your father died?

19 A. He came back to my mother's house to give me back
20 the key that he had been using to my father's apartment to
21 take care of his pet cat.

22 Q. Would you recognize Michael Clark if you saw him
23 today?

24 A. Yes.

25 Q. Okay. If you could take a look around and let us

1 know if you see him.

2 A. This gentleman over here.

3 (The witness indicated.)

4 Q. Wearing a suit next to the two women at the defense
5 table?

6 A. That's correct.

7 MR. BRACKLEY: Judge, subject to cross-examination,
8 indicating the Defendant.

9 THE COURT: The record will so reflect.

10 Q. (By Mr. Brackley) So how did you know -- or how do
11 you know the Defendant?

12 A. There was a good friend of mine in high school by
13 the name of Brian Fox was how we were introduced, and from
14 there he was in my general circle of friends.

15 Q. Okay. How would you characterize your relationship
16 with the Defendant back prior to your father's death?

17 A. Average. We weren't good friends, but we hung out
18 with the same people and I liked him.

19 Q. Did you socialize with him outside of school with
20 the groups of people?

21 A. With groups of people, yes.

22 Q. Did you ever socialize with him outside of school on
23 a one-on-one basis?

24 A. No.

25 Q. Would you ever consider your relationship with the

1 Defendant as boyfriend/girlfriend at the time?

2 A. No.

3 Q. Was he in the same class as you in high school?

4 A. No.

5 Q. Was he before you or after you?

6 A. You mean the same grade?

7 Q. Right, same grade.

8 A. He was in the same grade, yeah.

9 Q. Okay. Did you keep in touch with the Defendant
10 after high school?

11 A. No, not until he got in touch with me again when he
12 came back to Boulder.

13 Q. Okay. Do you know where he was between high school
14 and when he -- the day he came back to Boulder?

15 A. It was my understanding that he was going to college
16 somewhere in southern Colorado.

17 Q. Okay. And do you recall when in relation to your
18 father's murder that Michael Clark came back in to town?

19 A. It was a couple months, I think, before.

20 Q. And do you know where he was staying in Boulder at
21 the time?

22 A. At the time I thought that he was staying with
23 friends. I didn't think that he had a set place to stay.

24 Q. He was just sort of from place-to-place?

25 A. (The witness nods head.)

1 Q. Can you talk about the circumstances of getting back
2 in touch with the Defendant?

3 A. Yeah. He had just called me and said that he was
4 back in town, um, and we had arranged to go catch up, have a
5 bite to eat.

6 Q. Okay. Without giving specific details, do you
7 remember an incident involving yourself and the Defendant and
8 a stolen motorcycle?

9 A. Absolutely.

10 Q. Were you on the back of the motorcycle when Michael
11 Clark was arrested?

12 A. Yes.

13 Q. Okay. How did that effect your relationship with
14 Michael Clark?

15 A. Well, at the time I was stunned and upset, but I
16 tried to give him -- I didn't get to really talk to him, he
17 was arrested. I went on a trip the next day so, you know,
18 tried to give him a chance to explain the circumstances. You
19 know, it seemed like something incredibly stupid to do and to
20 involve me in it was -- angered me greatly, but at the same
21 time, you know, he was very charming and he can explain things
22 well. And I just, you know, felt like he needed -- deserved a
23 second chance, and I would say that pretty much sums it up,
24 you know.

25 Q. And you gave him that second chance?

1 A. Absolutely, it's what I regret.

2 Q. You had mentioned you went on a trip the next day.

3 Where did you go?

4 A. I went to Michigan.

5 Q. For what purpose?

6 A. A football game.

7 Q. Let's talk about that a little bit later. At that
8 time did you possess a gun?

9 A. No.

10 Q. Own a gun?

11 A. No.

12 Q. Ever borrow or use a gun?

13 A. No.

14 Q. Did you know the Defendant to have a gun at that
15 time?

16 A. No.

17 Q. Did you know anything about his interest in having a
18 gun?

19 A. No.

20 Q. Did he ever talk to you about it?

21 A. No.

22 Q. Did anyone in your group of friends or acquaintances
23 have guns?

24 A. No.

25 Q. Would that have been unusual --

1 A. Very.

2 Q. -- to carry a gun?

3 A. Yeah, very.

4 Q. So do you recall the exact date that you traveled to
5 Michigan back then in 1994?

6 A. No, I don't.

7 Q. Okay. What was the purpose of that trip? How did
8 that come about?

9 A. A friend of mine and myself worked for a company
10 that dealt with CU Buffalo football, and we had been invited
11 out to attend the game in Michigan.

12 Q. Okay. Let me show you what I have marked as
13 People's 45. Do you recognize that?

14 A. Yes.

15 Q. We go big here. Do you recognize that?

16 A. Yes.

17 Q. And is this a newspaper?

18 A. Yes.

19 Q. A newspaper that you recognize?

20 A. Yes.

21 Q. Okay. Which one?

22 A. The Daily Camera.

23 Q. Okay. And does that depict incidents that happened
24 in Michigan when you were there?

25 A. Yes, it does.

1 MR. BRACKLEY: Your Honor, I would move to admit
2 this as a publication or purported publication under the Rule
3 of Evidence 902.6.

4 THE COURT: Objection or voir dire?

5 MS. RING: No objection.

6 THE COURT: 45 will be admitted.

7 (People's Exhibit 45 was admitted into evidence by
8 agreement of the parties.)

9 Q. (By Mr. Brackley) Okay. And does that help you
10 remember the date that you were in Michigan?

11 A. If I can see the date on there, it would, certainly.
12 September 25th, 1994.

13 Q. And do you recall -- I'm just going to stand here
14 and publish it to the jury and then I'm going to move along.

15 Do you recall when you went to Michigan and when you
16 came back?

17 A. I don't know the exact date that I came back. We
18 were there for a few days.

19 Q. Do you remember after your father was murdered,
20 speaking to the police on a number of occasions?

21 A. Several.

22 Q. Okay. And do you remember the police on
23 November 2nd, 1994, speaking to you specifically about when
24 you went to Michigan and when you came back from Michigan?

25 A. I remember speaking to the police about that.

1 Q. Okay. And do you remember as you sit here today,
2 and if you don't, tell me, but do you remember telling the
3 police that specifically you left for Michigan on a Friday and
4 you came back on a Monday night?

5 A. I don't remember saying that.

6 Q. Do you remember the specific question being --

7 A. Mm-hmm.

8 Q. -- how long were you out of town during that week?

9 A. Mm-hmm.

10 Q. And saying I was gone that Friday, Saturday, Sunday
11 and I returned Monday evening and Marty returned Monday
12 evening?

13 A. That sounds accurate.

14 Q. By the way, do you remember the name of the
15 detective who you spoke to on those occasions?

16 A. I don't.

17 Q. Was it a male or female?

18 A. I believe I spoke to a male first and then a female.

19 Q. During the time that you were in Michigan on that
20 late September weekend, were you supposed to be -- or were you
21 asked by your father to watch his cat?

22 A. Yes.

23 Q. And what was your sort of job going to be in terms
24 of your father's apartment and cat?

25 A. Just to go over to the apartment to take care of the

1 cat. The cat got walked, so I needed to walk the cat, feed
2 the cat.

3 Q. Okay. And did you do that that weekend?

4 A. I did not.

5 Q. Because you were in Michigan?

6 A. That's correct.

7 Q. Did you make plans for someone else to watch the
8 cat?

9 A. I did.

10 Q. What plans did you make?

11 A. I asked Michael Clark to take care of the cat.

12 Q. And can you talk about the circumstances of asking
13 Michael Clark to watch your dad's cat?

14 A. Mm-hmm. Very simple, I needed -- I was going away.
15 I needed somebody to look after the cat while I was away. The
16 people that I knew at that time that I would have been able to
17 ask lived far away, in Arvada, and places that wouldn't be
18 practical. It was a perfect opportunity to have him
19 available.

20 Q. Do you recall as you sit here today knowing that at
21 that time the Defendant needed a place to stay around that
22 time?

23 A. Well, I knew that he was staying with various
24 friends.

25 Q. Do you know whether or not he was going to stay at

1 your father's house during that weekend?

2 A. I don't know specifically, but he was more than
3 welcome to.

4 Q. Do you remember when you gave him the key in
5 relation to you leaving for Michigan?

6 A. Not specifically.

7 Q. Do you remember on that same interview,
8 November 2nd, 1994, being asked the question, You gave the key
9 to Michael on that Friday, and answering, Right?

10 A. That sounds correct.

11 Q. But does that give you a -- a refreshed memory here
12 on the stand today or are you just saying that sounds correct
13 to you?

14 A. It sounds correct.

15 MR. BRACKLEY: Judge, this may be a good time for a
16 break.

17 THE COURT: All right. Ladies and gentlemen of the
18 jury, why don't we go ahead and take the mid morning recess.
19 We'll be in recess until 11:00, that gives you about 20
20 minutes to stretch your legs and use the restroom.

21 Remember the admonition that I gave you at the
22 recess yesterday, it applies to this recess as well. Don't
23 communicate about or discuss the case with anyone by any
24 means. If someone does approach you and tries to discuss the
25 case with you, please let me know about it immediately.

1 Don't read or listen to any news reports of the
2 trial. Don't consult any outside reference materials. Don't
3 form or express any opinion on the case until it is finally
4 submitted to you.

5 We should be ready for you back in court promptly at
6 11:00, so please relax a little over the next 20 minutes or
7 so.

8 (Whereupon, the jury exited the courtroom, and the
9 following proceedings were had out of the presence of the
10 jury.)

11 THE COURT: Ms. Grisham, if you would be back in the
12 witness stand chair at 11:00, please. And we'll be in recess
13 until 11:00.

14 (Whereupon, the morning recess was taken.)

15 THE COURT: Anything to take up on the record before
16 we bring the jury in?

17 MR. BRACKLEY: No, Your Honor.

18 THE COURT: Okay. Would you bring the jury in,
19 please.

20 (The jury entered the courtroom.)

21 THE COURT: All the members of the jury are back.
22 Welcome back, ladies and gentlemen of the jury. When we
23 recessed the People were in the middle of the direct
24 examination of Kristen Grisham.

25 Ms. Grisham, I'll remind you, you are still under

1 oath. And, Mr. Brackley, you may continue.

2 MR. BRACKLEY: Thank you, Judge.

3 Judge, if I may approach with what is marked as
4 People's 44 for identification.

5 THE COURT: Yes.

6 Q. (By Mr. Brackley) Ms. Grisham, do you recognize
7 People's 44 for identification?

8 A. That's a photo of Michael Clark.

9 Q. And is that a fair and accurate depiction of how
10 Michael Clark appeared back in 1994?

11 A. Yes.

12 MR. BRACKLEY: Judge, I would move to admit that
13 into evidence as People's 44.

14 MS. RING: No objection.

15 THE COURT: 44 is admitted.

16 (People's Exhibit 44 was admitted into evidence by
17 agreement of the parties.)

18 MR. BRACKLEY: And I would publish that briefly?

19 THE COURT: Granted.

20 MR. BRACKLEY: Okay. Thank you.

21 Q. (By Mr. Brackley) Ms. Grisham, do you know whether
22 your father, Marty Grisham, ever met the Defendant?

23 A. I believe he had.

24 Q. And do you know -- as you sit here today, do you
25 recall what circumstances and how many times your father would

1 have met the Defendant?

2 A. No, I'm sorry, I don't.

3 Q. Okay. Do you recall again on the November 2nd, 1994
4 interview with the police detectives, the detective asking
5 you, um, whether your father had ever met the Defendant?

6 A. Yes.

7 Q. And do you recall what your answer was?

8 A. No.

9 Q. Do you recall the detective asking you, You said
10 that Michael had met your father before in the past and how
11 would you classify that relationship between the two of them,
12 and your answer being, Totally fine?

13 A. That sounds correct.

14 Q. And then you saying, They -- They got along well.
15 They met -- I think that they met once, I think that I brought
16 Michael along, we had dinner or coffee or something, and that
17 was the first time they really even met. And I think that
18 they met a couple times after that, just general, like, he was
19 with me when I saw him and I saw my dad or something -- or
20 something like that.

21 A. That sounds correct.

22 Q. Okay. And then, again, as you sit here today do you
23 remember actually saying that to the detective back on
24 November 2nd, 1994?

25 A. No.

1 Q. Okay. Did you ever get your father's apartment key
2 back from the Defendant?

3 A. I believe that I got it back on the last time that I
4 saw him at my mother's house.

5 Q. And as you sit here today do you remember when that
6 was?

7 A. No.

8 Q. Okay. Do you remember on November 2nd, 1994, in
9 that same interview with the detective on that occasion being
10 asked about when you got the key back from your father -- from
11 Michael Clark?

12 A. Yes.

13 Q. Okay. And do you remember what your answer was?

14 A. No.

15 Q. Okay. Do you remember the detective saying, He gave
16 the key back to you when? Your answer, interrupting the
17 question being, The last time I saw him, the 24th. The
18 question being, Okay, 24th of -- that would be October; is
19 that right? And your answer being, Right?

20 A. That sounds correct.

21 Q. But as you sit here today do you remember
22 specifically being asked those questions and being given those
23 answers?

24 A. I do remember being asked the questions. I don't
25 remember my exact answers.

1 Q. All right. Do you remember as you sit here today
2 that the last time you saw the Defendant was the time when he
3 gave you the key back?

4 A. Yes.

5 Q. Do you recall a scenario where that -- your father's
6 apartment key was commingled with a key to a -- to the Marine
7 recruiter's office back in Boulder?

8 A. I don't remember that.

9 Q. Okay. Do you remember talking to the police about
10 that mingling of your father's apartment key with the key from
11 the Marine recruiting place?

12 A. No, I do not remember that.

13 Q. Do you remember ever learning or knowing that
14 Michael Clark had gotten -- gone to your mother's place of
15 business in order to exchange keys?

16 A. Yes, I remember that.

17 Q. Okay. And do you remember why that was?

18 A. I didn't remember that.

19 Q. Okay. Do you remember talking with police
20 detectives about -- well, do you remember -- again, we had
21 talked about the internet involving the motorcycle?

22 A. Mm-hmm.

23 Q. Do you recall after the incident involving the
24 motorcycle, but still there at the scene, getting the
25 apartment key back from the Defendant?

1 A. I didn't remember that.

2 Q. Okay. Do you remember there at the scene Michael
3 Clark actually giving you the wrong key?

4 A. I don't remember that.

5 Q. And do you remember talking to the detectives about
6 Michael Clark going to your mother's office to basically
7 exchange the keys?

8 A. I remember that.

9 Q. So to give back the apartment key, but to take the
10 Marine key?

11 A. I guess so.

12 THE COURT: And I'm sorry what was your answer?

13 THE WITNESS: I guess so.

14 THE COURT: Okay.

15 Q. (By Mr. Brackley) Did your father in the last days
16 of his life talk to you about a missing checkbook or missing
17 checks from his apartment?

18 A. He didn't specify checks, he had asked me if I had
19 taken anything from his apartment.

20 Q. Okay. And when did he ask you that?

21 A. A few days before he died.

22 Q. Okay. And do you recall what your exchange was with
23 your father back and forth at the time?

24 A. I don't remember.

25 Q. Okay. Did your father ever confront you

1 specifically about checks?

2 A. Not that I remember.

3 Q. Did the Defendant ever talk to you about checks from
4 your father's apartment?

5 A. No.

6 Q. Did the Defendant ever talk to you about writing
7 checks, your father's checks, that he took from his apartment?

8 A. No.

9 Q. Did the Defendant ever talk to you about cashing
10 checks that he had taken and written from your father's
11 apartment?

12 A. No.

13 Q. Did you know that the Defendant had taken checks
14 from your father's apartment before your father's murder?

15 A. No.

16 Q. Did the Defendant give you any money prior to your
17 father's murder?

18 A. No.

19 Q. Did you ask him for money prior to your father's
20 murder?

21 A. No.

22 Q. Did you eventually learn from any source that the
23 Defendant had, in fact, stolen checks from your father's
24 apartment?

25 A. Yes.

1 Q. How did you learn that?

2 A. The detectives asked me about it.

3 Q. Okay. And that would be the detectives who spoke to
4 you after your father's murder?

5 A. Yes.

6 Q. And did the detectives accuse you?

7 A. Yes.

8 Q. Okay. And did those accusations continue through
9 the years?

10 A. Yes.

11 Q. Up until a couple of years ago?

12 A. Yes.

13 Q. Did you take your father's checks?

14 A. No.

15 Q. Did you instruct the Defendant to take your father's
16 checks?

17 A. No.

18 Q. Did you have anything to do with the theft of your
19 father's checks?

20 A. No.

21 Q. Did you profit in any way from the theft of your
22 father's checks?

23 A. No.

24 Q. Do you remember the night that your father was
25 murdered?

1 A. Yes.

2 Q. Did you have plans with your father on the night of
3 his murder?

4 A. Yes.

5 Q. And what were those plans and what was the occasion?

6 A. He had invited me to dinner to meet his new
7 girlfriend.

8 Q. Okay. And is that something that you were
9 interested in doing?

10 A. Not at all.

11 Q. Had plans been made in the past for you to meet your
12 father's new girlfriend?

13 A. Not that I recall.

14 Q. Had you ever had plans with your -- well, did you go
15 to the -- your dad's apartment that night?

16 A. No, I didn't.

17 Q. Is it fair to say that you blew him off?

18 A. Yes.

19 Q. Prior to these particular plans with your father,
20 had you blown him off in the past?

21 A. Yes.

22 Q. Was that something that you did regularly?

23 A. Fairly regularly at that point in time.

24 Q. Why?

25 A. I didn't care for him at that point in time and I

1 didn't always feel like being around him so...

2 Q. Were you interested in meeting his new girlfriend?

3 A. Not really.

4 Q. Okay. Did you agree that you would have dinner with
5 your father?

6 A. I said I probably would.

7 Q. Okay. And under what circumstances did you not go
8 to your father's apartment on November 1st, 1994?

9 A. I had called him earlier in the day and then my
10 mother and I stayed home and watched a movie.

11 Q. Did you call him earlier in the day at work or at
12 home?

13 A. I don't remember where I called him.

14 Q. Okay. Did you leave a voice message for him?

15 A. Yes.

16 MR. BRACKLEY: Your Honor, if I can -- for this
17 witness, if I could ask her to listen to what's People's 10 in
18 evidence.

19 THE COURT: Yes.

20 MR. BRACKLEY: And I'm going to stay up here.

21 THE COURT: That's fine.

22 Q. (By Mr. Brackley) Was that your voice back in -- in
23 1994.

24 A. Yes.

25 Q. And was that the message that you left for your

1 father?

2 A. That sounds like it.

3 Q. Okay. Now would you characterize what happened back
4 on November 1st, 1994, as cancelling plans with your father or
5 just not showing up?

6 A. Just avoiding him.

7 Q. Okay. Did you hear from your father later that
8 afternoon or into that evening?

9 A. No.

10 Q. Do you recall whether your father called and left a
11 voice message for you at home?

12 A. I don't remember.

13 Q. Do you recall speaking with the police on
14 November 4th of 1994 and talking to them about whether you had
15 had any further contact with your father on the night of
16 November 1st, 1994?

17 A. I don't remember.

18 Q. And, by the way, were you interviewed over the
19 course of several days by the same detective or different
20 detectives?

21 A. Yes, it was the same -- well, there were multiple
22 detectives, but they were consistently the same people.

23 Q. Do you remember telling detectives that you called
24 him at 4:00 and I hadn't been able to get ahold of him. And
25 he called at 6:00 and we had the phone turned off because we

1 were all watching a movie, so we missed each other that way.

2 A. That sounds correct.

3 Q. Do you recall talking with police detectives back on
4 both November 2nd and also November 4th of 1994 about turning
5 the phone off that evening?

6 A. I'm sure we discussed it.

7 Q. But hearing those words today, does that -- do you
8 now remember, Well, yes, I said that?

9 A. Yes.

10 Q. Do you remember talking to the detectives about
11 wanting to avoid a guilt trip from your father for blowing him
12 off again?

13 A. I'm sure.

14 Q. Tell us about that.

15 A. It was just the nature of my father. So, like I
16 said, very belittling and it was difficult to have a basic
17 conversation with him. It was either going to be a really
18 great conversation or it was going to devolve into what a
19 horrible person I was, so I avoided as many conversations with
20 him as I could.

21 Q. Okay. Including that night?

22 A. Correct.

23 Q. Do you remember as you sit here today what you did
24 that night with your mom on November 1st, 1994?

25 A. We watched a movie at home.

1 Q. Do you remember the movie?

2 A. No.

3 Q. Do you remember the police asking you back on
4 November 4th of 1994 what movie you and your mother had
5 watched?

6 A. I'm sure that they asked.

7 Q. Okay. And do you remember telling them they watched
8 the movie, The Age Of Innocence, with Daniel Day Lewis?

9 A. That sounds correct.

10 Q. By the way, just for the record, what was your
11 mother's address back then in 1994?

12 A. It's the same address that she has now in
13 Louisville, so 2648 Dogwood Drive.

14 Q. There in Louisville?

15 A. Mm-hmm.

16 Q. And your father, his apartment was here in the city
17 and county of Boulder?

18 A. Yes.

19 Q. So do you remember officers wearing uniforms coming
20 to your house?

21 A. Yes.

22 Q. On November 1st, 1994?

23 A. Yes.

24 Q. What do you remember about that?

25 A. I remember when they showed up we didn't know what

1 was going on. An officer asked me to show him around the
2 house and to my brother's room. We walked around the house.
3 And then at some point later they gathered my mother and
4 myself together downstairs and told us that my father had been
5 murdered.

6 Q. So when the police first knocked on the door for
7 that very first time, did they tell you what they were there
8 for?

9 A. No.

10 Q. And how long were they in your house for before they
11 gathered your mother and yourself and talked to you?

12 A. I don't know exactly how long, but it was a
13 significant amount of time.

14 Q. Okay. And during that period of time that you call
15 "significant," were you wondering why the police were in your
16 house?

17 A. Yes.

18 Q. How did that make you feel?

19 A. Anxious, obviously, I mean not showing up there
20 because something good has happened, and it was disconcerting
21 that they weren't telling us what happened, so it was very
22 upsetting.

23 Q. How was your mother reacting to that?

24 A. She was upset as well.

25 Q. So do you recall as you sit here today whether the

1 officers who later came to the house, were they detectives in
2 plain clothes or were they still more uniform police officers?

3 A. I believe that there were a couple people in plain
4 clothes.

5 Q. And do you know if one of the first officers in
6 plain clothes was one of the ones who would interview you over
7 the course of the next week or so?

8 A. I don't remember.

9 Q. Okay. Do you remember your reaction upon hearing
10 that your father had been murdered?

11 A. No.

12 Q. Do you remember what you said upon hearing that your
13 father had been murdered?

14 A. No.

15 Q. Do you remember your mother's reaction?

16 A. She was in shock.

17 Q. Okay. Was anyone else in the house besides you,
18 your mother and the police officers and detectives?

19 A. No.

20 Q. Do you remember making a comment upon first hearing
21 why the police were there, making a comment to the extent
22 of -- referring to your father, that he could be a jerk, but
23 not that big of a jerk?

24 A. I'm sure I said something like that.

25 Q. Okay. As you sit here today do you remember saying

1 that?

2 A. No.

3 Q. Okay. Explain to the jury why you would say
4 something like that, hearing your father had just been
5 murdered?

6 A. I think that it was exactly what I said. It was a
7 shocking, horrible thing to hear. And the first thing in --
8 your mind starts to do is, How, Why, What, and that was the
9 first thought. The first thing that came to my mind is he is
10 not the nicest person, but I couldn't possibly imagine anybody
11 doing that to him.

12 Q. Did you laugh when you said it?

13 A. I hope not.

14 Q. Okay. If you were to hear that you laughed when you
15 said that, is that something that you could explain to this
16 jury?

17 A. I would say I was probably very nervous and upset.

18 Q. Do you recall asking if you could make a phone call
19 to someone named Belinda Deeds?

20 A. I'm sure, I would have needed to make a phone call
21 to her.

22 Q. Who was she?

23 A. She was staying in my brother's room at the time.
24 She was a housemate, roommate, a friend of mine from, work.
25 She was staying in my brother's room.

1 Q. Your brother, Loren's, room?

2 A. That's correct.

3 Q. Why did you want to call Belinda?

4 A. To let her know to expect police to be at the house.

5 Q. Okay. And did you get in touch with her?

6 A. I don't remember, I'm sure I did.

7 Q. Okay. Did you call her directly or did you call
8 another friend of both of yours?

9 A. She was with her friend or boyfriend at the time,
10 guy named Eric Palonie, so I would have probably contacted
11 him.

12 Q. Okay. And do you recall saying to that person, You
13 will never believe what happened?

14 A. I don't remember saying that.

15 Q. Is that something that you would likely say after
16 hearing your father had been murdered?

17 A. Sure.

18 Q. Okay. And do you remember also having some --
19 having some laughter upon saying that?

20 A. No.

21 Q. And is that something if you were to hear that a
22 police officer saw that, how could you explain that to this
23 jury?

24 A. I would say the same thing, I think that I was just
25 in shock, so I -- you don't know how to handle that situation

1 so... I'm surprised to hear that I laughed.

2 Q. So did you speak to the police that night and the
3 following day as well?

4 A. Correct.

5 Q. And a couple of days after that?

6 A. Correct.

7 Q. And a couple of weeks after that?

8 A. Correct.

9 Q. And 15 years after that?

10 A. Yes.

11 Q. Okay. And did the police continuously accuse you of
12 being involved in stealing checks?

13 A. Yes.

14 Q. How does that make you feel?

15 A. Frustrated mostly, and at this stage in my life I
16 understand that that's part of their job, you know, but just
17 angry and frustrated and upset.

18 Q. Do you -- was Loren home at all on November 1st of
19 1994?

20 A. No.

21 Q. Where was he?

22 A. He was up in school, up at Colorado Mountain
23 College.

24 Q. Did you talk to him that night?

25 A. I don't think so.

1 Q. Okay. Did Loren eventually come back home to
2 Boulder?

3 A. Yes.

4 Q. Was there a funeral for your father?

5 A. Yes.

6 Q. And did Loren attend the funeral?

7 A. Yes.

8 Q. And you did as well, of course?

9 A. (The witness nods head.)

10 MR. BRACKLEY: I have no further questions at this
11 time for Ms. Grisham.

12 THE COURT: All right. Cross-examination, Ms. Ring.

13 MS. RING: Thank you.

14 **CROSS-EXAMINATION**

15 **BY MS. RING:**

16 Q. Ms. Grisham, you are being asked a lot of questions
17 about very specific details from 18 years ago, right?

18 A. (The witness nods head.)

19 Q. I'm sorry you have to say yes or no.

20 A. Yes, I understand that.

21 Q. I know that you are nodding your head, but the court
22 reporter is taking everything down.

23 And Mr. Brackley has asked you throughout the time
24 you were testifying about different interviews by different
25 police officers on different dates --

1 A. Yes.

2 Q. -- right? So prior to testifying today, did you
3 meet with the District Attorney?

4 A. Yes.

5 Q. Okay. And did they show you transcripts and police
6 reports from those prior interviews?

7 A. I did not see any transcripts or police reports.

8 Q. Okay. So even though you met with him, they didn't
9 give you the opportunity to review the statements you made
10 back in 1994 to other police officers?

11 A. Correct.

12 Q. Okay. You seem to recall that you did have police
13 officers ask you questions the night that your father was
14 murdered when you were at your home?

15 A. Yes.

16 Q. So you remember that happening?

17 A. Sure.

18 Q. You just can't remember all the details of what you
19 told the officer?

20 A. Correct.

21 Q. Okay. And you remember that you were interviewed by
22 the police again the next day?

23 A. Yes.

24 Q. Okay. And do you also remember -- so that would
25 have been November 2nd?

1 A. Yes.

2 Q. That sounds right?

3 A. Mm-hmm. Mm-hmm.

4 Q. And then do you also remember being interviewed
5 again on November 4th of 1994?

6 A. Yes.

7 Q. Okay. And you have not -- you just told us you
8 haven't seen any of those transcripts?

9 A. Correct.

10 Q. Okay. And then you were also contacted by a
11 detective, David Spraggs, at some point when you were living
12 in New Jersey. Do you remember that?

13 A. I don't remember his name, but over the -- the years
14 several people would call and say that they were still working
15 on the case.

16 Q. Okay. And then do you remember that the gentleman
17 seated right here, Detective Heidel, actually came to New
18 Jersey in 2010 and interviewed you?

19 A. Yes.

20 Q. Okay. And then in August of 2011 you actually flew
21 out here?

22 A. Correct.

23 Q. And you met again with Detective Heidel --

24 A. Mm-hmm.

25 Q. -- right? Yes?

1 A. Yes.

2 Q. Okay. And he had another investigator with him, a
3 Jane Harmer?

4 A. Yes.

5 Q. Does that ring a bell?

6 A. Mm-hmm.

7 Q. And then at some point actually Mr. Brackley came
8 into the room at the end of that interview?

9 A. Correct.

10 Q. Okay. So you remember all of those things
11 happening, you just don't remember all of the details of all
12 of those interviews?

13 A. Correct.

14 Q. Okay. Mr. Brackley had asked you to describe your
15 relationship with Michael Clark?

16 A. Mm-hmm.

17 Q. And you basically said you guys were friends?

18 A. Mm-hmm.

19 Q. Yes?

20 A. Yes.

21 Q. Mm-hmm doesn't work either because it could be a yes
22 or no.

23 A. Okay.

24 Q. And you first got to be friends in high school?

25 A. Correct.

1 Q. And then you told us you dropped out of school?

2 A. Yep.

3 Q. And you knew at some point that Michael went away to
4 college down in southern Colorado?

5 A. Correct.

6 Q. Some contact then, but you certainly weren't super
7 close at the time?

8 A. Right.

9 Q. And your recollection is you really hadn't heard
10 much from him until he comes back up to the Boulder area after
11 leaving school?

12 A. Correct.

13 Q. Okay. And your recollection is you saw him and were
14 back in contact with him a couple of months before November of
15 1994?

16 A. Correct.

17 Q. Okay. And you're friendly, right?

18 A. Yes.

19 Q. See him once in a while?

20 A. Mm-hmm.

21 Q. Not super close?

22 A. No.

23 Q. And not boyfriend/girlfriend?

24 A. No.

25 Q. Okay. Now you talked about your relationship with

1 your father and kind of avoiding your father --

2 A. Mm-hmm.

3 Q. -- is that fair?

4 A. That's correct.

5 Q. Okay. And is it fair that during that time frame
6 when Michael Clark has gotten back in touch with you and, you
7 know, late summer or early fall of 1994 you are really not
8 seeing much of your father then?

9 A. Correct.

10 Q. That's kind of a time when you are avoiding him?

11 A. Correct.

12 Q. Okay. Let's talk a little bit more about how you
13 described your father. Do you recall somebody at some point
14 questioning you about why your father would need someone to
15 watch his cat?

16 A. Yes.

17 Q. That lots of people just, you know, they leave out
18 food and water and they don't really need someone to watch
19 their cat?

20 A. Yes.

21 Q. And that you actually have cats yourself and that's
22 when you -- when you go out of town?

23 A. Exactly.

24 Q. And you said that was kind of typical of your
25 father?

1 A. Yes.

2 Q. Kind of very -- maybe a bit of a perfectionist about
3 things?

4 A. Yes.

5 Q. Very detail-oriented?

6 A. Yes.

7 Q. And I think you told us that he wanted somebody to
8 walk his cat?

9 A. Yes.

10 Q. So when your dad wanted you to watch his cat,
11 somebody needed to go there and actually take care of the cat?

12 A. Correct.

13 Q. That was his expectation?

14 A. Yes.

15 Q. Okay. Is it also fair that your father was an IT
16 guy, right?

17 A. Yes.

18 Q. And so he was pretty familiar with computers even
19 back in 1994 when lots of people weren't?

20 A. Sure.

21 Q. He was a very organized guy?

22 A. Yes.

23 Q. Okay. And he actually used his computer as one of
24 the ways where he kept himself organized?

25 A. Sure.

1 Q. He had a lot of information on his computer?

2 A. I don't know.

3 Q. You don't know. Is it possible that back in
4 November of 1994 you would have told someone that it was your
5 belief that your father put everything in his computer and
6 that's where he kept all kinds of information?

7 A. I don't remember that.

8 MS. RING: Okay. May I approach, please?

9 THE COURT: Yes.

10 Q. (By Ms. Ring) I'm going to be on page 1821 of that
11 interview. So I'm going to show you -- sorry -- so that's --
12 you would agree with me that's a transcript that's dated
13 November 4th of 1994?

14 A. Mm-hmm.

15 Q. And it shows your name, Kristen Grisham?

16 A. Mm-hmm.

17 Q. And you're being interviewed by a Detective Hickman,
18 a Detective Trujillo and a Detective Weiler?

19 A. Mm-hmm.

20 Q. And I just lost my place when I did that. Just give
21 me a second.

22 So this conversation starts out and they are asking
23 you if you had a couple words to describe your dad, right?

24 A. Mm-hmm.

25 Q. And then they respond to you talking about him

1 biking and stuff, the saying that he is a pretty organized
2 guy --

3 A. Mm-hmm.

4 Q. -- right?

5 A. Yes.

6 Q. Okay. And then you answer, Very organized, and only
7 speaking when he had a daytimer. He's as bad as I am, he
8 likes to write everything down, everything down, everything is
9 in the computer.

10 A. Okay.

11 Q. Okay.

12 A. Okay.

13 Q. That's what you said then?

14 A. I see.

15 Q. Okay. Mr. Brackley also asked you about, you know,
16 your father and his personality and why you would avoid him,
17 and you described him as kind of -- you use the Jackal and
18 Hyde analogy, right?

19 A. Yes.

20 Q. You talked about this backpacking trip where it
21 would be wonderful to be with him?

22 A. That's correct.

23 Q. And then other times when he was very, very
24 difficult to be around?

25 A. Correct.

1 Q. Okay. You described him as being horrible to you at
2 points?

3 A. Correct.

4 Q. Also to your brother?

5 A. Correct.

6 Q. Also to your mother?

7 A. Correct.

8 Q. Okay. And Mr. Brackley also asked you about your
9 comment when you heard that your father had been murdered and
10 you said, He could be a jerk, but not that big of a jerk?

11 A. Correct.

12 Q. Do you also remember one point thinking that your
13 father finally pissed somebody off, he pissed him off so much
14 that that's why he was murdered?

15 A. It was exactly -- that goes to that statement as
16 well, he was a jerk, but not that much of a jerk.

17 Q. Okay. But you were thinking about your dad and how
18 you know the Jackal and Hyde in him?

19 A. Mm-hmm.

20 Q. That the not nice part of him could have pissed
21 somebody off so much that they could have murdered him?

22 A. I can't imagine that it would have been to the
23 extent of murder.

24 MS. RING: So if I could approach again.

25 Q. (By Ms. Ring) And this time I'm going to show you

1 the transcript from when you were interviewed in August of
2 2011.

3 A. Okay.

4 Q. And I'm going to be on page 1984. I think that I
5 have to break down and get progressive lenses. This eyeglass
6 thing is not working.

7 Okay. So now we are looking at another transcript,
8 it's dated August 16th to 17th, and you are being interviewed
9 by Detective Heidel and investigator Jane Harmer is there and
10 Mr. Brackley shows up at some point. And they are asking you
11 about that specific comment, the he could be a jerk, but not
12 that big of a jerk, and you respond absolutely.

13 Well, when my father first got killed I absolutely
14 thought that he finally pissed -- took it too far and pissed
15 somebody completely off. Absolutely?

16 A. Okay.

17 Q. Sorry. Mr. Brackley asked you about the police
18 throughout whenever they would interview almost always
19 accusing you of being involved in stealing your father's
20 checks?

21 A. Correct.

22 Q. And that was pretty clear from the types of
23 questions that they were asking you, that they thought that
24 you might be involved with Michael Clark taking and forging
25 those checks?

1 A. Yes.

2 Q. And you've always been adamant that you weren't
3 involved in that?

4 A. Correct.

5 Q. And it was also clear in their questioning that not
6 only were they potentially accusing you of participating in
7 stealing and forging your father's checks, but that they were
8 accusing you of actually being involved in your father's
9 murder?

10 A. Yes, because I knew Michael Clark.

11 Q. Because of Michael Clark?

12 A. Yes.

13 Q. And they actually asked you questions like, Did you
14 tell Michael Clark that your father physically abused you?

15 A. Okay.

16 Q. And asked if your father had ever done something
17 horrible to you that would make Michael Clark want to murder
18 your father for you?

19 A. Okay.

20 Q. Do you remember that?

21 A. No.

22 Q. Okay. And I'm on page 1879 of the 11-8 interview.
23 I need a smaller book. Okay.

24 So this is an interview that occurred on
25 November 8th of 1994. Again, you're Kristen Grisham, there's

1 a Jeff Janks, a Detective Tom Trujillo and Detective Curt
2 Weiler there?

3 A. Yes.

4 Q. And Detective Weiler, who's listed as "D" is saying
5 that there's something really, really bad and it's, like, from
6 my perspective, I don't know. One of the other female
7 detectives I talked to, she deals with a lot of victims, You
8 keep throwing it back at me that your dad never beat you,
9 never sexually assaulted you.

10 Do you remember that interview where they were
11 talking to you about that?

12 A. No.

13 Q. Okay. But you would agree with me that was an
14 interview where you were present?

15 A. According to that transcript.

16 Q. Okay. And certainly you recall that your father was
17 never physically abusive to you?

18 A. Absolutely not.

19 Q. And he wasn't sexually abusive to you?

20 A. No.

21 Q. And you certainly didn't share anything with Michael
22 Clark saying my father has been incredibly abusive to me and I
23 want him gone?

24 A. No.

25 Q. That conversation with Michael Clark never happened?

1 A. It could have never happened.

2 Q. Because it wasn't true?

3 A. Correct.

4 Q. And you threw all those accusations -- at some point
5 do you recall the District Attorney's Office talking to you --
6 or Detective Heidel when he comes to interview you, you saying
7 that the District Attorney's Office may be willing to grant
8 you immunity if you are willing to tell them about your
9 involvement with Michael Clark in the murder?

10 A. No.

11 Q. You don't remember them offering you immunity?

12 A. No.

13 Q. Okay. If they had offered you immunity in order to
14 give them information about your involvement in helping
15 Michael Clark murder your father, there was nothing for you to
16 give them?

17 A. It would have been irrelevant, yes.

18 Q. Right.

19 MS. RING: May I approach again. And I'm on page
20 919 of Detective Heidel's supplement 24. I should have just
21 stopped here.

22 Q. (By Ms. Ring) Okay. So what I'm showing you is,
23 it's a report from Detective Heidel.

24 A. Okay.

25 Q. It says it's dated September 22nd, 2011. And we'll

1 figure that up at another date and it says Detective Heidel is
2 interviewing you in Eaton, New Jersey?

3 A. Yes.

4 Q. You said you remember him coming out and
5 interviewing you in New Jersey?

6 A. Yes.

7 Q. And it says that he told you from conversation with
8 the Boulder District Attorney's Office that they might
9 consider you immunity on prosecution depending on your,
10 Kristen Grisham's, cooperation?

11 A. Okay.

12 Q. And the conversation was about the murder
13 investigation related to your father?

14 A. Yes.

15 MS. RING: Okay. May I have a moment, please?

16 THE COURT: Yes.

17 MS. RING: Nothing further. Thank you.

18 THE COURT: All right. Any redirect, Mr. Brackley?

19 MR. BRACKLEY: I do, Your Honor, very briefly.

20 If I could have a moment just to organize myself.

21 THE COURT: Sure.

22 **REDIRECT EXAMINATION**

23 **BY MR. BRACKLEY:**

24 Q. So when the police had -- Detective Heidel
25 specifically talked to you about immunity, it's some -- were

1 you interested at all in even talking about that?

2 A. I had no information so it was an irrelevant
3 question.

4 Q. Were you interested in negotiating for what type of
5 immunity? Were you interested in saying, Well, what could you
6 give me if I were able to tell you things?

7 A. No.

8 Q. Back in 1994, specifically on November 8th, the
9 interview that Ms. Ring showed you last, um, do you recall the
10 police trying to give you reasons -- or trying to suggest to
11 you reasons why you might want to have your father murdered or
12 to murder your father?

13 A. I don't remember specifics.

14 Q. For instance, when they were talking about physical
15 abuse --

16 A. Mm-hmm.

17 Q. -- were they saying, If he physically abused you,
18 maybe that's why you wanted to murder him?

19 A. No.

20 Q. When they were talking about sexual abuse, do you
21 remember them saying, If he was sexually abusing you, maybe
22 that would be understandable that you would murder him?

23 A. No.

24 Q. Do you remember the police on November 4th of 1994
25 essentially telling you -- lying to you that the Defendant

1 told them that he admitted talking to you about stealing
2 checks from your father?

3 A. No, I don't remember that.

4 Q. Let me show you those questions and --

5 MR. BRACKLEY: Page 1842.

6 MS. RING: Thank you.

7 Q. (By Mr. Brackley) Starting down here. If you can
8 read to yourself that exchange.

9 A. Okay.

10 Q. And I'm going to come up.

11 So do you remember the police confronting you,
12 Kristen, we know you stole these checks --

13 A. Yes.

14 Q. -- and you denying it?

15 A. Yes.

16 Q. And the police saying, Well, even Michael Clark told
17 us that you were involved in stealing those checks?

18 A. I don't remember them saying that.

19 Q. Okay. Do you remember as you sit here today having
20 read that, what your answer was?

21 A. I said, That's crap.

22 Q. Okay. So your exact answer to the police was,
23 That's crap?

24 A. Yes.

25 Q. And then you continued to deny that because it

1 wasn't true?

2 A. Correct.

3 Q. Did -- as you sit here today, though, do you
4 actually remember that exchange?

5 A. No.

6 MR. BRACKLEY: Thank you. No further questions.

7 THE COURT: Any recross, Ms. Ring?

8 MS. RING: No.

9 THE COURT: Ms. Grisham, you may step down.

10 Can this witness be excused?

11 MR. BRACKLEY: She may, Your Honor.

12 MS. RING: Yes.

13 THE COURT: All right. You are excused, ma'am.

14 Would the People call their next witness, please.

15 MR. BRACKLEY: The People call Ms. Nancy Cornwell.

16 Your Honor, Ms. Cornwell is downstairs. I can call.
17 I'm going to reverse course a little bit and call police
18 officer Robert Goodard. I think that we can finish him before
19 lunch.

20 THE COURT: Okay. The record should reflect that
21 Pamela and Kristen have left the courtroom.

22 Could you step forward, please, sir, and come all
23 the way up here.

24 **ROBERT GOODARD,**
25 a witness herein, having been first duly sworn, was examined

1 and testified on his oath as follows:

2 THE COURT: Please have a seat.

3 Go ahead, Mr. Brackley.

4 MR. BRACKLEY: Thank you, Your Honor.

5 **DIRECT EXAMINATION**

6 **BY MR. BRACKLEY:**

7 Q. Okay. Please state for the record your name,
8 spelling your last name.

9 A. It's Robert Goodard, G-o-o-d-a-r-d.

10 Q. Are you employed and by whom?

11 A. I'm with the city of Longmont Police Department.

12 Q. How long have you been with the city of Longmont
13 Police Department?

14 A. Since 1995.

15 Q. And what did you do prior to the city of Longmont
16 Police Department?

17 A. From 1991 to 1994 I was with the city of Louisville
18 Police Department.

19 Q. Okay. And any law enforcement experience before
20 that point?

21 A. Negative. No.

22 Q. What kind of assignments have you had in the last 17
23 years with Longmont Police Department?

24 A. Patrol, detectives, narcotics, field training
25 officer.

1 Q. Okay.

2 A. You want more or just the generics?

3 Q. That's fine.

4 A. Okay.

5 Q. What are you doing right now? What's your
6 assignment?

7 A. With patrol.

8 Q. And what kind of assignment did you have back in
9 your days with the city of Louisville Police Department?

10 A. Same, patrol detectives, field training officer.

11 Q. For the record, then, were you employed as a police
12 officer in Louisville in November of 1994?

13 A. Yes, I was.

14 Q. And was that in the patrol type capacity?

15 A. Yes, it was.

16 Q. So were you in a uniform and a marked police car?

17 A. Yes, it was.

18 Q. Okay. Do you recall November 1st, 1994 -- and I'm
19 going to ask you -- I see that stuff in front of you. Is that
20 a report that you did back in November of 1994?

21 A. Yes, it is.

22 Q. Okay. Why don't you close that up for now.

23 A. Okay.

24 Q. And if you need it, let us know and we'll talk about
25 it.

1 A. Okay.

2 Q. Okay. That way the record can reflect that you are
3 looking at the report.

4 A. Okay.

5 Q. Do you remember as you sit here today getting
6 involved in a death notification at Dogwood there in the city
7 of Louisville in November 1st of 1994?

8 A. Yes.

9 Q. Okay. What do you remember about that just from
10 the -- your -- just from the top of your head?

11 A. I remember they either called alert tones.
12 Louisville was dispatched to the same dispatch that Boulder
13 County, Boulder city at the time, the tones were activated,
14 that there had been a shooting in Boulder. And then we,
15 Officer Ray and I were dispatched to an address on Dogwood in
16 Louisville because of the association with that address and
17 the victim of the shooting in Boulder.

18 Q. Okay. And did there come a time where you went to
19 that address in Louisville?

20 A. Yes, I believe we were dispatched around 9:45 p.m.,
21 we were at the address within five minutes.

22 Q. Okay. When you say you were dispatched around
23 9:45 p.m., would that be at about the time the call came into
24 your patrol car?

25 A. That's correct.

1 Q. Okay.

2 A. Shortly after the initial call to Boulder.

3 Q. Okay. And can you tell the jurors the specific
4 address in Louisville that you went to?

5 A. I would have to refer to the report on that.

6 Q. Please do.

7 A. That would have been 2358 Dogwood Circle in
8 Louisville.

9 Q. Okay. You say you were with Officer Ray. Was he in
10 the car with you or did you arrive at the same time, but
11 separate cars?

12 A. We were separate cars -- Louisville, we were all
13 separate cars.

14 Q. Do you recall the first thing he did when you got to
15 that Louisville address in reference to a car that was parked
16 outside or in the driveway?

17 A. There was a vehicle in the driveway that we checked
18 to see if it appeared like it had been driven recently.

19 Q. When you say "checked," what did you do to check the
20 vehicle?

21 A. Usually touch the tail pipe and run your hand up
22 around the front of the vehicle to touch the radiator area to
23 see if it's warm.

24 Q. Okay. And at that point did you know anything about
25 the shooting in Boulder or who was in the house or any of the

1 circumstances?

2 A. Very limited information.

3 Q. Was checking that vehicle just something that you
4 did in your ordinary course of your police work at the time?

5 A. I wouldn't call it "ordinary," but given the
6 circumstances of what we were being asked to do, it was
7 something that we wanted to know if people were -- had come or
8 gone recently.

9 Q. Okay. And did you make any determinations based on
10 checking the tail pipe and around the hood of the vehicle?

11 A. As I recall, it did not appear to have been driven
12 recently, it was cool.

13 Q. Simply to say that there wasn't any warmth or heat
14 or anything coming off the areas?

15 A. Correct.

16 Q. Do you recall your first contact with the occupants
17 of that home?

18 A. It's limited. I know that the other -- two of the
19 other officers made initial contact with them and I was
20 present when they made that contact.

21 Q. Okay. Do you recall whether your initial contact
22 with the residents of that home, you made a death
23 notification, or you told them why you were there or what the
24 circumstances of your involvement were?

25 A. Not initially, no.

1 Q. Okay. What did you initially do?

2 A. Initially, just let them know that there had been an
3 incident and that Boulder -- another detective was going to
4 come speak to them.

5 Q. Okay.

6 A. So it was basically just finding out who was in the
7 home and making that initial contact, I guess.

8 Q. So from the -- and did there come a time when
9 Boulder detectives arrived at the location?

10 A. Yes.

11 Q. Okay. So between the time of your first contact and
12 Boulder detectives coming to the house, you were there, but
13 you weren't telling them what you were doing there?

14 A. Correct. We didn't divulge -- we didn't do the
15 death notification part, it wasn't our case.

16 Q. Okay. Did you search the house at that point or at
17 least do a walk through?

18 A. I know we did not search it. I would have to refer
19 to my report if we did a walk through.

20 Q. Please do.

21 A. Okay. There's no indication that we did a walk
22 through. We made contact with the two females that were there
23 and then waited for the Boulder detective.

24 Q. Okay. Can you tell the jurors as you sit here today
25 the name of the two females that were there?

1 A. The last name was Grisham, and it was Pam and I
2 believe Kristen.

3 Q. And is that information that you have in your
4 report?

5 A. It is.

6 Q. Okay. So were you present when the Boulder
7 detectives arrived and made what you call the "death
8 notification" to these two women?

9 A. Yes.

10 Q. Okay. By the way, do you have in your report what
11 Pam Grisham was wearing at the time?

12 A. I did not note that at the time.

13 Q. What was she wearing?

14 A. If I could refer to it?

15 Q. Please do.

16 A. At the time Pam Grisham was wearing sleeping clothes
17 with an overcoat.

18 Q. Okay. And what about Kristen Grisham?

19 A. T-shirt and jeans.

20 Q. Okay. So when the Boulder detectives arrived, do
21 you recall Detective Hickman arriving?

22 A. I do.

23 Q. And is she now Detective Campf?

24 A. I assume so. I --

25 Q. Okay.

1 A. -- I knew her as Detective Hickman.

2 Q. Okay. And you knew her from the police academy?

3 A. Correct.

4 Q. In other words, she was someone from Boulder that
5 you were familiar with?

6 A. Correct.

7 Q. Okay. Were you there when Detective Hickman at the
8 time did the death notification to both Pam and Kristen
9 Grisham?

10 A. I was.

11 Q. Okay. Do you recall a reaction from Pam Grisham?

12 A. I recall that she was upset, Pam Grisham.

13 Q. Do you recall specific words that she used?

14 A. Not off the top of my head, but I believe that I
15 documented that.

16 Q. Would you have recorded those particular words in
17 your report?

18 A. I believe I did, yes.

19 Q. Okay. Can you take a look at that and let us know
20 if it refreshes your recollection.

21 A. Sure. I made a note in my report that she made
22 comments of, Oh my god, and, Oh no.

23 Q. Do you remember Kristen Grisham's reaction to
24 hearing that news?

25 A. Yes.

1 Q. Okay. What was her reaction?

2 A. If I could refer to the report real quick.

3 Q. Please do.

4 A. Kristen also reacted that she had spoken to him
5 earlier and that everything was fine.

6 Q. Did she give a specific time that she had spoken to
7 him?

8 A. At 6:00.

9 Q. Did there come a time when Kristen had asked to make
10 a telephone call?

11 A. Yes.

12 Q. Okay. Do you recall that incident or that scenario
13 as you sit here today?

14 A. She asked to make a phone call, I believe to a
15 roommate -- well, a third person who lived in the home, but
16 wasn't a family member --

17 Q. Okay.

18 A. -- and she used the phone in an upstairs room.

19 Q. Were you there when she did that?

20 A. I went up the stairs with her, I wasn't right next
21 to her.

22 Q. Okay. And what, if anything, did you observe about
23 that particular phone call?

24 A. If I could refer to my report?

25 Q. Please.

1 THE COURT: While you are doing that, can I see
2 counsel at the bench quickly, off the record.

3 (Whereupon, a brief discussion was had off the
4 record.)

5 (Whereupon, the following proceedings were had in
6 the presence and the hearing of the jury.)

7 THE COURT: Please continue, Mr. Brackley.

8 Q. (By Mr. Brackley) I'm not sure if I had an
9 outstanding question or --

10 A. You did, yes.

11 Q. Was it to describe the -- Kristen Grisham on the
12 phone upstairs?

13 A. Correct. Correct.

14 Q. And tell us about that.

15 A. The person she wanted to call, again, was someone
16 that rented a room in the home and she wanted to call this
17 person so that she wouldn't be surprised if she came home
18 while officers and everybody were there.

19 Q. Okay. And did you hear any part of that
20 conversation?

21 A. The part that I documented was that she wouldn't
22 believe this, and that there was some laughter and some --

23 Q. Some laughter from Kristen?

24 A. From Kristen.

25 Q. Do you recall whether a fellow named Loren Grisham

1 was there when you got there to do the death notification
2 process at -- around that evening?

3 A. Loren was not present.

4 Q. Okay. Do you recall a time when you were there that
5 Loren Grisham called into the house?

6 A. Yes.

7 Q. And what do you remember about that? Or if you need
8 to refresh your recollection with your report, you can do
9 that.

10 A. When we arrived initially before the detective --
11 the Boulder detective was there, that was one of the -- the
12 names that we were provided of someone that could be at this
13 home was Loren, Pam and Kristen. Initially, we were told that
14 Loren was not present, and I believe that it was the sergeant
15 that obtained a phone number of where he was located in
16 college, that information was shared. Eventually somewhere in
17 that process there was a phone call made, but Loren called the
18 home and spoke to Pam.

19 Q. Okay. And did you record in your report your
20 observations of Loren's demeanor in that telephone call?

21 A. Well, I could not hear the conversation of what he
22 was saying exactly, based on what was transpiring on the
23 phone, it appeared to me that he was upset.

24 Q. Do you recall Detective Hickman asking Pam Grisham
25 and Kristen Grisham for their permission to have officers

1 search the house?

2 A. Yes.

3 Q. Okay. And do you recall based on that permission,
4 yourself and Officer Ray searched the house?

5 A. Yes, we searched the house with those parties
6 present.

7 Q. Okay. So they would sort of lead you through the
8 house and you would look at the house?

9 A. Correct.

10 Q. Okay. Did you go into every room?

11 A. Yes.

12 Q. Okay. Do you recall or did you record in your
13 report approximately how long you were at that -- the Dogwood
14 address in Louisville on November 1st, 1994, beginning at
15 about 9:45?

16 A. I would have to see if I recorded what time we left.

17 Q. Okay. If you can do that, please.

18 A. Okay. It appears that -- as stated earlier, we got
19 the call at about 9:45 p.m., we arrived at 9:50 p.m. I
20 documented in my report that Officer Ray was leaving at 23:50
21 or 11 -- yes, 23:50, which is 11:50 p.m. I did not document
22 what time I left as I remained on scene with Detective
23 Hickman.

24 Q. Do you recall documenting in your report that you
25 left that 00:20 hours on the bottom of the second page?

1 A. Actually, that's cutoff on this faxed copy so...

2 MR. BRACKLEY: If I can approach with discovery page
3 451?

4 THE COURT: Yes.

5 A. That is what I recorded at the time.

6 Q. (By Mr. Brackley) What is 00:20 in English?

7 A. 20 minutes after midnight on November 2nd.

8 Q. Okay. And is that the report that you took back
9 in -- that you wrote and authored back in November of 1994?

10 A. This appears to be the report that I wrote back in
11 1994 with the Louisville Police Department.

12 MR. BRACKLEY: Thank you, sir. No further
13 questions.

14 THE COURT: Cross-examination, Ms. Ring.

15 **CROSS-EXAMINATION**

16 **BY MS. RING:**

17 Q. Officer Goodard, you just told Mr. Brackley this was
18 the report that you authored back in November of 1994?

19 A. Mm-hmm.

20 Q. Right?

21 A. Yes.

22 Q. Okay. And that's what you do as a police officer
23 when you are involved in any kind of investigation, you write
24 down the material things that happened when you do your
25 investigation?

1 A. Yes.

2 Q. And it's important that you are accurate when you
3 write the report?

4 A. Yes.

5 Q. It's important that you put the material fact in the
6 report?

7 A. Yes.

8 Q. And you do that because you never know when you are
9 going to be called on to testify or tell the DA's office or
10 somebody else about what you do in any particular
11 investigation?

12 A. Yes.

13 Q. So if you didn't have this report right now, you'd
14 have a difficult time telling us any -- a few specifics of the
15 details of what happened when you went to that house in
16 November of 1994?

17 A. That's correct.

18 Q. And you actually were given a copy of the report
19 before you testified today so you could look over it to kind
20 of refresh your memory a little bit?

21 A. Correct.

22 Q. And even though you did that, you still can't
23 remember all the details without going back to that report?

24 A. That's correct.

25 Q. And you just want to be accurate, so you are looking

1 at your report to make sure you are as accurate as you can be
2 today when you are answering questions?

3 A. That's correct.

4 MS. RING: Nothing further. Thanks.

5 THE COURT: Any redirect, Mr. Brackley?

6 MR. BRACKLEY: No, Your Honor. Thank you.

7 THE COURT: All right. Officer, you can step down.
8 Can this witness be excused?

9 MR. BRACKLEY: He may.

10 THE COURT: Ms. Ring?

11 MS. RING: He may. And I believe that you are also
12 under our subpoena so...

13 THE COURT: Is he released from that?

14 MS. RING: He's released from our subpoenas as well.

15 THE COURT: Ladies and gentlemen of the jury, it's
16 just a couple minutes after 12:00, so we'll go ahead and take
17 the noon recess. We'll be in recess until 1:30. Remember the
18 admonition that I have given you previously, it applies at
19 this recess as well. Don't communicate about or discuss the
20 case with anyone by any means. If someone tries to talk about
21 the case with you, let me know immediately. Don't read or
22 listen to any news reports of the trial, don't consult any
23 outside reference materials.

24 Remember, it is especially important that you do not
25 form or express any opinion on the case until it is finally

1 submitted to you.

2 We'll be in recess until 1:30. Please enjoy your
3 lunch hour. Make sure you take all of your materials with you
4 back in the jury room. We'll see you at 1:30.

5 (Whereupon, the jury exited the courtroom, and the
6 following proceedings were had out of the presence and the
7 hearing of the jury.)

8 THE COURT: The record should reflect the jury has
9 left the courtroom.

10 Anything to take up on the record before we recess
11 for lunch on behalf of the People?

12 MR. BRACKLEY: No, Your Honor.

13 THE COURT: Ms. Ring?

14 MS. RING: No, Judge.

15 THE COURT: Then we'll be in recess until 1:30.
16 Everybody have a good noon hour.

17 (Whereupon, the noon recess was taken.)

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 6th day of May, 2013.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
22
23
24
25

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 11,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

1 I N D E X

2	WITNESSES FOR THE PEOPLE:		PAGE
3	NANCY CORNWELL,		
	Direct Examination by Mr. Brackley		4
4	Cross-Examination by Ms. Ring		12
5	DETECTIVE MELISSA KAMPF,		
	Direct Examination by Mr. Brackley		17
6	Cross-Examination by Ms. Ring		27
7	SGT. DONALD BREIER,		
	Direct Examination by Mr. Kellner		30
8	JASON BRESLIN,		
9	Direct Examination by Mr. Brackley		38
10	STACEY HOWELL,		
	Direct Examination by Mr. Kellner		46
11	RICH DENIG,		
12	Direct Examination by Mr. Kellner		58
	Cross-Examination by Ms. Milfeld		68
13	Redirect Examination by Mr. Kellner		73
14	COMMANDER KURT WEILER,		
	Direct Examination by Mr. Kellner		79
15	Cross-Examination by Ms. Milfeld		101
16			
17	EXHIBITS FOR THE PEOPLE:	OFFERED	ADMITTED
18	46 - Receipts	44	44
	47 - Photo	48	48
19	48 - Photo	63	63
	51 - Property Report	67	67
20	52 - Carmex Container	65	65
	53 - Photo	91	91
21	54 - Photo	91	91
	55 - Photo	91	91
22	56 - Advisement of Rights	94	94
	59 - DVD Interview of Michael Clark	100	101
23			
24			
25	REPORTER'S CERTIFICATE * * * * *		117

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

2 (The following proceedings occurred in the
3 afternoon.)

4 THE COURT: We're back on the record in People
5 versus Michael Clark. Mr. Clark is present, all counsel are
6 present.

7 Is there anything to take up on the record before
8 we bring the jury in?

9 MR. KELLNER: Not from the People.

10 MS. RING: No.

11 THE COURT: All right. Would you bring the jury
12 in please?

13 (The jury returned to the courtroom.)

14 THE COURT: Please be seated. Welcome back,
15 ladies and gentlemen.

16 Mr. Brackley, would the People call their next
17 witness?

18 MR. BRACKLEY: Thank you, Your Honor. The People
19 call Nancy Cornwell.

20 THE COURT: Ma'am, would you step forward please?
21 You can come on all the way up here, all the way up by the
22 witness chair there. Then if you would please face me and
23 raise your right hand.

24 NANCY CORNWELL,

25 called as a witness on behalf of the People, having been

1 first duly sworn, was examined and testified as follows:

2 THE COURT: Please have a seat.

3 Go ahead, Mr. Brackley.

4 MR. BRACKLEY: Thank you, Judge.

5 DIRECT EXAMINATION

6 BY MR. BRACKLEY:

7 Q Good afternoon, ma'am.

8 A Good afternoon.

9 Q Can you state your name and spell your last name
10 for the record?

11 A It's Nancy Cornwell, C-O-R-N-W-E-L-L.

12 Q Are you currently employed and by whom?

13 A Yes, I'm currently employed at Montana State
14 University.

15 Q What do you do there?

16 A I'm the dean of the college of arts and
17 architecture.

18 Q And how long have you been with Montana State
19 University?

20 A Three months.

21 Q What did you go do before that?

22 A Before that I was in Columbia, Missouri where I
23 was the interim pro-host at Stevens College for about a
24 year.

25 Q Before that?

1 A Before that I was the Ithaca College in upstate
2 New York in Ithaca. And before that I was at Linfield
3 College in Oregon. And before that I was at Western
4 Michigan University in Kalamazoo, Michigan. And that would
5 take me back to Boulder.

6 Q Okay. When were you in Boulder?

7 A I was in Boulder between July of 1994, and I left
8 in the summer of '96.

9 Q And when you were in Boulder were you employed --
10 or were you at the University of Colorado?

11 A I was. I was a doctoral student at the university
12 teaching there.

13 Q And when you were in Boulder where were you
14 living?

15 A I was living at the Fairway Apartments on Arapahoe
16 Road.

17 Q And how long did you live at the Fairway
18 Apartments for?

19 A From approximately July when I moved to Boulder,
20 and I left in February I believe it is, beginning of
21 February of the following year.

22 Q Okay. As you sit here today do you remember what
23 apartment you lived in?

24 A Yes. It was apartment 424. It was at the end of
25 the building you see coming off of the U, and it was the

1 second floor end unit on the right.

2 Q Let me show you two photos beginning with
3 People's -- let's start with People's 5 which is already in
4 evidence. And I'll publish that for the jury at the same
5 time. And I've also handed you People's 1 which is in
6 evidence as well. Do you recognize People's 5?

7 A Yes, I do.

8 Q Is that where you lived back in 1994?

9 A Yes, in the second floor apartment on the right.

10 Q I'm going to give you a pointer, and you can just
11 show us that particular apartment that you lived in because
12 I'm going to talk a little bit more in depth about it.

13 A That one right there.

14 Q Did you know Marty Grisham when you were living in
15 that building?

16 A Yes, I had met Marty.

17 Q And where did Marty live?

18 A He lived in that apartment right there.

19 Q And let me ask you to take a look at People's 1 in
20 evidence. And I'll put that up there for the jury as well.
21 Just so we get a sense of your orientation of -- well, why
22 don't you show us your building. And I'll ask you to point
23 out some other things for the sake of your testimony and
24 your orientation.

25 A I was fourth floor -- or second floor the end

1 right there.

2 Q Okay. And did you know the manager at the time,
3 Kirk Magill?

4 A Yes.

5 Q And do you see the -- there's kind of that
6 horseshoe shaped parking lot up at the -- kind of the top
7 center of the photo?

8 A Right there, um-hmm.

9 Q Were there other parking areas for that apartment
10 complex that you would use other than that one?

11 A That was the one that was designated, so I parked
12 my car there. But people I knew rented spots here.

13 Q And was there access from that parking lot into
14 the Fairway Apartments?

15 A Yes.

16 Q Where was that access?

17 A This was the mailbox area there, so it was
18 right -- I'm guessing right in there.

19 Q So that would be a little walkway from your area
20 into that parking lot?

21 A Correct.

22 Q Do you recall November 1, 1994?

23 A Yes.

24 Q And were you home in the evening after 9:30 p.m.
25 on November 1, 1994?

1 A Yes, I was. I was home that evening.

2 Q And how do you recall November 1, 1994?

3 A I had put my children to bed. My daughter doesn't
4 go to sleep easily. She was 9 at the time. And they had --
5 can I use the pointer?

6 Q Sure.

7 A Well, actually it was the other picture. But they
8 had a -- their bedroom was the door -- the window to the
9 bedroom was right there. So typically when she goes to bed
10 she listens to this, it sounds really funny, but it was a
11 meditation tape.

12 And so I put her to bed. I had come out in the
13 living area and I heard shots. And my immediate response
14 was to go back into the bedroom and check on the kids, which
15 is what I did.

16 Q Could you characterize for the jury how many shots
17 you heard?

18 A My recollection was three at the time, then I kind
19 of went on autopilot and went back in to check the children.

20 Q Could you characterize for the jury whether these
21 are shots in the distance or they're shots right there?

22 A They were right there. I mean, that's why I ran
23 back into the bedroom. I thought they were -- I thought
24 they might have been immediately below me actually.

25 Q Okay. And when you went back into the bedroom

1 anything unusual?

2 A No. My daughter was still awake and she was on
3 the top bunk. And I pulled her off the top bunk and put her
4 on the lower bunk with my son who was asleep, slept through
5 the entire thing, told her to stay there, then I ran back
6 out in the living room.

7 Q Okay. And where did you go from there?

8 A I went out these doors. It wasn't cold out.
9 These doors were open. Actually all the windows and doors
10 were open. But there are these blinds at the time were
11 hanging in this patio area, so I went through the blinds out
12 onto the patio.

13 Q Okay. And let me show you that other photo,
14 People's 1. When you got out there what did you see? What
15 did you do? What happened next?

16 A So I went out there, and I had heard footsteps
17 going off this way. So I was looking to see if I could see
18 anyone. So they were going off to the left. And so I was
19 looking over there, and then Kirk came out this way starting
20 to walk across this plaza towards me.

21 Q And Kirk being the building manager?

22 A Yes, Kirk is the manager -- was the manager.

23 Q Did you have any exchange with him in this moment?

24 A Yes. I -- I yelled from the balcony Kirk, did you
25 hear that. And his response was yes. He goes was it out on

1 the golf course. And I said no, it was right here.

2 Q Okay. What did he do next?

3 A He started to walk quite directly towards the
4 stairwell that was leading up to the apartments, those four
5 units.

6 Q And what did you see him doing? Could you tell
7 his demeanor or his expression or anything along that line?

8 A As best I could. It was -- it kind of changed
9 from him walking out to him walking rather deliberately over
10 this way. My sense then was that he knew something.

11 Q What did you do next?

12 A I called 911. I immediately called 911 as quickly
13 as I could. The phone was right in the living room and
14 handsets. And I made the 911 call, and then immediately ran
15 downstairs and joined Kirk.

16 Q Okay. Let me play for you what's already -- a
17 very short portion of what is already in evidence as
18 People's 11. I think I might need to turn up our volume
19 here.

20 (The recording was played in open court.)

21 Q (By Mr. Brackley) Is that your voice on that 911
22 call?

23 A Yes, it is.

24 Q Do you remember whether that's the first or only
25 call that you made that night?

1 A That was the second call I made. The first call I
2 made before I went down and went in with Kirk and saw Marty
3 and very -- I mean, within -- within easily a minute or less
4 I was back upstairs again.

5 Q So could you tell us from the time you first heard
6 the shots to the time you saw Kirk coming towards Marty's
7 apartment how much time passed in that span?

8 A Less than two minutes.

9 Q And when you got downstairs how much time passed
10 between getting downstairs and going back up to make that
11 second telephone call?

12 A Less than two minutes. It was very quick.

13 Q You had talked about seeing -- about hearing
14 footsteps. Can we show you People's 1 again in evidence?
15 So again, orient us on where you are and tell us what you
16 hear or characterize about those footsteps that you heard.

17 A The footsteps -- so I came out on the balcony
18 right about here because I heard footsteps, and I was
19 looking to see where they went. And I was looking this way,
20 I was looking this way, I was looking to the left. The
21 footsteps went off to the left. What I heard were footsteps
22 on concrete until I couldn't hear them anymore.

23 Q And do you know whether they went up towards the
24 horseshoe or in towards that other side parking lot?

25 A I can't say for sure.

1 Q Just that they went to the left?

2 A Absolutely sure about that, yes.

3 Q Did you see anyone associated with those
4 particular footsteps?

5 A No. It was dark at that point. So at night you
6 couldn't see very well past here back then. And so -- and I
7 did not see anyone, just heard the footsteps. But I was
8 looking off those two directions, and that's when I saw Kirk
9 coming out.

10 Q So how much time would you estimate passed between
11 hearing those shots and handing that phone to the woman in
12 Marty Grisham's apartment?

13 A I'm just going to walk through. Three to four
14 minutes at the most. The second phone call, it was very
15 fast.

16 MR. BRACKLEY: Thank you, ma'am. No further
17 questions.

18 THE COURT: Cross-examination.

19 MS. RING: Thank you.

20 CROSS-EXAMINATION

21 BY MS. RING:

22 Q Ms. Cornwell, you were interviewed pretty close to
23 the night that happened or the next day by Boulder police
24 officers?

25 A Yes.

1 Q And you told them everything you remembered about
2 what happened?

3 A Yes.

4 Q Okay. And prior to testifying today the district
5 attorney show you a copy of the report of your interview
6 back in November of 1994?

7 A Yes. I received it the very end of last week.

8 Q Okay. So she sent it to you where you live?

9 A Um-hmm.

10 Q Yes? Is that a yes?

11 A Yes. Okay. I'm sorry.

12 Q That's okay.

13 So you were able to review that report and refresh
14 your memory about your recollections from 1994?

15 A Yes.

16 Q And the report when you reviewed it was fairly
17 accurate in terms of what you remembered?

18 A Yes. There was actually -- I was commenting the
19 thing at the end about the tandem bike, I don't remember
20 that.

21 Q And you certainly weren't looking at any clocks
22 when any of this was happening that night?

23 A No. I had a general awareness of the time because
24 I was wishing my daughter was asleep. But no.

25 Q So you knew it was approximately 9:30 that

1 night --

2 A Yes.

3 Q -- when you heard the gunshots?

4 A Yes.

5 Q Okay. And what I just heard you tell us is that
6 the first thing you do when you hear the gunshots is you run
7 to your kids' room?

8 A Correct.

9 Q Make sure they're okay?

10 A Yes.

11 Q Okay. And then that includes getting your
12 daughter off the top bunk and putting her in the bottom
13 bunk?

14 A Yes. It was quite fast.

15 Q But you want to make sure they're safe?

16 A Yes.

17 Q Okay. And then what I heard you tell us the next
18 thing you did is went out on that balcony?

19 A Yes.

20 Q That's when you see Kirk Magill?

21 A Yes.

22 Q Okay. And then you go in and call 911?

23 A Yes.

24 Q Okay. And you do have a cordless phone at that
25 point?

1 A Correct.

2 Q Okay. So you call 911 and give them some
3 immediate information?

4 A Yes, very brief.

5 Q Okay. And then you go downstairs?

6 A Correct.

7 Q Without your phone because you have to go back
8 upstairs?

9 A Yes, that's correct actually.

10 Q So you go downstairs, and Kirk's downstairs?

11 A Yes.

12 Q Okay. The door to the apartment's closed?

13 A That I -- I remember it being slightly ajar.

14 Q Okay. And you are down there briefly, but long
15 enough that you can definitely see Marty's been shot?

16 A Yes.

17 Q Okay. And then you go back upstairs to get your
18 phone?

19 A Yes.

20 Q Call 911 again?

21 A Correct.

22 Q And that's when we hear you on the tape bringing
23 the phone?

24 A Bringing the phone down.

25 Q Okay. And you would have been calling obviously

1 both times from your home phone number?

2 A Correct.

3 MS. RING: Nothing further. Thank you.

4 THE COURT: All right. Any redirect,
5 Mr. Brackley?

6 MR. BRACKLEY: No, sir. Thank you.

7 THE COURT: Ms. Cornwell, you can step down.
8 Can this witness be excused?

9 MR. BRACKLEY: She may.

10 MS. RING: Yes.

11 THE COURT: Thank you, Ms. Cornwell. You're
12 excused.

13 THE WITNESS: Thank you.

14 THE COURT: Would the People call their next
15 witness?

16 MR. BRACKLEY: People call Detective Melissa
17 Kampf.

18 THE COURT: Would you step forward please? Would
19 you please face me and raise your right hand.

20 DETECTIVE MELISSA KAMPF,
21 called as a witness on behalf of the People, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please have a seat.

24 For the People? Go ahead, Mr. Brackley.

25 DIRECT EXAMINATION

1 BY MR. BRACKLEY:

2 Q Okay. I'm sorry. Can you for the record state
3 your name and spell your last name?

4 A It's Melissa Kampf, K-A-M-P-F.

5 Q Are you -- were you at any time in your life known
6 as Melissa Hickman?

7 A Yes.

8 Q And were you Detective Melissa Hickman back in
9 November of 1994?

10 A Yes, I was.

11 Q Are you employed still?

12 A Yes, I am.

13 Q And who are you employed by and for how long?

14 A I'm with the Boulder Police Department. I'm a
15 detective sergeant. And I've been there for 22 and a half
16 years.

17 Q Okay. Can you sort of take us back through your
18 career as a Boulder police officer from the beginning until
19 the present generally?

20 A I was hired on tax day in 1991 as a patrol
21 officer. I spent three years in patrol, and then I went to
22 the detective division. Did everything from graffiti crimes
23 to the newly formed family crimes unit, then the major
24 crimes unit.

25 I was promoted to sergeant from the major crimes

1 unit and went back to patrol at that time, spent six years
2 as a patrol supervisor. And then four years ago I selected
3 to become a detective sergeant. So I've been doing that
4 ever since.

5 Q And is there a particular unit that you're a
6 sergeant of today in the detective unit?

7 A I supervise the specialized crimes unit. So I
8 have all of the family crimes detectives, financial crimes
9 folks and the computer forensic analyst.

10 Q And your counterpart would be -- in the major
11 crimes unit would be Detective Sgt. Trujillo?

12 A Yes, that's correct.

13 Q So back in 1994 in November were you -- what type
14 of a detective were you then?

15 A A brand new one. At that time I was probably
16 doing graffiti crimes. I'd been a detective for about ten
17 months at that point.

18 Q Do you recall on November 1, 1994 after 9:30 p.m.
19 getting called out to a homicide here in Boulder?

20 A Yes. I received a phone call from dispatch
21 telling me to respond to a location, that there had been a
22 homicide. And I was the primary on-call detective at that
23 time, so I was the first detective to respond.

24 Q Okay. And do you recall generally or specifically
25 where you went in relation to that call?

1 A Initially I responded to the scene itself. And
2 I'm sorry that I can't remember the address, Marty Grisham's
3 apartment. And I talked to a patrol sergeant out there and
4 a couple of other people and then was directed to go to
5 Louisville.

6 Q Was Commander Pelle there at the scene at --

7 A I'm sorry, I don't remember.

8 Q Okay. Is it -- so typically when the detectives
9 and officers would converge on a scene would assignments be
10 passed out?

11 A Yes.

12 Q And do you recall what assignment you were given
13 in relation to this homicide?

14 A Excuse me, I was asked to respond to an address on
15 I believe it was Dogwood Circle in Louisville. The family
16 of Marty Grisham, his ex-wife and his daughter lived at that
17 address.

18 And they have -- Marty and Pam had a son named
19 Loren. We weren't sure whether he was there or not. So I
20 was asked to respond out there, find out who was home at the
21 time and do a death notification.

22 Q Before you went out there did you learn or did you
23 have occasion to know whether Louisville officers also went
24 out there?

25 A They had sent a couple of patrol officers out

1 there to make sure that they got their fairly quickly after
2 the call just to make sure that somebody was home and then
3 stood by outside waiting for me.

4 Q And do you know who the Louisville officers were
5 who went out there?

6 A One of them was Officer Robert Goodard, and the
7 other I believe was Officer Ray.

8 Q And what was your role supposed to be upon getting
9 to this Dogwood Circle address in Louisville?

10 A Primarily I had two roles. The first was to find
11 out who was home, find out if Loren specifically was there,
12 if Kristen was there, and then also to be the one to do the
13 death notification to the family.

14 Q And by death notification, is that simply
15 notifying the family about the death, or was this additional
16 investigator work that you were going to do as well?

17 A I was also asked to interview whoever was there to
18 find out some background information, and also find out
19 where they had been that night and just get a little bit
20 more information about the family.

21 Q Okay. When you got there did you interview --
22 well, did you make that notification to Pam Grisham and
23 Kristen Grisham?

24 A Yes, I did.

25 Q Do you recall Pam Grisham's response to hearing

1 this news?

2 A She seemed surprised. I believe she said oh, my
3 God, seemed a little nervous, but not especially distraught,
4 but upset.

5 Q And what was Kristen Grisham's reaction to hearing
6 this news?

7 A Didn't have a lot of reaction at the time
8 initially. I don't recall her saying anything. But just a
9 couple of moments later, I still recall this, her saying,
10 you know, he could be a jerk, but I didn't think he was that
11 big of a jerk.

12 Q Then what was her demeanor as she was saying that?

13 A She was nervous as well, but it was a fairly
14 conversational statement. There was some nervous laughter.
15 That's how I could kind of tell that she was nervous because
16 the giggling was kind of not in a place where you would
17 expect it.

18 Q Did there come a time when Kristen Grisham made a
19 phone call or asked if she could make a phone call?

20 A Yes. Just a couple of minutes into the time I was
21 at the home she asked if she could call a roommate who had
22 just moved in recently. And she wanted to let her know that
23 the police were at her house. She didn't want her to freak
24 out when she came home by seeing cop cars in front of the
25 house.

1 Q And were you actually present when that phone call
2 was made?

3 A No. Officer Goodard actually took her upstairs.
4 I heard the very beginning of the phone call, but I wasn't
5 present in the room.

6 Q Now, did you know about a brother to Kristen
7 Grisham and a son to Pam and Marty Grisham prior to going
8 out to the Dogwood Circle address in Louisville?

9 A I -- I'm sure I had been briefed about -- because
10 that was one of the reasons that I'd gone out there to see
11 if Loren Graham (sic) was there -- or I'm sorry, Loren
12 Grisham was there at the house.

13 Q Okay. Was Loren Grisham there at the house?

14 A No, he was not.

15 Q Did there come a time that a phone call came in
16 from Loren Grisham?

17 A Yes. And I -- the very first details of that call
18 I don't recall, but I do remember it was a collect call.
19 And at some point I spoke to Loren on the phone.

20 Q Okay. Did you learn where Loren Grisham was at
21 that time?

22 A I believe he was in his dorm in Glenwood Springs.

23 Q Did you conduct an interview with Loren Grisham at
24 that time?

25 A We had a very brief conversation. I explained to

1 him what I knew had happened, asked him where he had been,
2 how long he'd been there, very -- maybe a couple of minutes
3 at that point.

4 Q And then you turned your attention back to the
5 folks who were in the room with you?

6 A Yes.

7 Q Do you remember speaking with Pam Grisham the
8 following day being November 2, 1994?

9 A I have -- I remember more specifically talking to
10 Kristen. But I do know that I spoke to Pam the next day.

11 Q Do you remember -- and I'm going to hand you what
12 is discovery pages marked pages 1929 through 1935 and ask
13 you if you can just become familiar with what that is.

14 A It's an interview that I conducted with Pam
15 Grisham on November the 2nd.

16 Q And if I could direct your attention to page 6.
17 And did you ask Pam Grisham what time did you get home?

18 A On page 6?

19 Q I'm sorry, page 7.

20 A Oh, okay. Yes, I did.

21 Q And what was her response?

22 A She said I was home all day.

23 Q Did you ask her was Kristen home from what time?

24 A She told me that she had been home -- came home
25 close to around 2:30 that afternoon.

1 Q And did you ask her whether Kristen had gone out
2 at all?

3 A Yes.

4 Q And what did she say?

5 A She had not gone out at all.

6 Q Did you ask Pam Grisham about Michael Clark? And
7 I'm going to refer you to page 5.

8 A Thank you. Yes, I did.

9 Q And did Pam Grisham make a statement to you about
10 the relationship between a motorcycle incident and the
11 Marines and Michael Clark?

12 A Yes, I did ask her about that.

13 Q And did she state I think the motorcycle business
14 and the possibility of that keeping him from going into the
15 Marines scared the bejabbers out of him because he really
16 does want to get into the Marines. So I don't -- so I
17 really don't think he would do something like this,
18 referring to stealing checks?

19 A Yes.

20 Q Did you interview Kristen Grisham --

21 A Yes, I did.

22 Q -- over the course of that night and the next day
23 and some times following that?

24 A Yes, I did.

25 Q Do you remember talking with Kristen Grisham about

1 days -- about a trip that she took to Michigan?

2 A Yes, I do.

3 Q And do you remember on November 2, 1994 asking
4 Kristen Grisham this question, And how long were you out of
5 town during that weekend, and her response being I was gone
6 that Friday, Saturday, Sunday, and I returned Monday
7 evening, and Marty returned Monday evening.

8 A Yes, that's accurate.

9 Q Do you remember asking Kristin Grisham
10 specifically about whether she gave a key to Michael Clark
11 to Marty Grisham's apartment?

12 A Yes.

13 Q And do you remember asking her You gave the key to
14 Mike on that Friday?

15 A Yes.

16 Q And her response being Right?

17 A Yes.

18 Q Do you remember asking Kristen Grisham in that
19 same interview on November 2, 1994 whether Michael Clark had
20 ever met her father, Marty Grisham?

21 A Yes. She said they met.

22 Q And do you remember Kristen Grisham saying I think
23 they met once. I think I brought Michael along, we had
24 dinner or coffee or something. And that was the first time
25 they really even met. I think they met a couple times after

1 that, just general like he was with me and I saw my dad or
2 something like that?

3 A Yes, that's accurate.

4 Q Do you remember asking Kristen Grisham on
5 November 2, 1994 when it was that she got the key back?

6 A Yes, I did.

7 Q Or when Michael Clark returned the key to Marty
8 Grisham's apartment?

9 A Yes.

10 Q And do you remember her saying the last time I saw
11 him the 24th?

12 A Yes.

13 Q And you clarify that being the 24th of October?

14 A Yes.

15 Q Do you remember on the 4th of November, 1994
16 interviewing Kristen Grisham along with Detective Tom
17 Trujillo and Detective Kurt Weiler?

18 A Yes.

19 Q And do you remember Detective Tom Trujillo asking
20 Kristen -- or telling Kristen Grisham that Michael Clark had
21 implicated her in stealing the checks?

22 A Yes, I remember that.

23 Q And what was her response to that?

24 A It was a very strong absolutely not, she had no
25 knowledge of that.

1 Q Do you remember her using the expression that's
2 crap?

3 A That's accurate.

4 MR. BRACKLEY: Thank you. No further questions.

5 THE COURT: Cross-examination, Ms. Ring.

6 MS. RING: Thank you.

7 CROSS-EXAMINATION

8 BY MS. RING:

9 Q Sergeant?

10 A Um-hmm.

11 Q Sgt. Kampf, so prior to you testifying today you
12 were able to review the police reports you did in this case?

13 A Yes.

14 Q You were able to review the transcripts of the
15 interviews that you did with Pam Grisham and with Kristen
16 Grisham?

17 A Yes.

18 Q Okay. And so when Mr. Brackley was asking you if
19 you recalled these specific questions and specific answers
20 you recall those now because you had a chance to review
21 these transcripts prior to testifying?

22 A In terms of the exact words, yes. That's
23 accurate.

24 Q And so some of the details you remember from back
25 then?

1 A Sure.

2 Q But certainly not all of them?

3 A Oh, no.

4 Q Mr. Brackley just asked you about asking Kristen
5 Grisham about whether Michael Clark had ever met or knew
6 Marty Grisham?

7 A Um-hmm.

8 Q Right?

9 A Right.

10 Q Okay. And that was in an interview dated
11 November 2nd of 1994?

12 A Yes.

13 MS. RING: May I approach please?

14 THE COURT: Yes.

15 Q (By Ms. Ring) Oh, you have that up here with you.
16 Oh, that's Pam's.

17 So we're looking at the transcript from
18 November 2, 1994 when you are interviewing Kristen Grisham.
19 And you had been asking about whether or not Michael Clark
20 had met her father Marty in the past?

21 A Yes.

22 Q And she answered what Mr. Brackley just talked
23 about she thought they'd had dinner or coffee, one time she
24 brought Michael along, and maybe met a couple times after
25 that?

1 A Correct.

2 Q Okay. There's nothing around there that talks
3 about when those meetings occurred?

4 A No.

5 Q Okay. And then she goes on -- you ask about how
6 long she's known Michael, and she says they've been friends
7 since her sophomore year of high school?

8 A Correct.

9 MS. RING: Nothing further. Thank you.

10 THE COURT: All right. Any redirect,
11 Mr. Brackley?

12 MR. BRACKLEY: No, thank you.

13 THE COURT: All right. Detective, you can step
14 down.

15 Can this witness be excused?

16 MR. BRACKLEY: She may.

17 MS. RING: Judge, I think Sgt. Kampf is also under
18 our subpoena. So we need to ask her to remain under our
19 subpoena. And we'll be in touch about when that might --

20 THE COURT: Detective, you're not excused from the
21 defendant's subpoena, so you're subject to recall.

22 THE WITNESS: All right. Thank you.

23 THE COURT: Would the People call their next
24 witness?

25 MR. BRACKLEY: People call Jason Breslin.

1 (Pause.)

2 MR. BRACKLEY: Judge, apparently Mr. Breslin
3 stepped out of the building. I saw him as I was walking
4 into the courtroom. We can call Sgt. Breier.

5 THE COURT: Okay. Would you step forward?

6 SGT. DONALD BREIER,
7 called as a witness on behalf of the People, having been
8 first duly sworn, was examined and testified as follows:

9 THE COURT: Please have a seat.

10 Go ahead, Mr. Kellner.

11 MR. KELLNER: Thank you, Judge.

12 DIRECT EXAMINATION

13 BY MR. KELLNER:

14 Q Good afternoon, sir. Could you please state your
15 name and spell your last name for us?

16 A Do I -- my legal name is Donald Douglas Breier the
17 third. Last name is spelled B-R-E-I-E-R.

18 Q And sir, how are you employed?

19 A I'm employed by the Garfield County Sheriff's
20 Office as the investigation sergeant.

21 Q What is your title? Are you sergeant or --

22 A Sergeant of investigations.

23 Q Okay. So Sgt. Breier, how long have you been with
24 the Garfield County Sheriff's Office?

25 A Over 19 years.

1 Q And when did you first start with them because --

2 A In 1993.

3 Q -- I'm bad with math.

4 A In 1993.

5 Q What was your assignment back in 1993 when you
6 first started?

7 A Patrol deputy.

8 Q What does a patrol deputy do?

9 A Patrol deputy is what you might consider just a
10 police officer, performs the functions of a police officer,
11 patrol, apprehension of crime, deterrence of crime, what you
12 might expect of when you see a police officer in a marked
13 police unit.

14 Q Okay. Now, back in 1993 when you were a patrol
15 officer what was your assignment in November of 1994?

16 A Same, patrol deputy.

17 Q Now, you said Garfield County Sheriff's Office.
18 What territory does that cover?

19 A It's on the western side of Colorado. Most people
20 are familiar with it because of Glenwood Springs, which is
21 the county seat. However, it ranges from the Glenwood
22 Canyon all the way out to the Utah border, and north is Rio
23 Blanco County, south is Mesa County, Pitkin County, Eagle
24 County is to the east.

25 Q I want to draw your attention to November 1, 1994.

1 Do you recall making a death notification on that night,
2 November 1st?

3 A Yes, I do.

4 Q Can you tell the jury what you remember about
5 where you went and who you gave this notification to?

6 A It was late at night. And I remember receiving a
7 notification to respond to the Colorado Mountain College
8 Spring Valley Campus, which is between Glenwood Springs and
9 Carbondale, and was to contact a young man up there and
10 deliver notification that his father was passed away.

11 Q And do you recall where on the campus it was?

12 A Long time ago. Might have been the dorms or an
13 office building.

14 Q And do you recall the name of the young man who
15 you were going to make the notification to?

16 A I've heard it enough times here recently that I
17 should know, but it escapes my memory right at this moment.

18 Q If I showed you a CCIC teletype print-out might
19 that refresh your recollection?

20 A Yes.

21 Q Sgt. Breier, just take a look at that and see if
22 that refreshes your recollection?

23 A It does.

24 Q And what was the young man's name that you made
25 the death notification to?

1 A Loren Grisham.

2 Q Now, you mentioned that you went on to the campus
3 of the Colorado Mountain College. Do you recall what time
4 it was that you made this notification to Loren Grisham?

5 A I recall it being late in the evening. According
6 to the teletype it's --

7 MS. MILFELD: Objection, Judge. We ask that he
8 first be able to see whether he can remember what time it
9 was.

10 THE COURT: I'll sustain the objection. I can't
11 have you reading from the document.

12 Q (By Mr. Kellner) You can flip it over.

13 Do you recall what time it was?

14 A It was very late at night. It wasn't early in the
15 evening. It was late at night.

16 Q If you took a look at that teletype again might
17 that refresh your memory as to the time?

18 A Yes.

19 MR. KELLNER: Judge, with your permission?

20 THE COURT: Certainly. Just review that with
21 yourself, and let me know once you finished reading it.

22 THE WITNESS: All right, Your Honor.

23 THE COURT: Go ahead.

24 Q (By Mr. Kellner) What time was it?

25 A 2320 hours, which also would be known as

1 11:20 p.m.

2 Q Do you recall telling Loren Grisham to do anything
3 in particular after you informed him of his father's death?

4 A I remember he was to contact or make a contact
5 back over to -- back over to Boulder. I can't remember if
6 it was the police department or the sheriff's office or who
7 it was.

8 Q Do you recall whether or not he was supposed to
9 contact his mother?

10 A Sounds familiar, yes.

11 Q So you don't specifically remember telling him
12 that, but you think it sounds familiar?

13 A Yeah. I don't remember much specific words in the
14 conversation, but I remember informing him of his father's
15 passing and to contact home.

16 Q What was Loren Grisham's reaction when you told
17 him that his father had been killed?

18 A I would say mute, monotone, shock, not an
19 exclamatory shock, but just one of momentary overwhelming
20 situation that makes one quiet.

21 MR. KELLNER: Your Honor, may I approach the
22 witness with what I've marked as People's 47?

23 THE COURT: Yes.

24 Q (By Mr. Kellner) I'll retrieve the teletype.

25 Sgt. Breier, take a look at that picture I've

1 handed you, People's 47. Do you recognize the person in
2 that picture?

3 A I do.

4 Q How do you recognize him?

5 A That's the individual I contacted.

6 Q All right. That's the picture of Loren Grisham?

7 A It is.

8 Q Is that a fair and accurate depiction of what
9 Loren Grisham looked like --

10 A It is.

11 Q -- back in November of 1994?

12 A Yes, sir.

13 Q Now, I want to talk to you a little bit about the
14 distance from Glenwood Springs to Boulder. Did you drive
15 here from Glenwood Springs?

16 A I did.

17 Q And what is the approximate distance from -- if
18 you know, the Glenwood Springs Sheriff's Office or police
19 department to Boulder, the City of Boulder?

20 A It's about 170 miles, 175 miles. Time-wise about
21 three and a half hours.

22 Q What about back in 1994?

23 A I think it would have been about three and a half
24 hours then as well. Could have been a little longer.

25 Q Now, I asked you the distance roughly from the

1 police department in Glenwood Springs. Where is the police
2 department in relation to the highway?

3 A The sheriff's office?

4 Q Yeah, sorry.

5 A The sheriff's office is right off the main -- near
6 the main exit there in Glenwood Springs which would be mile
7 marker 116.

8 Q And once you get off that main exit, what road do
9 you take to the Colorado Mountain College?

10 A Highway 82.

11 Q How far is it from the police department to the
12 Colorado Mountain College up Highway 82?

13 A I'd estimate about -- you have to drive up
14 Highway 82 down to County Road 114 where the college is
15 actually located. It's probably about 11 miles.

16 Q What kind of road is it?

17 A Well, you have to go through town, through
18 Glenwood Springs. Should be also known as Grand Avenue.
19 And you go up Highway 82 approximately 6.5 miles or so to
20 County Road 114 which turns off and heads generally east.
21 And that goes up into the mountains. It's kind of a winding
22 road.

23 MR. KELLNER: Just a moment please.

24 (Pause.)

25 MR. KELLNER: I have no further questions. Thank

1 you.

2 THE COURT: All right. Cross-examination,
3 Ms. Milfeld.

4 MS. MILFELD: No questions, Judge. Thank you.

5 THE COURT: All right. Sergeant, you can step
6 down.

7 Can this witness be excused?

8 MR. KELLNER: He may.

9 THE COURT: Ms. Milfeld?

10 MS. MILFELD: Yes, Judge.

11 THE COURT: Sir, you're excused. Thank you very
12 much.

13 THE WITNESS: Thank you, Your Honor.

14 MR. KELLNER: I did not offer it. I intend to
15 offer it later.

16 THE COURT: Thank you, Sergeant.

17 Would the People call their next witness?

18 MR. BRACKLEY: Now, the People call Jason Breslin.

19 THE COURT: All right. Sir, would you step
20 forward please? Come on all the way up here. Go on all the
21 way up by that chair right there. And before you sit down
22 would you please face me and raise your right hand.

23 JASON BRESLIN,
24 called as a witness on behalf of the People, having been
25 first duly sworn, was examined and testified as follows:

1 THE COURT: Please have a seat.

2 Go ahead, Mr. Brackley.

3 MR. BRACKLEY: Thank you, Judge.

4 DIRECT EXAMINATION

5 BY MR. BRACKLEY:

6 Q Can you state your name and spell your last name
7 for the record?

8 A Jason Breslin, B-R-E-S-L-I-N.

9 Q Currently employed?

10 A Yes, sir.

11 Q What do you do for a living?

12 A I work for PODS Moving and Storage.

13 Q And how long have you done that for?

14 A Four years.

15 Q You currently living in Colorado?

16 A Yes, Lafayette.

17 Q You from Colorado?

18 A Yes, sir.

19 Q Did you know Loren Grisham?

20 A Yes.

21 Q And did you know Loren Grisham back in 1994?

22 A Yes, sir.

23 Q How did you know Loren Grisham?

24 A I know Loren in the Junior Rangers program with
25 the City of Boulder. And from there we had a friendship up

1 til college.

2 Q Did you go to college with Loren Grisham?

3 A I went to Colorado Mountain College in Glenwood
4 Springs.

5 Q Did Loren Grisham go to Colorado Mountain College
6 in Colorado Springs (sic) when you were there?

7 A Yes. Correct.

8 Q How would you characterize your friendship with
9 Loren Grisham?

10 A We hung out quite a bit. I'd be at their house in
11 Louisville probably five days a week.

12 Q Okay. Did you know Loren's dad, Marty Grisham?

13 A Yeah, when he lived in Boulder.

14 Q Do you recall November 1, 1994, the night that
15 Marty Grisham was murdered?

16 A Yeah. Loren came, knocked on my door and said
17 that Marty was murdered and we had to go back to Boulder.
18 At first I was like okay, well I'll talk to you later on.
19 Then five minutes later my roommate goes did he just say his
20 father was murdered. I go yeah. So I went to go look for
21 Loren, and he was gone with his friend to have a drink.

22 Q Had you been sleeping when Loren came into your
23 room?

24 A Yes.

25 Q Okay. Do you remember approximately what time it

1 was that Loren came into your room?

2 A I think around 11:00 or 12:00.

3 Q Sometime between 11:00 and 12:00?

4 A I think so, yeah.

5 Q Do you remember after Marty Grisham was murdered
6 talking with a police officer who came -- who came out to
7 Glenwood Springs to talk to you?

8 A I talked to him in Boulder, not Glenwood.

9 Q At the Boulder Police Department?

10 A Correct.

11 Q And is that when you came back with Loren after
12 his father was murdered?

13 A Correct.

14 Q And do you remember the officer asking you what
15 time Loren Grisham came into your room?

16 A I think I told him -- I really don't recall, I
17 think it was like or 11:00 or 12:00.

18 Q Do you remember being asked this question and
19 giving this answer; Okay. So he came and woke you up around
20 11:30? Yeah. And you then you talked about your roommate?

21 A Right.

22 Q Having that follow-up conversation with you?

23 A Yep.

24 Q And do you recall telling him that you went back
25 to bed and finally got up around midnight and went to look

1 for Loren?

2 A Yeah, it was like a shocking thing. Told him
3 well, I went back to sleep for a couple minutes, then I said
4 wait a minute, did he say his dad just got killed.

5 Q Do you remember the words that Loren used when he
6 told you that his father had been murdered?

7 A He said we have to go back to Boulder, Marty was
8 shot.

9 Q And do you remember whether there are police
10 officers with him or around him at that time?

11 A My roommate said he thought he heard a police
12 radio, but I didn't see anyone.

13 Q You were sleeping at the time?

14 A Yeah.

15 Q Do you recall the weekend prior to November 1st of
16 19 -- well, do you remember the weekend prior to Marty
17 Grisham being murdered being here in Boulder with Loren?

18 A Right. We had -- I came out for a dentist
19 appointment then. Loren came along with me.

20 Q When did you come back to Boulder?

21 A I think it was Thursday or Friday morning.

22 Q So Thursday or Friday morning the week --

23 A That -- the week before, yes.

24 Q And do you remember when you went back to Glenwood
25 Springs?

1 A Sunday.

2 Q From Boulder? Sorry.

3 A Sunday.

4 Q Okay.

5 A Around probably -- we broke down going back up to
6 school.

7 Q Do you remember how long it took you to get back
8 to Glenwood Springs from Boulder?

9 A I think it was about noon on the 1st.

10 Q And you left the day before that?

11 A Right. We left Sunday -- before Sunday, so it was
12 the 31st, right.

13 Q Well, you left on Sunday?

14 A Right. We got in back to Glenwood on Monday.

15 Q Okay. So what took so long? Why was that such a
16 long journey?

17 A My car broke down. Belt went out on it. And we
18 had to go buy a new battery and a belt, and NAPA was closed
19 at the time.

20 Q When -- where did you -- where did your car break
21 down?

22 A In Frisco. We stayed at the Best Western hotel.

23 Q And you waited until the next day to fix your car?

24 A Right, because the parts store was closed.

25 Q Let me --

1 MR. BRACKLEY: If I may approach the witness with
2 what I've marked People's 46 for identification?

3 THE COURT: Yes.

4 Q (By Mr. Brackley) This is a six-page document.
5 Well, it's six pages. I'm going to call it People's 46 for
6 identification. And I'm going to ask you to take a look at
7 those.

8 A Okay.

9 Q What are those?

10 A They're receipts from the night before.

11 Q Being the receipts?

12 A From?

13 Q From?

14 A Where we had to get parts for the car.

15 Q And also the hotel receipt?

16 A Yeah, from Dillon for the Best Western and the
17 receipts from NAPA Auto Parts.

18 Q Those are copies of the actual receipts; correct?

19 A Yeah. These are the ones I gave you guys.

20 Q And you handed the actual receipts to us?

21 A Right.

22 Q Sometime before today; right?

23 A Correct.

24 Q Those are copies of those?

25 A Yes, sir.

1 MR. BRACKLEY: Your Honor, I'd move to admit that
2 six-page document as People's 46.

3 THE COURT: Any objection or voir dire?

4 MS. MILFELD: No objection, no voir dire.

5 THE COURT: 46 will be admitted.

6 Q (By Mr. Brackley) From getting back to Glenwood
7 Springs on the Monday of that week, did you see Loren over
8 the next day, day and a half prior to him coming in and
9 telling you that his father had been murdered?

10 A I don't remember. I think maybe at lunch. His
11 room was right next door to mine.

12 Q Anything out of the ordinary in that day and a
13 half?

14 A No, not at all. I think we went to class, our
15 psychology class. We told the professor that we had to go
16 to Boulder because of Marty, so she let us go for that.

17 Q Did Loren have a car on campus?

18 A No, he didn't. I think he got his license shortly
19 after Marty died.

20 Q So he didn't have a driver's license at that time?

21 A No.

22 Q Did Loren ever take or borrow your car?

23 A No.

24 Q What kind of car were you driving?

25 A 1981 Aries K car.

1 Q What kind of condition was that car in other than
2 that trouble you had --

3 A It was --

4 Q -- in Frisco?

5 A It was -- already had a little body damage to it,
6 but nothing severe.

7 MR. BRACKLEY: Okay. Thank you, sir. No further
8 questions.

9 THE COURT: Cross-examination, Ms. Milfeld.

10 MS. MILFELD: No questions for this witness.
11 Thank you.

12 THE COURT: Mr. Breslin, you can step down.
13 Can this witness be excused?

14 MR. BRACKLEY: Yes, Your Honor.

15 MS. MILFELD: Yes.

16 THE COURT: Mr. Breslin, you're excused. Thank
17 you for your time. You can just leave those up there.
18 Thank you, sir.

19 Would the People call their next witness?

20 MR. KELLNER: Your Honor, the People call Stacey
21 Howell.

22 THE COURT: Would you step forward please, ma'am?
23 Come on all the way up here. Would you face me and raise
24 your right hand.

25 STACEY HOWELL,

1 called as a witness on behalf of the People, having been
2 first duly sworn, was examined and testified as follows:

3 THE COURT: Please have a seat.

4 Go ahead, Mr. Kellner.

5 MS. RING: Can I have a minute?

6 THE COURT: Sure.

7 (Pause.)

8 DIRECT EXAMINATION

9 BY MR. KELLNER:

10 Q Good afternoon, ma'am. Would you please state
11 your name and spell it?

12 A Stacey Howell, H-O-W-E-L-L.

13 Q Ma'am, where do you live generally speaking?

14 A Southern Colorado.

15 Q And what do you do for a living?

16 A I'm a veterinary technician.

17 Q How long have you done that?

18 A Probably 13 years.

19 Q And prior to moving to southern Colorado did you
20 live anywhere else in Colorado?

21 A I have lived in Glenwood Springs and Summit
22 County.

23 Q You said you lived in Glenwood Springs. When was
24 that?

25 A When I was in college.

1 Q Where did you go to college?

2 A Colorado Mountain College.

3 Q What did you study at the Colorado Mountain
4 College?

5 A Veterinary technology.

6 Q What year did you start attending Colorado
7 Mountain College?

8 A 1994.

9 Q Is that a four-year program?

10 A Two.

11 Q Two.

12 So in 1994 about when in the year did you start
13 taking classes?

14 A I believe it was August.

15 Q And when you attended Colorado Mountain College
16 did you know a man named Loren Grisham?

17 A Yes, I did.

18 Q How did you know Loren Grisham?

19 A I dated him.

20 Q When did you start dating Loren?

21 A Probably September or October of that year.

22 Q About -- is that September, October of 1994?

23 A Yes.

24 Q Okay. About how long did you date Loren Grisham
25 then?

1 A Probably I believe about a year.

2 MR. KELLNER: Judge, can I approach with
3 People's 47?

4 THE COURT: Yes.

5 Q (By Mr. Kellner) Ms. Howell, I'm handing you a
6 picture that's been marked as People's 47 for
7 identification. I'm going to take that away. Ma'am, do you
8 recognize the person in that picture?

9 A Yes, I do.

10 Q And how do you recognize it?

11 A That's Loren Grisham.

12 Q Is that picture a fair and accurate depiction of
13 Loren Grisham at the time you were dating him in October or
14 November time frame of 1994?

15 A Yes, it is.

16 MR. KELLNER: Judge, with your permission I'd ask
17 to admit that exhibit and publish it to the jury.

18 THE COURT: Any objection to the admission of 47?

19 MS. RING: No.

20 THE COURT: 47 will be admitted. Permission to
21 publish is granted.

22 MR. KELLNER: Thank you, sir.

23 Q (By Mr. Kellner) Ma'am, I just put it up on the
24 screen behind you, that picture of Loren. Did he have that
25 same sort of short haircut when you were dating him?

1 A Yes, he did.

2 Q Did he have that kind of short haircut then in
3 November, October time frame of 1994?

4 A Yes, he did.

5 Q I want to draw your attention to November 1, 1994,
6 the day that Marty Grisham was murdered. Do you remember
7 that day?

8 A Parts of it.

9 Q What I want to ask you is the parts that you do
10 remember. Who did you spend that day with?

11 A Loren and several other people.

12 Q When I say spend the day, I mean how much of the
13 day did you spend with him, how much time if you can recall?

14 A I don't know for sure, but it was all day.

15 Q Do you recall spending time with him that evening
16 as well?

17 A Yes, I do.

18 Q Why does that day stick out in your mind?

19 A Being told your boyfriend's dad was murdered is
20 pretty traumatic.

21 Q How did that come about? How did you learn about
22 that?

23 A I was sleeping or in bed in my dorm room. And one
24 of the RA's came and woke me up and said you need to come
25 downstairs, Loren's dad's been killed.

1 Q And prior to going to bed in your dorm room who
2 had you been hanging out with earlier that night?

3 A Loren.

4 Q And about what time if you can remember were you
5 notified by that RA?

6 A I don't know for sure. I believe it was probably
7 after 10:30, 11:00, somewhere in there. It was late.

8 Q Do you recall what you did with Loren that day
9 earlier in the day?

10 A Not clearly, no.

11 Q What sort of things would you normally do with
12 Loren?

13 A We would hang out in usually his room and, you
14 know, study, talk to friends. I think we watched a movie
15 that night or they showed a movie that night down in one of
16 the common areas.

17 Q I want to ask you about Loren's reaction to
18 finding out the news about his father. What do you remember
19 about his reaction?

20 A When I walked into the room he was sitting on the
21 couch with his elbows on his knees, and he was just kind of
22 rocking back and forth with his teeth gritted and he didn't
23 say a whole lot. So I don't think he said anything.

24 Q Is he the kind of guy who would share his
25 feelings?

1 A Not immediately.

2 Q What did you do with Loren that night after he was
3 informed of his father's murder?

4 A We got in my truck and drove off campus for a
5 little while and kind of drove around.

6 Q You said that he was kind of quiet when he heard
7 of his father's murder. Did he ever talk to you about it at
8 all or express any sort of emotion?

9 A From what I remember it was mostly disbelief,
10 just -- and speculation of what happened.

11 Q Let me ask you this, did Loren Grisham have a car
12 when you were dating him?

13 A No.

14 Q Who had the car?

15 A I did.

16 Q When you went places would you then drive?

17 A Yes.

18 Q Did he borrow your car that night and drive to
19 Boulder?

20 A No.

21 MR. KELLNER: No further questions.

22 THE COURT: Cross-examination.

23 MS. RING: No questions.

24 THE COURT: Okay. Ms. Howell, you can step down.

25 Can this witness be excused?

1 MR. KELLNER: She may, Your Honor.

2 MS. RING: Yes.

3 THE COURT: Ms. Howell, you're excused. Thank you
4 very much.

5 People call their next witness.

6 MR. BRACKLEY: Judge, can we approach?

7 THE COURT: Yes.

8 (The following proceedings occurred at the bench
9 out of the hearing of the jury.)

10 MR. BRACKLEY: We have a police officer in the
11 hallway. It's Officer Denig. We're ready to call him, but
12 his -- we're kind of scrambling to put some stuff together
13 for the rest of our afternoon. We've done our twelfth
14 witness today. It might be a time for a break so we can
15 make sure we start lining stuff up.

16 I just -- I don't think we ever expected to get
17 this far. And the remainder of our witnesses are travelers
18 or experts or cops that we are planning on calling on
19 Wednesday. We're just trying to get some of them in here
20 today if we have to, but --

21 THE COURT: You're going to have to, especially
22 early in the trial, with as much time as we have. We'll go
23 ahead and take a recess now for 20 minutes. And then, you
24 know, you need to fill in the rest of the afternoon if that
25 means calling Detective Heidel or somebody else.

1 MR. BRACKLEY: That what we're planning on doing.
2 I think it would be better to take a break, get those ducks
3 lined up, rather than doing it later. It gives us a chance
4 to --

5 THE COURT: Try to find witnesses for the rest of
6 the day, okay? Thank you.

7 (The following proceedings occurred in open
8 court.)

9 THE COURT: Ladies and gentlemen of the jury,
10 we're going to take the mid-afternoon recess a little bit
11 early. I've got to take care of some scheduling things. So
12 we're going to recess for about -- well, why don't we say
13 until 3:00. Gives you a little over -- well, almost 25
14 minutes. Stretch your legs, get a soda, use the restrooms.

15 Remember the admonition I've given you previously.
16 It applies at this recess as well. Don't talk to anybody
17 about the case. Don't do any outside research. Don't read
18 or listen to any news reports of the trial. And make sure
19 that you don't form or express any opinion on the case until
20 it is finally submitted to you.

21 We should be ready for you right at 3:00, so enjoy
22 the break. We'll see you then.

23 (A recess was taken.)

24 THE COURT: Let's go ahead and go on the record.
25 This is People versus Michael Clark. Mr. Clark and his

1 counsel are present. The prosecution is present.

2 The bailiff was handed a note by one of the
3 jurors. And essentially it's a question with respect to
4 evidence.

5 I'm inclined to simply tell the jury that if they
6 have questions about evidence they should continue to listen
7 to the testimony that's presented in court. Then they'll
8 have an opportunity to deliberate once the case is presented
9 to them.

10 I don't know if counsel wants to see the note from
11 the juror. It's a relatively innocuous question, but
12 it's -- do you want to know what it says, Ms. Ring?

13 MS. RING: Yes, please.

14 THE COURT: Mr. Brackley?

15 MR. BRACKLEY: I don't see why we wouldn't want
16 to.

17 THE COURT: Well --

18 MR. BRACKLEY: I don't see why we wouldn't want to
19 hear it.

20 THE COURT: Okay. Well, the question is could you
21 explain what a bullet fragment is.

22 So do you -- do you want me to tell the jury to
23 the extent they have questions about evidence, they should
24 continue to listen to the evidence that's presented, it may
25 answer their question. And they'll have an opportunity to

1 discuss their questions and issues during deliberations.

2 Does that make sense for the People?

3 MR. BRACKLEY: I'll state for the record there are
4 plenty of more ballistics type people coming. And I think
5 that's something they would have heard the answer to.

6 THE COURT: Ms. Ring, is that okay?

7 MS. RING: Yes.

8 THE COURT: All right. I'll do that then.

9 Anything else for the record before we bring the
10 jury in?

11 MR. BRACKLEY: No, Your Honor. So Officer Denig
12 is still outside. And we have Commander Weiler arriving.
13 And his testimony is very, very lengthy. It's listening to
14 a couple hours worth of audio recording. It's substantially
15 out of place, but of course we'll do that as a favor to the
16 Court. I'm not --

17 THE COURT: Actually it's a favor to the justice
18 system.

19 MR. BRACKLEY: I know, Your Honor. I was just
20 being facetious. So we will continue to move on today.

21 THE COURT: Okay.

22 MR. BRACKLEY: Another option that we have I think
23 is Detective Heidel. But I think it makes more sense at
24 this point in terms of counsel's ability to prepare to call
25 Detective -- to call Commander Weiler.

1 THE COURT: Okay. Well, I appreciate your efforts
2 to make meaningful use of the time that we have.

3 MS. RING: I want the opportunity to respond,
4 because I did speak to Mr. Brackley about this. Looking at
5 where we are, the witnesses they're planning on calling
6 tomorrow afternoon, you know, it does seem that we're being
7 efficient, we're in good shape.

8 And I know the Court is very concerned about
9 keeping things on track. But I don't see any reason based
10 on talking to the district attorney about what their witness
11 situation that we're going to have problems at this point.

12 THE COURT: Well, and I appreciate that. And I
13 recognize that counsel is being very professional and very
14 efficient. And I -- I mean, I really do appreciate it.

15 My concern is nobody knows what's going to happen
16 tomorrow or Monday or Tuesday. And this is a jury panel
17 that if you recall they started last Friday.

18 So while I realize that we've only been in court
19 for now what is the fourth day, for them they've been
20 dealing with this case for six days even though they haven't
21 been in court. So I want to be respectful of their time and
22 want to make meaningful use of the time that we have.

23 MR. BRACKLEY: Right. And I'll tell the Court I
24 think by tomorrow afternoon we could be where we expected to
25 be sometime on Monday afternoon.

1 THE COURT: So a day ahead of --

2 MR. BRACKLEY: Roughly. Roughly a half a day
3 ahead, you know, a half a day ahead I think. So you know --

4 THE COURT: All right. Keep up the good work.
5 Would you bring the jury in please?

6 (The jury returned to the courtroom.)

7 THE COURT: Please be seated.

8 Welcome back, ladies and gentlemen of the jury.

9 One of you had given a question regarding the
10 evidence to the bailiff, and she passed it on to me.

11 What I would tell you is that if you do have a
12 question about the evidence that's being presented in the
13 case, continue to listen to other evidence that is presented
14 because it may well answer the question that you have.

15 And also remember that once the case is concluded
16 you're going to be able to discuss the case with other
17 members of the jury back in the jury room.

18 So having said that, would the People call their
19 next witness?

20 MR. KELLNER: Yes, Your Honor. People call
21 Detective Rich Denig.

22 THE COURT: Would you step forward please, sir?
23 Then before you sit down would you face me and raise your
24 right hand.

25 RICH DENIG,

1 called as a witness on behalf of the People, having been
2 first duly sworn, was examined and testified as follows:

3 THE COURT: Please have a seat.

4 Go ahead, Mr. Kellner.

5 MR. KELLNER: Thank you, Judge.

6 DIRECT EXAMINATION

7 BY MR. KELLNER:

8 Q When you're settled can you state your name and
9 spell your last name for us?

10 A Rich Denig, D-E-N-I-G.

11 Q What do you do for a living, sir?

12 A I'm a police officer with the City of Boulder.

13 Q How long have you been a police officer with the
14 City of Boulder?

15 A Since 1988.

16 Q And what is your current assignment with the
17 Boulder Police Department?

18 A I'm currently assigned to an administrative
19 position in operations section.

20 Q What is your title right now?

21 A My official title right now is the Boulder Police
22 Officer's Association President. That's one of my primary
23 duties as well as other administrative patrol functions.

24 Q And before that were you a detective as well?

25 A Yes. I was a narcotics detective.

1 Q Give the jury just a brief outline of your career
2 then.

3 A I started my career in law enforcement in 1985,
4 Greeley Police Department. Came to Boulder in 1988. In
5 October of 1990 I went to the narcotics unit of the Boulder
6 Police Department as a detective. I remained there until --
7 through 1995. After that I returned to the street working
8 patrol until I took my current administrative assignment in
9 2004 where I've been to the present.

10 Q I want to focus in on that time frame you
11 mentioned that you were a detective before 1995. Were you a
12 detective in November of 1994?

13 A Yes, I was.

14 Q Generally speaking what were your responsibilities
15 as a detective in 1994?

16 A As a detective in the narcotics unit we primarily
17 had -- our investigations were focused primarily on
18 narcotics offenses. And that was our primary function.

19 Q Now, you said you're typically doing narcotics
20 investigations. Would you also assist in other
21 investigations that came up?

22 A Yes, if need be. If called upon we would assist
23 the regular investigations section in their -- whatever they
24 needed us to do.

25 Q And after November 1, 1994 were you actually

1 called upon to assist in the investigation in the murder of
2 Marty Grisham?

3 A Yes, I was.

4 Q All right. When were you called into the team so
5 to speak?

6 A I don't recall exactly when we were as a unit
7 asked for assistance. I recall my involvement began in the
8 case on the morning of November 2nd.

9 Q All right. Tell the jury about your involvement
10 on the morning of November 2nd. Why did you go or do
11 whatever you did that day?

12 A I was directed by my current supervisor at the
13 time, Detective Sgt. Matthews, Kurt Matthews, to go out to
14 the area of 5640 Arapahoe, the Fairway Apartment complex,
15 conduct an area search around the apartment building, the
16 grounds, exterior grounds, covering the trash areas, parking
17 lots to look for any possible evidence from the homicide the
18 previous night.

19 Q What were your directions with respect to taking
20 photographs?

21 A Well, taking photographs would be a correlation
22 with if any evidence was discovered and to be collected. So
23 I had those -- I had a camera with me and other items.

24 MR. KELLNER: Your Honor, I'd like to publish to
25 the jury People's 4 which has already been admitted.

1 THE COURT: Okay.

2 Q (By Mr. Kellner) Detective Denig, can you swivel
3 around and take a look at that picture? Do you recognize
4 that picture?

5 A Yes.

6 Q And how do you recognize it?

7 A I took it. I photographed it.

8 Q And approximately what time did you go to the
9 scene there to Marty Grisham's apartment on November 2nd?

10 A I arrived at the complex about 8:30 a.m. on the
11 2nd.

12 Q Now I'd like to focus in a little bit more on this
13 picture. Did you see anything unusual at the scene when you
14 responded there that morning, November 2nd?

15 A Well, initially I was contacted by one of the
16 residents in the -- a neighboring resident of the victim.

17 Q Let me ask you this, did you collect any evidence
18 at the scene?

19 A Yes, I did.

20 Q What evidence did you collect?

21 A A container of Carmex lip balm.

22 Q And can you see that Carmex lip balm container
23 depicted in People's 4?

24 A Yes.

25 MR. KELLNER: Approach with a laser pointer?

1 THE COURT: He should have one up there.

2 MR. KELLNER: Very well.

3 Q (By Mr. Kellner) Can you point it out to the jury
4 please?

5 A It's laying below the bottom stair.

6 MR. KELLNER: Judge, I'd like to approach the
7 witness with People's 48.

8 THE COURT: Yes.

9 MR. KELLNER: And 51.

10 THE COURT: 48 and 51?

11 MR. KELLNER: Yes, sir.

12 Q (By Mr. Kellner) Detective, do you recognize what
13 I provided you in People's 48?

14 A Yes, I do.

15 Q How do you recognize that picture?

16 A It's a photograph that I took of the Carmex
17 container.

18 Q What kind of camera were you using back then?

19 A It was a fixed lens 35mm film, rolls of film
20 35mm.

21 Q So with 35mm film you had to go develop it, then
22 see what your pictures came out looking like?

23 A Yes.

24 Q What does the police department use now?

25 A We use digital cameras.

1 Q Now I'm going to ask you about what's depicted in
2 People's 48, that Carmex container. Did you photograph it
3 before you moved it or touched it?

4 A Yes.

5 Q Is that your typical practice when searching a
6 scene for evidence?

7 A Yes. If it's to be collected you need to document
8 it.

9 Q And why did you feel the need to collect that
10 Carmex container?

11 A Because it was in close proximity to the homicide,
12 actual homicide scene, and could be of evidentiary value.

13 MR. KELLNER: Judge, I'd ask to admit People's 48.

14 THE COURT: Any objection or voir dire?

15 MS. MILFELD: No objection, no voir dire.

16 THE COURT: 48 will be admitted.

17 MR. KELLNER: And may I publish it?

18 THE COURT: Yes.

19 Q (By Mr. Kellner) So Detective Denig, once you
20 developed this were you happy with the picture?

21 A No, I was not.

22 Q You mentioned that you had a fixed lens camera.
23 Is that something that you could not focus?

24 A Correct.

25 Q Now, once you took this picture what did you do

1 with respect to the Carmex container?

2 A I collected it for evidence.

3 Q And what's your process for collecting evidence?

4 A The process would be to put on gloves, put the
5 item in some sort of container and transport it back to the
6 police department.

7 MR. KELLNER: Your Honor, I'd like to approach the
8 witness with what I've marked as People's Exhibit 52.

9 THE COURT: Okay.

10 Q (By Mr. Kellner) Detective Denig, what is
11 People's 52?

12 A In the clear baggy is a container of Carmex. And
13 the adjoining pouch there is a brown paper bag also with a
14 manila envelope.

15 Q Is that bag that I provided you, is that what you
16 would have put the Carmex container in when you collected it
17 as evidence?

18 A Yes. The bag -- brown paper bag is. This is my
19 handwriting. I wrote the case number, the date, my initials
20 and my employee number, item number which is 1, my initials,
21 what the item was. That would have been what it was
22 submitted in originally.

23 MR. KELLNER: Your Honor, at this time I'd ask to
24 admit People's 52.

25 THE COURT: Objection or voir dire?

1 MS. MILFELD: No objection, no voir dire.

2 THE COURT: 52 will be admitted.

3 MR. KELLNER: Actually, Judge, may I publish it to
4 the jury?

5 THE COURT: Sure. Why don't we have
6 Ms. Batchelder hand it to Ms. Timms. She can look at it and
7 pass it along to Mr. Lacopo, then he'll pass it back across
8 that way. And then Ms. O'Harah, if you'll give it back to
9 Ms. Batchelder.

10 (Pause.)

11 THE COURT: All right. Record should reflect
12 Exhibit 52 has been published to the jury.

13 You may continue, Mr. Kellner.

14 Q (By Mr. Kellner) Detective Denig, earlier you said
15 that you would take a photograph before moving something you
16 suspected of being -- of having evidentiary value?

17 A Yes.

18 Q I want to talk to you about the photograph of the
19 Carmex container. Was the Carmex container laying flat or
20 was it laying on its side?

21 A It's laying on its side, or the edge you might
22 say.

23 Q Did you take more than one picture of the Carmex
24 container close up?

25 A I believe there were two.

1 Q I haven't given it to you. I'm just asking if you
2 had taken more than one?

3 A I believe I did, yes.

4 Q Is it your recollection that they both came out
5 somewhat blurry?

6 A Yes.

7 Q What did you do with the Carmex container then
8 once you collected it after you put it in the bag?

9 A I -- when I was done with the rest of my stuff
10 with 5640 Arapahoe I took it back to the police department
11 later, entered it into property and evidence.

12 Q I'd like to take a look at People's 51. I believe
13 it's up there with you?

14 A Yes.

15 Q Do you recognize that document?

16 A Yes, I do.

17 Q What is it?

18 A It's a Boulder Police Department property report
19 that I completed on November 2nd in order to document the
20 entering of the Carmex container into evidence.

21 Q Did you personally complete that form and fill it
22 out?

23 A Yes, I did.

24 Q Is it something that you're required to do when
25 you're collecting evidence and putting it into your evidence

1 or property room?

2 A Yes.

3 MR. KELLNER: Judge, I'd ask to admit People's 51.

4 THE COURT: Objection or voir dire?

5 MS. MILFELD: No objection or voir dire.

6 THE COURT: 51 is admitted.

7 Q (By Mr. Kellner) Once you had collected the Carmex
8 container, logged it into evidence, did you submit it for
9 any type of scientific analysis?

10 A Yes, I did.

11 Q Where did you send it, or where did you take it
12 rather?

13 A On November 4th I took it to the Colorado Bureau
14 of Investigation, their lab, for analysis.

15 Q And what were you seeking to have analyzed at the
16 Colorado Bureau of Investigation?

17 A The request that I put in was to examine it for
18 latent fingerprints.

19 Q And where is their office building located, or
20 their lab?

21 A At that time the lab was on Kipling. I'd have
22 to --

23 Q Is that in Lakewood?

24 A Yes.

25 Q Did you personally take that Carmex container to

1 the Colorado Bureau of Investigation?

2 A Yes, I did.

3 MR. KELLNER: Can I have just a moment?

4 THE COURT: Yes.

5 (Pause.)

6 Q (By Mr. Kellner) Detective Denig, when you took
7 that and -- the Carmex container, I probably should have
8 been more specific, did you keep it in the packaging that
9 you had described earlier when you took it to CBI?

10 A Yes. I would have checked it out of property and
11 evidence in the same packaging.

12 Q So it's sealed when you deliver it to --

13 A Sealed with tape, yes.

14 MR. KELLNER: I have no further questions.

15 THE COURT: Cross-examination, Ms. Milfeld.

16 CROSS-EXAMINATION

17 BY MS. MILFELD:

18 Q Detective Denig, you testified that you arrived at
19 the scene about 8:30 a.m.?

20 A Yes.

21 Q You were not the first person that arrived there,
22 meaning there were other people that had been to the scene
23 previously?

24 A Correct.

25 Q There were other officers that had been there the

1 night before?

2 A Yes.

3 Q You also testified on direct that Sgt. Matthews
4 asked you to search the areas around the apartment?

5 A That's correct.

6 Q At this point your role was to assist
7 Sgt. Matthews in what he was doing?

8 A Yes. To fulfill his directive, yes.

9 Q You were not the main crime scene investigator at
10 that point?

11 A No. I was simply performing a task that needed to
12 be done.

13 Q Before you conducted the search you did not have
14 any personal knowledge of there being a Carmex container
15 there?

16 A No, I did not.

17 Q No one alerted it -- no one alerted you to it
18 being there?

19 A No.

20 Q As far as you know you were the first person that
21 actually found it?

22 A As far as I know.

23 Q You talked about how you took two -- well, three
24 photographs total of the Carmex container, one that was a
25 far away shot and two that were basically this blurry photo?

1 A Yes.

2 Q Mr. Kellner asked you that obviously you weren't
3 happy with how this picture turned out?

4 A I -- I -- I wish that it had been clearly in
5 focus.

6 Q One of the reasons why you wished it was clear is
7 because you know as a detective how important it is to have
8 photographs that clearly show what the evidence looks like?

9 A Yes, it's important.

10 Q You know that attorneys rely on photographs
11 because you can't take us back into time of what something
12 looked like?

13 A That's correct.

14 Q And I just want to draw your attention to the
15 photograph behind you. You'd agree with me that from the
16 photograph you can't tell the condition of the container?

17 A The physical condition?

18 Q Correct.

19 A Correct. It's -- that's correct.

20 Q You can't tell from this photograph that the
21 container -- whether it's dirty?

22 A That's correct.

23 Q You can't tell whether there are any smudges on
24 it?

25 A That's correct.

1 Q You can't tell whether it's discolored in anyway?

2 A That's correct.

3 Q And you can't tell all these things because of the
4 blurriness of the photograph?

5 A That's correct.

6 Q As part of your investigative duties in assisting
7 Sgt. Matthews you wrote a report in this case?

8 A Yes, I did.

9 Q You wrote a report about how you found the Carmex
10 container?

11 A Yes.

12 Q And in that report you did not write anything
13 specifically about the condition of the container?

14 A In that report I don't believe so.

15 Q By the time that you got to the crime scene any
16 sort of crime scene tape had been removed?

17 A Yes. I do not recall seeing any perimeter tape,
18 crime scene tape from stairs, landings or cross hallways in
19 the vicinity outside the apartment.

20 Q Which means that at that point the crime scene was
21 not secured?

22 A The crime scene itself. The apartment, 413, yes,
23 it was still secured.

24 Q But not the area around it?

25 A Not -- I don't believe the area around it was in a

1 condition that it was being -- it was taped off or otherwise
2 being delineated.

3 Q So besides -- we've seen pictures of the front of
4 apartment 413 where Mr. Grisham lived. You searched the
5 perimeter of the apartment as well?

6 A Yes.

7 Q So that would have included -- so if you could
8 turn your attention to the previously admitted exhibit, that
9 would have included the area in front of the apartment to
10 the right of the stairwell?

11 A That's correct.

12 Q That would have included the area directly in
13 front of Mr. Grisham's apartment?

14 A That's correct.

15 Q It would have included -- and you can't see this
16 in the picture, but you remember that there were parking
17 spaces that would have been in the foreground of this
18 photograph, it would have been in front of what we're
19 seeing?

20 A Yes.

21 Q And you searched that area as well?

22 A Yes.

23 Q You also mentioned that you searched dumpsters
24 around the apartment complex?

25 A That's correct.

1 Q So you pretty much just walked around the building
2 looking for anything that you could find?

3 A That's correct.

4 Q And you were looking for anything that was
5 unusual, anything that stood out to you?

6 A That's correct.

7 Q You didn't collect anything from your extensive
8 search of the perimeter of the building?

9 A No.

10 Q The only thing that you collected was this Carmex
11 container?

12 A That's correct.

13 MS. MILFELD: Nothing further.

14 THE COURT: Any redirect, Mr. Kellner?

15 MR. KELLNER: I do, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. KELLNER:

18 Q Detective Denig, defense counsel asked you about
19 the condition of the container. Is the purpose of putting
20 that Carmex container in that paper bag in order to preserve
21 it in the condition that you found it?

22 A Yes.

23 Q I mean, what I'm asking is when you collected the
24 evidence do you change its condition in anyway?

25 A No, I did not.

1 Q You wipe it off?

2 A No.

3 Q You just put it in that brown paper bag?

4 A Yes.

5 Q And put it into evidence?

6 A That's correct.

7 Q Detective, I'd like to show you what's been
8 previously admitted as People's 12. Have you seen this
9 picture before?

10 A Yes, I have.

11 Q After you found the Carmex container did you look
12 at photographs that Officer Ralph Smith had taken the night
13 before?

14 A Yes, I did.

15 Q Why did you look at the pictures that Officer
16 Smith took?

17 A I just looked through the entire crime scene
18 photographs of that night, the previous night.

19 Q And did you form any sort of opinion about whether
20 or not that Carmex container would have been readily visible
21 on the night of the murder?

22 A I believe it would not have been readily visible
23 in the darkness.

24 Q Because of the shadow cast by the final stair?

25 A Yes. And it was also underneath the stair.

1 Q Did you believe that you could actually see or
2 partially see the Carmex container in one of the pictures?

3 A Yes. In this photo I believe that this possibly
4 could be the actual Carmex container that I discovered the
5 following morning.

6 MR. KELLNER: Thank you, Detective. I have no
7 further questions.

8 THE COURT: Any recross, Ms. Milfeld?

9 MS. MILFELD: No recross, thank you.

10 THE COURT: Detective, you can step down.
11 May this witness be excused?

12 MR. KELLNER: Judge, he's going to be subject to
13 recall for further investigation that he conducted.

14 THE COURT: So Detective, you're excused at this
15 time, but you are subject to recall. Thank you.

16 Would the People call their next witness?

17 MR. KELLNER: Your Honor, may we approach?

18 THE COURT: Yes.

19 (The following proceedings occurred at the bench
20 out of the hearing of the jury.)

21 MR. KELLNER: Judge, I just wanted to bring it to
22 your attention, we have Detective Weiler here. We intend to
23 put him on. As you're well aware the interview itself which
24 we intend to play is probably going to take us well past
25 5:00.

1 THE COURT: Okay.

2 MR. KELLNER: So I guess we'll look for a good
3 stopping point at some point during that interview, but I
4 didn't know if that would be an issue with the defense.

5 THE COURT: I think what we're going to have to
6 do, there's going to be traffic congestion in town because
7 of the football game, so I don't want to go past 5:00. So
8 whenever a convenient time is closest to 5:00, we'll need to
9 interrupt the playing and recording.

10 MS. RING: How about right now?

11 THE COURT: Not quite yet.

12 MR. KELLNER: Judge, the other issue is that
13 Detective Weiler has listened to a copy of the CD. And in
14 fact, it was the one that was missing that portion that you
15 had previously noted. We have a copy that is completed, but
16 he hasn't listened to that complete copy.

17 So what I would end up having to do is play a part
18 of it, see if he can recognize it, and then ask to publish
19 it at that point to the jury after admitting it. But he
20 hasn't listened to the full copy that I'm going to provide.

21 THE COURT: Would you stipulate --

22 MR. BRACKLEY: Or we can stipulate that it's a
23 full and fair copy of it. Detective Heidel made a copy of
24 it yesterday and gave it to him. You know, we just didn't
25 expect to call him this afternoon.

1 THE COURT: Okay. So you and Mr. Kellner can't
2 stipulate to each other. It's up to Ms. Ring.

3 MR. BRACKLEY: It's all of us.

4 THE COURT: It's up to Ms. Ring and Ms. Milfeld.

5 MS. RING: The stipulating part is fine. I'm a
6 little concerned and would like an opportunity to look at
7 the interview and see if we could come up with a time that
8 makes sense to stop it. I don't really like the idea of not
9 playing the whole interview.

10 And I understand we've got these time constraints.
11 But I prefer we take five minutes, look at it, see if we can
12 come up with a stopping point in an hour or so. Because I
13 don't want to be arguing about where we're stopping since
14 nobody anticipated doing this.

15 THE COURT: All right. Well, how long -- just so
16 we're clear, the defense is willing to stipulate that the
17 exhibit is a true and correct copy of the recorded
18 interview; is that accurate?

19 MS. RING: Yes.

20 THE COURT: All right. So that resolves the
21 foundational question.

22 How long is it going to take before you're able to
23 lay the foundation and have the exhibit admitted and ready
24 to publish it to the jury?

25 MR. KELLNER: I think the direct examination prior

1 to him playing it is about 20 to 25 minutes perhaps.

2 THE COURT: All right. So look, I'll give you a
3 couple minutes right now to look for --

4 MR. BRACKLEY: Lay the foundation and have
5 cross-examination and then play it tomorrow.

6 THE COURT: Does that work for the defense?

7 MS. RING: Much better.

8 THE COURT: All right. Everybody, for the record
9 even the blind squirrel finds a nut now and then. Okay.

10 (The following proceedings occurred in open
11 court.)

12 THE COURT: All right. Your next witness please,
13 Mr. Kellner?

14 MR. KELLNER: Your Honor, the People call
15 Commander Weiler.

16 THE COURT: Sir, would you step forward please?
17 Come on all the way up. Would you please raise your right
18 hand?

19 COMMANDER KURT WEILER,
20 called as a witness on behalf of the People, having been
21 first duly sworn, was examined and testified as follows:

22 THE COURT: Please have a seat.

23 Go ahead, Mr. Kellner.

24 MR. KELLNER: Thank you, Your Honor.

25 DIRECT EXAMINATION

1 BY MR. KELLNER:

2 Q Good afternoon.

3 A Good afternoon.

4 Q Commander, can you please state your name and
5 spell your last name for the court reporter.

6 A My name is Kurt Weiler. My last name is spelled
7 W-E-I-L-E-R.

8 Q Commander, how are you employed?

9 A Been with the City of Boulder for 30 years as a
10 police officer.

11 Q Is that entire time with the Boulder Police
12 Department?

13 A No. I spent about eight months away with a
14 Special Agent with the DEA. They sent me out to Los
15 Angeles, so I came back.

16 Q Why didn't that work out?

17 A Because it was LA.

18 Q Back in the confines of Boulder here?

19 A Yes.

20 Q Can you tell the jury a little bit about your
21 career as a police officer with Boulder Police Department?

22 A So been around for a long time, did pretty much
23 everything in the department, did patrol work all three
24 shifts, worked as a narcotics investigator, worked as a
25 detective, got promoted to sergeant.

1 Then I worked as a patrol officer, was in charge
2 of the department's major crimes unit as a sergeant for five
3 years, was then promoted to commander, stayed in detectives
4 for another three years as detective commander.

5 And then since then I've had a couple other
6 assignments as a commander, one as a patrol commander on
7 watch two and three that are nights and evenings, and then
8 traffic commander and special events last year.

9 And this year I'm doing personnel and training, so
10 I get to hire people.

11 Q What does a commander do? What does that rank
12 mean?

13 A So the structure of the police department, there's
14 obviously a police chief and two deputy chiefs. And there
15 are five commanders under those two deputy chiefs. It's
16 split for either operations kinds of things, so detective
17 patrol or the staff services side which I'm now a part of,
18 so the hiring and training, that kind of stuff. So that's
19 kind of how it is if that makes sense.

20 Q I think you mentioned that you were a narcotics
21 detective at one point?

22 A Actually twice.

23 Q Twice, okay.

24 When were you a narcotics detective?

25 A Got hired in '83. I think my first stint was '87,

1 '86 or '87. And that was at the point where I kind of got
2 the bug and thought I'd leave Boulder and join the DEA. So
3 I was gone for DEA in part of '88.

4 Then I came back as a patrol officer in 1989,
5 worked patrol again and then worked again as a narcotics
6 investigator, and then kind of worked through the rest of my
7 career.

8 Q Were you a narcotics investigator or detective in
9 November of 1994?

10 A Yes, I was.

11 Q As a narcotics investigator were you primarily
12 undercover?

13 A Yeah. Believe it or not I had a pony tail and
14 rode a Harley around, did all kinds of things, so -- and I
15 didn't wear these glasses to read. So yeah, it was a
16 different time.

17 Q So you were a plain clothes officer at the time?

18 A Correct.

19 Q And what was your job as a narcotics investigator?

20 A To investigate narcotics crimes, develop
21 informants, try to do search warrants to gather illicit
22 drugs. Back then marijuana grow operations were illegal, so
23 we went after some of them.

24 But really we were kind of jacks of all trades.
25 And if the regular detectives needed us for assistance, then

1 we would be used to assist them in other cases kind of like
2 this one.

3 Q When you say this one, you're referring to the
4 investigation of the murder of Marty Grisham?

5 A That's correct.

6 Q As a narcotics investigator was one of your
7 responsibilities to try and locate people?

8 A Absolutely.

9 Q Back then as a narcotics investigator did you
10 drive a marked or unmarked car?

11 A The cars that we use were definitely not marked.
12 They weren't even part of the police fleet. So they were
13 basically just either old rental cars or whatever we could
14 get, something that definitely did not look like a police
15 car. Because that was the whole idea for us to be able to,
16 you know, be in a neighborhood or contact somebody and for
17 them not to see. Because I think all of us have seen
18 unmarked police cars, you know, full size Crown Vic without
19 lights on them, but you still go yeah, that's a police car.
20 So we tried to get cars that aren't like that.

21 Q Purpose of that is that so that you can conduct
22 surveillance without being obvious about it?

23 A Correct.

24 Q Now, you just mentioned earlier that you were
25 assigned to assist in the investigation of the murder of

1 Marty Grisham. What was your initial role in the case?

2 A Some of the things I did the first day, did some
3 interviews with people, called people back from a tip from
4 tip line calls, those kinds of things. And basically it was
5 really all hands on deck to try to get everything done that
6 we needed to get done as fast as we can, you know, as early
7 in the investigation as possible.

8 Q Did there come a time in your investigation, or at
9 least when you were assisting, that officers were trying to
10 locate a person named Michael Clark?

11 A That's correct.

12 Q Do you recall when it was that you were assigned
13 to locate Michael Clark?

14 A My start on this case was actually the day after
15 the homicide, so November 2nd. So that was really the first
16 day where it started getting tips, doing, you know,
17 investigative things, you know, and just being part of the
18 team, so getting up to speed knowing what has occurred to
19 that point, then moving forward.

20 Q As you're trying to -- well, did there come a time
21 that you were actively trying to locate Michael Clark?

22 A So on the morning of the 3rd one of the jobs that
23 I did was call the Department of Motor Vehicles and help to
24 identify any vehicle or any vehicles that might be driven by
25 Mr. Clark. And I think we were able to identify two,

1 possibly two, a Volkswagen and a Mustang.

2 So then that information was shared with our
3 patrol folks because really everybody was out looking.
4 There was a few places that we were looking to try to locate
5 him. And then we wanted to put the information out to all
6 of our patrol officers so they could be out looking for the
7 car.

8 Q And where were you looking for Michael Clark?

9 A Well, between the known residences that we had for
10 his parents, I think we had an address in Gunbarrel, and
11 then I think really wherever else we think we could find
12 him.

13 Q And tell the jury why you were trying to locate
14 the defendant.

15 A Well, as the investigation continued we -- it was
16 determined that Mr. Clark had written some checks on
17 Mr. Grisham's account actually writing them out to himself.
18 And so based on that information even though it was early in
19 the investigation Mr. Clark's name drew a lot of attention
20 as a potential suspect.

21 Q Do you recall setting up a surveillance position
22 off of Gunbarrel Avenue here in Boulder looking for the
23 defendant?

24 A So like when I mentioned earlier we identified two
25 possible vehicles that Mr. Clark was driving. And about

1 2:00 on the 3rd, 2:00 in the afternoon, one of our patrol
2 officers saw that vehicle. And it was parked at an address
3 up in Gunbarrel.

4 And so at that point he calls in, he doesn't go
5 anywhere near the vehicle, the patrol officer, but lets us
6 know. And so myself, Detective Denig, Detective Wyton also
7 a narcotics detective, and I think Sgt. Matthews -- I was
8 looking at my report and I think he was out there also --
9 set up a surveillance on the vehicle starting at about
10 2:00 that afternoon.

11 Q As you have your surveillance set up, did you
12 eventually find Michael Clark?

13 A Yes, he -- he -- we were able to park a
14 surveillance van right next to his vehicle, his Mustang.
15 And luckily we were able to park it on the driver's side of
16 his vehicle.

17 So I was in the van. I thought whoever would come
18 to that van and try to open up the locked door would
19 probably be pretty good chance that he's our guy. Plus we
20 also had information -- we had a picture of Mr. Clark. So I
21 had a limited view, but some view of the person as they were
22 coming to the car. And as he was actually approaching the
23 car I was almost positive it was him.

24 The other thing if I could, as we were set up on
25 that surveillance waiting -- waiting on that car, another

1 Detective, Carey Weinheimer, was talking to the Marine
2 recruiter here in Boulder and who had had conversations with
3 Mr. Clark.

4 And at that point we had information that
5 Mr. Clark had had a 9mm handgun in his possession. So I
6 wanted to make sure I shared that with all the other
7 surveillance units so they were aware that Mr. Clark may be
8 armed.

9 Q Is the fact that Mr. Clark may have been armed why
10 you pulled up the van next to the Mustang that was
11 identified as belonging to Mr. Clark?

12 A I think what we wanted to do was limit his options
13 for leaving and try to control the situation as quickly as
14 possible and not have it escalate. So I think that was the
15 reason why the van was so close. And then the other
16 surveillance detectives were close by, and I was in contact
17 with them by radio.

18 Q When you were going to -- what was the plan when
19 you found Michael Clark? Were you just going to talk to him
20 or what were you going to do?

21 A Well, the first thing is we wanted to safely get
22 him in custody. And with the concern about the handgun we
23 didn't want to mess around with that at all. We were taking
24 it very seriously. It's a homicide investigation. We just
25 got information that he had been seen with a handgun not too

1 long prior to the homicide. So we wanted to get him into
2 custody.

3 And at that point we knew we had probable cause to
4 arrest him for the check fraud case. So that was very
5 helpful for us to be able to not have to just go up and ask
6 for his cooperation, but we were going to place him under
7 arrest for those checks at that time.

8 Q How long did you wait in your surveillance vehicle
9 before you saw the defendant?

10 A Usually it doesn't happen this well. We didn't
11 have to wait too long. It was about 40 minutes. And that's
12 when Mr. Clark came to his vehicle.

13 Q And where did he come from?

14 A He came from apartment F. And I think it's -- I
15 didn't -- the number's in Gunbarrel. I can look it up and
16 tell you. I think it's 5948 I think.

17 Q Good memory, but we'll come back to that.

18 So you said that your plan was to place him under
19 arrest for the forgery. When he came out of the apartment
20 in Gunbarrel what did you do?

21 A I quickly opened the sliding door on the van and
22 placed a gun to the back of his head and told him I was a
23 Boulder police officer, not to move, he was under arrest.

24 Q You actually pulled out a weapon?

25 A Yes, and I pinned him up against his car with my

1 body because I didn't want to give him an opportunity to
2 turn and face me. I didn't want him to reach into anything.

3 I told him to keep his hands out. And as he was
4 coming to the car I was giving instructions to the other
5 detectives.

6 We had talked about what we were going to do when
7 he came out, that it was going to be very quick. I was
8 going to keep him immobile at that -- at that point, and
9 then the other detectives were going to come and cuff him
10 because with a gun in one hand, being able to cuff somebody
11 with one hand is really not possible.

12 Q Now, typically when you arrest someone do you pull
13 out a weapon?

14 A No.

15 Q And in this case you did that because what?

16 A The information about him having a firearm from
17 the Marine recruiter and that it was a homicide case that we
18 were looking at him for ultimately, even though we only had
19 charges at that point for the check fraud.

20 Q So once you pinned him against the car what did
21 the other officers do?

22 A They got there very quickly, and I was very happy
23 for that. He was placed in handcuffs. And then we kind of
24 shifted gears, or I tried to shift gears with Mr. Clark.

25 Q What do you mean by shifting gears?

1 A I knew there was a lot of things we wanted to talk
2 to Mr. Clark about. And meeting somebody that way really
3 tends to put a damper on that. So I tried to do my best to
4 talk to him and say hey, you know, we're here about the
5 checks, you know, there's lots of other things I want to
6 talk to you about, I know you're -- you have questions. And
7 so I really just started to try to build a rapport with
8 Mr. Clark.

9 Q At this point is he in handcuffs?

10 A Yes, because we're standing by his car. It's
11 November. I remember the day, it was pretty cold, pretty
12 damp, kind of a light snow coming down. And so I kind of
13 launched into my conversation with him trying to build that
14 rapport with him.

15 And then I asked him if he would feel more
16 comfortable talking up in the apartment as opposed to out by
17 his car, kind of gave him that option. And he said lets go
18 up to the apartment.

19 Q So you did in fact go up to the apartment then?

20 A Correct.

21 Q What happened next?

22 A So in the apartment it's myself, Mr. Clark,
23 Detective Denig, Detective Wyton, and I'm almost positive
24 Sgt. Matthews.

25 Mr. Clark and I were sitting at the table in the

1 kitchen dining room area, had him uncuffed at that time
2 because my plan was to have him sign some documents for me.
3 Because again, I'm looking to engage him as much as I can
4 and ask for his cooperation.

5 So there was going to be three documents that I
6 was going to work through with him to try to elicit his
7 cooperation so we could continue to talk to him.

8 MR. KELLNER: Your Honor, I'd like to approach the
9 witness with People's 53, 54 and 55.

10 THE COURT: Yes.

11 Q (By Mr. Kellner) Commander, do you recognize the
12 photographs I've handed you?

13 A Yes.

14 Q How do you recognize them?

15 A Those are pictures of Mr. Clark's Mustang with the
16 plate that I had located from the DMV earlier that day. So
17 there's a shot from the rear, left side, and then there's a
18 frontal shot just of the emblem and a little bit of the
19 grill and little bit of the front of the car.

20 Q Are those fair and accurate depictions of
21 Mr. Clark's Mustang as it appeared on November 3, 1994?

22 A Absolutely.

23 MR. KELLNER: Judge, I'd ask to admit People's 53,
24 54 and 55.

25 THE COURT: Any objection or voir dire?

1 MS. MILFELD: No objection, no voir dire.

2 THE COURT: 53 and 54 and 55 will be admitted.

3 MR. KELLNER: May I publish them to the jury?

4 THE COURT: Yes.

5 Q (By Mr. Kellner) Commander, I know we really just
6 kind of covered it, but can you tell us what we're looking
7 at here on the big screen?

8 A The left side of the Mustang. And so the
9 surveillance van that I was talking about is basically just
10 a full size I think it's a Chevy van at the time, had tinted
11 windows. So we were able to park it right to that side of
12 the car, so the driver's side of the car.

13 It's the rear of the car and there's the front
14 and --

15 Q This car appears to have sort of an odd paint job.
16 Can you describe the coloring of the vehicle?

17 A So a lot of it is primer gray. But there's
18 portions of it where some green kind of shows through. And
19 obviously that piece there is probably one of the better
20 examples of the green showing through on the paint job.

21 Q What do you mean by primer gray?

22 A I don't know a lot about cars, but I've done a
23 little body work. And when you fix them and if you're going
24 to do body work and you want to re-paint it or do any kind
25 of bondo or whatever, you do that finish work and then apply

1 a base coat of primer paint. And that's usually gray. And
2 then finish color would be added later.

3 Q Now Commander, you mentioned that you went up into
4 the apartment on Gunbarrel Avenue with the defendant. Did
5 you ask if you could search the apartment?

6 A Well, we had the conversation, and that was part
7 of the three items of paper that I wanted to explain to
8 Mr. Clark. The first was an advisement of rights because he
9 was under arrest and that I still -- and I wanted to talk to
10 him.

11 So in order for me to be able to do that and to be
12 able to use any information that he gave me I would have to
13 give him his rights and he would have to voluntarily waive
14 them.

15 Q Did Mr. Clark in fact give you permission to
16 search the apartment?

17 A Yes, he did.

18 So in addition to the advisement of rights forms,
19 there are actually two of what are called consent to search
20 forms. And we filled out two for those. And again, it's
21 basically asking Mr. Clark's permission for us to search
22 first one was the common areas in the apartment.

23 He was there not on the lease, but there was
24 somebody there who rented the apartment and Mr. Clark was
25 staying there. So we asked for consent to search the common

1 areas and the places that Mr. Clark had control over.

2 And then the last thing we asked for consent to
3 search for was the vehicle.

4 Q Did you search the apartment?

5 A Yes.

6 Q The common areas?

7 A Yes.

8 Q Did you collect any evidence related to your
9 investigation?

10 A No.

11 Q And what about the car, did you search the car as
12 well?

13 A Yes, same thing. We searched the car and did not
14 find anything in the car.

15 MR. KELLNER: Your Honor, may I approach the
16 witness again?

17 THE COURT: Yes.

18 Q (By Mr. Kellner) Handing the witness what's been
19 marked as People's Exhibit 56 for identification.

20 A This is the advisement of rights form that's used
21 by the department, or used by the department back in '94.
22 It's got some information at the top that I filled out,
23 basically lists the date, the location, the time that we
24 were talking to Michael Clark who was 19 years of age, that
25 we were at the address in Gunbarrel 5948 Gunbarrel apartment

1 F, and that he was being advised of his rights by myself and
2 Detective Denig and that we had identified ourselves as
3 officers of the Boulder Police Department.

4 And then it goes down through the four rights.
5 Asked if he understood each of those rights and we checked
6 yes. And then asked you understand that any of these above
7 mentioned rights can be exercised now or at any time during
8 the interview, marked yes. And then Mr. Clark signed, I
9 countersigned along with Rich Denig.

10 And then the final question, understanding the
11 above rights do you choose to voluntarily waive your rights
12 and make statements or answer questions. And again, it was
13 marked yes and again signed by myself, Detective Denig and
14 Mr. Clark.

15 MR. KELLNER: Your Honor, I'd ask to admit
16 People's 56.

17 THE COURT: Any objection or voir dire?

18 MS. MILFELD: No objection.

19 THE COURT: 56 will be admitted.

20 MR. KELLNER: Your Honor, if I may I'd like to
21 publish a previously admitted photograph of People's 44.

22 THE COURT: Okay.

23 Q (By Mr. Kellner) Commander, do you recognize the
24 person shown in People's Exhibit 44 which has previously
25 been admitted?

1 A Yes.

2 Q How do you recognize that person?

3 A That's the photo that we were using that day to
4 help us identify Mr. Clark as we were out searching, and
5 then that picture I saw before we went out on that
6 surveillance.

7 Q Is that a fair and accurate depiction of what
8 Mr. Clark looked like on November 3rd as well?

9 A Correct.

10 Q Is this the man that you saw that you arrested
11 outside of the Mustang?

12 A That's correct.

13 Q And do you recognize Mr. Clark here in court
14 today?

15 A Yes, I do. He's seated at defense table, gray
16 suit, purple tie, he's got a beard and short brown hair.

17 MR. KELLNER: Judge, I'd ask the record to reflect
18 identification of the accused.

19 THE COURT: Subject to cross-examination the
20 record will so reflect.

21 MR. KELLNER: And if I may I'd like to publish the
22 rights advisement?

23 THE COURT: Permission granted.

24 Q (By Mr. Kellner) Detective Denig -- I'm sorry,
25 excuse me, sir, Commander Weiler, is this a fair and

1 accurate depiction then of what I've shown you earlier as
2 People's 56, at least the top part of it?

3 A That's the top part. And those are the signatures
4 and the understanding to the rights and the check marks,
5 that's correct.

6 Q Commander, after the defendant agreed to speak
7 with you did you keep him at the apartment in Gunbarrel or
8 did you go somewhere else?

9 A We kept him at the apartment in Gunbarrel just for
10 a -- for a short time to go through all three of those
11 documents, this document and the two consent to searches.

12 But it was always my plan not to do any of our
13 interview there because what I wanted to do is to get
14 Mr. Clark back to the police department because we had been
15 out at Mr. Clark's residence both watching, waiting for him,
16 getting these documents signed hour, hour and a half. And I
17 know there was several other detectives doing work on this
18 case back at the police department.

19 So I wanted to get back to the department for two
20 main reasons. One, I wanted to be able to record -- have
21 the interview recorded with Mr. Clark. And two, I wanted to
22 check in with the other detectives with any new information
23 that might have been brought to light since we were out on
24 that surveillance. So we wanted to check in, and we also
25 wanted to do a more controlled interview with Mr. Clark at

1 the police department.

2 Q And did you in fact have that interview at the
3 police department?

4 A Yep. It was a long one.

5 Q When you say a long one, what do you mean?

6 A The whole thing lasted about three hours of
7 interview with about an hour of break in the middle. So we
8 were there a long time.

9 Q And did you actually record that interview with
10 the defendant?

11 A That's correct.

12 Q Throughout the course of the interview -- and
13 we're going to hear it later, but do you approach an
14 interview like that with someone you suspect in a homicide
15 with a plan?

16 A So Detective Tom Trujillo was the kind of case
17 agent for the case, and so he definitely had the most
18 knowledge. He had the most knowledge of what everybody else
19 was working on.

20 And so it was myself, Detective Trujillo and then
21 Carey Weinheimer who is a fraud and forgery detective at the
22 time, he's a commander now also. So it was kind of the
23 three of us. We put our heads together a little bit, got up
24 to speed on what had been happening up and to that point for
25 the investigation, and then we started what we thought would

1 be a long conversation with Mr. Clark.

2 And the reason why we thought that is that we
3 really wanted to keep him talking as long as we could
4 because we wanted to try to get as much information as
5 possible based on that interview because we knew that was
6 really going to be our only shot at that. And so we wanted
7 to cover everything backwards, forwards, up and down.

8 And then, like I said, partway through we took a
9 break, we conferred with people outside of the interview
10 room, kind of told other people outside -- this was before
11 we had the ability to remotely view the interview from
12 outside the room. We have that now.

13 So we would have to come out, we took a break for
14 about an hour, we conferred with other detectives, then went
15 back in and finished up for another hour.

16 Q When you say we, I just want to be clear as to who
17 the people were inside the interview room.

18 A So Mr. Clark was there obviously, myself, Tom
19 Trujillo, and I think the case detective whose case it was,
20 and then at that time Detective Carey Weinheimer.

21 Q Throughout the course of the interview do you
22 approach the defendant with anything -- well, what police
23 terminology may call a ruse?

24 A Yeah, there were a couple of things that we did
25 that day that we were hoping for the best to maybe elicit

1 some information from Mr. Clark.

2 Q And can you tell the jury about when you say you
3 approached him with some things, what do you mean?

4 A There were -- the things that I remember off the
5 top of my head, there was some talk about getting shoe
6 impressions, you know, that we might be able to match that
7 up to footprints left at the scene of the homicide.

8 We also did a gunshot residue test that based on
9 the information at the time, the kits that were available at
10 the time we knew we were well outside the parameters for the
11 information to be useful, but we didn't want Mr. Clark to
12 know that. So we wanted to move forward using that also as
13 a ploy to at least get him thinking that maybe we have more
14 information than we do.

15 Q What's your ultimate goal here when you're talking
16 to the defendant in this interview room?

17 A To find the truth. And sometimes if we're able to
18 ask the right questions and in the right order and maybe
19 plant the seed in somebody's mind that we have more
20 information than we do, sometimes we're able to get people
21 to admit to things.

22 And really the whole basis of our interview, and I
23 talk about it several times throughout the interview, is
24 that we want the truth. We don't want him to make up
25 anything, we don't want him to take anything away. We just

1 want him to tell us what happened. And so, you know, that's
2 really what we were looking for.

3 Q Did you advise him of his rights again when you
4 started that interview?

5 A I reminded him that we had done that out at the
6 Gunbarrel house and that -- and that he -- you know, we were
7 still under the same kind of set of circumstances, that if
8 there was something that he did not want to talk about that
9 he didn't have to, but I then also added that we would still
10 like to really talk to him throughout.

11 MR. KELLNER: Judge, pursuant to our discussion at
12 the bench I think this is a good time for me to stop my
13 direct examination and tender the witness prior to admitting
14 the exhibit.

15 THE COURT: Do you want to do that prior to
16 offering the exhibit?

17 MR. KELLNER: Judge, in that case I'd offer
18 People's 59 which has been agreed upon and stipulated by the
19 People and the defense.

20 THE COURT: As a true and accurate copy of the
21 interview?

22 MR. KELLNER: Yes, Your Honor.

23 THE COURT: And Ms. Ring, you agree with that?

24 MS. RING: We do.

25 THE COURT: All right. Then 59 will be admitted.

1 All right. Cross-examination, Ms. Ring,
2 Ms. Milfeld.

3 MS. MILFELD: One moment, Judge.

4 (Pause.)

5 CROSS-EXAMINATION

6 BY MS. MILFELD:

7 Q Commander Weiler, you talked about how one of the
8 first things when you arrested Mr. Clark was asking for his
9 cooperation?

10 A Correct.

11 Q You spent many hours with Mr. Clark?

12 A Correct.

13 Q You spent total about six hours with him?

14 A Right.

15 Q Throughout the entire time you were with him he
16 was cooperative with you?

17 A Yes, he was.

18 Q He was polite?

19 A Yes.

20 Q Respectful?

21 A Yes.

22 Q He was completely compliant with what you had
23 asked of him?

24 A Absolutely.

25 Q You talked about how when you arrested Mr. Clark

1 due to safety concerns you had pinned him up against his
2 car?

3 A Right.

4 Q You also placed a gun to his head?

5 A Right.

6 Q When you did those actions Mr. Clark didn't resist
7 in any way?

8 A Right.

9 Q When you approached him he didn't try to run away?

10 A Right.

11 Q Did he try to fight you in any way?

12 A No.

13 Q He was completely cooperative when you arrested
14 him?

15 A Yes.

16 Q You talked about how you went inside with
17 Mr. Clark, inside of the townhome, and went over various
18 forms with him?

19 A Right. Sorry.

20 Q That's okay.

21 One of the forms that you went over with him
22 Mr. Kellner showed you was the Miranda advisement?

23 A Yes.

24 Q You went over that form with him by first reading
25 it to him?

1 A Right.

2 Q You let him read it himself?

3 A I don't remember if he read it himself. I think
4 we were sitting side by side and it was in front of both of
5 us.

6 Q So the assumption was he was reading along as you
7 were reading it to him?

8 A I guess I wouldn't assume that, but I was hoping
9 he was following along.

10 Q It appeared that he was paying attention?

11 A Correct.

12 Q When you went over the form with him, obviously he
13 didn't have to sign it?

14 A Absolutely.

15 Q It's voluntary?

16 A Right.

17 Q By signing it he agreed to cooperate with you?

18 A Correct.

19 Q That was the -- one of the ways he agreed to
20 cooperate is he agreed to be interviewed by you and other
21 detectives?

22 A Right.

23 Q Other forms that you went over with him were
24 consent to search forms?

25 A Right.

1 Q You had asked him whether you or other detectives
2 could search areas of the townhome that he had access to?

3 A Right.

4 Q You went over that form with him?

5 A Right.

6 Q Of course he didn't have to sign that if he didn't
7 want to?

8 A Same as the first, correct.

9 Q It's completely voluntary?

10 A Right.

11 Q He agreed to that as well?

12 A Yes.

13 Q He cooperated by agreeing to let you and other
14 detectives search parts of the townhome?

15 A Yes.

16 Q You also went over another form with him, another
17 consent to search form?

18 A Correct.

19 Q That was for the Mustang car that was sitting
20 outside?

21 A Right.

22 Q You asked whether or not you could search the
23 entire car?

24 A Right.

25 Q Again, all these things that you're asking of him

1 were completely voluntary?

2 A Yes.

3 Q He doesn't have to do this at all?

4 A Correct.

5 Q He agreed to let you search his car?

6 A Right.

7 Q You talked with Mr. Kellner about how as a result
8 of him agreeing to all this detectives searched areas of the
9 townhome?

10 A Right.

11 Q They also searched his Mustang?

12 A Right.

13 Q At this point you had also talked about how
14 Mr. Clark was a suspect in a homicide investigation?

15 A Right.

16 Q So in addition to having probable cause for
17 forgery, he was a substantial person of interest in the
18 murder investigation?

19 A That's correct.

20 Q So when you did these searches or when the
21 detectives conduct these searches, these searches were
22 thorough?

23 A Yes.

24 Q They were extensive to the degree that the areas
25 could be searched?

1 A Correct.

2 Q They were exhaustive?

3 A Yes.

4 Q You or other detectives did not collect anything
5 as a result of those searches?

6 A That's correct.

7 Q You didn't collect anything because you didn't
8 find anything relevant to the murder investigation?

9 A That's correct.

10 Q Commander, after you were at the townhome that
11 first day you in fact went back to the townhome to talk to
12 the owner, Bob Mann?

13 A Later that night.

14 Q You went back to talk to him to try to get more
15 information?

16 A Well, we knew he was not at the residence when we
17 did the consent. And when we learned that he did return we
18 wanted to go to try to do the same thing with the rest of
19 the residence with his cooperation.

20 Q So when you went back later that night you got
21 Mr. Mann's consent?

22 A Correct.

23 Q He let you search the entire townhome?

24 A That's correct.

25 Q And again, because this is a murder investigation,

1 Michael Clark is a suspect, you're looking for anything
2 that's going to be relevant?

3 A Right.

4 Q You searched the entire townhome completely?

5 A We searched the rest of the portions that we did
6 not search earlier.

7 Q You did that search carefully?

8 A Correct.

9 Q When you did that search you did not collect
10 anything?

11 A Correct.

12 Q You didn't collect anything because, again, you
13 didn't find anything in the entire townhome relevant to the
14 murder investigation?

15 A Right.

16 Q When you talked with Mr. Mann you also learned
17 that Michael Clark had been living there since the beginning
18 of October?

19 A I don't recall that specifically.

20 Q But you recall speaking to Mr. Mann with Detective
21 Denig?

22 A Right. I could refer to my report. I just don't
23 have a recollection of that.

24 Q But you remember naming off a specific date, but
25 Mr. Mann telling you he had been there quite some time?

1 A Right.

2 Q It just hadn't been the few days before that?

3 A Right.

4 Q He had been there for at least over a week before
5 you had been there?

6 A That's the part I don't remember.

7 Q Okay. But it didn't sound to you like it was he
8 just got there?

9 A I can refer to my report if you'd like if it's in
10 there.

11 MS. MILFELD: May I approach, Judge?

12 THE COURT: Yes.

13 Q (By Ms. Milfeld) I'm showing you Detective Denig's
14 report at the bottom of page 2. And I'd ask you to review
15 that.

16 A Okay. And --

17 Q Just -- and just let me know when you're done.

18 A Okay.

19 Q Does that refresh your memory about how long
20 Mr. Mann told you that Mr. Clark had been there?

21 A Not really. And I think that's really just
22 because during this investigation so many pieces were given
23 to different people, it was hard for everybody to know what
24 everybody else was doing and seeing. I would imagine that
25 there was a conversation between Detective Denig and I that

1 he would document that in his report.

2 Q But you do remember going over and speaking to
3 Mr. Mann?

4 A Absolutely.

5 Q And you remember having a conversation with him?

6 A Yeah.

7 Q We talked earlier about how you pinned him up
8 against the car when he tried to open the car door?

9 A Right.

10 Q He was handcuffed right away?

11 A Right.

12 Q And that was because of the safety concerns that
13 you had?

14 A Right.

15 Q When you went inside the townhome you actually
16 unhandcuffed him?

17 A Correct.

18 Q Because at that point you didn't think that he
19 posed any sort of safety threat?

20 A After he was cuffed he was searched, he was
21 separated -- I think he had a bag. I think he was separated
22 from that bag at that point. And so then we checked around
23 the area of the table initially, made sure there was nothing
24 there.

25 And again, part of trying to develop that rapport

1 with him I wanted to get the handcuffs off of him because my
2 plan was to have him to be able to sign the documents that I
3 was planning on having him sign if that's the route that we
4 took.

5 Q So he was -- we already talked about how he was
6 very cooperative?

7 A Correct.

8 Q And one of the reasons why you took the handcuffs
9 off is because he was so cooperative?

10 A Once he was searched and we found out that he
11 didn't have any weapons on him or near him, then yeah,
12 everything that he was doing and saying at that point led us
13 to believe that he would continue to be cooperative. And so
14 it was -- at that point it opened the door to allow us to
15 continue what our plan was in trying to keep that
16 conversation going.

17 Q And I wanted to talk to you about the search that
18 you did of Mr. Clark himself when he was arrested. You
19 mentioned that he had a backpack and a wallet on him?

20 A I think Denig had that information. I don't
21 remember specifically who searched him. I might have
22 searched him at the car a little bit, but it was in
23 conjunction with Denig and I think Wyton as he was arrested
24 right there.

25 Q And as far as you remember nothing was found

1 relevant to the murder investigation as a result of that
2 search?

3 A Correct.

4 MS. MILFELD: No further questions.

5 THE COURT: All right. Any redirect at this time,
6 Mr. Kellner?

7 MR. KELLNER: Judge, not at this time.

8 THE COURT: Okay. Would counsel approach?

9 (The following proceedings occurred at the bench
10 out of the hearing of the jury.)

11 THE COURT: I just want to confirm with everybody
12 that you're still on board with the plan to excuse the jury
13 at this point, and then for us to -- first thing tomorrow
14 morning we'll play the recording that's been admitted as 59?

15 MR. BRACKLEY: Okay. I guess play it, then we'll
16 continue our direct as we would have after the playing.

17 THE COURT: What do you want me to instruct
18 Commander Weiler to do in terms of his return? I'm assuming
19 you don't want him sitting on the witness stand for the two
20 hours that the video is being played.

21 MS. RING: I do.

22 THE COURT: Well, okay.

23 MS. RING: I was just kidding.

24 THE COURT: Do you know how long that tape is?
25 And tell him to be here, you know, 10 or 15 minutes before

1 the end of the tape or the end of the recording.

2 MR. KELLNER: Your Honor, the only other thing I
3 may do before he steps off the stand then is present him
4 with a copy of the transcript. Because my intent would be
5 to provide to the jury a transcript that they can read along
6 so they can understand who is saying what given the number
7 of voices going on.

8 THE COURT: Okay. Well, we probably need to do
9 that before he leaves today.

10 MR. KELLNER: I think that would be appropriate if
11 he's not going to come back. That's why I raise it now.

12 MR. BRACKLEY: My personal expectation would be
13 that he would be here, you know.

14 THE COURT: All right. Then I'll tell him to
15 return at 9:00. You want to take up the foundation for the
16 transcript right now?

17 MR. KELLNER: It won't take long, Judge.

18 MR. BRACKLEY: We could just do it the morning.

19 MR. KELLNER: I think we could do it in the
20 morning though.

21 THE COURT: All right. Okay.

22 (The following proceedings occurred in open
23 court.)

24 THE COURT: So ladies and gentlemen of the jury, I
25 mentioned to you earlier I needed some extra time to take

1 care of some scheduling issues. That's what the attorneys
2 and I have been talking.

3 The next step in the trial process is to play the
4 recording of the interview that was admitted as Exhibit 59.
5 It is lengthy, probably several hours long. And I'm
6 concerned about starting it now and then interrupting it
7 randomly at some point around 5:00.

8 So what we're going to do so that you can listen
9 to that recorded interview from start to finish without
10 interruption is we're going to take the evening recess.

11 And when you come back tomorrow morning at
12 9:00 there may some brief questions for the commander, but I
13 anticipate that almost immediately you'll be listening to
14 that recorded interview.

15 The other reason that I'm comfortable recessing at
16 this point in time is two reasons really. The attorneys
17 tell me that we are ahead of schedule. And that probably
18 may seem hard for you to believe, but I think that's true.
19 And I'm comfortable with that assessment at this point in
20 the trial.

21 The second reason that I'm comfortable taking the
22 recess now is that there's a football game at the University
23 of Colorado tonight. Traffic for you to get away from the
24 courthouse back to wherever you're going, whether it's home
25 or otherwise, is going to be pretty difficult. So the fact

1 that we can get you out of here 35 minutes early I think
2 makes some sense to me.

3 So we're going to take the evening recess. We'll
4 reconvene tomorrow morning at 9:00. Remember the admonition
5 that I've given you at every other recess. It applies at
6 this recess as well.

7 You must not communicate about or discuss this
8 case with anyone by any means. This includes members of
9 your family, people involved in the trial, other jurors or
10 anyone else. If someone approaches you and tries to discuss
11 the trial with you, let me know about it immediately.

12 Don't read or listen to any news reports of the
13 trial. Don't consult any outside reference materials,
14 including a dictionary, the encyclopedia or the internet.

15 Finally, remember that it is especially important
16 that you do not form or express any opinion on the case
17 until it is finally submitted to you.

18 So we'll be in recess until 9:00 tomorrow morning.
19 Please have a good evening and drive safely.

20 (The jury left the courtroom.)

21 THE COURT: All right. The record should reflect
22 the jury has left the courtroom.

23 Commander, if you would please be back here at
24 9:00 tomorrow morning -- and I know we took you out of
25 order. I'm sorry to press you like that, but I appreciate

1 your cooperation. So you're excused until 9:00 tomorrow
2 morning.

3 Is there anything else that we need to take up on
4 the record for the People?

5 MR. BRACKLEY: No, Your Honor.

6 MS. RING: One thing you and I need to discuss.

7 MR. KELLNER: No, Judge, thank you.

8 THE COURT: Anything else for the record right
9 now, Ms. Ring?

10 MS. RING: Judge, just that I know that the
11 prosecution intends on admitting the -- well, they've
12 already admitted the interview and the transcript.

13 You know, I'm going to be concerned at some point
14 about what the jury does with that and making sure that if
15 the jury wants to see the interview or the transcript again
16 that we have -- you know, I think the case law provides for
17 that to be --

18 THE COURT: During deliberations?

19 MS. RING: Yes.

20 THE COURT: Absolutely. I will tell you that
21 typically what I would do is allow the jury to review that
22 in the jury room under the supervision of the bailiff, who
23 is instructed that she would play whatever the audio or
24 video evidence is from start to finish straight through
25 without interruption, without rewind. But we can talk about

1 that once we get to the end of the trial.

2 But I understand your concern. I certainly would
3 not at least at this point in time consider allowing the
4 jury unfettered access to any of the audio or video
5 exhibits.

6 All right. If there's nothing else, then we'll be
7 in recess until 9:00 tomorrow morning. I do not have an
8 8:15 docket tomorrow morning. This courtroom I think will
9 be secured. In fact, once everybody leaves if you want I
10 can call -- I can call security, they can come lock the door
11 and then things should be secured until tomorrow morning.

12 So everybody have a good evening.

13 MR. KELLNER: Thank you, Your Honor.

14 (The trial concluded for the day.)

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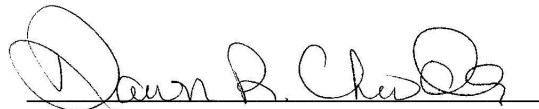
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 18th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 11,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

1 I N D E X

2	WITNESSES FOR THE PEOPLE:		PAGE
3	NANCY CORNWELL,		
4	Direct Examination by Mr. Brackley	4	
	Cross-Examination by Ms. Ring	12	
5	DETECTIVE MELISSA KAMPF,		
6	Direct Examination by Mr. Brackley	17	
	Cross-Examination by Ms. Ring	27	
7	SGT. DONALD BREIER,		
8	Direct Examination by Mr. Kellner	30	
9	JASON BRESLIN,		
	Direct Examination by Mr. Brackley	38	
10	STACEY HOWELL,		
11	Direct Examination by Mr. Kellner	46	
12	RICH DENIG,		
	Direct Examination by Mr. Kellner	58	
	Cross-Examination by Ms. Milfeld	68	
13	Redirect Examination by Mr. Kellner	73	
14	COMMANDER KURT WEILER,		
15	Direct Examination by Mr. Kellner	79	
	Cross-Examination by Ms. Milfeld	101	
16			
17	EXHIBITS FOR THE PEOPLE:	OFFERED	ADMITTED
18	46 - Receipts	44	44
	47 - Photo	48	48
19	48 - Photo	63	63
	51 - Property Report	67	67
20	52 - Carmex Container	65	65
	53 - Photo	91	91
21	54 - Photo	91	91
	55 - Photo	91	91
22	56 - Advisement of Rights	94	94
	59 - DVD Interview of Michael Clark	100	101
23			
24			
25	REPORTER'S CERTIFICATE * * * * *		117

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

2 (The following proceedings occurred in the
3 afternoon.)

4 THE COURT: We're back on the record in People
5 versus Michael Clark. Mr. Clark is present, all counsel are
6 present.

7 Is there anything to take up on the record before
8 we bring the jury in?

9 MR. KELLNER: Not from the People.

10 MS. RING: No.

11 THE COURT: All right. Would you bring the jury
12 in please?

13 (The jury returned to the courtroom.)

14 THE COURT: Please be seated. Welcome back,
15 ladies and gentlemen.

16 Mr. Brackley, would the People call their next
17 witness?

18 MR. BRACKLEY: Thank you, Your Honor. The People
19 call Nancy Cornwell.

20 THE COURT: Ma'am, would you step forward please?
21 You can come on all the way up here, all the way up by the
22 witness chair there. Then if you would please face me and
23 raise your right hand.

24 NANCY CORNWELL,

25 called as a witness on behalf of the People, having been

1 first duly sworn, was examined and testified as follows:

2 THE COURT: Please have a seat.

3 Go ahead, Mr. Brackley.

4 MR. BRACKLEY: Thank you, Judge.

5 DIRECT EXAMINATION

6 BY MR. BRACKLEY:

7 Q Good afternoon, ma'am.

8 A Good afternoon.

9 Q Can you state your name and spell your last name
10 for the record?

11 A It's Nancy Cornwell, C-O-R-N-W-E-L-L.

12 Q Are you currently employed and by whom?

13 A Yes, I'm currently employed at Montana State
14 University.

15 Q What do you do there?

16 A I'm the dean of the college of arts and
17 architecture.

18 Q And how long have you been with Montana State
19 University?

20 A Three months.

21 Q What did you go do before that?

22 A Before that I was in Columbia, Missouri where I
23 was the interim pro-host at Stevens College for about a
24 year.

25 Q Before that?

1 A Before that I was the Ithaca College in upstate
2 New York in Ithaca. And before that I was at Linfield
3 College in Oregon. And before that I was at Western
4 Michigan University in Kalamazoo, Michigan. And that would
5 take me back to Boulder.

6 Q Okay. When were you in Boulder?

7 A I was in Boulder between July of 1994, and I left
8 in the summer of '96.

9 Q And when you were in Boulder were you employed --
10 or were you at the University of Colorado?

11 A I was. I was a doctoral student at the university
12 teaching there.

13 Q And when you were in Boulder where were you
14 living?

15 A I was living at the Fairway Apartments on Arapahoe
16 Road.

17 Q And how long did you live at the Fairway
18 Apartments for?

19 A From approximately July when I moved to Boulder,
20 and I left in February I believe it is, beginning of
21 February of the following year.

22 Q Okay. As you sit here today do you remember what
23 apartment you lived in?

24 A Yes. It was apartment 424. It was at the end of
25 the building you see coming off of the U, and it was the

1 second floor end unit on the right.

2 Q Let me show you two photos beginning with
3 People's -- let's start with People's 5 which is already in
4 evidence. And I'll publish that for the jury at the same
5 time. And I've also handed you People's 1 which is in
6 evidence as well. Do you recognize People's 5?

7 A Yes, I do.

8 Q Is that where you lived back in 1994?

9 A Yes, in the second floor apartment on the right.

10 Q I'm going to give you a pointer, and you can just
11 show us that particular apartment that you lived in because
12 I'm going to talk a little bit more in depth about it.

13 A That one right there.

14 Q Did you know Marty Grisham when you were living in
15 that building?

16 A Yes, I had met Marty.

17 Q And where did Marty live?

18 A He lived in that apartment right there.

19 Q And let me ask you to take a look at People's 1 in
20 evidence. And I'll put that up there for the jury as well.
21 Just so we get a sense of your orientation of -- well, why
22 don't you show us your building. And I'll ask you to point
23 out some other things for the sake of your testimony and
24 your orientation.

25 A I was fourth floor -- or second floor the end

1 right there.

2 Q Okay. And did you know the manager at the time,
3 Kirk Magill?

4 A Yes.

5 Q And do you see the -- there's kind of that
6 horseshoe shaped parking lot up at the -- kind of the top
7 center of the photo?

8 A Right there, um-hmm.

9 Q Were there other parking areas for that apartment
10 complex that you would use other than that one?

11 A That was the one that was designated, so I parked
12 my car there. But people I knew rented spots here.

13 Q And was there access from that parking lot into
14 the Fairway Apartments?

15 A Yes.

16 Q Where was that access?

17 A This was the mailbox area there, so it was
18 right -- I'm guessing right in there.

19 Q So that would be a little walkway from your area
20 into that parking lot?

21 A Correct.

22 Q Do you recall November 1, 1994?

23 A Yes.

24 Q And were you home in the evening after 9:30 p.m.
25 on November 1, 1994?

1 A Yes, I was. I was home that evening.

2 Q And how do you recall November 1, 1994?

3 A I had put my children to bed. My daughter doesn't
4 go to sleep easily. She was 9 at the time. And they had --
5 can I use the pointer?

6 Q Sure.

7 A Well, actually it was the other picture. But they
8 had a -- their bedroom was the door -- the window to the
9 bedroom was right there. So typically when she goes to bed
10 she listens to this, it sounds really funny, but it was a
11 meditation tape.

12 And so I put her to bed. I had come out in the
13 living area and I heard shots. And my immediate response
14 was to go back into the bedroom and check on the kids, which
15 is what I did.

16 Q Could you characterize for the jury how many shots
17 you heard?

18 A My recollection was three at the time, then I kind
19 of went on autopilot and went back in to check the children.

20 Q Could you characterize for the jury whether these
21 are shots in the distance or they're shots right there?

22 A They were right there. I mean, that's why I ran
23 back into the bedroom. I thought they were -- I thought
24 they might have been immediately below me actually.

25 Q Okay. And when you went back into the bedroom

1 anything unusual?

2 A No. My daughter was still awake and she was on
3 the top bunk. And I pulled her off the top bunk and put her
4 on the lower bunk with my son who was asleep, slept through
5 the entire thing, told her to stay there, then I ran back
6 out in the living room.

7 Q Okay. And where did you go from there?

8 A I went out these doors. It wasn't cold out.
9 These doors were open. Actually all the windows and doors
10 were open. But there are these blinds at the time were
11 hanging in this patio area, so I went through the blinds out
12 onto the patio.

13 Q Okay. And let me show you that other photo,
14 People's 1. When you got out there what did you see? What
15 did you do? What happened next?

16 A So I went out there, and I had heard footsteps
17 going off this way. So I was looking to see if I could see
18 anyone. So they were going off to the left. And so I was
19 looking over there, and then Kirk came out this way starting
20 to walk across this plaza towards me.

21 Q And Kirk being the building manager?

22 A Yes, Kirk is the manager -- was the manager.

23 Q Did you have any exchange with him in this moment?

24 A Yes. I -- I yelled from the balcony Kirk, did you
25 hear that. And his response was yes. He goes was it out on

1 the golf course. And I said no, it was right here.

2 Q Okay. What did he do next?

3 A He started to walk quite directly towards the
4 stairwell that was leading up to the apartments, those four
5 units.

6 Q And what did you see him doing? Could you tell
7 his demeanor or his expression or anything along that line?

8 A As best I could. It was -- it kind of changed
9 from him walking out to him walking rather deliberately over
10 this way. My sense then was that he knew something.

11 Q What did you do next?

12 A I called 911. I immediately called 911 as quickly
13 as I could. The phone was right in the living room and
14 handsets. And I made the 911 call, and then immediately ran
15 downstairs and joined Kirk.

16 Q Okay. Let me play for you what's already -- a
17 very short portion of what is already in evidence as
18 People's 11. I think I might need to turn up our volume
19 here.

20 (The recording was played in open court.)

21 Q (By Mr. Brackley) Is that your voice on that 911
22 call?

23 A Yes, it is.

24 Q Do you remember whether that's the first or only
25 call that you made that night?

1 A That was the second call I made. The first call I
2 made before I went down and went in with Kirk and saw Marty
3 and very -- I mean, within -- within easily a minute or less
4 I was back upstairs again.

5 Q So could you tell us from the time you first heard
6 the shots to the time you saw Kirk coming towards Marty's
7 apartment how much time passed in that span?

8 A Less than two minutes.

9 Q And when you got downstairs how much time passed
10 between getting downstairs and going back up to make that
11 second telephone call?

12 A Less than two minutes. It was very quick.

13 Q You had talked about seeing -- about hearing
14 footsteps. Can we show you People's 1 again in evidence?
15 So again, orient us on where you are and tell us what you
16 hear or characterize about those footsteps that you heard.

17 A The footsteps -- so I came out on the balcony
18 right about here because I heard footsteps, and I was
19 looking to see where they went. And I was looking this way,
20 I was looking this way, I was looking to the left. The
21 footsteps went off to the left. What I heard were footsteps
22 on concrete until I couldn't hear them anymore.

23 Q And do you know whether they went up towards the
24 horseshoe or in towards that other side parking lot?

25 A I can't say for sure.

1 Q Just that they went to the left?

2 A Absolutely sure about that, yes.

3 Q Did you see anyone associated with those
4 particular footsteps?

5 A No. It was dark at that point. So at night you
6 couldn't see very well past here back then. And so -- and I
7 did not see anyone, just heard the footsteps. But I was
8 looking off those two directions, and that's when I saw Kirk
9 coming out.

10 Q So how much time would you estimate passed between
11 hearing those shots and handing that phone to the woman in
12 Marty Grisham's apartment?

13 A I'm just going to walk through. Three to four
14 minutes at the most. The second phone call, it was very
15 fast.

16 MR. BRACKLEY: Thank you, ma'am. No further
17 questions.

18 THE COURT: Cross-examination.

19 MS. RING: Thank you.

20 CROSS-EXAMINATION

21 BY MS. RING:

22 Q Ms. Cornwell, you were interviewed pretty close to
23 the night that happened or the next day by Boulder police
24 officers?

25 A Yes.

1 Q And you told them everything you remembered about
2 what happened?

3 A Yes.

4 Q Okay. And prior to testifying today the district
5 attorney show you a copy of the report of your interview
6 back in November of 1994?

7 A Yes. I received it the very end of last week.

8 Q Okay. So she sent it to you where you live?

9 A Um-hmm.

10 Q Yes? Is that a yes?

11 A Yes. Okay. I'm sorry.

12 Q That's okay.

13 So you were able to review that report and refresh
14 your memory about your recollections from 1994?

15 A Yes.

16 Q And the report when you reviewed it was fairly
17 accurate in terms of what you remembered?

18 A Yes. There was actually -- I was commenting the
19 thing at the end about the tandem bike, I don't remember
20 that.

21 Q And you certainly weren't looking at any clocks
22 when any of this was happening that night?

23 A No. I had a general awareness of the time because
24 I was wishing my daughter was asleep. But no.

25 Q So you knew it was approximately 9:30 that

1 night --

2 A Yes.

3 Q -- when you heard the gunshots?

4 A Yes.

5 Q Okay. And what I just heard you tell us is that
6 the first thing you do when you hear the gunshots is you run
7 to your kids' room?

8 A Correct.

9 Q Make sure they're okay?

10 A Yes.

11 Q Okay. And then that includes getting your
12 daughter off the top bunk and putting her in the bottom
13 bunk?

14 A Yes. It was quite fast.

15 Q But you want to make sure they're safe?

16 A Yes.

17 Q Okay. And then what I heard you tell us the next
18 thing you did is went out on that balcony?

19 A Yes.

20 Q That's when you see Kirk Magill?

21 A Yes.

22 Q Okay. And then you go in and call 911?

23 A Yes.

24 Q Okay. And you do have a cordless phone at that
25 point?

1 A Correct.

2 Q Okay. So you call 911 and give them some
3 immediate information?

4 A Yes, very brief.

5 Q Okay. And then you go downstairs?

6 A Correct.

7 Q Without your phone because you have to go back
8 upstairs?

9 A Yes, that's correct actually.

10 Q So you go downstairs, and Kirk's downstairs?

11 A Yes.

12 Q Okay. The door to the apartment's closed?

13 A That I -- I remember it being slightly ajar.

14 Q Okay. And you are down there briefly, but long
15 enough that you can definitely see Marty's been shot?

16 A Yes.

17 Q Okay. And then you go back upstairs to get your
18 phone?

19 A Yes.

20 Q Call 911 again?

21 A Correct.

22 Q And that's when we hear you on the tape bringing
23 the phone?

24 A Bringing the phone down.

25 Q Okay. And you would have been calling obviously

1 both times from your home phone number?

2 A Correct.

3 MS. RING: Nothing further. Thank you.

4 THE COURT: All right. Any redirect,
5 Mr. Brackley?

6 MR. BRACKLEY: No, sir. Thank you.

7 THE COURT: Ms. Cornwell, you can step down.
8 Can this witness be excused?

9 MR. BRACKLEY: She may.

10 MS. RING: Yes.

11 THE COURT: Thank you, Ms. Cornwell. You're
12 excused.

13 THE WITNESS: Thank you.

14 THE COURT: Would the People call their next
15 witness?

16 MR. BRACKLEY: People call Detective Melissa
17 Kampf.

18 THE COURT: Would you step forward please? Would
19 you please face me and raise your right hand.

20 DETECTIVE MELISSA KAMPF,
21 called as a witness on behalf of the People, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please have a seat.

24 For the People? Go ahead, Mr. Brackley.

25 DIRECT EXAMINATION

1 BY MR. BRACKLEY:

2 Q Okay. I'm sorry. Can you for the record state
3 your name and spell your last name?

4 A It's Melissa Kampf, K-A-M-P-F.

5 Q Are you -- were you at any time in your life known
6 as Melissa Hickman?

7 A Yes.

8 Q And were you Detective Melissa Hickman back in
9 November of 1994?

10 A Yes, I was.

11 Q Are you employed still?

12 A Yes, I am.

13 Q And who are you employed by and for how long?

14 A I'm with the Boulder Police Department. I'm a
15 detective sergeant. And I've been there for 22 and a half
16 years.

17 Q Okay. Can you sort of take us back through your
18 career as a Boulder police officer from the beginning until
19 the present generally?

20 A I was hired on tax day in 1991 as a patrol
21 officer. I spent three years in patrol, and then I went to
22 the detective division. Did everything from graffiti crimes
23 to the newly formed family crimes unit, then the major
24 crimes unit.

25 I was promoted to sergeant from the major crimes

1 unit and went back to patrol at that time, spent six years
2 as a patrol supervisor. And then four years ago I selected
3 to become a detective sergeant. So I've been doing that
4 ever since.

5 Q And is there a particular unit that you're a
6 sergeant of today in the detective unit?

7 A I supervise the specialized crimes unit. So I
8 have all of the family crimes detectives, financial crimes
9 folks and the computer forensic analyst.

10 Q And your counterpart would be -- in the major
11 crimes unit would be Detective Sgt. Trujillo?

12 A Yes, that's correct.

13 Q So back in 1994 in November were you -- what type
14 of a detective were you then?

15 A A brand new one. At that time I was probably
16 doing graffiti crimes. I'd been a detective for about ten
17 months at that point.

18 Q Do you recall on November 1, 1994 after 9:30 p.m.
19 getting called out to a homicide here in Boulder?

20 A Yes. I received a phone call from dispatch
21 telling me to respond to a location, that there had been a
22 homicide. And I was the primary on-call detective at that
23 time, so I was the first detective to respond.

24 Q Okay. And do you recall generally or specifically
25 where you went in relation to that call?

1 A Initially I responded to the scene itself. And
2 I'm sorry that I can't remember the address, Marty Grisham's
3 apartment. And I talked to a patrol sergeant out there and
4 a couple of other people and then was directed to go to
5 Louisville.

6 Q Was Commander Pelle there at the scene at --

7 A I'm sorry, I don't remember.

8 Q Okay. Is it -- so typically when the detectives
9 and officers would converge on a scene would assignments be
10 passed out?

11 A Yes.

12 Q And do you recall what assignment you were given
13 in relation to this homicide?

14 A Excuse me, I was asked to respond to an address on
15 I believe it was Dogwood Circle in Louisville. The family
16 of Marty Grisham, his ex-wife and his daughter lived at that
17 address.

18 And they have -- Marty and Pam had a son named
19 Loren. We weren't sure whether he was there or not. So I
20 was asked to respond out there, find out who was home at the
21 time and do a death notification.

22 Q Before you went out there did you learn or did you
23 have occasion to know whether Louisville officers also went
24 out there?

25 A They had sent a couple of patrol officers out

1 there to make sure that they got their fairly quickly after
2 the call just to make sure that somebody was home and then
3 stood by outside waiting for me.

4 Q And do you know who the Louisville officers were
5 who went out there?

6 A One of them was Officer Robert Goodard, and the
7 other I believe was Officer Ray.

8 Q And what was your role supposed to be upon getting
9 to this Dogwood Circle address in Louisville?

10 A Primarily I had two roles. The first was to find
11 out who was home, find out if Loren specifically was there,
12 if Kristen was there, and then also to be the one to do the
13 death notification to the family.

14 Q And by death notification, is that simply
15 notifying the family about the death, or was this additional
16 investigator work that you were going to do as well?

17 A I was also asked to interview whoever was there to
18 find out some background information, and also find out
19 where they had been that night and just get a little bit
20 more information about the family.

21 Q Okay. When you got there did you interview --
22 well, did you make that notification to Pam Grisham and
23 Kristen Grisham?

24 A Yes, I did.

25 Q Do you recall Pam Grisham's response to hearing

1 this news?

2 A She seemed surprised. I believe she said oh, my
3 God, seemed a little nervous, but not especially distraught,
4 but upset.

5 Q And what was Kristen Grisham's reaction to hearing
6 this news?

7 A Didn't have a lot of reaction at the time
8 initially. I don't recall her saying anything. But just a
9 couple of moments later, I still recall this, her saying,
10 you know, he could be a jerk, but I didn't think he was that
11 big of a jerk.

12 Q Then what was her demeanor as she was saying that?

13 A She was nervous as well, but it was a fairly
14 conversational statement. There was some nervous laughter.
15 That's how I could kind of tell that she was nervous because
16 the giggling was kind of not in a place where you would
17 expect it.

18 Q Did there come a time when Kristen Grisham made a
19 phone call or asked if she could make a phone call?

20 A Yes. Just a couple of minutes into the time I was
21 at the home she asked if she could call a roommate who had
22 just moved in recently. And she wanted to let her know that
23 the police were at her house. She didn't want her to freak
24 out when she came home by seeing cop cars in front of the
25 house.

1 Q And were you actually present when that phone call
2 was made?

3 A No. Officer Goodard actually took her upstairs.
4 I heard the very beginning of the phone call, but I wasn't
5 present in the room.

6 Q Now, did you know about a brother to Kristen
7 Grisham and a son to Pam and Marty Grisham prior to going
8 out to the Dogwood Circle address in Louisville?

9 A I -- I'm sure I had been briefed about -- because
10 that was one of the reasons that I'd gone out there to see
11 if Loren Graham (sic) was there -- or I'm sorry, Loren
12 Grisham was there at the house.

13 Q Okay. Was Loren Grisham there at the house?

14 A No, he was not.

15 Q Did there come a time that a phone call came in
16 from Loren Grisham?

17 A Yes. And I -- the very first details of that call
18 I don't recall, but I do remember it was a collect call.
19 And at some point I spoke to Loren on the phone.

20 Q Okay. Did you learn where Loren Grisham was at
21 that time?

22 A I believe he was in his dorm in Glenwood Springs.

23 Q Did you conduct an interview with Loren Grisham at
24 that time?

25 A We had a very brief conversation. I explained to

1 him what I knew had happened, asked him where he had been,
2 how long he'd been there, very -- maybe a couple of minutes
3 at that point.

4 Q And then you turned your attention back to the
5 folks who were in the room with you?

6 A Yes.

7 Q Do you remember speaking with Pam Grisham the
8 following day being November 2, 1994?

9 A I have -- I remember more specifically talking to
10 Kristen. But I do know that I spoke to Pam the next day.

11 Q Do you remember -- and I'm going to hand you what
12 is discovery pages marked pages 1929 through 1935 and ask
13 you if you can just become familiar with what that is.

14 A It's an interview that I conducted with Pam
15 Grisham on November the 2nd.

16 Q And if I could direct your attention to page 6.
17 And did you ask Pam Grisham what time did you get home?

18 A On page 6?

19 Q I'm sorry, page 7.

20 A Oh, okay. Yes, I did.

21 Q And what was her response?

22 A She said I was home all day.

23 Q Did you ask her was Kristen home from what time?

24 A She told me that she had been home -- came home
25 close to around 2:30 that afternoon.

1 Q And did you ask her whether Kristen had gone out
2 at all?

3 A Yes.

4 Q And what did she say?

5 A She had not gone out at all.

6 Q Did you ask Pam Grisham about Michael Clark? And
7 I'm going to refer you to page 5.

8 A Thank you. Yes, I did.

9 Q And did Pam Grisham make a statement to you about
10 the relationship between a motorcycle incident and the
11 Marines and Michael Clark?

12 A Yes, I did ask her about that.

13 Q And did she state I think the motorcycle business
14 and the possibility of that keeping him from going into the
15 Marines scared the bejabbers out of him because he really
16 does want to get into the Marines. So I don't -- so I
17 really don't think he would do something like this,
18 referring to stealing checks?

19 A Yes.

20 Q Did you interview Kristen Grisham --

21 A Yes, I did.

22 Q -- over the course of that night and the next day
23 and some times following that?

24 A Yes, I did.

25 Q Do you remember talking with Kristen Grisham about

1 days -- about a trip that she took to Michigan?

2 A Yes, I do.

3 Q And do you remember on November 2, 1994 asking
4 Kristen Grisham this question, And how long were you out of
5 town during that weekend, and her response being I was gone
6 that Friday, Saturday, Sunday, and I returned Monday
7 evening, and Marty returned Monday evening.

8 A Yes, that's accurate.

9 Q Do you remember asking Kristin Grisham
10 specifically about whether she gave a key to Michael Clark
11 to Marty Grisham's apartment?

12 A Yes.

13 Q And do you remember asking her You gave the key to
14 Mike on that Friday?

15 A Yes.

16 Q And her response being Right?

17 A Yes.

18 Q Do you remember asking Kristen Grisham in that
19 same interview on November 2, 1994 whether Michael Clark had
20 ever met her father, Marty Grisham?

21 A Yes. She said they met.

22 Q And do you remember Kristen Grisham saying I think
23 they met once. I think I brought Michael along, we had
24 dinner or coffee or something. And that was the first time
25 they really even met. I think they met a couple times after

1 that, just general like he was with me and I saw my dad or
2 something like that?

3 A Yes, that's accurate.

4 Q Do you remember asking Kristen Grisham on
5 November 2, 1994 when it was that she got the key back?

6 A Yes, I did.

7 Q Or when Michael Clark returned the key to Marty
8 Grisham's apartment?

9 A Yes.

10 Q And do you remember her saying the last time I saw
11 him the 24th?

12 A Yes.

13 Q And you clarify that being the 24th of October?

14 A Yes.

15 Q Do you remember on the 4th of November, 1994
16 interviewing Kristen Grisham along with Detective Tom
17 Trujillo and Detective Kurt Weiler?

18 A Yes.

19 Q And do you remember Detective Tom Trujillo asking
20 Kristen -- or telling Kristen Grisham that Michael Clark had
21 implicated her in stealing the checks?

22 A Yes, I remember that.

23 Q And what was her response to that?

24 A It was a very strong absolutely not, she had no
25 knowledge of that.

1 Q Do you remember her using the expression that's
2 crap?

3 A That's accurate.

4 MR. BRACKLEY: Thank you. No further questions.

5 THE COURT: Cross-examination, Ms. Ring.

6 MS. RING: Thank you.

7 CROSS-EXAMINATION

8 BY MS. RING:

9 Q Sergeant?

10 A Um-hmm.

11 Q Sgt. Kampf, so prior to you testifying today you
12 were able to review the police reports you did in this case?

13 A Yes.

14 Q You were able to review the transcripts of the
15 interviews that you did with Pam Grisham and with Kristen
16 Grisham?

17 A Yes.

18 Q Okay. And so when Mr. Brackley was asking you if
19 you recalled these specific questions and specific answers
20 you recall those now because you had a chance to review
21 these transcripts prior to testifying?

22 A In terms of the exact words, yes. That's
23 accurate.

24 Q And so some of the details you remember from back
25 then?

1 A Sure.

2 Q But certainly not all of them?

3 A Oh, no.

4 Q Mr. Brackley just asked you about asking Kristen
5 Grisham about whether Michael Clark had ever met or knew
6 Marty Grisham?

7 A Um-hmm.

8 Q Right?

9 A Right.

10 Q Okay. And that was in an interview dated
11 November 2nd of 1994?

12 A Yes.

13 MS. RING: May I approach please?

14 THE COURT: Yes.

15 Q (By Ms. Ring) Oh, you have that up here with you.
16 Oh, that's Pam's.

17 So we're looking at the transcript from
18 November 2, 1994 when you are interviewing Kristen Grisham.
19 And you had been asking about whether or not Michael Clark
20 had met her father Marty in the past?

21 A Yes.

22 Q And she answered what Mr. Brackley just talked
23 about she thought they'd had dinner or coffee, one time she
24 brought Michael along, and maybe met a couple times after
25 that?

1 A Correct.

2 Q Okay. There's nothing around there that talks
3 about when those meetings occurred?

4 A No.

5 Q Okay. And then she goes on -- you ask about how
6 long she's known Michael, and she says they've been friends
7 since her sophomore year of high school?

8 A Correct.

9 MS. RING: Nothing further. Thank you.

10 THE COURT: All right. Any redirect,
11 Mr. Brackley?

12 MR. BRACKLEY: No, thank you.

13 THE COURT: All right. Detective, you can step
14 down.

15 Can this witness be excused?

16 MR. BRACKLEY: She may.

17 MS. RING: Judge, I think Sgt. Kampf is also under
18 our subpoena. So we need to ask her to remain under our
19 subpoena. And we'll be in touch about when that might --

20 THE COURT: Detective, you're not excused from the
21 defendant's subpoena, so you're subject to recall.

22 THE WITNESS: All right. Thank you.

23 THE COURT: Would the People call their next
24 witness?

25 MR. BRACKLEY: People call Jason Breslin.

1 (Pause.)

2 MR. BRACKLEY: Judge, apparently Mr. Breslin
3 stepped out of the building. I saw him as I was walking
4 into the courtroom. We can call Sgt. Breier.

5 THE COURT: Okay. Would you step forward?

6 SGT. DONALD BREIER,
7 called as a witness on behalf of the People, having been
8 first duly sworn, was examined and testified as follows:

9 THE COURT: Please have a seat.

10 Go ahead, Mr. Kellner.

11 MR. KELLNER: Thank you, Judge.

12 DIRECT EXAMINATION

13 BY MR. KELLNER:

14 Q Good afternoon, sir. Could you please state your
15 name and spell your last name for us?

16 A Do I -- my legal name is Donald Douglas Breier the
17 third. Last name is spelled B-R-E-I-E-R.

18 Q And sir, how are you employed?

19 A I'm employed by the Garfield County Sheriff's
20 Office as the investigation sergeant.

21 Q What is your title? Are you sergeant or --

22 A Sergeant of investigations.

23 Q Okay. So Sgt. Breier, how long have you been with
24 the Garfield County Sheriff's Office?

25 A Over 19 years.

1 Q And when did you first start with them because --

2 A In 1993.

3 Q -- I'm bad with math.

4 A In 1993.

5 Q What was your assignment back in 1993 when you
6 first started?

7 A Patrol deputy.

8 Q What does a patrol deputy do?

9 A Patrol deputy is what you might consider just a
10 police officer, performs the functions of a police officer,
11 patrol, apprehension of crime, deterrence of crime, what you
12 might expect of when you see a police officer in a marked
13 police unit.

14 Q Okay. Now, back in 1993 when you were a patrol
15 officer what was your assignment in November of 1994?

16 A Same, patrol deputy.

17 Q Now, you said Garfield County Sheriff's Office.
18 What territory does that cover?

19 A It's on the western side of Colorado. Most people
20 are familiar with it because of Glenwood Springs, which is
21 the county seat. However, it ranges from the Glenwood
22 Canyon all the way out to the Utah border, and north is Rio
23 Blanco County, south is Mesa County, Pitkin County, Eagle
24 County is to the east.

25 Q I want to draw your attention to November 1, 1994.

1 Do you recall making a death notification on that night,
2 November 1st?

3 A Yes, I do.

4 Q Can you tell the jury what you remember about
5 where you went and who you gave this notification to?

6 A It was late at night. And I remember receiving a
7 notification to respond to the Colorado Mountain College
8 Spring Valley Campus, which is between Glenwood Springs and
9 Carbondale, and was to contact a young man up there and
10 deliver notification that his father was passed away.

11 Q And do you recall where on the campus it was?

12 A Long time ago. Might have been the dorms or an
13 office building.

14 Q And do you recall the name of the young man who
15 you were going to make the notification to?

16 A I've heard it enough times here recently that I
17 should know, but it escapes my memory right at this moment.

18 Q If I showed you a CCIC teletype print-out might
19 that refresh your recollection?

20 A Yes.

21 Q Sgt. Breier, just take a look at that and see if
22 that refreshes your recollection?

23 A It does.

24 Q And what was the young man's name that you made
25 the death notification to?

1 A Loren Grisham.

2 Q Now, you mentioned that you went on to the campus
3 of the Colorado Mountain College. Do you recall what time
4 it was that you made this notification to Loren Grisham?

5 A I recall it being late in the evening. According
6 to the teletype it's --

7 MS. MILFELD: Objection, Judge. We ask that he
8 first be able to see whether he can remember what time it
9 was.

10 THE COURT: I'll sustain the objection. I can't
11 have you reading from the document.

12 Q (By Mr. Kellner) You can flip it over.

13 Do you recall what time it was?

14 A It was very late at night. It wasn't early in the
15 evening. It was late at night.

16 Q If you took a look at that teletype again might
17 that refresh your memory as to the time?

18 A Yes.

19 MR. KELLNER: Judge, with your permission?

20 THE COURT: Certainly. Just review that with
21 yourself, and let me know once you finished reading it.

22 THE WITNESS: All right, Your Honor.

23 THE COURT: Go ahead.

24 Q (By Mr. Kellner) What time was it?

25 A 2320 hours, which also would be known as

1 11:20 p.m.

2 Q Do you recall telling Loren Grisham to do anything
3 in particular after you informed him of his father's death?

4 A I remember he was to contact or make a contact
5 back over to -- back over to Boulder. I can't remember if
6 it was the police department or the sheriff's office or who
7 it was.

8 Q Do you recall whether or not he was supposed to
9 contact his mother?

10 A Sounds familiar, yes.

11 Q So you don't specifically remember telling him
12 that, but you think it sounds familiar?

13 A Yeah. I don't remember much specific words in the
14 conversation, but I remember informing him of his father's
15 passing and to contact home.

16 Q What was Loren Grisham's reaction when you told
17 him that his father had been killed?

18 A I would say mute, monotone, shock, not an
19 exclamatory shock, but just one of momentary overwhelming
20 situation that makes one quiet.

21 MR. KELLNER: Your Honor, may I approach the
22 witness with what I've marked as People's 47?

23 THE COURT: Yes.

24 Q (By Mr. Kellner) I'll retrieve the teletype.

25 Sgt. Breier, take a look at that picture I've

1 handed you, People's 47. Do you recognize the person in
2 that picture?

3 A I do.

4 Q How do you recognize him?

5 A That's the individual I contacted.

6 Q All right. That's the picture of Loren Grisham?

7 A It is.

8 Q Is that a fair and accurate depiction of what
9 Loren Grisham looked like --

10 A It is.

11 Q -- back in November of 1994?

12 A Yes, sir.

13 Q Now, I want to talk to you a little bit about the
14 distance from Glenwood Springs to Boulder. Did you drive
15 here from Glenwood Springs?

16 A I did.

17 Q And what is the approximate distance from -- if
18 you know, the Glenwood Springs Sheriff's Office or police
19 department to Boulder, the City of Boulder?

20 A It's about 170 miles, 175 miles. Time-wise about
21 three and a half hours.

22 Q What about back in 1994?

23 A I think it would have been about three and a half
24 hours then as well. Could have been a little longer.

25 Q Now, I asked you the distance roughly from the

1 police department in Glenwood Springs. Where is the police
2 department in relation to the highway?

3 A The sheriff's office?

4 Q Yeah, sorry.

5 A The sheriff's office is right off the main -- near
6 the main exit there in Glenwood Springs which would be mile
7 marker 116.

8 Q And once you get off that main exit, what road do
9 you take to the Colorado Mountain College?

10 A Highway 82.

11 Q How far is it from the police department to the
12 Colorado Mountain College up Highway 82?

13 A I'd estimate about -- you have to drive up
14 Highway 82 down to County Road 114 where the college is
15 actually located. It's probably about 11 miles.

16 Q What kind of road is it?

17 A Well, you have to go through town, through
18 Glenwood Springs. Should be also known as Grand Avenue.
19 And you go up Highway 82 approximately 6.5 miles or so to
20 County Road 114 which turns off and heads generally east.
21 And that goes up into the mountains. It's kind of a winding
22 road.

23 MR. KELLNER: Just a moment please.

24 (Pause.)

25 MR. KELLNER: I have no further questions. Thank

1 you.

2 THE COURT: All right. Cross-examination,
3 Ms. Milfeld.

4 MS. MILFELD: No questions, Judge. Thank you.

5 THE COURT: All right. Sergeant, you can step
6 down.

7 Can this witness be excused?

8 MR. KELLNER: He may.

9 THE COURT: Ms. Milfeld?

10 MS. MILFELD: Yes, Judge.

11 THE COURT: Sir, you're excused. Thank you very
12 much.

13 THE WITNESS: Thank you, Your Honor.

14 MR. KELLNER: I did not offer it. I intend to
15 offer it later.

16 THE COURT: Thank you, Sergeant.

17 Would the People call their next witness?

18 MR. BRACKLEY: Now, the People call Jason Breslin.

19 THE COURT: All right. Sir, would you step
20 forward please? Come on all the way up here. Go on all the
21 way up by that chair right there. And before you sit down
22 would you please face me and raise your right hand.

23 JASON BRESLIN,
24 called as a witness on behalf of the People, having been
25 first duly sworn, was examined and testified as follows:

1 THE COURT: Please have a seat.

2 Go ahead, Mr. Brackley.

3 MR. BRACKLEY: Thank you, Judge.

4 DIRECT EXAMINATION

5 BY MR. BRACKLEY:

6 Q Can you state your name and spell your last name
7 for the record?

8 A Jason Breslin, B-R-E-S-L-I-N.

9 Q Currently employed?

10 A Yes, sir.

11 Q What do you do for a living?

12 A I work for PODS Moving and Storage.

13 Q And how long have you done that for?

14 A Four years.

15 Q You currently living in Colorado?

16 A Yes, Lafayette.

17 Q You from Colorado?

18 A Yes, sir.

19 Q Did you know Loren Grisham?

20 A Yes.

21 Q And did you know Loren Grisham back in 1994?

22 A Yes, sir.

23 Q How did you know Loren Grisham?

24 A I know Loren in the Junior Rangers program with
25 the City of Boulder. And from there we had a friendship up

1 til college.

2 Q Did you go to college with Loren Grisham?

3 A I went to Colorado Mountain College in Glenwood
4 Springs.

5 Q Did Loren Grisham go to Colorado Mountain College
6 in Colorado Springs (sic) when you were there?

7 A Yes. Correct.

8 Q How would you characterize your friendship with
9 Loren Grisham?

10 A We hung out quite a bit. I'd be at their house in
11 Louisville probably five days a week.

12 Q Okay. Did you know Loren's dad, Marty Grisham?

13 A Yeah, when he lived in Boulder.

14 Q Do you recall November 1, 1994, the night that
15 Marty Grisham was murdered?

16 A Yeah. Loren came, knocked on my door and said
17 that Marty was murdered and we had to go back to Boulder.
18 At first I was like okay, well I'll talk to you later on.
19 Then five minutes later my roommate goes did he just say his
20 father was murdered. I go yeah. So I went to go look for
21 Loren, and he was gone with his friend to have a drink.

22 Q Had you been sleeping when Loren came into your
23 room?

24 A Yes.

25 Q Okay. Do you remember approximately what time it

1 was that Loren came into your room?

2 A I think around 11:00 or 12:00.

3 Q Sometime between 11:00 and 12:00?

4 A I think so, yeah.

5 Q Do you remember after Marty Grisham was murdered
6 talking with a police officer who came -- who came out to
7 Glenwood Springs to talk to you?

8 A I talked to him in Boulder, not Glenwood.

9 Q At the Boulder Police Department?

10 A Correct.

11 Q And is that when you came back with Loren after
12 his father was murdered?

13 A Correct.

14 Q And do you remember the officer asking you what
15 time Loren Grisham came into your room?

16 A I think I told him -- I really don't recall, I
17 think it was like or 11:00 or 12:00.

18 Q Do you remember being asked this question and
19 giving this answer; Okay. So he came and woke you up around
20 11:30? Yeah. And you then you talked about your roommate?

21 A Right.

22 Q Having that follow-up conversation with you?

23 A Yep.

24 Q And do you recall telling him that you went back
25 to bed and finally got up around midnight and went to look

1 for Loren?

2 A Yeah, it was like a shocking thing. Told him
3 well, I went back to sleep for a couple minutes, then I said
4 wait a minute, did he say his dad just got killed.

5 Q Do you remember the words that Loren used when he
6 told you that his father had been murdered?

7 A He said we have to go back to Boulder, Marty was
8 shot.

9 Q And do you remember whether there are police
10 officers with him or around him at that time?

11 A My roommate said he thought he heard a police
12 radio, but I didn't see anyone.

13 Q You were sleeping at the time?

14 A Yeah.

15 Q Do you recall the weekend prior to November 1st of
16 19 -- well, do you remember the weekend prior to Marty
17 Grisham being murdered being here in Boulder with Loren?

18 A Right. We had -- I came out for a dentist
19 appointment then. Loren came along with me.

20 Q When did you come back to Boulder?

21 A I think it was Thursday or Friday morning.

22 Q So Thursday or Friday morning the week --

23 A That -- the week before, yes.

24 Q And do you remember when you went back to Glenwood
25 Springs?

1 A Sunday.

2 Q From Boulder? Sorry.

3 A Sunday.

4 Q Okay.

5 A Around probably -- we broke down going back up to
6 school.

7 Q Do you remember how long it took you to get back
8 to Glenwood Springs from Boulder?

9 A I think it was about noon on the 1st.

10 Q And you left the day before that?

11 A Right. We left Sunday -- before Sunday, so it was
12 the 31st, right.

13 Q Well, you left on Sunday?

14 A Right. We got in back to Glenwood on Monday.

15 Q Okay. So what took so long? Why was that such a
16 long journey?

17 A My car broke down. Belt went out on it. And we
18 had to go buy a new battery and a belt, and NAPA was closed
19 at the time.

20 Q When -- where did you -- where did your car break
21 down?

22 A In Frisco. We stayed at the Best Western hotel.

23 Q And you waited until the next day to fix your car?

24 A Right, because the parts store was closed.

25 Q Let me --

1 MR. BRACKLEY: If I may approach the witness with
2 what I've marked People's 46 for identification?

3 THE COURT: Yes.

4 Q (By Mr. Brackley) This is a six-page document.
5 Well, it's six pages. I'm going to call it People's 46 for
6 identification. And I'm going to ask you to take a look at
7 those.

8 A Okay.

9 Q What are those?

10 A They're receipts from the night before.

11 Q Being the receipts?

12 A From?

13 Q From?

14 A Where we had to get parts for the car.

15 Q And also the hotel receipt?

16 A Yeah, from Dillon for the Best Western and the
17 receipts from NAPA Auto Parts.

18 Q Those are copies of the actual receipts; correct?

19 A Yeah. These are the ones I gave you guys.

20 Q And you handed the actual receipts to us?

21 A Right.

22 Q Sometime before today; right?

23 A Correct.

24 Q Those are copies of those?

25 A Yes, sir.

1 MR. BRACKLEY: Your Honor, I'd move to admit that
2 six-page document as People's 46.

3 THE COURT: Any objection or voir dire?

4 MS. MILFELD: No objection, no voir dire.

5 THE COURT: 46 will be admitted.

6 Q (By Mr. Brackley) From getting back to Glenwood
7 Springs on the Monday of that week, did you see Loren over
8 the next day, day and a half prior to him coming in and
9 telling you that his father had been murdered?

10 A I don't remember. I think maybe at lunch. His
11 room was right next door to mine.

12 Q Anything out of the ordinary in that day and a
13 half?

14 A No, not at all. I think we went to class, our
15 psychology class. We told the professor that we had to go
16 to Boulder because of Marty, so she let us go for that.

17 Q Did Loren have a car on campus?

18 A No, he didn't. I think he got his license shortly
19 after Marty died.

20 Q So he didn't have a driver's license at that time?

21 A No.

22 Q Did Loren ever take or borrow your car?

23 A No.

24 Q What kind of car were you driving?

25 A 1981 Aries K car.

1 Q What kind of condition was that car in other than
2 that trouble you had --

3 A It was --

4 Q -- in Frisco?

5 A It was -- already had a little body damage to it,
6 but nothing severe.

7 MR. BRACKLEY: Okay. Thank you, sir. No further
8 questions.

9 THE COURT: Cross-examination, Ms. Milfeld.

10 MS. MILFELD: No questions for this witness.
11 Thank you.

12 THE COURT: Mr. Breslin, you can step down.
13 Can this witness be excused?

14 MR. BRACKLEY: Yes, Your Honor.

15 MS. MILFELD: Yes.

16 THE COURT: Mr. Breslin, you're excused. Thank
17 you for your time. You can just leave those up there.
18 Thank you, sir.

19 Would the People call their next witness?

20 MR. KELLNER: Your Honor, the People call Stacey
21 Howell.

22 THE COURT: Would you step forward please, ma'am?
23 Come on all the way up here. Would you face me and raise
24 your right hand.

25 STACEY HOWELL,

1 called as a witness on behalf of the People, having been
2 first duly sworn, was examined and testified as follows:

3 THE COURT: Please have a seat.

4 Go ahead, Mr. Kellner.

5 MS. RING: Can I have a minute?

6 THE COURT: Sure.

7 (Pause.)

8 DIRECT EXAMINATION

9 BY MR. KELLNER:

10 Q Good afternoon, ma'am. Would you please state
11 your name and spell it?

12 A Stacey Howell, H-O-W-E-L-L.

13 Q Ma'am, where do you live generally speaking?

14 A Southern Colorado.

15 Q And what do you do for a living?

16 A I'm a veterinary technician.

17 Q How long have you done that?

18 A Probably 13 years.

19 Q And prior to moving to southern Colorado did you
20 live anywhere else in Colorado?

21 A I have lived in Glenwood Springs and Summit
22 County.

23 Q You said you lived in Glenwood Springs. When was
24 that?

25 A When I was in college.

1 Q Where did you go to college?

2 A Colorado Mountain College.

3 Q What did you study at the Colorado Mountain
4 College?

5 A Veterinary technology.

6 Q What year did you start attending Colorado
7 Mountain College?

8 A 1994.

9 Q Is that a four-year program?

10 A Two.

11 Q Two.

12 So in 1994 about when in the year did you start
13 taking classes?

14 A I believe it was August.

15 Q And when you attended Colorado Mountain College
16 did you know a man named Loren Grisham?

17 A Yes, I did.

18 Q How did you know Loren Grisham?

19 A I dated him.

20 Q When did you start dating Loren?

21 A Probably September or October of that year.

22 Q About -- is that September, October of 1994?

23 A Yes.

24 Q Okay. About how long did you date Loren Grisham
25 then?

1 A Probably I believe about a year.

2 MR. KELLNER: Judge, can I approach with
3 People's 47?

4 THE COURT: Yes.

5 Q (By Mr. Kellner) Ms. Howell, I'm handing you a
6 picture that's been marked as People's 47 for
7 identification. I'm going to take that away. Ma'am, do you
8 recognize the person in that picture?

9 A Yes, I do.

10 Q And how do you recognize it?

11 A That's Loren Grisham.

12 Q Is that picture a fair and accurate depiction of
13 Loren Grisham at the time you were dating him in October or
14 November time frame of 1994?

15 A Yes, it is.

16 MR. KELLNER: Judge, with your permission I'd ask
17 to admit that exhibit and publish it to the jury.

18 THE COURT: Any objection to the admission of 47?

19 MS. RING: No.

20 THE COURT: 47 will be admitted. Permission to
21 publish is granted.

22 MR. KELLNER: Thank you, sir.

23 Q (By Mr. Kellner) Ma'am, I just put it up on the
24 screen behind you, that picture of Loren. Did he have that
25 same sort of short haircut when you were dating him?

1 A Yes, he did.

2 Q Did he have that kind of short haircut then in
3 November, October time frame of 1994?

4 A Yes, he did.

5 Q I want to draw your attention to November 1, 1994,
6 the day that Marty Grisham was murdered. Do you remember
7 that day?

8 A Parts of it.

9 Q What I want to ask you is the parts that you do
10 remember. Who did you spend that day with?

11 A Loren and several other people.

12 Q When I say spend the day, I mean how much of the
13 day did you spend with him, how much time if you can recall?

14 A I don't know for sure, but it was all day.

15 Q Do you recall spending time with him that evening
16 as well?

17 A Yes, I do.

18 Q Why does that day stick out in your mind?

19 A Being told your boyfriend's dad was murdered is
20 pretty traumatic.

21 Q How did that come about? How did you learn about
22 that?

23 A I was sleeping or in bed in my dorm room. And one
24 of the RA's came and woke me up and said you need to come
25 downstairs, Loren's dad's been killed.

1 Q And prior to going to bed in your dorm room who
2 had you been hanging out with earlier that night?

3 A Loren.

4 Q And about what time if you can remember were you
5 notified by that RA?

6 A I don't know for sure. I believe it was probably
7 after 10:30, 11:00, somewhere in there. It was late.

8 Q Do you recall what you did with Loren that day
9 earlier in the day?

10 A Not clearly, no.

11 Q What sort of things would you normally do with
12 Loren?

13 A We would hang out in usually his room and, you
14 know, study, talk to friends. I think we watched a movie
15 that night or they showed a movie that night down in one of
16 the common areas.

17 Q I want to ask you about Loren's reaction to
18 finding out the news about his father. What do you remember
19 about his reaction?

20 A When I walked into the room he was sitting on the
21 couch with his elbows on his knees, and he was just kind of
22 rocking back and forth with his teeth gritted and he didn't
23 say a whole lot. So I don't think he said anything.

24 Q Is he the kind of guy who would share his
25 feelings?

1 A Not immediately.

2 Q What did you do with Loren that night after he was
3 informed of his father's murder?

4 A We got in my truck and drove off campus for a
5 little while and kind of drove around.

6 Q You said that he was kind of quiet when he heard
7 of his father's murder. Did he ever talk to you about it at
8 all or express any sort of emotion?

9 A From what I remember it was mostly disbelief,
10 just -- and speculation of what happened.

11 Q Let me ask you this, did Loren Grisham have a car
12 when you were dating him?

13 A No.

14 Q Who had the car?

15 A I did.

16 Q When you went places would you then drive?

17 A Yes.

18 Q Did he borrow your car that night and drive to
19 Boulder?

20 A No.

21 MR. KELLNER: No further questions.

22 THE COURT: Cross-examination.

23 MS. RING: No questions.

24 THE COURT: Okay. Ms. Howell, you can step down.

25 Can this witness be excused?

1 MR. KELLNER: She may, Your Honor.

2 MS. RING: Yes.

3 THE COURT: Ms. Howell, you're excused. Thank you
4 very much.

5 People call their next witness.

6 MR. BRACKLEY: Judge, can we approach?

7 THE COURT: Yes.

8 (The following proceedings occurred at the bench
9 out of the hearing of the jury.)

10 MR. BRACKLEY: We have a police officer in the
11 hallway. It's Officer Denig. We're ready to call him, but
12 his -- we're kind of scrambling to put some stuff together
13 for the rest of our afternoon. We've done our twelfth
14 witness today. It might be a time for a break so we can
15 make sure we start lining stuff up.

16 I just -- I don't think we ever expected to get
17 this far. And the remainder of our witnesses are travelers
18 or experts or cops that we are planning on calling on
19 Wednesday. We're just trying to get some of them in here
20 today if we have to, but --

21 THE COURT: You're going to have to, especially
22 early in the trial, with as much time as we have. We'll go
23 ahead and take a recess now for 20 minutes. And then, you
24 know, you need to fill in the rest of the afternoon if that
25 means calling Detective Heidel or somebody else.

1 MR. BRACKLEY: That what we're planning on doing.
2 I think it would be better to take a break, get those ducks
3 lined up, rather than doing it later. It gives us a chance
4 to --

5 THE COURT: Try to find witnesses for the rest of
6 the day, okay? Thank you.

7 (The following proceedings occurred in open
8 court.)

9 THE COURT: Ladies and gentlemen of the jury,
10 we're going to take the mid-afternoon recess a little bit
11 early. I've got to take care of some scheduling things. So
12 we're going to recess for about -- well, why don't we say
13 until 3:00. Gives you a little over -- well, almost 25
14 minutes. Stretch your legs, get a soda, use the restrooms.

15 Remember the admonition I've given you previously.
16 It applies at this recess as well. Don't talk to anybody
17 about the case. Don't do any outside research. Don't read
18 or listen to any news reports of the trial. And make sure
19 that you don't form or express any opinion on the case until
20 it is finally submitted to you.

21 We should be ready for you right at 3:00, so enjoy
22 the break. We'll see you then.

23 (A recess was taken.)

24 THE COURT: Let's go ahead and go on the record.
25 This is People versus Michael Clark. Mr. Clark and his

1 counsel are present. The prosecution is present.

2 The bailiff was handed a note by one of the
3 jurors. And essentially it's a question with respect to
4 evidence.

5 I'm inclined to simply tell the jury that if they
6 have questions about evidence they should continue to listen
7 to the testimony that's presented in court. Then they'll
8 have an opportunity to deliberate once the case is presented
9 to them.

10 I don't know if counsel wants to see the note from
11 the juror. It's a relatively innocuous question, but
12 it's -- do you want to know what it says, Ms. Ring?

13 MS. RING: Yes, please.

14 THE COURT: Mr. Brackley?

15 MR. BRACKLEY: I don't see why we wouldn't want
16 to.

17 THE COURT: Well --

18 MR. BRACKLEY: I don't see why we wouldn't want to
19 hear it.

20 THE COURT: Okay. Well, the question is could you
21 explain what a bullet fragment is.

22 So do you -- do you want me to tell the jury to
23 the extent they have questions about evidence, they should
24 continue to listen to the evidence that's presented, it may
25 answer their question. And they'll have an opportunity to

1 discuss their questions and issues during deliberations.

2 Does that make sense for the People?

3 MR. BRACKLEY: I'll state for the record there are
4 plenty of more ballistics type people coming. And I think
5 that's something they would have heard the answer to.

6 THE COURT: Ms. Ring, is that okay?

7 MS. RING: Yes.

8 THE COURT: All right. I'll do that then.

9 Anything else for the record before we bring the
10 jury in?

11 MR. BRACKLEY: No, Your Honor. So Officer Denig
12 is still outside. And we have Commander Weiler arriving.
13 And his testimony is very, very lengthy. It's listening to
14 a couple hours worth of audio recording. It's substantially
15 out of place, but of course we'll do that as a favor to the
16 Court. I'm not --

17 THE COURT: Actually it's a favor to the justice
18 system.

19 MR. BRACKLEY: I know, Your Honor. I was just
20 being facetious. So we will continue to move on today.

21 THE COURT: Okay.

22 MR. BRACKLEY: Another option that we have I think
23 is Detective Heidel. But I think it makes more sense at
24 this point in terms of counsel's ability to prepare to call
25 Detective -- to call Commander Weiler.

1 THE COURT: Okay. Well, I appreciate your efforts
2 to make meaningful use of the time that we have.

3 MS. RING: I want the opportunity to respond,
4 because I did speak to Mr. Brackley about this. Looking at
5 where we are, the witnesses they're planning on calling
6 tomorrow afternoon, you know, it does seem that we're being
7 efficient, we're in good shape.

8 And I know the Court is very concerned about
9 keeping things on track. But I don't see any reason based
10 on talking to the district attorney about what their witness
11 situation that we're going to have problems at this point.

12 THE COURT: Well, and I appreciate that. And I
13 recognize that counsel is being very professional and very
14 efficient. And I -- I mean, I really do appreciate it.

15 My concern is nobody knows what's going to happen
16 tomorrow or Monday or Tuesday. And this is a jury panel
17 that if you recall they started last Friday.

18 So while I realize that we've only been in court
19 for now what is the fourth day, for them they've been
20 dealing with this case for six days even though they haven't
21 been in court. So I want to be respectful of their time and
22 want to make meaningful use of the time that we have.

23 MR. BRACKLEY: Right. And I'll tell the Court I
24 think by tomorrow afternoon we could be where we expected to
25 be sometime on Monday afternoon.

1 THE COURT: So a day ahead of --

2 MR. BRACKLEY: Roughly. Roughly a half a day
3 ahead, you know, a half a day ahead I think. So you know --

4 THE COURT: All right. Keep up the good work.
5 Would you bring the jury in please?

6 (The jury returned to the courtroom.)

7 THE COURT: Please be seated.

8 Welcome back, ladies and gentlemen of the jury.

9 One of you had given a question regarding the
10 evidence to the bailiff, and she passed it on to me.

11 What I would tell you is that if you do have a
12 question about the evidence that's being presented in the
13 case, continue to listen to other evidence that is presented
14 because it may well answer the question that you have.

15 And also remember that once the case is concluded
16 you're going to be able to discuss the case with other
17 members of the jury back in the jury room.

18 So having said that, would the People call their
19 next witness?

20 MR. KELLNER: Yes, Your Honor. People call
21 Detective Rich Denig.

22 THE COURT: Would you step forward please, sir?
23 Then before you sit down would you face me and raise your
24 right hand.

25 RICH DENIG,

1 called as a witness on behalf of the People, having been
2 first duly sworn, was examined and testified as follows:

3 THE COURT: Please have a seat.

4 Go ahead, Mr. Kellner.

5 MR. KELLNER: Thank you, Judge.

6 DIRECT EXAMINATION

7 BY MR. KELLNER:

8 Q When you're settled can you state your name and
9 spell your last name for us?

10 A Rich Denig, D-E-N-I-G.

11 Q What do you do for a living, sir?

12 A I'm a police officer with the City of Boulder.

13 Q How long have you been a police officer with the
14 City of Boulder?

15 A Since 1988.

16 Q And what is your current assignment with the
17 Boulder Police Department?

18 A I'm currently assigned to an administrative
19 position in operations section.

20 Q What is your title right now?

21 A My official title right now is the Boulder Police
22 Officer's Association President. That's one of my primary
23 duties as well as other administrative patrol functions.

24 Q And before that were you a detective as well?

25 A Yes. I was a narcotics detective.

1 Q Give the jury just a brief outline of your career
2 then.

3 A I started my career in law enforcement in 1985,
4 Greeley Police Department. Came to Boulder in 1988. In
5 October of 1990 I went to the narcotics unit of the Boulder
6 Police Department as a detective. I remained there until --
7 through 1995. After that I returned to the street working
8 patrol until I took my current administrative assignment in
9 2004 where I've been to the present.

10 Q I want to focus in on that time frame you
11 mentioned that you were a detective before 1995. Were you a
12 detective in November of 1994?

13 A Yes, I was.

14 Q Generally speaking what were your responsibilities
15 as a detective in 1994?

16 A As a detective in the narcotics unit we primarily
17 had -- our investigations were focused primarily on
18 narcotics offenses. And that was our primary function.

19 Q Now, you said you're typically doing narcotics
20 investigations. Would you also assist in other
21 investigations that came up?

22 A Yes, if need be. If called upon we would assist
23 the regular investigations section in their -- whatever they
24 needed us to do.

25 Q And after November 1, 1994 were you actually

1 called upon to assist in the investigation in the murder of
2 Marty Grisham?

3 A Yes, I was.

4 Q All right. When were you called into the team so
5 to speak?

6 A I don't recall exactly when we were as a unit
7 asked for assistance. I recall my involvement began in the
8 case on the morning of November 2nd.

9 Q All right. Tell the jury about your involvement
10 on the morning of November 2nd. Why did you go or do
11 whatever you did that day?

12 A I was directed by my current supervisor at the
13 time, Detective Sgt. Matthews, Kurt Matthews, to go out to
14 the area of 5640 Arapahoe, the Fairway Apartment complex,
15 conduct an area search around the apartment building, the
16 grounds, exterior grounds, covering the trash areas, parking
17 lots to look for any possible evidence from the homicide the
18 previous night.

19 Q What were your directions with respect to taking
20 photographs?

21 A Well, taking photographs would be a correlation
22 with if any evidence was discovered and to be collected. So
23 I had those -- I had a camera with me and other items.

24 MR. KELLNER: Your Honor, I'd like to publish to
25 the jury People's 4 which has already been admitted.

1 THE COURT: Okay.

2 Q (By Mr. Kellner) Detective Denig, can you swivel
3 around and take a look at that picture? Do you recognize
4 that picture?

5 A Yes.

6 Q And how do you recognize it?

7 A I took it. I photographed it.

8 Q And approximately what time did you go to the
9 scene there to Marty Grisham's apartment on November 2nd?

10 A I arrived at the complex about 8:30 a.m. on the
11 2nd.

12 Q Now I'd like to focus in a little bit more on this
13 picture. Did you see anything unusual at the scene when you
14 responded there that morning, November 2nd?

15 A Well, initially I was contacted by one of the
16 residents in the -- a neighboring resident of the victim.

17 Q Let me ask you this, did you collect any evidence
18 at the scene?

19 A Yes, I did.

20 Q What evidence did you collect?

21 A A container of Carmex lip balm.

22 Q And can you see that Carmex lip balm container
23 depicted in People's 4?

24 A Yes.

25 MR. KELLNER: Approach with a laser pointer?

1 THE COURT: He should have one up there.

2 MR. KELLNER: Very well.

3 Q (By Mr. Kellner) Can you point it out to the jury
4 please?

5 A It's laying below the bottom stair.

6 MR. KELLNER: Judge, I'd like to approach the
7 witness with People's 48.

8 THE COURT: Yes.

9 MR. KELLNER: And 51.

10 THE COURT: 48 and 51?

11 MR. KELLNER: Yes, sir.

12 Q (By Mr. Kellner) Detective, do you recognize what
13 I provided you in People's 48?

14 A Yes, I do.

15 Q How do you recognize that picture?

16 A It's a photograph that I took of the Carmex
17 container.

18 Q What kind of camera were you using back then?

19 A It was a fixed lens 35mm film, rolls of film
20 35mm.

21 Q So with 35mm film you had to go develop it, then
22 see what your pictures came out looking like?

23 A Yes.

24 Q What does the police department use now?

25 A We use digital cameras.

1 Q Now I'm going to ask you about what's depicted in
2 People's 48, that Carmex container. Did you photograph it
3 before you moved it or touched it?

4 A Yes.

5 Q Is that your typical practice when searching a
6 scene for evidence?

7 A Yes. If it's to be collected you need to document
8 it.

9 Q And why did you feel the need to collect that
10 Carmex container?

11 A Because it was in close proximity to the homicide,
12 actual homicide scene, and could be of evidentiary value.

13 MR. KELLNER: Judge, I'd ask to admit People's 48.

14 THE COURT: Any objection or voir dire?

15 MS. MILFELD: No objection, no voir dire.

16 THE COURT: 48 will be admitted.

17 MR. KELLNER: And may I publish it?

18 THE COURT: Yes.

19 Q (By Mr. Kellner) So Detective Denig, once you
20 developed this were you happy with the picture?

21 A No, I was not.

22 Q You mentioned that you had a fixed lens camera.
23 Is that something that you could not focus?

24 A Correct.

25 Q Now, once you took this picture what did you do

1 with respect to the Carmex container?

2 A I collected it for evidence.

3 Q And what's your process for collecting evidence?

4 A The process would be to put on gloves, put the
5 item in some sort of container and transport it back to the
6 police department.

7 MR. KELLNER: Your Honor, I'd like to approach the
8 witness with what I've marked as People's Exhibit 52.

9 THE COURT: Okay.

10 Q (By Mr. Kellner) Detective Denig, what is
11 People's 52?

12 A In the clear baggy is a container of Carmex. And
13 the adjoining pouch there is a brown paper bag also with a
14 manila envelope.

15 Q Is that bag that I provided you, is that what you
16 would have put the Carmex container in when you collected it
17 as evidence?

18 A Yes. The bag -- brown paper bag is. This is my
19 handwriting. I wrote the case number, the date, my initials
20 and my employee number, item number which is 1, my initials,
21 what the item was. That would have been what it was
22 submitted in originally.

23 MR. KELLNER: Your Honor, at this time I'd ask to
24 admit People's 52.

25 THE COURT: Objection or voir dire?

1 MS. MILFELD: No objection, no voir dire.

2 THE COURT: 52 will be admitted.

3 MR. KELLNER: Actually, Judge, may I publish it to
4 the jury?

5 THE COURT: Sure. Why don't we have
6 Ms. Batchelder hand it to Ms. Timms. She can look at it and
7 pass it along to Mr. Lacopo, then he'll pass it back across
8 that way. And then Ms. O'Harah, if you'll give it back to
9 Ms. Batchelder.

10 (Pause.)

11 THE COURT: All right. Record should reflect
12 Exhibit 52 has been published to the jury.

13 You may continue, Mr. Kellner.

14 Q (By Mr. Kellner) Detective Denig, earlier you said
15 that you would take a photograph before moving something you
16 suspected of being -- of having evidentiary value?

17 A Yes.

18 Q I want to talk to you about the photograph of the
19 Carmex container. Was the Carmex container laying flat or
20 was it laying on its side?

21 A It's laying on its side, or the edge you might
22 say.

23 Q Did you take more than one picture of the Carmex
24 container close up?

25 A I believe there were two.

1 Q I haven't given it to you. I'm just asking if you
2 had taken more than one?

3 A I believe I did, yes.

4 Q Is it your recollection that they both came out
5 somewhat blurry?

6 A Yes.

7 Q What did you do with the Carmex container then
8 once you collected it after you put it in the bag?

9 A I -- when I was done with the rest of my stuff
10 with 5640 Arapahoe I took it back to the police department
11 later, entered it into property and evidence.

12 Q I'd like to take a look at People's 51. I believe
13 it's up there with you?

14 A Yes.

15 Q Do you recognize that document?

16 A Yes, I do.

17 Q What is it?

18 A It's a Boulder Police Department property report
19 that I completed on November 2nd in order to document the
20 entering of the Carmex container into evidence.

21 Q Did you personally complete that form and fill it
22 out?

23 A Yes, I did.

24 Q Is it something that you're required to do when
25 you're collecting evidence and putting it into your evidence

1 or property room?

2 A Yes.

3 MR. KELLNER: Judge, I'd ask to admit People's 51.

4 THE COURT: Objection or voir dire?

5 MS. MILFELD: No objection or voir dire.

6 THE COURT: 51 is admitted.

7 Q (By Mr. Kellner) Once you had collected the Carmex
8 container, logged it into evidence, did you submit it for
9 any type of scientific analysis?

10 A Yes, I did.

11 Q Where did you send it, or where did you take it
12 rather?

13 A On November 4th I took it to the Colorado Bureau
14 of Investigation, their lab, for analysis.

15 Q And what were you seeking to have analyzed at the
16 Colorado Bureau of Investigation?

17 A The request that I put in was to examine it for
18 latent fingerprints.

19 Q And where is their office building located, or
20 their lab?

21 A At that time the lab was on Kipling. I'd have
22 to --

23 Q Is that in Lakewood?

24 A Yes.

25 Q Did you personally take that Carmex container to

1 the Colorado Bureau of Investigation?

2 A Yes, I did.

3 MR. KELLNER: Can I have just a moment?

4 THE COURT: Yes.

5 (Pause.)

6 Q (By Mr. Kellner) Detective Denig, when you took
7 that and -- the Carmex container, I probably should have
8 been more specific, did you keep it in the packaging that
9 you had described earlier when you took it to CBI?

10 A Yes. I would have checked it out of property and
11 evidence in the same packaging.

12 Q So it's sealed when you deliver it to --

13 A Sealed with tape, yes.

14 MR. KELLNER: I have no further questions.

15 THE COURT: Cross-examination, Ms. Milfeld.

16 CROSS-EXAMINATION

17 BY MS. MILFELD:

18 Q Detective Denig, you testified that you arrived at
19 the scene about 8:30 a.m.?

20 A Yes.

21 Q You were not the first person that arrived there,
22 meaning there were other people that had been to the scene
23 previously?

24 A Correct.

25 Q There were other officers that had been there the

1 night before?

2 A Yes.

3 Q You also testified on direct that Sgt. Matthews
4 asked you to search the areas around the apartment?

5 A That's correct.

6 Q At this point your role was to assist
7 Sgt. Matthews in what he was doing?

8 A Yes. To fulfill his directive, yes.

9 Q You were not the main crime scene investigator at
10 that point?

11 A No. I was simply performing a task that needed to
12 be done.

13 Q Before you conducted the search you did not have
14 any personal knowledge of there being a Carmex container
15 there?

16 A No, I did not.

17 Q No one alerted it -- no one alerted you to it
18 being there?

19 A No.

20 Q As far as you know you were the first person that
21 actually found it?

22 A As far as I know.

23 Q You talked about how you took two -- well, three
24 photographs total of the Carmex container, one that was a
25 far away shot and two that were basically this blurry photo?

1 A Yes.

2 Q Mr. Kellner asked you that obviously you weren't
3 happy with how this picture turned out?

4 A I -- I -- I wish that it had been clearly in
5 focus.

6 Q One of the reasons why you wished it was clear is
7 because you know as a detective how important it is to have
8 photographs that clearly show what the evidence looks like?

9 A Yes, it's important.

10 Q You know that attorneys rely on photographs
11 because you can't take us back into time of what something
12 looked like?

13 A That's correct.

14 Q And I just want to draw your attention to the
15 photograph behind you. You'd agree with me that from the
16 photograph you can't tell the condition of the container?

17 A The physical condition?

18 Q Correct.

19 A Correct. It's -- that's correct.

20 Q You can't tell from this photograph that the
21 container -- whether it's dirty?

22 A That's correct.

23 Q You can't tell whether there are any smudges on
24 it?

25 A That's correct.

1 Q You can't tell whether it's discolored in anyway?

2 A That's correct.

3 Q And you can't tell all these things because of the
4 blurriness of the photograph?

5 A That's correct.

6 Q As part of your investigative duties in assisting
7 Sgt. Matthews you wrote a report in this case?

8 A Yes, I did.

9 Q You wrote a report about how you found the Carmex
10 container?

11 A Yes.

12 Q And in that report you did not write anything
13 specifically about the condition of the container?

14 A In that report I don't believe so.

15 Q By the time that you got to the crime scene any
16 sort of crime scene tape had been removed?

17 A Yes. I do not recall seeing any perimeter tape,
18 crime scene tape from stairs, landings or cross hallways in
19 the vicinity outside the apartment.

20 Q Which means that at that point the crime scene was
21 not secured?

22 A The crime scene itself. The apartment, 413, yes,
23 it was still secured.

24 Q But not the area around it?

25 A Not -- I don't believe the area around it was in a

1 condition that it was being -- it was taped off or otherwise
2 being delineated.

3 Q So besides -- we've seen pictures of the front of
4 apartment 413 where Mr. Grisham lived. You searched the
5 perimeter of the apartment as well?

6 A Yes.

7 Q So that would have included -- so if you could
8 turn your attention to the previously admitted exhibit, that
9 would have included the area in front of the apartment to
10 the right of the stairwell?

11 A That's correct.

12 Q That would have included the area directly in
13 front of Mr. Grisham's apartment?

14 A That's correct.

15 Q It would have included -- and you can't see this
16 in the picture, but you remember that there were parking
17 spaces that would have been in the foreground of this
18 photograph, it would have been in front of what we're
19 seeing?

20 A Yes.

21 Q And you searched that area as well?

22 A Yes.

23 Q You also mentioned that you searched dumpsters
24 around the apartment complex?

25 A That's correct.

1 Q So you pretty much just walked around the building
2 looking for anything that you could find?

3 A That's correct.

4 Q And you were looking for anything that was
5 unusual, anything that stood out to you?

6 A That's correct.

7 Q You didn't collect anything from your extensive
8 search of the perimeter of the building?

9 A No.

10 Q The only thing that you collected was this Carmex
11 container?

12 A That's correct.

13 MS. MILFELD: Nothing further.

14 THE COURT: Any redirect, Mr. Kellner?

15 MR. KELLNER: I do, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. KELLNER:

18 Q Detective Denig, defense counsel asked you about
19 the condition of the container. Is the purpose of putting
20 that Carmex container in that paper bag in order to preserve
21 it in the condition that you found it?

22 A Yes.

23 Q I mean, what I'm asking is when you collected the
24 evidence do you change its condition in anyway?

25 A No, I did not.

1 Q You wipe it off?

2 A No.

3 Q You just put it in that brown paper bag?

4 A Yes.

5 Q And put it into evidence?

6 A That's correct.

7 Q Detective, I'd like to show you what's been
8 previously admitted as People's 12. Have you seen this
9 picture before?

10 A Yes, I have.

11 Q After you found the Carmex container did you look
12 at photographs that Officer Ralph Smith had taken the night
13 before?

14 A Yes, I did.

15 Q Why did you look at the pictures that Officer
16 Smith took?

17 A I just looked through the entire crime scene
18 photographs of that night, the previous night.

19 Q And did you form any sort of opinion about whether
20 or not that Carmex container would have been readily visible
21 on the night of the murder?

22 A I believe it would not have been readily visible
23 in the darkness.

24 Q Because of the shadow cast by the final stair?

25 A Yes. And it was also underneath the stair.

1 Q Did you believe that you could actually see or
2 partially see the Carmex container in one of the pictures?

3 A Yes. In this photo I believe that this possibly
4 could be the actual Carmex container that I discovered the
5 following morning.

6 MR. KELLNER: Thank you, Detective. I have no
7 further questions.

8 THE COURT: Any recross, Ms. Milfeld?

9 MS. MILFELD: No recross, thank you.

10 THE COURT: Detective, you can step down.
11 May this witness be excused?

12 MR. KELLNER: Judge, he's going to be subject to
13 recall for further investigation that he conducted.

14 THE COURT: So Detective, you're excused at this
15 time, but you are subject to recall. Thank you.

16 Would the People call their next witness?

17 MR. KELLNER: Your Honor, may we approach?

18 THE COURT: Yes.

19 (The following proceedings occurred at the bench
20 out of the hearing of the jury.)

21 MR. KELLNER: Judge, I just wanted to bring it to
22 your attention, we have Detective Weiler here. We intend to
23 put him on. As you're well aware the interview itself which
24 we intend to play is probably going to take us well past
25 5:00.

1 THE COURT: Okay.

2 MR. KELLNER: So I guess we'll look for a good
3 stopping point at some point during that interview, but I
4 didn't know if that would be an issue with the defense.

5 THE COURT: I think what we're going to have to
6 do, there's going to be traffic congestion in town because
7 of the football game, so I don't want to go past 5:00. So
8 whenever a convenient time is closest to 5:00, we'll need to
9 interrupt the playing and recording.

10 MS. RING: How about right now?

11 THE COURT: Not quite yet.

12 MR. KELLNER: Judge, the other issue is that
13 Detective Weiler has listened to a copy of the CD. And in
14 fact, it was the one that was missing that portion that you
15 had previously noted. We have a copy that is completed, but
16 he hasn't listened to that complete copy.

17 So what I would end up having to do is play a part
18 of it, see if he can recognize it, and then ask to publish
19 it at that point to the jury after admitting it. But he
20 hasn't listened to the full copy that I'm going to provide.

21 THE COURT: Would you stipulate --

22 MR. BRACKLEY: Or we can stipulate that it's a
23 full and fair copy of it. Detective Heidel made a copy of
24 it yesterday and gave it to him. You know, we just didn't
25 expect to call him this afternoon.

1 THE COURT: Okay. So you and Mr. Kellner can't
2 stipulate to each other. It's up to Ms. Ring.

3 MR. BRACKLEY: It's all of us.

4 THE COURT: It's up to Ms. Ring and Ms. Milfeld.

5 MS. RING: The stipulating part is fine. I'm a
6 little concerned and would like an opportunity to look at
7 the interview and see if we could come up with a time that
8 makes sense to stop it. I don't really like the idea of not
9 playing the whole interview.

10 And I understand we've got these time constraints.
11 But I prefer we take five minutes, look at it, see if we can
12 come up with a stopping point in an hour or so. Because I
13 don't want to be arguing about where we're stopping since
14 nobody anticipated doing this.

15 THE COURT: All right. Well, how long -- just so
16 we're clear, the defense is willing to stipulate that the
17 exhibit is a true and correct copy of the recorded
18 interview; is that accurate?

19 MS. RING: Yes.

20 THE COURT: All right. So that resolves the
21 foundational question.

22 How long is it going to take before you're able to
23 lay the foundation and have the exhibit admitted and ready
24 to publish it to the jury?

25 MR. KELLNER: I think the direct examination prior

1 to him playing it is about 20 to 25 minutes perhaps.

2 THE COURT: All right. So look, I'll give you a
3 couple minutes right now to look for --

4 MR. BRACKLEY: Lay the foundation and have
5 cross-examination and then play it tomorrow.

6 THE COURT: Does that work for the defense?

7 MS. RING: Much better.

8 THE COURT: All right. Everybody, for the record
9 even the blind squirrel finds a nut now and then. Okay.

10 (The following proceedings occurred in open
11 court.)

12 THE COURT: All right. Your next witness please,
13 Mr. Kellner?

14 MR. KELLNER: Your Honor, the People call
15 Commander Weiler.

16 THE COURT: Sir, would you step forward please?
17 Come on all the way up. Would you please raise your right
18 hand?

19 COMMANDER KURT WEILER,
20 called as a witness on behalf of the People, having been
21 first duly sworn, was examined and testified as follows:

22 THE COURT: Please have a seat.

23 Go ahead, Mr. Kellner.

24 MR. KELLNER: Thank you, Your Honor.

25 DIRECT EXAMINATION

1 BY MR. KELLNER:

2 Q Good afternoon.

3 A Good afternoon.

4 Q Commander, can you please state your name and
5 spell your last name for the court reporter.

6 A My name is Kurt Weiler. My last name is spelled
7 W-E-I-L-E-R.

8 Q Commander, how are you employed?

9 A Been with the City of Boulder for 30 years as a
10 police officer.

11 Q Is that entire time with the Boulder Police
12 Department?

13 A No. I spent about eight months away with a
14 Special Agent with the DEA. They sent me out to Los
15 Angeles, so I came back.

16 Q Why didn't that work out?

17 A Because it was LA.

18 Q Back in the confines of Boulder here?

19 A Yes.

20 Q Can you tell the jury a little bit about your
21 career as a police officer with Boulder Police Department?

22 A So been around for a long time, did pretty much
23 everything in the department, did patrol work all three
24 shifts, worked as a narcotics investigator, worked as a
25 detective, got promoted to sergeant.

1 Then I worked as a patrol officer, was in charge
2 of the department's major crimes unit as a sergeant for five
3 years, was then promoted to commander, stayed in detectives
4 for another three years as detective commander.

5 And then since then I've had a couple other
6 assignments as a commander, one as a patrol commander on
7 watch two and three that are nights and evenings, and then
8 traffic commander and special events last year.

9 And this year I'm doing personnel and training, so
10 I get to hire people.

11 Q What does a commander do? What does that rank
12 mean?

13 A So the structure of the police department, there's
14 obviously a police chief and two deputy chiefs. And there
15 are five commanders under those two deputy chiefs. It's
16 split for either operations kinds of things, so detective
17 patrol or the staff services side which I'm now a part of,
18 so the hiring and training, that kind of stuff. So that's
19 kind of how it is if that makes sense.

20 Q I think you mentioned that you were a narcotics
21 detective at one point?

22 A Actually twice.

23 Q Twice, okay.

24 When were you a narcotics detective?

25 A Got hired in '83. I think my first stint was '87,

1 '86 or '87. And that was at the point where I kind of got
2 the bug and thought I'd leave Boulder and join the DEA. So
3 I was gone for DEA in part of '88.

4 Then I came back as a patrol officer in 1989,
5 worked patrol again and then worked again as a narcotics
6 investigator, and then kind of worked through the rest of my
7 career.

8 Q Were you a narcotics investigator or detective in
9 November of 1994?

10 A Yes, I was.

11 Q As a narcotics investigator were you primarily
12 undercover?

13 A Yeah. Believe it or not I had a pony tail and
14 rode a Harley around, did all kinds of things, so -- and I
15 didn't wear these glasses to read. So yeah, it was a
16 different time.

17 Q So you were a plain clothes officer at the time?

18 A Correct.

19 Q And what was your job as a narcotics investigator?

20 A To investigate narcotics crimes, develop
21 informants, try to do search warrants to gather illicit
22 drugs. Back then marijuana grow operations were illegal, so
23 we went after some of them.

24 But really we were kind of jacks of all trades.
25 And if the regular detectives needed us for assistance, then

1 we would be used to assist them in other cases kind of like
2 this one.

3 Q When you say this one, you're referring to the
4 investigation of the murder of Marty Grisham?

5 A That's correct.

6 Q As a narcotics investigator was one of your
7 responsibilities to try and locate people?

8 A Absolutely.

9 Q Back then as a narcotics investigator did you
10 drive a marked or unmarked car?

11 A The cars that we use were definitely not marked.
12 They weren't even part of the police fleet. So they were
13 basically just either old rental cars or whatever we could
14 get, something that definitely did not look like a police
15 car. Because that was the whole idea for us to be able to,
16 you know, be in a neighborhood or contact somebody and for
17 them not to see. Because I think all of us have seen
18 unmarked police cars, you know, full size Crown Vic without
19 lights on them, but you still go yeah, that's a police car.
20 So we tried to get cars that aren't like that.

21 Q Purpose of that is that so that you can conduct
22 surveillance without being obvious about it?

23 A Correct.

24 Q Now, you just mentioned earlier that you were
25 assigned to assist in the investigation of the murder of

1 Marty Grisham. What was your initial role in the case?

2 A Some of the things I did the first day, did some
3 interviews with people, called people back from a tip from
4 tip line calls, those kinds of things. And basically it was
5 really all hands on deck to try to get everything done that
6 we needed to get done as fast as we can, you know, as early
7 in the investigation as possible.

8 Q Did there come a time in your investigation, or at
9 least when you were assisting, that officers were trying to
10 locate a person named Michael Clark?

11 A That's correct.

12 Q Do you recall when it was that you were assigned
13 to locate Michael Clark?

14 A My start on this case was actually the day after
15 the homicide, so November 2nd. So that was really the first
16 day where it started getting tips, doing, you know,
17 investigative things, you know, and just being part of the
18 team, so getting up to speed knowing what has occurred to
19 that point, then moving forward.

20 Q As you're trying to -- well, did there come a time
21 that you were actively trying to locate Michael Clark?

22 A So on the morning of the 3rd one of the jobs that
23 I did was call the Department of Motor Vehicles and help to
24 identify any vehicle or any vehicles that might be driven by
25 Mr. Clark. And I think we were able to identify two,

1 possibly two, a Volkswagen and a Mustang.

2 So then that information was shared with our
3 patrol folks because really everybody was out looking.
4 There was a few places that we were looking to try to locate
5 him. And then we wanted to put the information out to all
6 of our patrol officers so they could be out looking for the
7 car.

8 Q And where were you looking for Michael Clark?

9 A Well, between the known residences that we had for
10 his parents, I think we had an address in Gunbarrel, and
11 then I think really wherever else we think we could find
12 him.

13 Q And tell the jury why you were trying to locate
14 the defendant.

15 A Well, as the investigation continued we -- it was
16 determined that Mr. Clark had written some checks on
17 Mr. Grisham's account actually writing them out to himself.
18 And so based on that information even though it was early in
19 the investigation Mr. Clark's name drew a lot of attention
20 as a potential suspect.

21 Q Do you recall setting up a surveillance position
22 off of Gunbarrel Avenue here in Boulder looking for the
23 defendant?

24 A So like when I mentioned earlier we identified two
25 possible vehicles that Mr. Clark was driving. And about

1 2:00 on the 3rd, 2:00 in the afternoon, one of our patrol
2 officers saw that vehicle. And it was parked at an address
3 up in Gunbarrel.

4 And so at that point he calls in, he doesn't go
5 anywhere near the vehicle, the patrol officer, but lets us
6 know. And so myself, Detective Denig, Detective Wyton also
7 a narcotics detective, and I think Sgt. Matthews -- I was
8 looking at my report and I think he was out there also --
9 set up a surveillance on the vehicle starting at about
10 2:00 that afternoon.

11 Q As you have your surveillance set up, did you
12 eventually find Michael Clark?

13 A Yes, he -- he -- we were able to park a
14 surveillance van right next to his vehicle, his Mustang.
15 And luckily we were able to park it on the driver's side of
16 his vehicle.

17 So I was in the van. I thought whoever would come
18 to that van and try to open up the locked door would
19 probably be pretty good chance that he's our guy. Plus we
20 also had information -- we had a picture of Mr. Clark. So I
21 had a limited view, but some view of the person as they were
22 coming to the car. And as he was actually approaching the
23 car I was almost positive it was him.

24 The other thing if I could, as we were set up on
25 that surveillance waiting -- waiting on that car, another

1 Detective, Carey Weinheimer, was talking to the Marine
2 recruiter here in Boulder and who had had conversations with
3 Mr. Clark.

4 And at that point we had information that
5 Mr. Clark had had a 9mm handgun in his possession. So I
6 wanted to make sure I shared that with all the other
7 surveillance units so they were aware that Mr. Clark may be
8 armed.

9 Q Is the fact that Mr. Clark may have been armed why
10 you pulled up the van next to the Mustang that was
11 identified as belonging to Mr. Clark?

12 A I think what we wanted to do was limit his options
13 for leaving and try to control the situation as quickly as
14 possible and not have it escalate. So I think that was the
15 reason why the van was so close. And then the other
16 surveillance detectives were close by, and I was in contact
17 with them by radio.

18 Q When you were going to -- what was the plan when
19 you found Michael Clark? Were you just going to talk to him
20 or what were you going to do?

21 A Well, the first thing is we wanted to safely get
22 him in custody. And with the concern about the handgun we
23 didn't want to mess around with that at all. We were taking
24 it very seriously. It's a homicide investigation. We just
25 got information that he had been seen with a handgun not too

1 long prior to the homicide. So we wanted to get him into
2 custody.

3 And at that point we knew we had probable cause to
4 arrest him for the check fraud case. So that was very
5 helpful for us to be able to not have to just go up and ask
6 for his cooperation, but we were going to place him under
7 arrest for those checks at that time.

8 Q How long did you wait in your surveillance vehicle
9 before you saw the defendant?

10 A Usually it doesn't happen this well. We didn't
11 have to wait too long. It was about 40 minutes. And that's
12 when Mr. Clark came to his vehicle.

13 Q And where did he come from?

14 A He came from apartment F. And I think it's -- I
15 didn't -- the number's in Gunbarrel. I can look it up and
16 tell you. I think it's 5948 I think.

17 Q Good memory, but we'll come back to that.

18 So you said that your plan was to place him under
19 arrest for the forgery. When he came out of the apartment
20 in Gunbarrel what did you do?

21 A I quickly opened the sliding door on the van and
22 placed a gun to the back of his head and told him I was a
23 Boulder police officer, not to move, he was under arrest.

24 Q You actually pulled out a weapon?

25 A Yes, and I pinned him up against his car with my

1 body because I didn't want to give him an opportunity to
2 turn and face me. I didn't want him to reach into anything.

3 I told him to keep his hands out. And as he was
4 coming to the car I was giving instructions to the other
5 detectives.

6 We had talked about what we were going to do when
7 he came out, that it was going to be very quick. I was
8 going to keep him immobile at that -- at that point, and
9 then the other detectives were going to come and cuff him
10 because with a gun in one hand, being able to cuff somebody
11 with one hand is really not possible.

12 Q Now, typically when you arrest someone do you pull
13 out a weapon?

14 A No.

15 Q And in this case you did that because what?

16 A The information about him having a firearm from
17 the Marine recruiter and that it was a homicide case that we
18 were looking at him for ultimately, even though we only had
19 charges at that point for the check fraud.

20 Q So once you pinned him against the car what did
21 the other officers do?

22 A They got there very quickly, and I was very happy
23 for that. He was placed in handcuffs. And then we kind of
24 shifted gears, or I tried to shift gears with Mr. Clark.

25 Q What do you mean by shifting gears?

1 A I knew there was a lot of things we wanted to talk
2 to Mr. Clark about. And meeting somebody that way really
3 tends to put a damper on that. So I tried to do my best to
4 talk to him and say hey, you know, we're here about the
5 checks, you know, there's lots of other things I want to
6 talk to you about, I know you're -- you have questions. And
7 so I really just started to try to build a rapport with
8 Mr. Clark.

9 Q At this point is he in handcuffs?

10 A Yes, because we're standing by his car. It's
11 November. I remember the day, it was pretty cold, pretty
12 damp, kind of a light snow coming down. And so I kind of
13 launched into my conversation with him trying to build that
14 rapport with him.

15 And then I asked him if he would feel more
16 comfortable talking up in the apartment as opposed to out by
17 his car, kind of gave him that option. And he said lets go
18 up to the apartment.

19 Q So you did in fact go up to the apartment then?

20 A Correct.

21 Q What happened next?

22 A So in the apartment it's myself, Mr. Clark,
23 Detective Denig, Detective Wyton, and I'm almost positive
24 Sgt. Matthews.

25 Mr. Clark and I were sitting at the table in the

1 kitchen dining room area, had him uncuffed at that time
2 because my plan was to have him sign some documents for me.
3 Because again, I'm looking to engage him as much as I can
4 and ask for his cooperation.

5 So there was going to be three documents that I
6 was going to work through with him to try to elicit his
7 cooperation so we could continue to talk to him.

8 MR. KELLNER: Your Honor, I'd like to approach the
9 witness with People's 53, 54 and 55.

10 THE COURT: Yes.

11 Q (By Mr. Kellner) Commander, do you recognize the
12 photographs I've handed you?

13 A Yes.

14 Q How do you recognize them?

15 A Those are pictures of Mr. Clark's Mustang with the
16 plate that I had located from the DMV earlier that day. So
17 there's a shot from the rear, left side, and then there's a
18 frontal shot just of the emblem and a little bit of the
19 grill and little bit of the front of the car.

20 Q Are those fair and accurate depictions of
21 Mr. Clark's Mustang as it appeared on November 3, 1994?

22 A Absolutely.

23 MR. KELLNER: Judge, I'd ask to admit People's 53,
24 54 and 55.

25 THE COURT: Any objection or voir dire?

1 MS. MILFELD: No objection, no voir dire.

2 THE COURT: 53 and 54 and 55 will be admitted.

3 MR. KELLNER: May I publish them to the jury?

4 THE COURT: Yes.

5 Q (By Mr. Kellner) Commander, I know we really just
6 kind of covered it, but can you tell us what we're looking
7 at here on the big screen?

8 A The left side of the Mustang. And so the
9 surveillance van that I was talking about is basically just
10 a full size I think it's a Chevy van at the time, had tinted
11 windows. So we were able to park it right to that side of
12 the car, so the driver's side of the car.

13 It's the rear of the car and there's the front
14 and --

15 Q This car appears to have sort of an odd paint job.
16 Can you describe the coloring of the vehicle?

17 A So a lot of it is primer gray. But there's
18 portions of it where some green kind of shows through. And
19 obviously that piece there is probably one of the better
20 examples of the green showing through on the paint job.

21 Q What do you mean by primer gray?

22 A I don't know a lot about cars, but I've done a
23 little body work. And when you fix them and if you're going
24 to do body work and you want to re-paint it or do any kind
25 of bondo or whatever, you do that finish work and then apply

1 a base coat of primer paint. And that's usually gray. And
2 then finish color would be added later.

3 Q Now Commander, you mentioned that you went up into
4 the apartment on Gunbarrel Avenue with the defendant. Did
5 you ask if you could search the apartment?

6 A Well, we had the conversation, and that was part
7 of the three items of paper that I wanted to explain to
8 Mr. Clark. The first was an advisement of rights because he
9 was under arrest and that I still -- and I wanted to talk to
10 him.

11 So in order for me to be able to do that and to be
12 able to use any information that he gave me I would have to
13 give him his rights and he would have to voluntarily waive
14 them.

15 Q Did Mr. Clark in fact give you permission to
16 search the apartment?

17 A Yes, he did.

18 So in addition to the advisement of rights forms,
19 there are actually two of what are called consent to search
20 forms. And we filled out two for those. And again, it's
21 basically asking Mr. Clark's permission for us to search
22 first one was the common areas in the apartment.

23 He was there not on the lease, but there was
24 somebody there who rented the apartment and Mr. Clark was
25 staying there. So we asked for consent to search the common

1 areas and the places that Mr. Clark had control over.

2 And then the last thing we asked for consent to
3 search for was the vehicle.

4 Q Did you search the apartment?

5 A Yes.

6 Q The common areas?

7 A Yes.

8 Q Did you collect any evidence related to your
9 investigation?

10 A No.

11 Q And what about the car, did you search the car as
12 well?

13 A Yes, same thing. We searched the car and did not
14 find anything in the car.

15 MR. KELLNER: Your Honor, may I approach the
16 witness again?

17 THE COURT: Yes.

18 Q (By Mr. Kellner) Handing the witness what's been
19 marked as People's Exhibit 56 for identification.

20 A This is the advisement of rights form that's used
21 by the department, or used by the department back in '94.
22 It's got some information at the top that I filled out,
23 basically lists the date, the location, the time that we
24 were talking to Michael Clark who was 19 years of age, that
25 we were at the address in Gunbarrel 5948 Gunbarrel apartment

1 F, and that he was being advised of his rights by myself and
2 Detective Denig and that we had identified ourselves as
3 officers of the Boulder Police Department.

4 And then it goes down through the four rights.
5 Asked if he understood each of those rights and we checked
6 yes. And then asked you understand that any of these above
7 mentioned rights can be exercised now or at any time during
8 the interview, marked yes. And then Mr. Clark signed, I
9 countersigned along with Rich Denig.

10 And then the final question, understanding the
11 above rights do you choose to voluntarily waive your rights
12 and make statements or answer questions. And again, it was
13 marked yes and again signed by myself, Detective Denig and
14 Mr. Clark.

15 MR. KELLNER: Your Honor, I'd ask to admit
16 People's 56.

17 THE COURT: Any objection or voir dire?

18 MS. MILFELD: No objection.

19 THE COURT: 56 will be admitted.

20 MR. KELLNER: Your Honor, if I may I'd like to
21 publish a previously admitted photograph of People's 44.

22 THE COURT: Okay.

23 Q (By Mr. Kellner) Commander, do you recognize the
24 person shown in People's Exhibit 44 which has previously
25 been admitted?

1 A Yes.

2 Q How do you recognize that person?

3 A That's the photo that we were using that day to
4 help us identify Mr. Clark as we were out searching, and
5 then that picture I saw before we went out on that
6 surveillance.

7 Q Is that a fair and accurate depiction of what
8 Mr. Clark looked like on November 3rd as well?

9 A Correct.

10 Q Is this the man that you saw that you arrested
11 outside of the Mustang?

12 A That's correct.

13 Q And do you recognize Mr. Clark here in court
14 today?

15 A Yes, I do. He's seated at defense table, gray
16 suit, purple tie, he's got a beard and short brown hair.

17 MR. KELLNER: Judge, I'd ask the record to reflect
18 identification of the accused.

19 THE COURT: Subject to cross-examination the
20 record will so reflect.

21 MR. KELLNER: And if I may I'd like to publish the
22 rights advisement?

23 THE COURT: Permission granted.

24 Q (By Mr. Kellner) Detective Denig -- I'm sorry,
25 excuse me, sir, Commander Weiler, is this a fair and

1 accurate depiction then of what I've shown you earlier as
2 People's 56, at least the top part of it?

3 A That's the top part. And those are the signatures
4 and the understanding to the rights and the check marks,
5 that's correct.

6 Q Commander, after the defendant agreed to speak
7 with you did you keep him at the apartment in Gunbarrel or
8 did you go somewhere else?

9 A We kept him at the apartment in Gunbarrel just for
10 a -- for a short time to go through all three of those
11 documents, this document and the two consent to searches.

12 But it was always my plan not to do any of our
13 interview there because what I wanted to do is to get
14 Mr. Clark back to the police department because we had been
15 out at Mr. Clark's residence both watching, waiting for him,
16 getting these documents signed hour, hour and a half. And I
17 know there was several other detectives doing work on this
18 case back at the police department.

19 So I wanted to get back to the department for two
20 main reasons. One, I wanted to be able to record -- have
21 the interview recorded with Mr. Clark. And two, I wanted to
22 check in with the other detectives with any new information
23 that might have been brought to light since we were out on
24 that surveillance. So we wanted to check in, and we also
25 wanted to do a more controlled interview with Mr. Clark at

1 the police department.

2 Q And did you in fact have that interview at the
3 police department?

4 A Yep. It was a long one.

5 Q When you say a long one, what do you mean?

6 A The whole thing lasted about three hours of
7 interview with about an hour of break in the middle. So we
8 were there a long time.

9 Q And did you actually record that interview with
10 the defendant?

11 A That's correct.

12 Q Throughout the course of the interview -- and
13 we're going to hear it later, but do you approach an
14 interview like that with someone you suspect in a homicide
15 with a plan?

16 A So Detective Tom Trujillo was the kind of case
17 agent for the case, and so he definitely had the most
18 knowledge. He had the most knowledge of what everybody else
19 was working on.

20 And so it was myself, Detective Trujillo and then
21 Carey Weinheimer who is a fraud and forgery detective at the
22 time, he's a commander now also. So it was kind of the
23 three of us. We put our heads together a little bit, got up
24 to speed on what had been happening up and to that point for
25 the investigation, and then we started what we thought would

1 be a long conversation with Mr. Clark.

2 And the reason why we thought that is that we
3 really wanted to keep him talking as long as we could
4 because we wanted to try to get as much information as
5 possible based on that interview because we knew that was
6 really going to be our only shot at that. And so we wanted
7 to cover everything backwards, forwards, up and down.

8 And then, like I said, partway through we took a
9 break, we conferred with people outside of the interview
10 room, kind of told other people outside -- this was before
11 we had the ability to remotely view the interview from
12 outside the room. We have that now.

13 So we would have to come out, we took a break for
14 about an hour, we conferred with other detectives, then went
15 back in and finished up for another hour.

16 Q When you say we, I just want to be clear as to who
17 the people were inside the interview room.

18 A So Mr. Clark was there obviously, myself, Tom
19 Trujillo, and I think the case detective whose case it was,
20 and then at that time Detective Carey Weinheimer.

21 Q Throughout the course of the interview do you
22 approach the defendant with anything -- well, what police
23 terminology may call a ruse?

24 A Yeah, there were a couple of things that we did
25 that day that we were hoping for the best to maybe elicit

1 some information from Mr. Clark.

2 Q And can you tell the jury about when you say you
3 approached him with some things, what do you mean?

4 A There were -- the things that I remember off the
5 top of my head, there was some talk about getting shoe
6 impressions, you know, that we might be able to match that
7 up to footprints left at the scene of the homicide.

8 We also did a gunshot residue test that based on
9 the information at the time, the kits that were available at
10 the time we knew we were well outside the parameters for the
11 information to be useful, but we didn't want Mr. Clark to
12 know that. So we wanted to move forward using that also as
13 a ploy to at least get him thinking that maybe we have more
14 information than we do.

15 Q What's your ultimate goal here when you're talking
16 to the defendant in this interview room?

17 A To find the truth. And sometimes if we're able to
18 ask the right questions and in the right order and maybe
19 plant the seed in somebody's mind that we have more
20 information than we do, sometimes we're able to get people
21 to admit to things.

22 And really the whole basis of our interview, and I
23 talk about it several times throughout the interview, is
24 that we want the truth. We don't want him to make up
25 anything, we don't want him to take anything away. We just

1 want him to tell us what happened. And so, you know, that's
2 really what we were looking for.

3 Q Did you advise him of his rights again when you
4 started that interview?

5 A I reminded him that we had done that out at the
6 Gunbarrel house and that -- and that he -- you know, we were
7 still under the same kind of set of circumstances, that if
8 there was something that he did not want to talk about that
9 he didn't have to, but I then also added that we would still
10 like to really talk to him throughout.

11 MR. KELLNER: Judge, pursuant to our discussion at
12 the bench I think this is a good time for me to stop my
13 direct examination and tender the witness prior to admitting
14 the exhibit.

15 THE COURT: Do you want to do that prior to
16 offering the exhibit?

17 MR. KELLNER: Judge, in that case I'd offer
18 People's 59 which has been agreed upon and stipulated by the
19 People and the defense.

20 THE COURT: As a true and accurate copy of the
21 interview?

22 MR. KELLNER: Yes, Your Honor.

23 THE COURT: And Ms. Ring, you agree with that?

24 MS. RING: We do.

25 THE COURT: All right. Then 59 will be admitted.

1 All right. Cross-examination, Ms. Ring,
2 Ms. Milfeld.

3 MS. MILFELD: One moment, Judge.

4 (Pause.)

5 CROSS-EXAMINATION

6 BY MS. MILFELD:

7 Q Commander Weiler, you talked about how one of the
8 first things when you arrested Mr. Clark was asking for his
9 cooperation?

10 A Correct.

11 Q You spent many hours with Mr. Clark?

12 A Correct.

13 Q You spent total about six hours with him?

14 A Right.

15 Q Throughout the entire time you were with him he
16 was cooperative with you?

17 A Yes, he was.

18 Q He was polite?

19 A Yes.

20 Q Respectful?

21 A Yes.

22 Q He was completely compliant with what you had
23 asked of him?

24 A Absolutely.

25 Q You talked about how when you arrested Mr. Clark

1 due to safety concerns you had pinned him up against his
2 car?

3 A Right.

4 Q You also placed a gun to his head?

5 A Right.

6 Q When you did those actions Mr. Clark didn't resist
7 in any way?

8 A Right.

9 Q When you approached him he didn't try to run away?

10 A Right.

11 Q Did he try to fight you in any way?

12 A No.

13 Q He was completely cooperative when you arrested
14 him?

15 A Yes.

16 Q You talked about how you went inside with
17 Mr. Clark, inside of the townhome, and went over various
18 forms with him?

19 A Right. Sorry.

20 Q That's okay.

21 One of the forms that you went over with him
22 Mr. Kellner showed you was the Miranda advisement?

23 A Yes.

24 Q You went over that form with him by first reading
25 it to him?

1 A Right.

2 Q You let him read it himself?

3 A I don't remember if he read it himself. I think
4 we were sitting side by side and it was in front of both of
5 us.

6 Q So the assumption was he was reading along as you
7 were reading it to him?

8 A I guess I wouldn't assume that, but I was hoping
9 he was following along.

10 Q It appeared that he was paying attention?

11 A Correct.

12 Q When you went over the form with him, obviously he
13 didn't have to sign it?

14 A Absolutely.

15 Q It's voluntary?

16 A Right.

17 Q By signing it he agreed to cooperate with you?

18 A Correct.

19 Q That was the -- one of the ways he agreed to
20 cooperate is he agreed to be interviewed by you and other
21 detectives?

22 A Right.

23 Q Other forms that you went over with him were
24 consent to search forms?

25 A Right.

1 Q You had asked him whether you or other detectives
2 could search areas of the townhome that he had access to?

3 A Right.

4 Q You went over that form with him?

5 A Right.

6 Q Of course he didn't have to sign that if he didn't
7 want to?

8 A Same as the first, correct.

9 Q It's completely voluntary?

10 A Right.

11 Q He agreed to that as well?

12 A Yes.

13 Q He cooperated by agreeing to let you and other
14 detectives search parts of the townhome?

15 A Yes.

16 Q You also went over another form with him, another
17 consent to search form?

18 A Correct.

19 Q That was for the Mustang car that was sitting
20 outside?

21 A Right.

22 Q You asked whether or not you could search the
23 entire car?

24 A Right.

25 Q Again, all these things that you're asking of him

1 were completely voluntary?

2 A Yes.

3 Q He doesn't have to do this at all?

4 A Correct.

5 Q He agreed to let you search his car?

6 A Right.

7 Q You talked with Mr. Kellner about how as a result
8 of him agreeing to all this detectives searched areas of the
9 townhome?

10 A Right.

11 Q They also searched his Mustang?

12 A Right.

13 Q At this point you had also talked about how
14 Mr. Clark was a suspect in a homicide investigation?

15 A Right.

16 Q So in addition to having probable cause for
17 forgery, he was a substantial person of interest in the
18 murder investigation?

19 A That's correct.

20 Q So when you did these searches or when the
21 detectives conduct these searches, these searches were
22 thorough?

23 A Yes.

24 Q They were extensive to the degree that the areas
25 could be searched?

1 A Correct.

2 Q They were exhaustive?

3 A Yes.

4 Q You or other detectives did not collect anything
5 as a result of those searches?

6 A That's correct.

7 Q You didn't collect anything because you didn't
8 find anything relevant to the murder investigation?

9 A That's correct.

10 Q Commander, after you were at the townhome that
11 first day you in fact went back to the townhome to talk to
12 the owner, Bob Mann?

13 A Later that night.

14 Q You went back to talk to him to try to get more
15 information?

16 A Well, we knew he was not at the residence when we
17 did the consent. And when we learned that he did return we
18 wanted to go to try to do the same thing with the rest of
19 the residence with his cooperation.

20 Q So when you went back later that night you got
21 Mr. Mann's consent?

22 A Correct.

23 Q He let you search the entire townhome?

24 A That's correct.

25 Q And again, because this is a murder investigation,

1 Michael Clark is a suspect, you're looking for anything
2 that's going to be relevant?

3 A Right.

4 Q You searched the entire townhome completely?

5 A We searched the rest of the portions that we did
6 not search earlier.

7 Q You did that search carefully?

8 A Correct.

9 Q When you did that search you did not collect
10 anything?

11 A Correct.

12 Q You didn't collect anything because, again, you
13 didn't find anything in the entire townhome relevant to the
14 murder investigation?

15 A Right.

16 Q When you talked with Mr. Mann you also learned
17 that Michael Clark had been living there since the beginning
18 of October?

19 A I don't recall that specifically.

20 Q But you recall speaking to Mr. Mann with Detective
21 Denig?

22 A Right. I could refer to my report. I just don't
23 have a recollection of that.

24 Q But you remember naming off a specific date, but
25 Mr. Mann telling you he had been there quite some time?

1 A Right.

2 Q It just hadn't been the few days before that?

3 A Right.

4 Q He had been there for at least over a week before
5 you had been there?

6 A That's the part I don't remember.

7 Q Okay. But it didn't sound to you like it was he
8 just got there?

9 A I can refer to my report if you'd like if it's in
10 there.

11 MS. MILFELD: May I approach, Judge?

12 THE COURT: Yes.

13 Q (By Ms. Milfeld) I'm showing you Detective Denig's
14 report at the bottom of page 2. And I'd ask you to review
15 that.

16 A Okay. And --

17 Q Just -- and just let me know when you're done.

18 A Okay.

19 Q Does that refresh your memory about how long
20 Mr. Mann told you that Mr. Clark had been there?

21 A Not really. And I think that's really just
22 because during this investigation so many pieces were given
23 to different people, it was hard for everybody to know what
24 everybody else was doing and seeing. I would imagine that
25 there was a conversation between Detective Denig and I that

1 he would document that in his report.

2 Q But you do remember going over and speaking to
3 Mr. Mann?

4 A Absolutely.

5 Q And you remember having a conversation with him?

6 A Yeah.

7 Q We talked earlier about how you pinned him up
8 against the car when he tried to open the car door?

9 A Right.

10 Q He was handcuffed right away?

11 A Right.

12 Q And that was because of the safety concerns that
13 you had?

14 A Right.

15 Q When you went inside the townhome you actually
16 unhandcuffed him?

17 A Correct.

18 Q Because at that point you didn't think that he
19 posed any sort of safety threat?

20 A After he was cuffed he was searched, he was
21 separated -- I think he had a bag. I think he was separated
22 from that bag at that point. And so then we checked around
23 the area of the table initially, made sure there was nothing
24 there.

25 And again, part of trying to develop that rapport

1 with him I wanted to get the handcuffs off of him because my
2 plan was to have him to be able to sign the documents that I
3 was planning on having him sign if that's the route that we
4 took.

5 Q So he was -- we already talked about how he was
6 very cooperative?

7 A Correct.

8 Q And one of the reasons why you took the handcuffs
9 off is because he was so cooperative?

10 A Once he was searched and we found out that he
11 didn't have any weapons on him or near him, then yeah,
12 everything that he was doing and saying at that point led us
13 to believe that he would continue to be cooperative. And so
14 it was -- at that point it opened the door to allow us to
15 continue what our plan was in trying to keep that
16 conversation going.

17 Q And I wanted to talk to you about the search that
18 you did of Mr. Clark himself when he was arrested. You
19 mentioned that he had a backpack and a wallet on him?

20 A I think Denig had that information. I don't
21 remember specifically who searched him. I might have
22 searched him at the car a little bit, but it was in
23 conjunction with Denig and I think Wyton as he was arrested
24 right there.

25 Q And as far as you remember nothing was found

1 relevant to the murder investigation as a result of that
2 search?

3 A Correct.

4 MS. MILFELD: No further questions.

5 THE COURT: All right. Any redirect at this time,
6 Mr. Kellner?

7 MR. KELLNER: Judge, not at this time.

8 THE COURT: Okay. Would counsel approach?

9 (The following proceedings occurred at the bench
10 out of the hearing of the jury.)

11 THE COURT: I just want to confirm with everybody
12 that you're still on board with the plan to excuse the jury
13 at this point, and then for us to -- first thing tomorrow
14 morning we'll play the recording that's been admitted as 59?

15 MR. BRACKLEY: Okay. I guess play it, then we'll
16 continue our direct as we would have after the playing.

17 THE COURT: What do you want me to instruct
18 Commander Weiler to do in terms of his return? I'm assuming
19 you don't want him sitting on the witness stand for the two
20 hours that the video is being played.

21 MS. RING: I do.

22 THE COURT: Well, okay.

23 MS. RING: I was just kidding.

24 THE COURT: Do you know how long that tape is?
25 And tell him to be here, you know, 10 or 15 minutes before

1 the end of the tape or the end of the recording.

2 MR. KELLNER: Your Honor, the only other thing I
3 may do before he steps off the stand then is present him
4 with a copy of the transcript. Because my intent would be
5 to provide to the jury a transcript that they can read along
6 so they can understand who is saying what given the number
7 of voices going on.

8 THE COURT: Okay. Well, we probably need to do
9 that before he leaves today.

10 MR. KELLNER: I think that would be appropriate if
11 he's not going to come back. That's why I raise it now.

12 MR. BRACKLEY: My personal expectation would be
13 that he would be here, you know.

14 THE COURT: All right. Then I'll tell him to
15 return at 9:00. You want to take up the foundation for the
16 transcript right now?

17 MR. KELLNER: It won't take long, Judge.

18 MR. BRACKLEY: We could just do it the morning.

19 MR. KELLNER: I think we could do it in the
20 morning though.

21 THE COURT: All right. Okay.

22 (The following proceedings occurred in open
23 court.)

24 THE COURT: So ladies and gentlemen of the jury, I
25 mentioned to you earlier I needed some extra time to take

1 care of some scheduling issues. That's what the attorneys
2 and I have been talking.

3 The next step in the trial process is to play the
4 recording of the interview that was admitted as Exhibit 59.
5 It is lengthy, probably several hours long. And I'm
6 concerned about starting it now and then interrupting it
7 randomly at some point around 5:00.

8 So what we're going to do so that you can listen
9 to that recorded interview from start to finish without
10 interruption is we're going to take the evening recess.

11 And when you come back tomorrow morning at
12 9:00 there may some brief questions for the commander, but I
13 anticipate that almost immediately you'll be listening to
14 that recorded interview.

15 The other reason that I'm comfortable recessing at
16 this point in time is two reasons really. The attorneys
17 tell me that we are ahead of schedule. And that probably
18 may seem hard for you to believe, but I think that's true.
19 And I'm comfortable with that assessment at this point in
20 the trial.

21 The second reason that I'm comfortable taking the
22 recess now is that there's a football game at the University
23 of Colorado tonight. Traffic for you to get away from the
24 courthouse back to wherever you're going, whether it's home
25 or otherwise, is going to be pretty difficult. So the fact

1 that we can get you out of here 35 minutes early I think
2 makes some sense to me.

3 So we're going to take the evening recess. We'll
4 reconvene tomorrow morning at 9:00. Remember the admonition
5 that I've given you at every other recess. It applies at
6 this recess as well.

7 You must not communicate about or discuss this
8 case with anyone by any means. This includes members of
9 your family, people involved in the trial, other jurors or
10 anyone else. If someone approaches you and tries to discuss
11 the trial with you, let me know about it immediately.

12 Don't read or listen to any news reports of the
13 trial. Don't consult any outside reference materials,
14 including a dictionary, the encyclopedia or the internet.

15 Finally, remember that it is especially important
16 that you do not form or express any opinion on the case
17 until it is finally submitted to you.

18 So we'll be in recess until 9:00 tomorrow morning.
19 Please have a good evening and drive safely.

20 (The jury left the courtroom.)

21 THE COURT: All right. The record should reflect
22 the jury has left the courtroom.

23 Commander, if you would please be back here at
24 9:00 tomorrow morning -- and I know we took you out of
25 order. I'm sorry to press you like that, but I appreciate

1 your cooperation. So you're excused until 9:00 tomorrow
2 morning.

3 Is there anything else that we need to take up on
4 the record for the People?

5 MR. BRACKLEY: No, Your Honor.

6 MS. RING: One thing you and I need to discuss.

7 MR. KELLNER: No, Judge, thank you.

8 THE COURT: Anything else for the record right
9 now, Ms. Ring?

10 MS. RING: Judge, just that I know that the
11 prosecution intends on admitting the -- well, they've
12 already admitted the interview and the transcript.

13 You know, I'm going to be concerned at some point
14 about what the jury does with that and making sure that if
15 the jury wants to see the interview or the transcript again
16 that we have -- you know, I think the case law provides for
17 that to be --

18 THE COURT: During deliberations?

19 MS. RING: Yes.

20 THE COURT: Absolutely. I will tell you that
21 typically what I would do is allow the jury to review that
22 in the jury room under the supervision of the bailiff, who
23 is instructed that she would play whatever the audio or
24 video evidence is from start to finish straight through
25 without interruption, without rewind. But we can talk about

1 that once we get to the end of the trial.

2 But I understand your concern. I certainly would
3 not at least at this point in time consider allowing the
4 jury unfettered access to any of the audio or video
5 exhibits.

6 All right. If there's nothing else, then we'll be
7 in recess until 9:00 tomorrow morning. I do not have an
8 8:15 docket tomorrow morning. This courtroom I think will
9 be secured. In fact, once everybody leaves if you want I
10 can call -- I can call security, they can come lock the door
11 and then things should be secured until tomorrow morning.

12 So everybody have a good evening.

13 MR. KELLNER: Thank you, Your Honor.

14 (The trial concluded for the day.)

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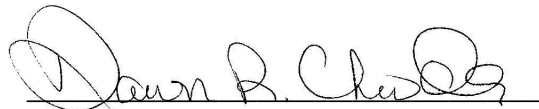
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 18th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----
2 **DISTRICT COURT**
3 **BOULDER COUNTY**
4 **COLORADO**
5 1777 6th Street
6 Boulder, CO 80302
7 -----

8 **Plaintiff:**

9 People of the State of Colorado

10 **Defendant:**

11 Michael Martin Clark

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! ***FOR COURT USE ONLY***
!
! Case No. 12CR222
! Division 6
!

12 -----
13 The matter came on for jury trial on October 12th,
14 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
15 Boulder District Court, and a jury of 12 persons, and the
16 following proceedings were had.
17 -----

1 **P R O C E E D I N G S**

2 The matter came on for jury trial on October 12th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: We are on the record in 12 CR 222,
8 defendant and his counsel are present; People are present
9 through their counsel, the jury is not. Anything to take up
10 on the record before we bring the jury in on behalf of the
11 People?

12 MR. BRACKLEY: Yes.

13 MR. KELLNER: Yes, Your Honor. Yesterday in our
14 sort of haste to bring in Commander Weiler and that disk, she
15 inadvertently made a copy of the wrong disk, Megan Ring's,
16 that audio portion. I'm having the correct copy brought up
17 right now. I'm going to show it to Ms. Ring and I'm going to
18 ask to substitute that completed copy for number 59, which has
19 already been admitted.

20 THE COURT: And it was not ready for the jury
21 yesterday? Ms. Ring, is there any objection to submitting the
22 complete recording?

23 MS. RING: We prefer that, Judge.

24 THE COURT: I think that I would, too.

25 THE COURT: So where's the complete recording?

1 MR. KELLNER: Ms. Langfield from our office is
2 making a copy right now.

3 THE COURT: Okay.

4 MR. KELLNER: And the other thing that I was
5 discussing with Ms. Ring is that because of sort of the
6 intense nature of listening to the audio and following along
7 with the transcript for -- you know, it's going to be a pretty
8 long time, that I would suggest maybe about an hour in taking
9 a 5-minute break sort of, you know, like, you know, we would
10 with any witness as they come and go. So I wanted to give the
11 jurors a little bit of time to, you know, adjust and reset.

12 THE COURT: Okay. Well, in theory that's a great
13 idea, but that was one of the concerns raised by the defense
14 and that was one of the justifications that I used to recess
15 early yesterday. What's the defense's position on taking a
16 break about halfway through the 2-hour recording?

17 MS. RING: Judge, I guess that -- I'm sorry -- if I
18 wasn't clear yesterday. My biggest concern was ending the --
19 in the middle of the evening and having them going home at
20 night only having heard half of it. I agree that asking them
21 to sit and listen and pay attention for that long to me, that
22 was the bigger issue, is going home with having heard half of
23 it. I'm not as concerned with a 5-minute break and going
24 right back to it.

25 THE COURT: Okay. Have you folks talked about a

1 convenient place to take that break?

2 MR. KELLNER: No, Your Honor, but we can do that
3 right now.

4 MS. RING: Well, the other thing is I think if we
5 want to start paying attention at 10:00 and just watching the
6 jurors. If they start, we'll --

7 THE COURT: Okay. All right. I'll --

8 MS. RING: -- ask --

9 THE COURT: I'll take responsibility for that. I'll
10 figure out where a good place to take a break is.

11 So when are we going to have the completed copy of
12 59 available to play for the jury?

13 MR. KELLNER: I told them a matter of minutes.

14 THE COURT: Okay. In the meantime, do you have
15 further testimony from Commander Weiler?

16 MR. KELLNER: The only additional testimony prior to
17 playing the audio would be playing a foundation for the
18 transcript --

19 THE COURT: Transcript --

20 MR. KELLNER: -- which I think is very, very brief.

21 THE COURT: Well, it seems to me if you bring the
22 jury in, you lay the foundation, there's cross-examination on
23 that foundation, we should have the copied disk, right?

24 MR. KELLNER: Yes, sir.

25 THE COURT: Okay.

1 THE COURT: Anything else for the record before we
2 bring the jury in, from the Defendant?

3 MS. RING: No, Your Honor.

4 MR. BRACKLEY: Judge, I just noticed Ms. Kristen
5 Grisham is here in the courtroom this morning.

6 THE COURT: Okay. I didn't notice her at first.

7 Okay. All right. Would you bring the jury in.

8 BAILIFF: Yes.

9 (Whereupon, the jury entered the courtroom, and the
10 following proceedings were had in the presence and the hearing
11 of the jury.)

12 THE COURT: All right. Please be seated. All the
13 members of the jury are back. Good morning, ladies and
14 gentlemen. I hope that you had a nice evening.

15 When we recessed yesterday evening the People were
16 examining Commander Weiler. At this time, do you have further
17 examination for this witness, Mr. Kellner?

18 MR. KELLNER: I do, Your Honor.

19 THE COURT: Go ahead. And, Commander, I'll remind
20 you, you are still under oath.

21 THE WITNESS: Thank you.

22 **DIRECT EXAMINATION**

23 **BY MR. KELLNER:**

24 Q. Good morning, Commander Weiler.

25 A. Good morning.

1 Q. Yesterday we had some discussion about an audio
2 recording of the Defendant's interview on November 3rd, 1994?

3 A. That's correct.

4 Q. And you were present for that interview? I believe
5 you testified earlier --

6 A. Yes.

7 Q. Have you had a chance to listen to that audio
8 recording?

9 A. Yes, I have.

10 MR. KELLNER: Judge, may I approach the witness --

11 THE COURT: Yes.

12 MR. KELLNER: -- with what I have marked as People's
13 60?

14 THE COURT: Yes.

15 Q. (By Mr. Kellner) Commander Weiler, do you recognize
16 what I have just provided you as People's 60 for
17 identification?

18 A. Yes, I do.

19 Q. And how do you recognize it?

20 A. It's the transcribed copy of the interview that we
21 did with Mr. Clark back in '94.

22 Q. And have you actually read through that transcript
23 prior to coming into court today?

24 A. Repeatedly.

25 Q. And approximately how many pages is it -- or

1 actually how many pages is it?

2 A. I think that it's 88 -- 89, maybe 88.

3 Q. Does that transcript contain the complete -- well, a
4 complete and fair copy of what was said in the audio of the
5 interview on November 3rd, 1994, that you had also listened
6 to?

7 A. Yes, it is.

8 Q. Now in that transcript, there are multiple people
9 identified. Who are identified and by what, um, letters in
10 that transcript?

11 A. So next to each part of the transcription there's a
12 letter designator unlisted as the first one. So I'm A,
13 Mr. Clark is B, Detective Tom Trujillo was C, and Detective
14 Corey Weinheimer is D.

15 Q. And when you were listening to this audio recording,
16 did you recognize the Defendant's voice as well?

17 A. Yes.

18 Q. And what about the person or the name designated as
19 C, Detective Tom Trujillo, did you recognize his voice in the
20 audio recording?

21 A. Absolutely.

22 Q. And what about D, Detective Corey Weinheimer?

23 A. The same, yes.

24 Q. And when you listened to that recording, did -- what
25 was spoken by those voices, the people you recognize, is that

1 fairly and accurately captured in this transcript?

2 A. That's correct.

3 MR. KELLNER: Judge, at this time I would offer
4 People's 60 into evidence.

5 THE COURT: Objection or voir dire?

6 MS. MILFELD: No objection or voir dire.

7 THE COURT: 60 will be admitted.

8 (People's Exhibit 60 was admitted into evidence by
9 agreement of the parties.)

10 MR. KELLNER: Your Honor, at this time I have 14
11 copies of this transcript.

12 THE COURT: All right.

13 MR. KELLNER: I would like to publish to the jury.

14 THE COURT: All right. Permission granted.

15 Why don't you have Ms. Batchelder pass those out.

16 BAILIFF: Judge, it's okay if they write on the
17 transcript?

18 THE COURT: Yes.

19 BAILIFF: I think that I'm short one.

20 MR. KELLNER: You are?

21 BAILIFF: Do you need me to make another copy.

22 MR. KELLNER: Is that the last copy that you have?

23 BAILIFF: Yes, and there are two people without.

24 MR. KELLNER: Here we go.

25 THE COURT: All right. Could I see counsel at the

1 bench quickly, off the record.

2 (Discussion was had at the bench off the record).

3 MR. KELLNER: Your Honor at this time I would
4 request permission to publish People's 59, a recorded copy of
5 the Defendant's interview from 1994.

6 THE COURT: That permission to publish is granted.

7 Commander, if you would be more comfortable, because
8 this is a lengthy recording, you can step down from the
9 witness stand and sit out on the wooden benches, if that's
10 more comfortable for you. I just need you to remain in the
11 courtroom in case something comes up.

12 THE WITNESS: I think that this seat is better than
13 what's out there.

14 THE COURT: All right. The other thing, ladies and
15 gentlemen of the jury, I want to be clear with you. Those
16 transcripts that you have are for your use now while the
17 recording is being played, but I'm going to retrieve those
18 transcripts from you at the end of the playing of this
19 recording. You'll get -- I mean the transcript has been
20 admitted as an exhibit, so you are going to get a copy of the
21 transcript when you go back to deliberate, but you should not
22 assume that you are going to have that transcript to hold on
23 to through the rest of the trial. Does that make sense to
24 you?

25 Okay. Go ahead and publish 59.

1 MR. KELLNER: Thank you, Your Honor.

2 (Audio was played off the record.)

3 THE COURT: Mr. Kellner, I need you to pause that
4 for a second.

5 Would counsel approach.

6 (Whereupon, counsel for the parties and the reporter
7 approached the bench, and the following proceedings were had
8 out of the hearing of the jury.)

9 THE COURT: That recording doesn't seem to have the
10 same quality as the one that I was brought.

11 MR. KELLNER: Your Honor, it's essentially loading
12 on the computer, the remainder of the audio. It's going to
13 buffer and it's going to smooth out very soon so that it
14 shouldn't have any glitches.

15 THE COURT: Okay. Does it solve the problem if we
16 wait for 60 seconds so it can load and buffer?

17 MR. KELLNER: It will probably be ready when we get
18 back.

19 THE COURT: Okay. Thanks.

20 (Whereupon, the following proceedings were had in
21 the presence and the hearing of the jury.)

22 THE COURT: I'm told that it's a buffering problem,
23 so hopefully it will be fixed in about 60 seconds.

24 Mr. Kellner, I'm going to ask you to start that over
25 from the beginning.

1 MR. KELLNER: Yes, Your Honor.

2 (Whereupon, the audio recording was played off the
3 record.)

4 THE COURT: So, ladies and gentlemen, you have been
5 listening for about an hour. Do you want 5 minutes to stand
6 up and stretch or do you want to keep going? You need to
7 stretch? Looks like you are all doing fine.

8 THE JURY: Okay.

9 THE COURT: Do you want to keep going?

10 THE JURY: Yeah.

11 THE COURT: Okay. Please continue, Mr. Kellner.

12 MR. KELLNER: Yes, sir.

13 (Whereupon, the audio was played off the record.)

14 THE COURT: Do you want a break? Yeah. Okay. Why
15 don't we go ahead and take a 15-minute recess. We'll be in
16 recess until 11:05. Remember the admonition that I have given
17 you previously, it applies to this recess as well. Don't
18 communicate about or discuss the case with anyone by any
19 means. If someone tries to talk to you about the case, let me
20 know about it immediately. Don't read or listen to any
21 reports of the trial, don't consult any outside reference
22 materials.

23 Remember, it's especially important that you not
24 form or express any opinion on the case until it's finally
25 submitted to you.

1 Yes, sir, you held up the transcript and I think
2 what I'm going to have you do is leave the transcripts on your
3 chairs while you retire to the jury room and then, obviously,
4 they will be there when you come back at 11:05. So we'll see
5 you at 11:05.

6 Commander, if you would be back on the witness stand
7 at 11:05, please.

8 THE WITNESS: Yes.

9 (A brief recess was taken.)

10 THE COURT: Back on the record in 12 CR 222.
11 Mr. Clark and his counsel are present, prosecution is present.

12 Bring the jury in, please.

13 (The jury entered the courtroom.)

14 THE COURT: Please be seated. All the members of
15 the jury are back. Welcome back, ladies and gentlemen.

16 Mr. Kellner -- well, let me make sure everybody has
17 their transcripts. All the jurors, yep. All right.

18 Mr. Kellner, would you continue playing the Exhibit 59.

19 MR. KELLNER: Yes, Your Honor.

20 (Whereupon, the audio was played off the record.)

21 THE COURT: Back on the record.

22 MR. KELLNER: Your Honor, we have a slight technical
23 issue with this. I need to fast-forward this a little bit to
24 get to the right spot when it switched tapes over, so can we
25 have a few minutes to do that, Judge.

1 THE COURT: Sure. When you say a "few," are you
2 talking 2 or 10?

3 MR. KELLNER: Closer to 10 I'd say.

4 THE COURT: How much of the exhibit remains to be
5 played?

6 MR. KELLNER: About 25 minutes, Your Honor.

7 THE COURT: Okay. Why don't we do this, ladies and
8 gentlemen, if you would leave your transcripts on your chairs,
9 Ms. Batchelder, would you escort the jury to the jury room.
10 Ladies and gentlemen, I think that we'll have you back in here
11 at about 10 to 12:00. We'll finish the -- we'll finish the
12 playing of Exhibit 59 and then take the noon recess.

13 (The jury exited the courtroom.)

14 THE COURT: The record should reflect the jury has
15 left the courtroom. Please be seated.

16 Mr. Kellner, why don't you go ahead and fix that and
17 advise me or the bailiff as soon as it's ready to continue.

18 (The noon recess was taken.)

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1 **P R O C E E D I N G S**

2 The afternoon session commenced on October 12th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: All right. We are on the record in
8 12 CR 222. Mr. Clark is present, his counsel are present, the
9 prosecution is present.

10 Mr. Kellner, where are we on Exhibit 59?

11 MR. KELLNER: Judge, we're at the right spot where
12 we left off at 2 hours and 5 minutes and 52 seconds.

13 THE COURT: All right. And there is a disk that is
14 Exhibit 59 that will be available for the record that contains
15 all portions of the audio played for the jury?

16 MR. KELLNER: Yes, Your Honor.

17 THE COURT: Okay. Anything for the record before we
18 bring the jury in on behalf of the People?

19 MR. BRACKLEY: No, Your Honor.

20 THE COURT: On behalf of the Defendant?

21 All right. Would you bring the jury in.

22 (The jury entered the courtroom.)

23 THE COURT: Please be seated. Welcome back, ladies
24 and gentlemen of the jury, I think that we fixed our technical
25 difficulties. Everybody has their copy of Exhibit 60, the

1 transcript. You do?

2 All right. Mr. Kellner, would you continue playing
3 Exhibit 59 at the point where we lost audio.

4 MR. KELLNER: Yes, Your Honor. This is page 63 of
5 the transcript.

6 THE COURT: Let me have counsel at the bench for
7 just a moment for a brief conversation off the record.

8 (Whereupon, a brief discussion was had off the
9 record.)

10 THE COURT: All right. So it looks like page 67 of
11 the transcript was copied twice in your packet, so just ignore
12 the second page 67 and go on to page 68.

13 Go ahead, Mr. Kellner.

14 (Whereupon, the audio was played.)

15 THE COURT: All right. Mr. Kellner, I'm going to
16 ask you to turn off the speaker, if that makes sense. And I'm
17 going to ask you, ladies and gentlemen of the jury, would you
18 take the copies of the transcripts and pass them that way and
19 then, Alex, would you pick them up and... I want to make sure
20 that there's an Exhibit 60, though, that's not admitted
21 evidence. There it is.

22 MR. KELLNER: Right here.

23 THE COURT: Great. Mr. Kellner, did you have
24 further direct examination for Commander Weiler?

25 MR. KELLNER: I do, Your Honor.

1 THE COURT: Go ahead.

2 MR. KELLNER: Thank you.

3 **DIRECT EXAMINATION**

4 **BY MR. KELLNER:**

5 Q. Commander, earlier yesterday you talked about
6 investigative techniques, such as using a ruse?

7 A. That's correct.

8 Q. And can you tell the jury again what that means?

9 A. It would be a tactic that we would use to try to
10 elicit additional information from somebody. And in some
11 cases it's -- it's based on trying to present the person that
12 we're talking to, letting them think possibly that we have
13 more information or more facts than we actually do.

14 Q. Looking at page 63 on that transcript, there was --
15 and as the jury heard -- discussion about a gunshot residue
16 test.

17 A. Okay.

18 Q. Is that an example of what you called a "ruse"?

19 A. That's one of the ones we used in this particular
20 case.

21 Q. Specifically one of the things that was said is that
22 you could even use the gunshot residue test to find out what
23 the manufacturer is of a, you know, particular firearm that
24 fired a bullet?

25 A. Right, or the type of powder or manufacturer of the

1 powder.

2 Q. Is that something that you would actually find out
3 in a gunshot residue test?

4 A. Not that I'm familiar with.

5 Q. Another thing that you tried was getting shoe
6 impressions?

7 A. That's correct.

8 Q. Is that another example of something that you were
9 doing to represent that you had maybe more information?

10 A. Right. And the parts that I know as assisting
11 Detective Trujillo, not the case agent for this, there was
12 some things that I was very familiar with and other things
13 maybe not so much. It was my understanding when we were
14 having that conversation that there were not any shoe print
15 impressions at the scene, but that -- that was just my
16 understanding of it.

17 Q. So you mentioned you were -- you know, obviously,
18 assisting Detective Trujillo and other folks with this case.
19 Were you the investigator on the check fraud case?

20 A. Absolutely not. Like I mentioned yesterday, I was a
21 narcotics investigator at the time, and check fraud was
22 probably as far away from what I did as could be.

23 Q. Who was the lead detective on the check fraud case?

24 A. Jeff Kithcart.

25 Q. Okay. And you are aware that Marty Grisham was

1 murdered on Tuesday, November 1st of 1994?

2 A. That's correct.

3 Q. And the -- throughout that interview we hear mention
4 of a phone call from a bank on a Monday?

5 A. That's correct.

6 Q. And, in fact, that's something that you said to the
7 Defendant?

8 A. Right.

9 Q. Are you sure that that was, in fact, when the phone
10 call was made, or is that something that you were saying based
11 on your belief at the time?

12 A. It was something that I was saying based on my
13 belief at the time.

14 Q. Commander, I want to turn your attention now to two
15 to three weeks down the line, November 29th, 1994.

16 A. Okay.

17 Q. Did you take any sort of investigative action in
18 this case on November 29th, 1994?

19 A. Myself and Detective Denig attempted to drive the
20 routes that we thought would be most likely used by Mr. Clark
21 from Mr. Uhlir's residence down off of University in Denver,
22 and to Mr. Grisham's residence and -- to see if -- to give bit
23 a baseline for how long that would actually take to help
24 develop a timeline.

25 Q. And this is because of the conversation that you had

1 with the Defendant with respect to where he was on the evening
2 of November 1st?

3 A. Right. Because he was down -- dropped off Jamie
4 Uhlir after a soccer game and then said that he -- he left for
5 home after that.

6 Q. Why did you pick November 29th to test drive this
7 route?

8 A. Because that was also a Tuesday night, the same
9 night as the night of the homicide, so we wanted to try to
10 match as best as we could the time of day and day of week
11 to -- to try to get that same kind of driving situation or
12 traffic situation.

13 Q. What kind of vehicles were you driving, you and
14 Detective Denig?

15 A. I don't remember the specific makes, but they,
16 obviously, were not police cars. They were totally just
17 unmarked, probably, you know, like a Pontiac Grand Am kind of
18 car. I remember a few from back then, but they definitely
19 weren't police cars or police looking in any way, because
20 those were the cars that we used in our regular job of doing
21 narcotics investigations.

22 Q. Okay. Yesterday you mentioned that as a narcotics
23 investigator you -- the kind of unmarked cars you drove didn't
24 have lights or sirens?

25 A. No, nothing, no radios, no lights, not a single

1 thing in there that would identify it as a police vehicle.

2 Q. The kind of car you drove on this route, is that
3 also the same, no lights or sirens?

4 A. That's correct.

5 Q. Do you recall where you started in Denver?

6 A. We started out in front of Mr. Uhlir's residence and
7 he lives on University just one block off of I-25, so very
8 close to DU campus.

9 Q. So Mr. Uhlir's building is basically the first
10 building that you come to as you get off the highway?

11 A. Yeah, he probably hears a lot of highway noise or
12 did back then.

13 MR. KELLNER: Okay. Your Honor, may I approach the
14 witness with what I have marked as People's 58?

15 THE COURT: Yes.

16 Q. (By Mr. Kelner) Detective Weiler, do you recognize
17 People's 58?

18 A. Yes, I do.

19 Q. And how do you recognize it?

20 A. It's the route using I-25 up to Highway 36, so from
21 Mr. Uhlir's residence to Mr. Grisham's.

22 Q. Is People's 58 a fair and accurate depiction of the
23 route you took that evening on November 29th?

24 A. Yeah, and we didn't have Google back then, but I
25 agree.

1 Q. Looks the same?

2 A. Yes.

3 MR. KELLNER: Judge, I would ask to admit
4 People's 58.

5 THE COURT: Any objection or voir dire?

6 MS. MILFELD: No objection, no voir dire.

7 THE COURT: 58 will be admitted.

8 (People's Exhibit 58 was admitted into evidence by
9 agreement of the parties.)

10 MR. KELLNER: Can I use the easel to publish this to
11 the jury?

12 THE COURT: Yes.

13 MR. KELLNER: Thank you.

14 Q. (By Mr. Kellner) Can you see that?

15 A. Yeah.

16 Q. So, Commander Weiler, what was the approximate
17 distance from Jamie Uhlir's residence just off of I-25 and
18 University to Marty Grisham's apartment?

19 A. About 33 miles.

20 Q. And tell the jury specifically the route that you
21 took?

22 A. So the route that we took was just leaving right
23 from Mr. Uhlir's residence, crossing over the I-25 bridge to
24 get onto I-25 north to get right on there. Like I said, his
25 building is the first building off of the intersection. Then

1 took I-25 north all the way up to Highway 36, took 36 to
2 Foothills and then we went east on Arapahoe from Foothills to
3 Mr. Grisham's residence. We thought that was really the most
4 direct route that there was.

5 Q. What time of night did you make this drive?

6 A. In one of -- in an interview that I conducted with
7 Jamie Uhler, he was the person that went with Mr. Clark to the
8 soccer game, in a conversation with him we asked him when
9 Mr. Clark left his residence and he said 8:50 to 9:00. So
10 in -- and that was a pretty good guess on his part. He
11 couldn't get it down any closer to that.

12 Q. Did you and Detective Denig leave Jamie Uhler's
13 residence at the same time?

14 A. No, I -- I drove that route at 8:50 and Rich Denig
15 left at 9:00, so just 10 minutes after I did.

16 Q. So you left Jamie Uhler's apartment at 8:50. What
17 time did you arrive at Marty Grisham's apartment?

18 A. 9:21, so it took me 31 minutes.

19 Q. Tell the jury, you know, approximately how fast you
20 were you going?

21 A. Well, we wanted to do this, you know, because,
22 obviously, we -- we were not in police cars, but we wanted to
23 travel with the flow of traffic and -- and that's really what
24 we did. We, you know -- we weren't passing people, you know,
25 left and right, we were just trying to do -- to just stay with

1 the flow as much as we could. And, obviously, it was a pretty
2 good flow that night at 8:50 or 9:00 at night.

3 Q. You lived in and around Boulder and Denver now
4 for --

5 A. Long time.

6 Q. -- a long time. Safe to say that since 1994 to
7 present day, there's a little bit more population or populated
8 areas between Denver and Boulder now?

9 A. I bet you it would be a little slower if we did it
10 today.

11 Q. Once you arrived at Marty Grisham's apartment at
12 9:21, as you testified, what did you do next?

13 A. Just waited in the parking lot for Detective Denig
14 to arrive.

15 Q. What time did Detective Denig arrive?

16 A. 9:32, so it took him a minute longer to travel the
17 same route, so 32 minutes.

18 Q. You said he had left at 9:00?

19 A. Yes.

20 Q. So once he arrived at 9:32, keeping in mind the time
21 of the 911 call, what did you do next?

22 A. We then thought we would drive the rest of the way
23 to where Mr. Clark was living up in Gunbarrel, and -- and we
24 chose two different routes to do that, as long as both of us
25 were out there. So Detective Denig took a route that Michael

1 talked more about, going north on 55th to 63rd and kind of up
2 that way. I went a little bit differently. Just based on my
3 interview with Mr. Clark earlier, he talked that sometimes he
4 would get off in Louisville and go up 75th. So from
5 Mr. Grisham's house Denig went up 55th to 63rd, I took
6 Arapahoe east to 75th and then north and kind of worked my way
7 back around to the Gunbarrel address.

8 MR. KELLNER: Your Honor, may I approach the witness
9 with what I have marked as People's 57?

10 THE COURT: Yes.

11 Q. (By Mr. Kellner) Do you recognize People 57?

12 A. Yes, I do.

13 Q. And how do you recognize it?

14 A. It's basically the route that we just talked about.

15 MR. KELLNER: Judge, may I publish this? I'm
16 sorry -- I ask to admit 57.

17 THE COURT: Objection or voir dire?

18 MS. MILFELD: No objection or voir dire.

19 THE COURT: 57 is admitted.

20 (People's Exhibit 57 was admitted into evidence by
21 agreement of the parties.)

22 MR. KELLNER: And may I publish it?

23 THE COURT: Yes.

24 MR. KELLNER: Take down this previously admitted
25 exhibit.

1 Q. (By Mr. Kellner) Now, Commander Weiler, you did
2 that -- you had left Marty Grisham's apartment at 9:35?

3 A. Right.

4 Q. Approximately what time did you arrive at the
5 address in Gunbarrel, 5948 Gunbarrel Avenue, where the
6 Defendant was staying?

7 A. 9:43, so it took about eight minutes.

8 Q. Did you hit a lot of traffic on the way?

9 A. Nope, and it's nothing like how it is right now.
10 It's a lot of construction.

11 Q. And approximately what time did Detective Denig
12 arrive?

13 A. We arrived almost the same time within, you know,
14 seconds of each other.

15 MR. KELLNER: Commander Weiler, I appreciate your
16 testimony. I have no further questions at this time.

17 THE COURT: Cross-examination.

18 MS. MILFELD: Thank you. Ms. Milfeld.

19 **CROSS-EXAMINATION**

20 **BY MS. MILFELD:**

21 Q. Going back to the interview, the first thing that
22 you talked to Michael Clark about was the checks?

23 A. Yes.

24 Q. You confronted him right away and you asked him
25 whether or not he stole and forged the checks?

1 A. Right.

2 Q. He admitted that to you right away?

3 A. Correct.

4 Q. Mr. Kellner talked to you about a number of the
5 ruses you employed during the course of the interview?

6 A. That's correct.

7 Q. You testified that you used these ruses to gather
8 more information from someone?

9 A. Yes.

10 Q. That sometimes you tell them things that aren't
11 exactly true?

12 A. Correct.

13 Q. Ultimately by using these ruses you hope to get a
14 confession?

15 A. I think it was pretty clear in the interview we were
16 trying to get the truth from our interview with Mr. Clark.

17 Q. But if you got more information, then the ruse was
18 successful?

19 A. Correct.

20 Q. One of the ruses that you used was telling him about
21 the ammunition?

22 A. I guess that I don't follow your question.

23 Q. One of the ruses you employed is that you told
24 Mr. Clark that you found out that the ammunition used was the
25 same kind that was used in the murder?

1 A. Correct.

2 Q. You told him that the ammunition that he showed to
3 Sergeant Weir you could trace to the gun that was used in the
4 murder?

5 A. That's correct.

6 Q. That wasn't true at all?

7 A. Correct.

8 Q. There was no way that you would be able to trace
9 that?

10 A. As far as I know, no.

11 Q. As a result of that ruse, Mr. Clark didn't give you
12 any more information?

13 A. Correct.

14 Q. He didn't tell you that he was involved in the
15 murder in any way?

16 A. Correct.

17 Q. He didn't confess at all?

18 A. No.

19 Q. The second ruse that you used and Mr. Kellner talked
20 to you about, this was the shoe prints?

21 A. Correct.

22 Q. Again, that was something that you told Mr. Clark
23 that wasn't true?

24 A. Correct.

25 Q. Because you wouldn't be able to look at Mr. Clark's

1 shoes and compare it with any shoe prints because none of
2 these existed?

3 A. Correct.

4 Q. As a result of this ruse -- and you talked before
5 how your goal is to get more information, he didn't give you
6 any information?

7 A. That's right.

8 Q. The other ruse that you talked about was using the
9 gunshot residue test?

10 A. Right.

11 Q. And typically when you are using that test, that's
12 an evidence-gathering tool?

13 A. Correct.

14 Q. When you use this gunshot residue test, you also
15 told him things that weren't true at all?

16 A. Could you give me an example?

17 Q. For example, Mr. Kellner talked to you about how you
18 could tell from the test what kind of gunpowder was used?

19 A. Like you mentioned earlier --

20 Q. That's not true?

21 A. -- correct.

22 Q. It's also not true that you can't tell the
23 manufacturer of the gun, based on the gunshot residue test?

24 A. Correct.

25 Q. When you told him -- when you did this ruse with

1 Mr. Clark, he didn't provide any more information to you?

2 A. Correct.

3 Q. He did not say as a result of this ruse that he was
4 involved in the murder of Marty Grisham?

5 A. Correct.

6 Q. You heard a lot of testimony -- or you heard the
7 interview in which Mr. Clark told the story about getting a
8 gun from Luis?

9 A. Correct.

10 Q. He told you that he had gone to buy this hot stereo,
11 and in that process Luis left a gun in his car?

12 A. Right, that was his -- what he explained to us.

13 Q. Throughout the interview you and the other
14 detectives questioned him pretty hard about that?

15 A. Absolutely.

16 Q. You told him that that was an incredible story?

17 A. Right.

18 Q. You told him that, You know what, we don't believe
19 that story at all?

20 A. Correct.

21 Q. Because in your minds that story was completely
22 nonsensical?

23 A. Correct.

24 Q. You later talked in the interview with Mr. Clark
25 about his relationship with Sergeant Weir?

1 A. Yes.

2 Q. And Mr. Clark tells you that he thought that
3 Mr. Weir had a problem with him because he didn't think that
4 he was very tough?

5 A. I recall that.

6 Q. Mr. Clark told you that Sergeant Weir didn't think
7 that he was a tough guy and that he wanted to impress him?

8 A. Right.

9 Q. Mr. Clark said that he knew that guns were a big
10 thing in the Marines?

11 A. Correct.

12 Q. He wanted to impress Sergeant Weir, so one of things
13 about acting tough and trying to impress him was acting like
14 he knew a lot about guns?

15 A. Correct.

16 Q. Throughout your interview with Mr. Clark you and the
17 other detectives directly confront him and by -- let me be
18 more elaborate. You accuse him of committing the crime?

19 A. I think that the words that we used were that, um,
20 he was definitely somebody we were looking at and in that part
21 of it, yes.

22 Q. You tell him that he's your main guy?

23 A. Right then at this point, yes.

24 Q. You tell him, We think you're involved in something?

25 A. Right.

1 Q. You tell him, Mr. Clark, You're in the hot seat
2 right now?

3 A. Yep.

4 Q. That you are our suspect?

5 A. Yes.

6 Q. As a result of that, Mr. Clark tells you that I
7 didn't have anything to do with Mr. Grisham's murder?

8 A. Right.

9 Q. He tells you, I don't know what happened to him?

10 A. Correct.

11 Q. He says, I know that I took the checks, I'll admit
12 to that, but I have no idea what happened to Mr. Grisham?

13 A. Right.

14 Q. He repeatedly tells you, I didn't have anything to
15 do with Mr. Grisham's death?

16 A. That's true.

17 Q. I want to turn your attention to the route that you
18 drove. When you spoke with Mr. Clark in the interview, he
19 told you his whereabouts on the night of November 1st?

20 A. Right.

21 Q. Part of that was -- was he told you that he had gone
22 to the soccer game in Lakewood?

23 A. Right.

24 Q. He told you that after the soccer game he went back
25 to Jamie's place?

1 A. Correct.

2 Q. As part of you and Detective Denig driving the
3 route, you and Detective Denig chose to start the route at
4 Mr. Uhlir's place?

5 A. Right.

6 Q. You did not drive any route from the Lakewood
7 Memorial Stadium to Jamie's house?

8 A. We did not.

9 Q. So you don't know how long it would take for them to
10 get from the stadium to his house?

11 A. I do not know that.

12 Q. You talked about how the approximate mileage of the
13 route you took was 33 miles?

14 A. Right.

15 Q. That you arrived at the parking lot approximately
16 9:21?

17 A. Right.

18 Q. So the 33 mile drive took you approximately
19 31 minutes total?

20 A. Right.

21 MS. MILFELD: Judge, may I approach?

22 THE COURT: Certainly.

23 MS. MILFELD: I'm just going to grab this behind
24 you.

25 THE COURT: You are going to have to back it up,

1 Ms. Milfeld, because the jurors on the end aren't going to be
2 able to see it.

3 MS. MILFELD: I'm sorry, I told you I wasn't good at
4 this.

5 Q. (By Ms. Milfeld) Now can you see it?

6 A. Sure.

7 THE COURT: Okay.

8 Q. (By Ms. Milfeld) I want to draw your attention to
9 the end of the route here where it says 5640 Arapahoe?

10 A. Okay.

11 Q. You would agree with me that that particular map
12 doesn't show intersections on Foothills and Arapahoe?

13 A. Correct.

14 Q. That actually when you come in off of Foothills,
15 it's not a completely straight shot from Foothills to
16 5640 Arapahoe?

17 A. That's correct.

18 Q. You have to go through various traffic signals to
19 get there?

20 A. True.

21 Q. You talked about how -- that you drove with the flow
22 of traffic?

23 A. Right.

24 Q. You didn't actually record your speed in any way
25 that day?

1 A. No, because it would be variable throughout the
2 entire trip.

3 Q. But you -- throughout the variable speeds, you
4 didn't try to track that down or record that in any way?

5 A. I was alone in the car, so I was driving.

6 Q. So the answer is, no, you did not?

7 A. So two hands on the wheel.

8 Q. Safe driving.

9 You also did not research traffic conditions from
10 the night of November 1st?

11 A. Did not.

12 Q. And because you didn't do any of these things, you
13 never wrote that in your report?

14 A. Correct.

15 Q. The route that you drove and Detective Denig drove,
16 you both only drove the route once?

17 A. Correct.

18 Q. You didn't drive the route on any other day?

19 A. That's right.

20 Q. So you can only tell us what the time was on that
21 particular day, November 29th?

22 A. Just that it was a similar day of the week and a
23 similar time of day.

24 MS. MILFELD: No further questions.

25 THE COURT: Any redirect, Mr. Kellner?

REDIRECT EXAMINATION

BY MR. KELLNER:

Q. Commander, you mentioned the ruse about the bullets. Why did you want to find the gun that Mr. Clark had so badly?

A. That was the biggest piece of the homicide investigation that we hadn't been able to find, and whether Mr. Clark was involved or not really hinged on our ability to get the gun. And with everything that he told us, that he wasn't involved, we were trying our best to find that gun, and if we would have been able to find that gun, we would have been able to cross him off the list because to that point with the information that we had in the investigation at that time, like I mentioned repeatedly in this interview, is that things were looking bad for him and that gun would be something that would kind of be his ticket out, if we were able to locate it.

Q. If you had found that gun, what would you have done with it or where would you have sent it?

MS. MILFELD: Objection, calls for speculation.

THE COURT: Response.

MR. KELLNER: Judge, I can rephrase the question and ask normal practice.

THE COURT: I'll sustain the objection.

Q. (By Mr. Kellner) As a detective, as a person who has I'm sure investigated a number of different crimes, have you ever submitted a gun to the Colorado Bureau of

1 Investigations --

2 A. Yeah --

3 Q. -- for analysis?

4 A. -- that would be our first stop. That -- they would
5 be the people that would do the ballistics check to check the
6 bullets, check -- check the bullets recovered from Mr. Grisham
7 against bullets fired from that gun to be able to match the
8 gun and that event together.

9 Q. Now despite all these investigative tactics you
10 employed, the Defendant maintained his story the entire time
11 about Luis and Montbellow and giving the gun to some unknown
12 man?

13 A. Yeah. And we went to great lengths to continue to
14 talk to Mr. Clark about that because we knew other information
15 would come down the line, and we wanted to get as much
16 information from Mr. Clark as possible in regards to the gun.
17 And so I think that horse was pretty well beaten to death
18 during that interview, but we wanted to make absolutely sure
19 that we had that for the record and we knew that was our only
20 opportunity to get that.

21 MR. KELLNER: Thank you, Commander.

22 THE COURT: Any recross, Ms. Milfeld?

23 MS. MILFELD: No, Judge.

24 THE COURT: All right. Sir, you can step down.

25 Is Commander Weiler subject to recall?

1 MR. KELLNER: He is, Your Honor.

2 THE COURT: All right. So, Commander, you can step
3 down, but you are subject to recall, so... thank you, sir.

4 THE WITNESS: Thank you.

5 THE COURT: Would the People call their next
6 witness.

7 MR. KELLNER: We call Jeff Gore.

8 THE COURT: Sir, would you step forward and come all
9 the way up here to the witness chair.

10 **JEFFREY D. GORE,**
11 a witness herein, having been first duly sworn, was examined
12 and testified on his oath as follows:

13 THE COURT: Please have a seat.

14 Go ahead, Mr. Kellner.

15 **DIRECT EXAMINATION**

16 **BY MR. KELLNER:**

17 Q. Good afternoon, sir. Can you please state your name
18 and spell your last name for us.

19 A. Jeffrey D. Gore, G-o-r-e.

20 Q. And, Mr. Gore, how are you employed?

21 A. I work as a loan officer at First National Bank in
22 Frankfort, Kansas.

23 Q. And how long have you worked for the bank in
24 Frankfort, Kansas?

25 A. Since 2005.

1 Q. What sort of jobs have you held in the past?

2 A. Mortgage underwriter, credit union president, credit
3 union vice president, credit officer with Farm Credit
4 Services.

5 Q. Was there ever a time when you lived in Boulder?

6 A. No, I worked in Boulder, I did not live in Boulder.

7 Q. Where did you work in Boulder?

8 A. I worked at Boulder Municipal Employees Federal
9 Credit Union.

10 Q. When did you work for the Boulder Municipal
11 Employees Credit Union?

12 A. July of 1992 through December of 1998.

13 Q. What was your job at the credit union?

14 A. I worked in the loan department. I had started out
15 as a loan officer and then worked as the vice president in
16 charge of the loan department.

17 Q. Did you do that the entire time that you worked for
18 the Boulder Municipal Employees Federal Credit Union?

19 A. Yes.

20 Q. And shorter way of saying that?

21 A. BMEFCU, I guess.

22 Q. That's not very helpful.

23 A. Okay.

24 Q. Mr. Gore, I'm going to draw your attention to
25 November 1st, 1994.

1 A. Okay.

2 Q. Did you know a man named Marty Grisham?

3 A. I knew of him. I'm sure that I had seen him before
4 that, yes.

5 Q. And how was it that you would have known him?

6 A. He was a credit union member at Boulder Municipal.

7 Q. Do you recall receiving a phone call at the credit
8 union from someone claiming to be Marty Grisham?

9 A. Yes.

10 Q. When did you receive this phone call?

11 A. It was before my lunchtime on November 1st. I don't
12 know the exact time of the day, but it was before I went to
13 lunch.

14 Q. Now this person when they called you claiming to be
15 Marty Grisham, what did this person ask you?

16 A. Something along the lines of what is my account
17 balance. How much do I have in my account.

18 Q. And did you give that person on the other end of the
19 line that information about the account balance?

20 A. No. I -- credit union practice -- financial
21 institution practice is to ask some form of challenge
22 question. I asked a question of the caller because the voice
23 was not recognizable to me to verify that I was talking to my
24 credit union member or customer.

25 Q. And do you recall issuing a challenge to the

1 person --

2 A. Yes.

3 Q. -- that called?

4 A. Yes.

5 Q. And what did you ask this person?

6 A. Had to do with the -- an address, zip code.

7 Q. Did the person claiming to be Marty Grisham give you
8 a satisfactory answer to your challenge question?

9 A. Not the current, no. The address was incorrect.

10 Q. So when you -- well, what did you do once you heard
11 this person giving --

12 A. I said --

13 Q. -- I need the address?

14 A. I said, Marty, we must have some wrong information,
15 so you must -- you know, you are going to need to come in to
16 the credit union to get this corrected because that's not what
17 I have.

18 Q. And what happened next?

19 A. The person on the end of the line hung up the phone
20 without ending the call, just hung up the phone.

21 Q. Because of the sort of abrupt ending of that call,
22 did you form any sort of suspicion?

23 A. Yes, at that time I did.

24 Q. Tell the jury about that, please.

25 A. At that time I didn't -- that's not normal. I was

1 thinking somebody was trying to fraud the account, so I called
2 Marty's number at work.

3 Q. What did you do once you called Marty Grisham's
4 number at work?

5 A. I told him to call me, that there was some
6 information that people were trying to get on his account at
7 the credit union.

8 Q. And did you actually speak to Marty Grisham?

9 A. He called me back and I talked to him about the --
10 his account, he said, No, I didn't call you earlier that day.
11 So I went through on my screen the checks that had been going
12 through his account and he said, No, these items -- I didn't
13 do any of those. I don't have anything in my book that says
14 any of those, so something is going on, put a stop to that.
15 So we did and he headed down to the -- headed down to the
16 credit union at that point, he left work and came down to see
17 us.

18 Q. Did you see him later that day on November 1st at
19 the credit union?

20 A. He was there and he was speaking to Patty Harris.

21 Q. Mr. Gore, do you remember getting any news about
22 Marty Grisham the following day?

23 A. Yes, I -- I came into the credit union in the
24 morning and Patty, first thing came up to me and had a -- a --
25 an ashen look on her face and said, Marty was shot last night.

1 And it just kind of hit me pretty hard, I mean I can visibly
2 remember --

3 MS. RING: Judge, can we approach?

4 A. -- remember the face.

5 THE COURT: Hold on, Mr. Gore. Would counsel
6 approach.

7 (Whereupon, counsel for the parties and the reporter
8 approached the bench and the following proceedings were had
9 out of the hearing of the jury.)

10 MS. RING: I'm having trouble figuring out the
11 relevance to this part of the questioning.

12 MR. KELLNER: Judge, just that during the interview
13 the officers mistakenly said the phone call came in on Monday
14 at the bank, and the purpose of Mr. Gore is to establish that
15 the phone call him in on the day of Marty Grisham's murder.
16 So I'm trying to give the jury some context as to why he would
17 remember that it was the day prior to the murder -- I'm
18 sorry -- the day of the murder that he got the call.

19 THE COURT: Brief explanation, there is some
20 relevance. I'll overrule the objection.

21 (Whereupon, the following proceedings were had in
22 the presence and the hearing of the jury.)

23 THE COURT: I've overruled the relevance objection.
24 Mr. Kellner said that he had one more question.

25 Please continue, Mr. Kellner.

1 MR. KELLNER: Thank you, Judge.

2 Q. (By Mr. Kellner) Now, Mr. Gore, how is it
3 approximately 18 years later that you are certain that this
4 call you received from the unknown caller came in on
5 November 1st, 1994?

6 A. The day after sticks in my mind. I -- the day
7 before we went through the rig a -- the account fraud
8 scenario, the next day sticks in my mind extremely because I
9 distinctly sat in my office and said, Gosh, yesterday I think
10 that I -- I talked to Marty on his last day, so that's how I
11 remember it in my mind now.

12 MR. KELLNER: Thank you, Mr. Gore. I have no
13 further questions.

14 THE COURT: Cross-examination, Ms. Ring.

15 MS. RING: No questions.

16 THE COURT: All right. Mr. Gore, you can step down.

17 THE WITNESS: Yes.

18 THE COURT: Can this witness be excused?

19 MR. KELLNER: He may, Your Honor.

20 MS. RING: Yes.

21 THE COURT: Mr. Gore, you are excused. Thank you
22 very much.

23 THE WITNESS: Thank you.

24 THE COURT: Would the People call their next
25 witness.

1 MR. KELLNER: The People call Patty Harris.

2 THE COURT: Would you step forward, please, ma'am.

3 Come all the way up here by the witness chair.

4 **PATTY HARRIS,**

5 a witness herein, having been first duly sworn, was examined
6 and testified on her oath as follows:

7 THE COURT: Please have a seat.

8 Go ahead, Mr. Kellner.

9 MR. KELLNER: Thank you, Judge.

10 **DIRECT EXAMINATION**

11 **BY MR. KELLNER:**

12 Q. Good afternoon, ma'am. Could you please state your
13 name and spell your last name.

14 A. Patricia Harris, H-a-r-r-i-s.

15 Q. And, Ms. Harris, what do you do for a living?

16 A. I work for Boulder Valley Credit Union, I'm a branch
17 manager.

18 Q. How long have you worked for the Boulder Valley
19 Credit Union?

20 A. Almost 15 years.

21 Q. And before working for the Boulder Valley Credit
22 Union, where did you work?

23 A. Boulder Municipal Employees Credit Union.

24 Q. Approximately from what time periods did you work
25 for the Boulder Municipal Federal Credit Union?

1 A. I worked there from 1985 to 1997.

2 Q. What was your job at the credit union?

3 A. The Municipal Credit Union?

4 Q. Sorry, I was trying to shorten that.

5 A. That's okay. I was a loan officer and basically a
6 member service person.

7 Q. Did you know a man named Marty Grisham?

8 A. Yes, I did.

9 Q. And how did you know Marty Grisham?

10 A. I knew him as a member. He did his banking there
11 and -- well, we had done -- I had done a loan for him.

12 Q. What kind of loan did you do for Marty Grisham?

13 A. It was a loan for a truck.

14 Q. Let me draw your attention to November 1st, 1994.
15 Do you remember anything unusual happening that day with
16 respect to Marty Grisham's checking account?

17 A. Yes, he had contacted us -- or somebody from my
18 office had contacted him about a phone call and then he came
19 down to speak with us about the unusual activity that was
20 happening in his account, and he came down to speak to me
21 about it.

22 Q. And what did you discuss with Marty Grisham, just
23 generally speaking?

24 A. Generally, we went through his account and looked at
25 the checks that were clearing the account and he was stating

1 that they were not checks that he had written.

2 Q. Did you take any action on Marty Grisham's behalf
3 upon learning that there was some checks that he had not
4 written?

5 A. Yes, I went through the history of the transactions
6 that were going on and we wrote down, um, all the check
7 numbers and checks that he stated were not his. And then I
8 told him at that time that we had to order copies of those
9 checks from our processor to get -- to see, you know, what
10 was -- who was -- or what was being written on them and...

11 Q. So --

12 A. The signatures.

13 Q. -- back in 1994, you didn't actually have some
14 printout of the checks readily available?

15 A. Right, not then. We had to go through Sun Core,
16 which was the check processing where as checks cleared, they
17 would be stored there, so then they would have to pull those
18 checks and send us photocopies of them.

19 Q. Do you recall approximately how many checks Marty
20 Grisham had flagged as not being checks that he had written?

21 A. I do, I remember that there was somewhere between
22 10, maybe 12 checks total.

23 Q. And did you request these checks from that central
24 processor, the Sun Core?

25 A. I did.

1 Q. Now after you had had this conversation with Marty
2 Grisham about these checks having been cashed on his account,
3 did he make any calls from your office?

4 A. He did. I think that he called the Boulder police
5 to see about reporting the check fraud, checks that had been
6 stolen and fraudulently written on his account.

7 Q. After that phone call, how did your meeting in your
8 office end that day on November 1st?

9 A. Well, how it ended was I told him that as soon as I
10 got copies of those checks, you know, I would let him know and
11 that, um, he would be able to give them to the police
12 department, and then he said that he was actually very
13 interested in seeing the signatures on those checks, that he
14 was anxious to see that.

15 Q. Do you know where Mr. Grisham was heading after
16 leaving your office?

17 A. He said that he was going to go report it, straight
18 down to the police department.

19 Q. Did you ever have any other conversations with Marty
20 Grisham again?

21 A. No.

22 Q. The following day, November 2nd, did you receive
23 copies of those checks from Sun Core?

24 A. I did.

25 MR. KELLNER: Judge, may I approach the witness with

1 what I have marked as People's 61?

2 THE COURT: Yes.

3 Q. (By Mr. Kellner) Ms. Harris, I'm going to ask you
4 to take a moment and look at this.

5 A. Mm-hmm.

6 Q. Do you recognize People's 61?

7 A. I do.

8 Q. And how do you recognize it?

9 A. Well, I recognize it because they are checks from
10 the Boulder Municipal Credit Union. They were printed with
11 Marty's signature -- I mean with his name on the checks. And
12 I do recall that these checks were all even amounts, you know,
13 they weren't -- and they were larger amounts.

14 Q. Did you recall Marty Grisham's signature and what
15 his signature looked like?

16 A. Yes.

17 Q. When you received the checks from Sun Core, did the
18 signature that you recall match up with the signature that you
19 saw on the checks?

20 A. No.

21 Q. And is People's Exhibit 61 a fair and accurate
22 depiction of the checks that you had received from Sun Core --

23 A. Yes.

24 Q. -- on November 2nd, 1994?

25 A. Yes.

1 MR. KELLNER: Your Honor, I would ask to admit
2 People's 61.

3 THE COURT: Objection or voir dire?

4 MS. RING: No.

5 THE COURT: 61 will be admitted.

6 (People's Exhibit 61 was admitted into evidence by
7 agreement of the parties.)

8 MR. KELLNER: And if I may publish it to the jury?

9 THE COURT: Sure.

10 Q. (By Mr. Kellner) Ms. Harris, the checks that you
11 received from Sun Core on November 2nd, who were all those
12 checks made out to?

13 A. Michael Clark.

14 Q. Once you received these checks from Sun Core, what
15 did you do with them, if you can recall?

16 A. Well, I believe that the police department had
17 requested a copy. I don't recall if I called them, but I do
18 know that they contacted us and we had copies of those checks
19 for them.

20 Q. And did you provide copies of the checks to the
21 police?

22 A. Yes. Yes.

23 MR. KELLNER: Thank you. No further questions.

24 THE COURT: Any cross-examination?

25 MS. RING: Thank you.

1 THE COURT: Mm-hmm.

2 CROSS-EXAMINATION

3 BY MS. RING:

4 Q. Ms. Harris, Mr. Kellner just asked you about whether
5 you looked at the signatures on those checks when you received
6 them from Sun Core.

7 A. Mm-hmm.

8 Q. And you did?

9 A. Right.

10 Q. And you were familiar with Marty Grisham's
11 signature -- or you actually had his signature card?

12 A. Right. Both.

13 Q. Both. Okay.

14 A. Mm-hmm.

15 Q. So it was very easy for you to look at those
16 signatures on those checks and say, That's not Marty Grisham's
17 signature?

18 A. Right.

19 Q. Okay. I think you also told us that it was your
20 understanding that another person who worked at the credit
21 union with you had called Marty Grisham that day?

22 A. Right.

23 Q. To report this odd phone call and concerns about the
24 activity in the account, right?

25 A. Right.

1 Q. And that Marty Grisham came right down to the credit
2 union that day?

3 A. Yes.

4 Q. And it was your impression as you were going through
5 the activity in his account that day that that was the first
6 time Marty Grisham was realizing somebody had written these
7 checks on his account without his permission?

8 A. Well, I know that when I had spoken to him he had
9 mentioned that there were a couple of things that he wasn't
10 quite sure wasn't making sense to him in days prior. And then
11 when the phone call happened, he thought, okay, something is
12 going wrong, and he stopped and left work and came down.

13 Q. Okay. But as you're going -- because I think what
14 I'm understand is you actually go through his checking account
15 activity with him as he is sitting with you?

16 A. Yes.

17 Q. And you are going through the checks, right?

18 A. Right.

19 Q. And he is saying, I didn't write that check, right?

20 A. Right.

21 Q. I didn't write that check?

22 A. Right.

23 Q. And he's saying that to you as you are going through
24 those with him on November 1st?

25 A. Right. He said -- I do recall him saying something

1 to the effect of he didn't have the checkbook. He had -- at
2 the time the numbering didn't even go that high and he knew
3 that he didn't write those checks.

4 MS. RING: Those checks. Okay. Nothing further.
5 Thank you.

6 THE COURT: Any redirect, Mr. Kellner?

7 MR. KELLNER: No, Your Honor.

8 THE COURT: All right. Ms. Harris, you can step
9 down.

10 Can this witness be excused?

11 MR. KELLNER: She may.

12 THE COURT: Ms. Harris, you are excused. Thank you
13 very much.

14 THE WITNESS: Thank you.

15 THE COURT: Ladies and gentlemen of the jury, why
16 don't we go ahead and take the mid afternoon recess. We'll be
17 in recess until 3:30. Remember the admonition that I gave you
18 previously applies at this recess as well. Don't communicate
19 about or discuss the case with anyone by any means. If
20 someone tries to talk about the trial with you, let me know
21 about it immediately. Don't read or listen to any news
22 reports about the trial. Don't consult any outside reference
23 materials. Don't do any independent investigation.

24 Remember, it is especially important that you do not
25 form or express any opinion on the case until it is finally

1 submitted to you. So we'll be in recess until 3:30.

2 (The jury exited the courtroom.)

3 THE COURT: The record should reflect the jury has
4 left the courtroom. One thing for the record before we
5 recess. The jury's excused at about 20 minutes to 12:00 this
6 morning with the anticipation that they be brought back in a
7 few minutes. When we continued to have technical difficulties
8 with Exhibit 59, I went directly into the jury room and told
9 the jurors that we were in recess until 1:30 and that the
10 admonition that I had previously given them at every recess
11 applied at this recess as well. So we'll be in recess until
12 3:30.

13 MR. BRACKLEY: Can I say one thing quickly. Our
14 next witness is going to be Agent Woods from the CBI. There's
15 a slight foundational issue where normally we would call
16 Detective Heidel in to say that he submitted Michael Clark's
17 buccal swabs to the agent and then she processed those buccal
18 swabs, et cetera. Given the time of day and given the fact
19 that Agent Woods is going to be at a training next week and
20 not available, we were going to put her in -- it will be
21 subject to correction of Detective Heidel, who will testify
22 immediately after her. I expect it will all happen today, but
23 I just want to make sure that there's plenty of time to use
24 the witness who will be available next week.

25 THE COURT: That makes sense to me. Is that all

1 right with you, Ms. Ring?

2 MS. RING: Yes.

3 THE COURT: All right. Thank you. We'll be in
4 recess.

5 (Whereupon, the afternoon recess was taken.)

6 THE COURT: 12 CR 222. Mr. Clark and his counsel
7 are present, the prosecution is present.

8 Anything for the record before we bring the jury?

9 MR. BRACKLEY: No, Your Honor.

10 THE COURT: Would you bring the jury in.

11 (The jury entered the courtroom.)

12 THE COURT: Please be seated. All the members of
13 the jury are back.

14 Would the People call their next witness.

15 MR. BRACKLEY: The People call Yvonne Woods.

16 THE COURT: Please step forward, ma'am.

17 **YVONNE WOODS,**

18 a witness herein, having been first duly sworn, was examined
19 and testified on her oath as follows:

20 THE COURT: Please have a seat.

21 Go ahead, Mr. Brackley.

22 MR. BRACKLEY: Thank you, Judge. **DIRECT EXAMINATION.**

23 **BY MR. BRACKLEY:**

24 Q. Good afternoon.

25 A. Good afternoon.

1 Q. Could you state your name and spell your last name.

2 A. My name is Yvonne Woods, W-o-o-d-s.

3 Q. Are you employed?

4 A. Yes, I am.

5 Q. By whom?

6 A. I'm employed by the state of Colorado, specifically
7 by the Colorado Bureau of Investigations, employed as a
8 laboratory agent at the state crime lab.

9 Q. Is the Colorado Bureau of Investigation also known
10 as CBI?

11 A. Yes, it is.

12 Q. And what is your current position? What do you do?

13 A. I work in the forensic biology section, so I screen
14 items of physical evidence for their DNA potential, and I
15 perform forensic DNA analysis on items of evidence submitted
16 by medical and state law enforcement agencies.

17 Q. How long have you been in that particular position
18 doing that type of work for?

19 A. I've been doing forensic DNA analysis at the CBI for
20 a little over 12 years.

21 Q. What did you do prior to that?

22 A. I have been employed with the Colorado Bureau in the
23 crime lab in the biology section since 1994, so almost -- for
24 almost 19 years I've been employed at the CBI lab. The first
25 seven of those I was a forensic serologist and a hair and

1 fiber examiner before I moved into the forensic DNA laboratory
2 and went through a training program, and with a completion
3 date was around -- that completion date was around the year
4 2000. I began doing forensic case work in the year 2001.

5 Q. Can you tell the jury about your educational
6 background as it applies to the work that you do?

7 A. I have a bachelor of science degree in microbiology
8 with a chemistry minor. I began my forensic career in the
9 state of Wyoming in 1988 employed as a forensic serologist.
10 While employed by the state of Wyoming I did attend many
11 schools specific to the field, one of them was the FBI
12 academy's basic serology school, and another one of the
13 schools was the Serological Research Institute, their basic
14 serology school. And both of these schools were two week
15 schools which focused entirely on the identification of blood
16 and biological fluids as they applied to criminal matters.

17 After I remained in the employment of the state of
18 Wyoming for approximately five years, I went to work for
19 Dallas County Crime Laboratory in Dallas, Texas, for about
20 eight months. And I then began my employment with the CBI in
21 1994, and have been to many schools specific to the field
22 since then. Some of those -- most of the schools that I have
23 attended since being employed at the CBI were DNA specific,
24 because as a DNA analyst working in a state crime laboratory,
25 who does participate in federal programs, I am required to

1 attend annual trainings. So for the past 12 years I have had
2 at least annual trainings in the field of forensic DNA
3 analysis.

4 Q. Okay. So can you define that word for us,
5 "forensic" or "forensic biology"?

6 A. Well, the term "forensic" means the application of
7 science to law, so when we talk about forensic DNA or forensic
8 serology, um, we're talking about the identification of
9 biological fluids or the development of DNA profiles as they
10 apply to criminal matters.

11 Q. Have you as an agent with the CBI and before that
12 had the personal occasion to develop and analyze DNA profiles
13 from items of evidence?

14 A. Yes.

15 Q. Could you quantify how much or how many times?

16 A. I really couldn't. It's well into the thousands.

17 Q. And when we talk about evidence, does that, um --
18 are we talking about not only biological fluids submitted to
19 you, but also actual physical pieces of crime scene evidence?

20 A. Yes.

21 Q. Have you ever testified in court before?

22 A. Yes, I have.

23 Q. And what courts and approximately how many times?

24 A. I've testified over 500 times in the states of
25 Wyoming, Colorado, Texas, South Dakota and Montana and -- in

1 the fields of forensic serology, forensic DNA analysis and
2 hair and fiber comparisons.

3 MR. BRACKLEY: Your Honor, at this time I would ask
4 that Agent Woods be qualified as an expert in the field of DNA
5 analysis and DNA identifications.

6 MS. MILFELD: No objection; no voir dire.

7 THE COURT: All right. Then Ms. Woods will be
8 qualified as an expert in the areas of DNA analysis and DNA
9 identifications. She will be allowed to opine pursuant to
10 Rule 702.

11 You may continue.

12 MR. BRACKLEY: Thank you, Judge.

13 Q. (By Mr. Brackley) So let's take a couple steps back
14 and define some terms and sort of do some background work.
15 And I'll start with the most basic question, I think, which is
16 what is DNA and where is it found and what does it mean?

17 A. DNA stands for your body actually. The type of DNA
18 that we analyze at the CBI laboratory is called nuclear DNA,
19 so it's contained with the cells of your body that contains a
20 nucleus, and most cells do contain a nucleus, however, some of
21 them do not.

22 What your DNA does in your body is it -- it dictates
23 your eye color, your hair color, your skin color, your
24 predisposition to certain diseases. It is also your control
25 center. It is responsible for your body maintaining life,

1 because it tells your body when to make proteins and enzymes
2 that are necessary for metabolism and other bodily functions.

3 You get -- there are -- we test for nuclear DNA, but
4 we have two different ways of testing this nuclear DNA. The
5 most common way is looking at the DNA that is genetically
6 inherited, where you get half from your mom and half from your
7 dad at conception. This type of DNA is called your autosomal
8 DNA. And no two individuals are expected to have the same
9 autosomal DNA profile with the exception of identical
10 siblings.

11 So identical twins and identical triplets have
12 identical DNA profiles. And when I refer to this autosomal
13 DNA, what that actually means is that in the nucleus of every
14 cell of your body you have 23 pairs of chromosomes; 22 are
15 called the autosomes, which, again, make you unique as an
16 individual unless, again, you have an identical sibling.

17 The 23rd pair of your chromosomes is called your sex
18 chromosomes. You either have two "X" chromosomes or you have
19 an "X" and a "Y". If you have two "X's" you're a female, if
20 you have an "X" and "Y" you're a male. So the other type of
21 DNA analysis that we can perform focuses on the genetic
22 information entirely on the "Y" chromosome, hence, we call it
23 Y-STR or male specific DNA.

24 The -- once we -- when we analyze for this type of
25 DNA it's -- it is not unique to an individual, it's unique to

1 a paternal lineage. Because at conception when the egg and
2 the sperm come together, if a male child is born, it means
3 that the male has passed on his "Y" chromosome and when that
4 happens, it is passed on virtually unchanged. Whereas,
5 when -- if when we are looking at just the autosomal DNA at
6 conception, there's -- half of the DNA comes from the mom and
7 half of the DNA comes from the dad, so there's a form of
8 natural selection. So it's basically, um -- there's nothing
9 to determine exactly how those chromosomes are going to join
10 at conception. So it's a random meeting of the chromosomes.

11 However, when we test for this "Y" chromosomal DNA,
12 again, the "Y" chromosome has been passed on from the male to
13 the male child, so consequently any male individual, their Y
14 chromosomal or Y-STR profile is going to be exactly the same
15 as their biological brothers, but the same dad, as -- and it's
16 going to be the same as the dad, all of the dad's brothers
17 with the same dad, et cetera. So it shows a paternal lineage.

18 So what I'm trying to say again is it's not unique
19 to an individual, however, it is one of the types of DNA that
20 we can test for and it does have uses in the forensic
21 sciences.

22 Q. Okay. So -- and let me pull from that a couple of
23 terms that we are going to hear again just to clarify. All of
24 us then would have this autosomal DNA profile, correct?

25 A. That's correct. And your autosomal is sometimes

1 also referred to as your total DNA because, again, it is the
2 most common way that we test for DNA because it can indicate
3 identity or it can come pretty darn close to identity.

4 Q. Okay. And then just to further clarify -- well, I
5 think that at this point it's clear -- only males have that
6 "Y" DNA profile?

7 A. That's correct.

8 Q. And my "Y" profile would be the same as my brothers
9 and the same as my son and the same as my dad's?

10 A. That's correct.

11 Q. Okay. When CBI is doing a DNA analysis, are you
12 looking at -- what -- what are you looking at in the -- in a
13 DNA strand or DNA profile in the forensic setting? And if I
14 can clarify that further.

15 You stated that DNA -- you use two examples, one of
16 them being eye color. Are you looking at that type of
17 information in the forensic setting?

18 A. No, the genetic marker that we look at in the
19 forensic setting at this point in time do not indicate race,
20 hair color, eye color or any types of predisposition to
21 certain diseases.

22 The locations that we test for in the autosomal DNA
23 are -- we test for them because they have a tendency to show
24 differences from person to person, and because that DNA shows
25 differences from person to person we can identify those

1 differences and we can apply a statistical difference to those
2 differences. Whereas in the Y chromosomal DNA, we look at a
3 profile that's passed on virtually unchanged. And when we
4 look at the profile we cannot -- we cannot say that it's
5 unique to an individual, we can say that it belongs to a
6 paternal lineage.

7 Q. Okay. And when we talk about differences in the
8 forensic setting, we're not talking about differences in eye
9 color, hair color, height, weight, race. We're just talking
10 about differences that exist within that DNA profile that have
11 nothing to do with any of those types of things?

12 A. As far as we know right now with the method that we
13 use, the -- the locations that we test for don't impart any
14 type of race or hair or skin color, et cetera.

15 Q. Okay. Then one other concept. You talked about DNA
16 being the same all throughout our body. Would that mean our
17 DNA in our saliva is the same as the DNA in our blood?

18 A. In most instances, yes. And I only say that because
19 in the case where an individual has had a bone marrow
20 transplant, it changes the ball game. But in most instances
21 where there is no cancer or cancer types of treatments
22 involved, your DNA is unique to you and it does not change
23 over the course of your lifetime.

24 Q. So I could compare blood sample to a saliva sample
25 to a skin cell sample?

1 A. That's correct.

2 Q. Now those locations as you mentioned that the CBI
3 uses to credit a forensic profile, are those the same
4 locations used in other labs in other states and other
5 jurisdictions and other countries throughout the world in a
6 forensic setting?

7 A. Yes.

8 Q. Okay. So you've all identified the same things that
9 you are looking at?

10 A. In the United States all forensic labs look at
11 exactly the same location. There are laboratories in other
12 countries that look at the locations that we look at in
13 addition to some other locations or they look at most of the
14 ones that we look at in the -- in the United States,
15 however -- and in the United Kingdom they may look -- and I
16 know they do look at a few other locations that we don't look
17 at and they -- and they don't look at some of the ones that we
18 do look at.

19 Q. How many are there that you look at?

20 A. Currently?

21 Q. In the autosomal context?

22 A. Currently we are looking at 15 locations along the
23 DNA strand. When we first started performing forensic DNA in
24 the state of Colorado we were only looking at actually 14 --
25 13 of those locations were the autosomal locations; the 14th

1 location is the gender indicator. So currently we look at 15
2 locations, the 16th location is the gender indicator.

3 Q. So let's talk about this particular case. Back in
4 February of 2011 were you assigned to do DNA analysis on a
5 piece of crime scene evidence in connection of the
6 investigation into the murder of Marty Grisham here in
7 Boulder?

8 A. Yes.

9 Q. And what police agency did those items or did that
10 item come from?

11 A. That item was submitted by the Boulder Police
12 Department.

13 Q. Okay. And once an item comes to you at CBI, do you
14 give it a particular item number?

15 A. Yes.

16 MR. BRACKLEY: Okay. And, Judge, if I may approach,
17 Your Honor?

18 THE COURT: Yes.

19 Q. (By Mr. Brackley) I'm going to show you what has
20 been marked as People's 52 in evidence. Do you recognize
21 that?

22 A. Yes, I do.

23 Q. And do you recognize that as relating to this
24 particular case?

25 A. Yes, I do.

1 Q. How do you recognize it as that?

2 A. I recognize it because of the CBI identifiers on the
3 exterior packaging. I can see the blue tape on this
4 packaging, which is evidence of my having resealed this item.
5 And I can also look at the bottom of the Carmex container
6 itself and see my markings on the bottom of that indicating
7 that it is -- this is an item that I did perform some
8 examinations on.

9 Q. Okay. So there's a brown envelope there that you
10 were holding up that has all that tape all over it. Is that
11 the one on the outside with the red tape and the blue tape?

12 A. Mm-hmm.

13 Q. Does an item come to CBI in that packaging and leave
14 CBI in that same packaging?

15 A. In most instances the item that has been submitted
16 is repackaged into the original packaging and returned to the
17 submitting agency. In some instances where the packaging has
18 been torn or maybe was not sufficient for initial submission
19 or for repackaging the item back into the original packaging,
20 we'll repackage, but in most instances we do make an attempt
21 to repackage the item of evidence back into the original
22 packaging.

23 Q. Okay. And that would account for tape with your
24 initials on it and tape with other people's initials?

25 A. That's correct.

1 Q. And do you recognize other initials on there as
2 other folks at CBI?

3 A. Yes, I do.

4 Q. Can you explain further to the jury what you did --
5 well, you got this -- the particular Carmex container on two
6 separate containers, correct?

7 A. That's correct.

8 Q. And let's talk about the first occasion beginning
9 February of 2011. What did you do in reference to that Carmex
10 container?

11 A. I swabbed the exterior of the Carmex container, and
12 I performed DNA analysis on that swab from the exterior.

13 Q. And when you say you "swabbed" it, what did you do?

14 A. I took a sterile swab and got it wet with sterile
15 water and rubbed the exterior of the Carmex container in an
16 attempt to collect any cellular material that may be
17 adhering -- adhering to the exterior of the container.

18 Q. And just tell us the process. Tell us how you could
19 or would or did develop a DNA profile of any kind from the
20 outside of that Carmex container?

21 A. So once the swab is collected from the item, it's
22 taken into the DNA laboratory for processing, and the DNA
23 process goes like this. A portion of the original item, it
24 might be a questioned item or a referenced sample from an
25 individual, because both of those processes are exactly the

1 same except that we make an attempt to do the extraction at
2 different times. But -- so a portion of the collected item
3 goes into a tube and we add to that tube chemicals necessary
4 to break open the nucleus of any cellular material that may be
5 contained within that sample.

6 Then we make an attempt to clean up that sample. We
7 call it purifying, and what -- what it is is an attempt to
8 remove anything in that sample that may have an effect on any
9 downstream analysis. So we make an attempt to remove any dirt
10 or soil or dyes or anything that -- that may have an effect on
11 future analysis.

12 Q. And you're making that effort with the swab, not
13 with the original container, correct?

14 A. This is with the swab, the -- the solution that
15 we've actually added to the swab, and this is after we've
16 added chemicals to break open the nucleus. So we're using a
17 testing -- a solution at this point in time, a very small
18 amount of liquid.

19 So after it is cleaned up we test the resulted
20 liquid or extracted DNA to see how much we have, and this test
21 is called the quantitation. It's a test that gives us an
22 estimate of the amount of amplifiable DNA in a sample. And I
23 use the term "amplifiable" because that becomes very
24 important, because a sample may have DNA in it, but whether or
25 not it is amplifiable is the big question because the next

1 step in the DNA process is called the DNA amplification.

2 So if this test gives us an indication that there is
3 very little amplifiable DNA or that there is no DNA -- if
4 there is no DNA indicated we won't take the test further for
5 further analysis because we know that the amplification
6 process won't work. But the amplification process is a
7 process by which we take an amount of the extracted DNA and we
8 put it into a tube and we give to it or add to it all of the
9 building blocks necessary for the DNA to make copies of itself
10 outside of the DNA -- outside of the cell the same way that it
11 naturally does inside the cell, but much faster. So,
12 theoretically, we can obtain a large amount of copied or
13 amplified DNA.

14 If you think about this process as maybe -- maybe
15 like molecular xeroxing, like when you take a recipe to the
16 photocopier at work and you make 20 copies of it, well, you
17 get 20 copies of an almost identical copy of your recipe.
18 Well, in the same way we are getting -- we are anticipating a
19 large number of copies of the original strands of DNA that's
20 in the extracted sample. This process is also termed the PCR
21 or the Polumerase Chain Reaction, and it's a method by which
22 laboratories, not just forensic laboratories but laboratories
23 around the world, are able to obtain enough DNA from a very
24 small sample in order to get some type of interpretable DNA
25 profile in cases. This amplification process, again, is very

1 important because it is the method by which we get from
2 extracted DNA to a DNA profile, but it becomes very important
3 when we have degraded DNA or extremely small amounts of
4 initial DNA or even inhibited DNA.

5 So amplification -- once this amplification process
6 has been completed, we take a portion of the amplified DNA and
7 we put it into an instrument called the genetic analyzer and
8 that genetic analyzer then separates the DNA into fragments,
9 and we term those fragments Short Tandem Repeats. And what
10 it's actually looking at is repeating units of DNA at the
11 locations that we test for.

12 In the case of autosomal DNA you will have two
13 results at each location we test for, one result is a
14 contribution from your mother and one's from your father. So
15 at each of the locations we look at in the autosomal DNA
16 profiles we can see up to two peaks or up to two
17 contributions.

18 In the Y chromosomal DNA profile we are only looking
19 at one peak in every location that we look at because this
20 profile is what's called a haplotype. It's passed on
21 virtually unchanged, so there is no contribution from the
22 mother and the father at each of the locations.

23 So once we've -- we receive information from our
24 instrumentation, we interpret it for quality. We look at it,
25 first of all, to see if we have a DNA profile resultant from

1 everything that we have done so far, and if we do have a DNA
2 profile, we try to determine, first of all, is it a complete
3 profile. Do we have interpretable information at all of the
4 locations that we look at or is it partial, meaning, do we
5 have interpretable information at some, but not all of the
6 locations. And if that is the case and it is a partial
7 profile, it is usually still interpretable, it's just not a
8 complete profile. So if it is a partial profile, we will do
9 the interpretation and we will identify that profile as being
10 a partial profile.

11 Once we've determined whether or not the DNA profile
12 is interpretable, we'll make an attempt to compare it to a
13 known or a reference sample from an individual. Again,
14 because you're DNA is consistent from basically head to toe,
15 we get reference samples. At this point in time the reference
16 samples we usually get are called buccal swabs, and that's
17 spelled b-u-c-c-a-l, and it's a swabbing of the inside of the
18 mouth that contains large nucleated cells that are excellent
19 sources of DNA.

20 So once we've compared the questioned sample
21 profiles to the referenced samples, we'll get an indication of
22 whether or not they match or not. If they do match and if
23 they have a significance to a case, we need to back that match
24 up with some type of statistics.

25 In autosomal DNA if we have a match we'll plug the

1 questioned profile into a population statistics program
2 provided to us by the FBI called POP Stats, and that program
3 will give us a random match probability or the probability of
4 selecting another individual at random having that same DNA
5 profile.

6 And the instance of the Y chromosomal DNA because it
7 is not unique to an individual we have to use a statistical
8 calculation called the counting method, and this is where we
9 enter the profile into a statistical database provided to us
10 by the manufacturers of the DNA kit and it will tell us how
11 many times this -- that Y chromosomal profile has been
12 observed in a certain number of individuals. They will have
13 their own database size, and then we'll calculate from that
14 point how many or the probability of exclusion.

15 So in the instance of a Y chromosomal or a male
16 specific profile match, if we do say that this profile
17 matches, we'll go on to say so neither this individual nor his
18 paternal male relatives are excluded as a potential
19 contributor, and then we back that up with the probability of
20 exclusion. So what's the probability of finding someone else
21 in the population having that same DNA profile.

22 Q. You still need me?

23 So did you find an interpretable DNA profile in that
24 first round of tests you do with the Carmex container which
25 you called CBI-7?

1 A. I did. And actually this particular profile that we
2 are talking about from the exterior of the Carmex container is
3 identified as profile 7-1. And I did obtain and -- a partial
4 interpretable autosomal and a partial interpretable Y
5 chromosomal DNA profile from that exterior of the Carmex
6 container.

7 Q. And what is meant by a partial profile?

8 A. It means that in the case of the autosomal DNA that
9 there were interpretable -- there was interpretable
10 information at -- at some -- at 7 of the locations that we
11 test for. So 7 out of 15 locations were interpretable on the
12 autosomal DNA. And on the Y chromosomal, or male specific,
13 there were 6 locations that were interpretable. And in the Y
14 chromosomal DNA, I haven't indicated this yet, but I keep
15 talking about the 15 locations we test for, and the autosomal
16 we actually test at 17 locations in the Y chromosomal or male
17 specific DNA.

18 Q. Could you tell whether the two -- the two partial
19 profiles, the autosomal and the Y profile, were of the same
20 people or different people?

21 A. I couldn't tell because comparing the Y chromosomal
22 profile to the autosomal profile is kind of like comparing
23 apples to oranges, the two are completely different things,
24 but I did get an interpretable autosomal profile and I did get
25 an interpretable male specific or Y chromosomal profile.

1 Q. Now can you quantify the amount -- if it's even
2 something that -- if it's even a fair question, but can you
3 quantify the amount of DNA that was found on the outside of
4 the Carmex container or the -- or the quality of the DNA on
5 the outside of the Carmex container?

6 A. Well, again, there was a quantitation performed on
7 the extracted DNA from the sample and it indicated a very,
8 very small amount of DNA, and the resultant DNA profile
9 especially in the autosomal indicated that it was a degraded
10 sample. The profile in the Y chromosomal also indicated some
11 level of degradation, but there could have also been some type
12 of an inhibitor in there as well because these are partial
13 profiles. The profiles that were obtained were basically
14 expected from the amount of DNA that was indicated on the
15 quantitation test.

16 Q. Now as of the completion of your DNA analysis of the
17 outside of the Carmex container, what you called 7-1, was
18 there anything that you could do further at that time with
19 what you had to identify who -- to identify the source of
20 those profiles, either one?

21 A. There was nothing else at this point in time that I
22 could do.

23 Q. So did you issue a report stating that you had
24 recovered two partial profiles?

25 A. Yes.

1 Q. Back to the Boulder Police Department. Did you make
2 a suggestion that if you were to send me a known -- a known
3 sample of someone, you could make a comparison to that --

4 A. I did --

5 Q. -- that known sample?

6 A. -- that is how the report ended up reading. It
7 indicated the partial profiles that were developed and there
8 was a request for a referenced samples.

9 Q. So now skipping ahead to August of 2011. Did you
10 get the Carmex container back along with what you called
11 before a buccal swab?

12 A. Yes.

13 Q. Okay. And who did you get that from?

14 A. The Boulder Police Department.

15 Q. Specifically Detective Heidel?

16 A. That's correct.

17 Q. And in the meantime, between the two analyses, did
18 you speak with Detective Heidel about other types of things
19 that could be done with that Carmex container?

20 A. Actually, Detective Heidel called me and asked me if
21 I could swab the inside of the Carmex container.

22 Q. Okay. And what did you think about that idea?

23 A. I had to think about it, and I was really
24 embarrassed that I hadn't already thought about it because
25 that's pretty much my job, and this particular case I had not

1 thought about that. This -- as an agency we've only been
2 doing contact or touch DNA analysis for about six to seven
3 years, and every time you think that you've seen, you know, as
4 much as you could possibly see in a crime laboratory, there
5 comes something that you haven't thought about and this was
6 something that I hadn't thought about.

7 So the discussion that I had with Detective Heidel
8 was, Well -- he asked, Did you do the inside, and I said, No.
9 And he said, Well, could you, and I said, Well, I could try.
10 Because it is, you know, Carmex, it's a kind of waxy surface
11 material. I didn't know that I would have much success with
12 that type of a sample, but I thought let's give it a try. So
13 the Carmex container was resubmitted in August of 2011 along
14 with buccal swabs. And so the same type of analysis was then
15 completed on the interior of the Carmex container.

16 Q. And did you call that, um, 7-2?

17 A. I did.

18 Q. Okay. And did you give a number to the buccal swabs
19 that came in?

20 A. The buccal swabs were identified as item 14.

21 Q. Okay. And do you know from whom the buccal swabs
22 came from?

23 A. Yes, they came from an individual by the name of
24 Michael Clark.

25 Q. And did you obtain a DNA profile from the buccal

1 swabs?

2 A. Yes.

3 Q. And did you obtain a DNA profile from item 7-2, the
4 swabbing from inside the Carmex container?

5 A. I attempted to do three different types of analyses
6 on the collection from the inside, however, only one of those
7 analyses or amplifications needed interpretable information
8 and that was the Y chromosomal or male specific test that was
9 performed on the swab from the inside.

10 Q. Okay. And then did you compare the DNA profile from
11 Michael Clark to the DNA profile that you obtained from item
12 7-2 inside the Carmex container?

13 A. Yes, I did.

14 Q. So what results -- what was your -- what did you
15 find?

16 A. The partial Y-STR DNA profile developed from
17 the inside of the Carmex container, item 7-2, matched the Y
18 chromosomal or male specific profile of the buccal swab from
19 Michael Clark. Therefore, neither Michael Clark nor his
20 paternal male relatives are excluded as potential contributors
21 to this partial Y chromosomal profile. When this partial
22 profile was entered into the Y-STR population database, the
23 most conservative of the probabilities of exclusion that was
24 obtained is 99.4 percent of the population. So, in effect, 6
25 out of every 1,000 males would be included as a potential

1 donor to this partial profile.

2 Q. Okay. And that's essentially any population you
3 were to choose, whether it's the city of Boulder, or Colorado,
4 the United States, the world?

5 A. That's correct.

6 Q. Okay. So 99.4 percent of the world would be
7 excluded from having that same population as would 99.4
8 percent of every 1,000 males?

9 A. And, again, it would be 99.4 percent of the male
10 population.

11 Q. Right, the male population.

12 Let me show you what I have marked as People's 62,
13 and this will help us talk about the partiality -- or the
14 partial aspect of this particular profile. And is this
15 something that you saw, although not in this big form, before
16 you came to court at some point?

17 A. Yes.

18 Q. Does this reflect both the locations along that Y
19 chromosome analysis that you did as well as Michael Clark's
20 buccal swab, as well as the areas or locations that you were
21 able to obtain results from from the interior of the Carmex
22 container?

23 A. Yes.

24 Q. And would this help you demonstrate to the jury what
25 locations there were and how many, as compared to ones that

1 you weren't?

2 A. Yes.

3 MR. BRACKLEY: And, Your Honor, if I could admit
4 this as evidence as People's 62.

5 THE COURT: Objection or voir dire?

6 MS. MILFELD: No objection; no voir dire.

7 THE COURT: 62 will be admitted.

8 (People's Exhibit 62 was admitted into evidence by
9 agreement of the parties.)

10 MR. BRACKLEY: If we can publish that, and I believe
11 that we can do it up on the big screen.

12 Q. (By Mr. Brackley) So what are we looking at?

13 A. The left-hand column is the 17 locations that we
14 test for.

15 Q. And if you were counting them like I just did,
16 because I wanted to make sure, it looks like there's 16 there.
17 But if you see the location where it says A and B, A stands
18 for one location and B stands for a separate location. So
19 in -- at that location you see two numbers, and that's because
20 one is the A and one is the B.

21 All of the other locations you see only one number,
22 this is consistent with a haplotype, this is consistent with a
23 Y chromosomal DNA profile. The -- and so the center -- the
24 center accumulation of numbers is reflective of the Y
25 chromosomal profile developed from Mr. Clark, which would be

1 consistent with him and his paternal male relatives.

2 On the right-hand column, that is the genetic
3 information that was obtained from the inside of the Carmex
4 container. The location at DYS 391, which has the 11 in it,
5 was not used for statistical purposes because at that
6 location, that location did indicate the presence of a
7 mixture, however, there was more of this 11 in that -- in that
8 location than was the minor contributor. So it's reflected on
9 this chart, however, it was not used in the calculation that I
10 presented to you that -- that reflected the 99.4 percent
11 probability of exclusion.

12 Q. So in a very general sense, what accounts for the
13 lack -- for the lack of your ability to fill in the rest of
14 the numbers to say as simply as possible?

15 A. Well, in this particular sample, based on my
16 training and experience, I would say that it is probably
17 inhibition because of the -- of the fact -- first of all, it
18 is a very waxy type of substance, and swabbing it -- in
19 swabbing it some of that substance got on to the swab. In the
20 quantitation process of the DNA analysis, the quantitation
21 process basically said it's inhibited. It basically did not
22 give me a quantitation value for this particular sample.

23 Consequently, it was still amplified because I knew
24 theoretically Carmex should have -- especially the pot of
25 Carmex should have DNA on it because of what you typically do

1 with the pot of Carmex. There should have been nucleated
2 cells in that sample. So, again, based on my training and
3 experience, I -- it, um -- this sample isn't indicative of an
4 inhibited sample. Again, when I say "inhibited," it means
5 that there is something that's on -- on that DNA strand to
6 where when it separates and all these little building blocks
7 necessary to make an exact copy of it are -- are put on there,
8 there's something there that's not letting it adhere to it.
9 It's kind of like, you know, if you have ever played Legos
10 with your kids and they were out in the mud puddle and they
11 came in and they had mud on the bottom of the Lego and you are
12 trying to fit the two Legos together and it's just not
13 happening, it's kind of similar to what can happen in
14 inhibition. Basically the parts that are supposed to lineup
15 in the amplification process simply don't because there is
16 something there that is causing or that is not allowing them
17 to come together and to stay together.

18 Q. Was the analysis that you did on the outside of the
19 Carmex container, the 7.1 analysis, was that what you would
20 consider a trace or a touch or a trace or touch type analysis?

21 A. Yes.

22 Q. And what about for inside the container, same?

23 A. Yes.

24 Q. Okay. Was CBI doing any DNA analysis in 1994?

25 A. No.

1 Q. When did CBI start doing DNAs?

2 A. They went on-line with the first version of DNA in
3 approximately late 1995 to early 1996.

4 Q. Okay. But other labs from -- the FBI, for instance,
5 was doing -- was doing DNA in general in 1994?

6 A. They were.

7 Q. And private labs were doing DNA also, but CBI was
8 not?

9 A. That's correct.

10 Q. And when CBI started to do DNA analysis, what types
11 of evidence were they doing in the very beginning?

12 A. When CBI first started doing DNA analysis for the
13 state of Colorado, they were only doing DNA analysis for
14 homicides and for sex assaults.

15 Q. Using actual fluids found at crime scenes?

16 A. Yes. And they were only performing DNA analysis on
17 robust sources of DNA, and when I say "robust," I mean DNA
18 rich or high cell concentration types of samples. So robust
19 sources of DNA are typically samples that we can identify as
20 biological fluid. So if we can identify blood or semen or
21 saliva, or if we can get an indication that vaginal fluid is
22 present in a sample, these are all robust sources of DNA.

23 Other robust sources of DNA that we can't test for
24 are like eye mucus, nasal mucus, ear wax, things like that.
25 They contain large numbers of nucleated cells, so consequently

1 they are robust sources. And we fully intend to obtain a full
2 interpretable profile from these types of samples unless, of
3 course, they are mixed with dirt or soil -- I mean dirt or,
4 um, denim, blue denim, indigo dye or nicotine, or things that
5 we know have inhibitory effects.

6 We don't know everything in the forensic field that
7 is a DNA inhibitor. We do know that dirt is and that -- that
8 indigo dye is. And we do know that when we have certain types
9 of samples we are expecting some types of inhibition, but we
10 don't know all of the inhibitors at this point in time.

11 Q. So can you very quickly define for us what trace or
12 touch DNA is?

13 A. In the forensic laboratory if we look at a sample
14 and we can't see anything visible, and we're not seeing
15 anything red, we are not testing for blood, we don't have an
16 indication that it might be seminal fluid, we will evaluate --
17 I -- I indicated earlier that we evaluate samples for their
18 DNA potential. So in this whole realm of trace or contact or
19 touch DNA, it's -- it's theoretical DNA. We have an idea that
20 it's there, but we really have no idea whether or not it's
21 truly there. So we'll swab items of evidence where we think
22 DNA may be.

23 We routinely test like the insides of waistbands of
24 clothing that we don't know who it belongs to. We will
25 routinely test that. We will routinely test maybe the inside

1 fly of an individual's boxer shorts, if he is a suspect in a
2 alleged sex assault. So we'll routinely look for and swab
3 items of evidence that we think DNA is on, but we don't know
4 for sure. And, again, we will test for it and then we will
5 make an attempt to interpret the results if we get any. But,
6 again, it's usually something you can't see. You have an idea
7 that it might be there, and if it is an item of evidence that
8 people usually touch, there's usually a good indication that
9 there might be something there.

10 Q. And what is it that -- what is it about the touch
11 that leaves the DNA sample? Is it sweat or is it skin cells
12 or something else?

13 A. You can pick any one of those. And the whole reason
14 why we even look at contact or touch DNA revolves around a
15 scientific theory called low cards theory of exchange, which
16 says that when two things or two items come into contact
17 something's gained and something's lost. Whether or not the
18 amount that is left behind on an item is detectable is the
19 true question, because things get -- I mean so somebody might
20 touch an item and then another person may come along and touch
21 the same item. When that item is touched initially there's
22 going to be something left there. That something could be
23 sloughed off skin cells, it could be old saliva cells that
24 have been degraded or maybe kind of washed off when they
25 washed their hands or rubbed off when their hands were rubbed,

1 but there's, um -- the deposition of the initial DNA on an
2 item could be a lot of nucleated cells or a small amount of
3 nucleated cells. And I'm talking nucleated cells because
4 that's all I need in -- in order to get some type of genetic
5 information that may or may not be interpretable.

6 So say we have got the initial contact on an item of
7 evidence or on any item, that item gets put down, it gets
8 picked up by another individual. Well, that individual is not
9 only depositing their DNA on that sample again, pick your
10 source of DNA, is it touch -- you know, it's contact or touch
11 DNA, but where was it originally, was it originally saliva,
12 nasal mucus, did the person, you know -- I do this a lot, so I
13 have my DNA on my finger a lot because I have -- I blink a
14 lot. So I have DNA from that and then I may touch something.
15 Well, I'm depositing my DNA and then the next person that
16 comes along takes some of mine, but leaves some of their's as
17 well. But even every time you touch something you are rubbing
18 off what is there as well as depositing. So, in effect, when
19 we are doing swabbing for contact or touch DNA we really never
20 have a true expectation of a final result.

21 Q. Okay. So -- and focusing on the Carmex container.
22 It certainly wouldn't be a fair statement to say that from the
23 DNA profile gleaned from the outside of the container, 7-1,
24 that's the owner of the Carmex container?

25 A. No.

1 Q. You couldn't say that, right?

2 A. I can just say that the DNA is there.

3 Q. You can say that somehow DNA got on there via touch
4 or transfer or contact?

5 A. That's correct.

6 Q. Okay. But it certainly more than would be from sort
7 of picking it up from here and placing it over here?

8 A. It is indicative of a -- more DNA than just a simple
9 touch like that, but then again, you always have to take into
10 consideration where were the fingers before the touch. It is
11 not consistent with me just picking up this pointer and
12 placing it -- well, actually, use my other hand because I just
13 touched my eye thing with that. So I didn't touch my eye with
14 the one, but me picking that up and touching it and putting it
15 down, I have left some DNA on there, but it's probably not
16 enough to even detect.

17 Q. Okay. It could be someone who untwisted the top and
18 smells it --

19 A. That's correct.

20 Q. -- with the top back on or it could be someone who
21 palmed it for more time than it would take to pick it up and
22 move it from one place to another?

23 A. That's also correct.

24 Q. And I bet that we can come up with an *ad infinitum*
25 of examples or hypotheticals as to how DNA could have gotten

1 on the outside of this container in the -- in the quantity
2 that you found, correct?

3 A. That's correct. And I could never pick one of those
4 thousands of scenarios and say that's the one that I like the
5 best because there wouldn't be one.

6 Q. Okay. Could any of that type of contact with it
7 allow the -- well, let me just go to this part. How -- how do
8 you get the DNA on the inside of the container?

9 A. When Detective Heidel first asked me if I thought
10 that it was possible, I had to think what do you do with a
11 Carmex container, with a pot. We always called it a pot.
12 Well, you open it, you stick your finger in it, you touch your
13 lips. You stick your finger, you get your bottom lip, stick
14 your finger in and get the top lip. When you are putting your
15 finger back in again you are potentially depositing some of
16 the cells from the bottom lip into the pot and then getting
17 the Carmex and putting it on the top.

18 So consequently I thought, hmm, there could be DNA
19 there, because I didn't know. I had never swabbed the inside
20 of a Carmex container before so I thought it was a good idea.
21 So my -- my thoughts on how it could potentially get on the
22 inside is from use.

23 Q. By use, sticking a finger in and wiping your lips
24 and going about your business?

25 A. That's correct.

1 MR. BRACKLEY: I have no further questions at this
2 time for Agent Woods.

3 THE COURT: All right. Cross-examination,
4 Ms. Milfeld.

5 MS. MILFELD: Thank you.

6 **CROSS-EXAMINATION**

7 **BY MS. MILFELD:**

8 Q. Ms. Woods, you talked about how you developed a
9 partial autosomal DNA from the swab of the exterior of the
10 container?

11 A. That's correct.

12 Q. You later received Michael Clark's profile?

13 A. I did.

14 Q. Mr. Brackley didn't talk to you about this, but you
15 compared the partial autosomal to Mr. Clark's profile?

16 A. I did.

17 Q. It didn't match?

18 A. That's correct.

19 Q. You also developed a partial Y-STR profile for the
20 exterior of the container?

21 A. I did.

22 Q. Again, Mr. Brackley didn't talk to you about this,
23 but it didn't match Mr. Clark either?

24 A. That's correct.

25 Q. You talked a bit about how when you first received

1 the Carmex container, it just simply didn't occur to you to
2 swab the inside?

3 A. That's also correct.

4 Q. And you sort of demonstrated up there with the
5 Carmex container and the reasons why you thought, well, you
6 know, people who use the Carmex container, they unscrew it. I
7 have a Carmex container in my hand, they stick it in and they
8 rub their lips, stick it in again, rub their upper lip and
9 then untwist it?

10 A. That's correct.

11 Q. So that's why you decided to swab the exterior of
12 the Carmex container?

13 A. Well, the exterior was swabbed because it was
14 submitted with that request, but that's also the reason that I
15 thought, hmm, the interior would probably work, too.

16 Q. Okay. When you did the quantification of the DNA on
17 the interior, you talked about how there was the presence of
18 an inhibitor?

19 A. There was a potential inhibitor.

20 Q. The quantity that you were able to come up with
21 ultimately was undetermined?

22 A. Actually, yes, that's on the inside.

23 Q. Correct. And that's -- I should have been more
24 clear, but for the inside of the Carmex container the quantity
25 was undetermined?

1 A. That's correct. It actually was not undetermined it
2 was inhibited as reflected by the results of the analysis.

3 Q. You thought as a result of that, that the wax in the
4 Carmex might be inhibiting the results?

5 A. That's correct.

6 Q. And the presence of an inhibitor could mean a few
7 different things, and one of the things could mean that
8 potentially there was a lot of DNA from the swab and a lot of
9 inhibitor?

10 A. That's possible.

11 Q. It's also possible there could be a little DNA and
12 not a lot of the inhibitor?

13 A. That's also correct.

14 Q. So it's possible that the amount of DNA on the
15 inside could be very low?

16 A. That's also possible.

17 MS. MILFELD: Judge, may I approach?

18 THE COURT: Yes.

19 Q. (By Ms. Milfeld) So I'm showing you what is very
20 similar to what you have seen before which is People's
21 Exhibit 62. And what you had talked about was that actually
22 there was a mixture at location 391. So in here, even though
23 it says 11, you actually saw two types there. It was a 10 and
24 11?

25 A. Yes.

1 Q. So this isn't entirely accurate because there should
2 be a 10 here as well?

3 A. Well, there was more 11 than 10 in that location and
4 you could potentially indicate that the 11 was the major
5 contributor. However, it was not used for statistics because
6 I didn't feel that there was enough of a difference between
7 the two contributors, but there was more of the 11 contributor
8 than there was the other.

9 Q. There was the presence, though, of the 10, which is
10 reflected there?

11 A. That's correct.

12 Q. The reason why you didn't use that for statistical
13 analysis is because the difference in peak heights weren't
14 more than 50 percent?

15 A. Yes.

16 Q. Looking up there, the Y filer tests at 17 different
17 locations?

18 A. It does.

19 Q. But when we are talking about the Y filer, we're
20 talking about the test that looks at the Y chromosome of male
21 DNA?

22 A. The Y filer is the commercial kit we actually use.
23 The -- the company has identified it as being the Y filer and,
24 yes, that's correct.

25 Q. So out of the 17 potential locations, you were able

1 to come up with types at 5 of the 17?

2 A. That's correct.

3 Q. When you look at different peak heights for the Y
4 filer, which Mr. Brackley had talked to you about, is that you
5 only analyze peak heights over 75 relative fluorescent units?

6 A. That's correct.

7 Q. Which means you don't analyze anything under 75?

8 A. Our software will not assign a -- a DNA at a
9 number -- at a location that is below our cutoff of 75. And
10 when counsel indicates relative fluorescent units, we're
11 actually -- instrumentation is actually looking at
12 fluorescence that's given off of the DNA that we have tagged
13 at these locations.

14 Q. So I'm glad you went there because I wasn't going to
15 explain that.

16 And in this case when you looked at the peak heights
17 for Mr. Clark, they ranged from 344 to 1458 relative
18 fluorescent units. And I'll give you a minute to review that.

19 A. And are you talking about his referenced sample?

20 Q. Yes.

21 A. And you said 344 to what?

22 Q. 1458?

23 A. Yes.

24 Q. The peak heights for 7-1, the interior of the
25 Carmex, range from 90 to 153?

1 A. That's correct.

2 Q. 90 is not that far above your threshold, which is
3 the cutoff for your software?

4 A. That's also correct.

5 Q. So I want to talk to you about the mixture location.

6 MS. MILFELD: If I may approach, Judge.

7 THE COURT: Yes.

8 Q. (By Ms. Milfeld) So at the mixture location -- I
9 don't know why I want to stand here, but...

10 THE COURT: You might be able to move it back and
11 this way a little bit where --

12 MS. MILFELD: See, I was afraid of that because then
13 I thought that I might cause it to topple over. Let's see if
14 we can move.

15 THE COURT: No, you have to get it level.

16 MS. MILFELD: Okay. I just want to make sure that
17 you will be able to see it.

18 Q. (By Ms. Milfeld) So at this mixture location we
19 know that there was a minor contributor of 10, major
20 contributor 11?

21 A. That's correct.

22 Q. So the type 11 theoretically could be contributed by
23 someone else who is similar to Clark in all of these
24 locations, but different at the mixture location?

25 A. That's correct.

1 Q. So this person, for example, could be similar at 390
2 with a 25, 458 with a 17, 19 with a 14, 439 and 13, and he --
3 for example, this person, could be a 10.

4 A. It's possible, but not probable.

5 Q. Okay. But it's possible that could be the
6 scenario --

7 A. That's correct.

8 Q. -- because of the mixture?

9 A. That's correct.

10 Q. You know, because of the minor contributor that
11 there is someone else that is not Mr. Clark?

12 A. That's correct.

13 Q. And you can't tell us who that other person is?

14 A. No, I can't.

15 Q. So a person with a 10 would be consistent with what
16 you found at that location?

17 A. If he had a 10 and a 25 and a 17 and a 15, yes.

18 Q. And the reason being that you can't just say if it
19 was only a 10 is because the problem of the mixture?

20 A. That's correct.

21 Q. And you can't actually make any assumptions because
22 of the mixture about who's in the DNA or who's in the sample?

23 A. I have already made a scientific conclusion,
24 however, I can't give any other -- any indications of who else
25 may be in that mixture.

1 Q. And I guess that I should have been more specific,
2 but, for example, you can't assume that a woman is not present
3 in the sample?

4 A. I can assume that there is no woman in this
5 particular -- in this particular amplification. I could not
6 be certain that there is no woman in the autosomal because I
7 did not get a result.

8 Q. You also can't assume that they are just two males
9 that are in the sample as well?

10 A. That's also correct.

11 Q. You can't assume that because it's possible that
12 there are more than two males in the mixture?

13 A. That's correct.

14 Q. Yes.

15 MS. MILFELD: Judge, if I may approach again.

16 THE COURT: Yes.

17 Q. (By Ms. Milfeld) So the way that a person is
18 excluded is, for example, if you were to come up with a
19 different number at 3891 and it did not match Mr. Clark, it
20 would be excluded?

21 A. That's correct.

22 Q. So what are other types at 3891 that is, for
23 example, in type 13?

24 A. Can you re-ask the question?

25 Q. So say I'm not familiar with the types of numbers

1 that are at certain locations, but say, for example, it's
2 possible for someone to have a 12 at that location. If you
3 knew a type was a 12 at 3891 and Mr. Clark is a 13, he's
4 automatically excluded?

5 A. Well, it -- you -- you wouldn't look at just one
6 location in a DNA profile to make an exclusion. You are
7 looking at the profile as a whole in an attempt to make an
8 inclusion or an exclusion. Now if you looked at the whole
9 profile as a whole and he was matching at those other
10 locations and he was different at that one location, yes, you
11 would say exclusion.

12 Q. Okay. And that's certainly true the more numbers
13 that you come up with, the more types of that you find?

14 A. That's correct.

15 Q. So what you just said is that in this case if we
16 were to have -- and in this case you only used statistical
17 analysis on the fourth location. If you had a fifth,
18 Mr. Clark would be excluded from it, did not match?

19 A. Right.

20 Q. Now you talked about the database that is applied by
21 the manufacturer for the Y-STR testing?

22 A. I did.

23 Q. The database is provided by the manufacturer?

24 A. That's correct.

25 Q. And you remember that I had previously met with you

1 with my investigators and another attorney?

2 A. We did.

3 Q. And we had a discussion about that database?

4 A. I vaguely remember that.

5 Q. Because you do a lot of cases, I'm sure it's hard to
6 remember, but we talked about how the -- that the database,
7 for example, Caucasian males consists of about 4,100 people?

8 A. For this particular manufacturer, yes.

9 Q. You yourself have not researched the database itself
10 where they come up with the statistics?

11 A. No.

12 Q. You don't know the randomness of the database?

13 A. No.

14 Q. In fact, you at one point said I think that I might
15 have looked at it one time and I think that they might have
16 used surnames to determine ethnicity?

17 A. And I think that was something someone said at some
18 scientific meeting, but I don't know how they determined that.

19 Q. So for all you know, the 4,100 people could be
20 people from the state of New York and nowhere else?

21 A. Again, I don't know how the individuals were
22 selected for participation in this database. So you are
23 correct in that -- making that because I don't know.

24 Q. And the statistics that they are coming up with is
25 based on the 4,100 number?

1 A. It is.

2 Q. And that's what it's limited to?

3 A. It is.

4 Q. It doesn't say the database includes the entire
5 world?

6 A. That's correct.

7 Q. I just wanted to talk to you briefly about the
8 Carmex container itself, and this is going to seem really
9 obvious to you, but you don't know how the Carmex container
10 got where it was?

11 A. I don't.

12 Q. Your scientific analysis doesn't include looking at
13 when the Carmex container got there?

14 A. It does not.

15 Q. And you don't know how it got there?

16 A. That's also correct.

17 Q. And you can't tell when the DNA got on the Carmex?

18 A. That's also correct.

19 MS. MILFELD: No further questions.

20 THE COURT: Okay.

21 **REDIRECT EXAMINATION**

22 **BY MR. BRACKLEY:**

23 Q. So Ms. Milfeld asked you --

24 MR. BRACKLEY: May I, Judge?

25 THE COURT: Redirect.

1 MR. BRACKLEY: Thank you.

2 Q. (By Mr. Brackley) Ms. Milfeld asked you about the
3 possibilities of, um, certain results here and you said
4 possible, but not probable. Why not probable?

5 A. Because even though the profile, you know, is a
6 partial profile, it is still very interpretable and it does
7 not indicate that there's any more than -- there's one major
8 contributor. And, yes, there is at least one other male who
9 left a small amount of DNA in the location with the 11 there,
10 however, there is no indication that there's any more than
11 that.

12 Now unless you start thinking that it would be more
13 than two males of the same paternal lineage, then I would not
14 be able to tell that. So, yes, if two or three people from
15 the same paternal lineage had touched it, it would still look
16 the same. It would still look like a single source because
17 their Y chromosome DNA would be the same. So I won't know if
18 more than one individual from that paternal lineage touched
19 it, but there is at least a contributor of one little allele,
20 one little piece of genetic information in this profile that
21 does not belong to -- or it can be excluded as being a part of
22 Mr. Clark's paternal lineage.

23 Q. Obviously, the databases don't include every single
24 person in the entire world, right?

25 A. That's correct, but -- but none of the databases do.

1 They choose a database large enough to where they feel that
2 they could assign some significance, and we choose three
3 databases to compare our profiles against. And those three
4 databases that we use at the CBI laboratory are the African
5 American, the Caucasian and the Hispanic populations because
6 those populations are most prevalent in this part of the
7 United States.

8 Now there are scientists all over the world that
9 have databases for American Indians or people from Guam or all
10 these other racial, um, classes, but we don't choose those
11 because if we would use to use one of those databases then we
12 would be assuming that our profile had to come from that
13 racial class and -- and we don't. All we're doing at the CBI
14 laboratory is trying to give you an indication of how -- how,
15 um -- how rare or, um, how prevalent a particular profile is.

16 We're just trying to give you an indication of how
17 often we may see that profile.

18 Q. And is there a statistical analysis the same as that
19 used at the FBI?

20 A. The -- I don't know what type of Y-STR kit the FBI
21 uses, but the kits that are -- that are commercially available
22 out there, their databases are yielding similar results. So,
23 like I said, I don't know if the FBI is using the same kit
24 that we use. I think that there's actually three commercial
25 kits out there right now that you can use and associated with

1 each one of those is their own manufacturers database. So I
2 don't know.

3 Q. But their database isn't the entire population of
4 the world either?

5 A. No.

6 Q. Now Ms. Milfeld is correct. If there was that --
7 say the 3891 location a 12, as opposed to a 13 on that major
8 contributor, that would exclude Michael Clark from being on
9 the inside of the Carmex container, correct?

10 A. That's correct.

11 Q. And you choose the four locations that you did,
12 excluding the one at 391, in order to obtain the most
13 conservative results, correct?

14 A. That's correct.

15 Q. And those -- the most conservative results were 99.4
16 of the male population, right?

17 A. That's correct.

18 Q. If you had put in the major -- that other -- the 11
19 from the 391, that would have been a number higher than the
20 99.4?

21 A. It could have been.

22 Q. Certainly if you had found interpretable results at
23 other locations, it could have been higher?

24 A. Yes, it could have been.

25 Q. Okay. And for the Y chromosome, the statistics go

1 up to 99.9?

2 A. Yes, because when we have a Y chromosomal match we
3 will never indicate identity. The best statistic that is
4 associated with a Y chromosomal match is 99.9 percent
5 probability of exclusion.

6 Q. You stated a couple times that you don't make
7 assumptions or that your scientific conclusions aren't based
8 on assumptions, correct?

9 A. That's correct.

10 Q. What are your scientific conclusions upon comparison
11 of 7-2 inside the Carmex container and 16, Michael Clark?

12 A. The scientific conclusion is that the profile -- the
13 major component of the profile developed from the inside of
14 the Carmex container matches the Y chromosomal DNA profiled
15 from Michael Clark. So consequently neither he nor his
16 paternal relatives are excluded as contributors to the major
17 component of that mixture profile.

18 MR. BRACKLEY: Thank you.

19 THE COURT: Any recross, Ms. Milfeld.

20 **RECROSS-EXAMINATION**

21 **BY MS. MILFELD:**

22 Q. The only swab that you were given to compare the
23 partial profile to was from Michael Clark?

24 MR. BRACKLEY: Objection, outside the scope.

25 THE COURT: Overruled.

1 A. That's correct.

2 Q. (By Ms. Milfeld) You weren't given a swab from
3 anyone else to compare it to?

4 A. That's correct.

5 MS. MILFELD: No further questions.

6 THE COURT: All right. Agent Woods, you can step
7 down.

8 Can the witness be excused?

9 MR. BRACKLEY: She may, Judge, thank you.

10 MS. MILFELD: Yes, Judge.

11 THE COURT: Agent Woods, you are excused. Thank you
12 very much.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Could I see counsel at the bench,
15 please. This doesn't need to be on the record.

16 (Whereupon, a brief discussion was had off the
17 record.)

18 THE COURT: Okay. Ladies and gentlemen of the jury,
19 we are going to go ahead and recess for the weekend. I'm
20 comfortable telling you that we are on pace and perhaps even a
21 little ahead of where I thought that we would be at this point
22 in the trial, so we are going to recess until 9:00 on Monday
23 morning.

24 Remember the admonition that I have given you
25 previously, it applies to this recess as well. Don't

1 communicate about or talk about the case with anyone by any
2 means, this includes members of your family, people involved
3 in the trial, other jurors or anyone else. If someone does
4 approach you and tries to talk about the trial, please let me
5 know about it immediately. Don't read or listen to any news
6 reports of the trial, don't consult any outside reference
7 materials, including the dictionary, the encyclopedia or the
8 internet.

9 Finally, remember it is especially important that
10 you do not form or express any opinion on the case until it is
11 finally submitted to you. We should be ready to continue the
12 presentation of evidence at 9:00 on Monday morning. Have a
13 good evening weekend. Make sure you take your materials with
14 you and leave them in the jury room. We'll make sure that
15 they are safeguarded over the weekend. Have a great weekend.
16 We'll see you on Monday morning.

17 (The jury exited the courtroom.)

18 THE COURT: The record should reflect the jury has
19 left the courtroom. I've got a couple things that I wanted to
20 talk to counsel about. Is there anything that you wanted to
21 take up on the record for the People? Mr. Kellner.

22 MR. KELLNER: Yes, Your Honor. Ms. Ring and I were
23 having a discussion about the redacted audio copy for the
24 April 15th, 2011 interview.

25 THE COURT: You read my mind.

1 MR. KELLNER: And I think that what we would like to
2 do, Judge, is provide you a copy of our proposed redactions.
3 I will e-mail you a transcript as well as a copy of the
4 redacted transcript, or at least markings on where our audio
5 is giving up and ending. And I can do that, obviously, before
6 we leave for the weekend.

7 THE COURT: Okay.

8 MR. KELLNER: And I'm not prepared to speak as to
9 Ms. Ring's position on how much should come in or not.

10 MS. RING: So, Judge, I think that I said this
11 earlier in the week that I had received this last Friday. I
12 went through it again and my -- my position is that the way in
13 which it's been redacted by the District Attorney's Office, I
14 think, takes out much of the context of the interview. We
15 talked a lot about ruse today from the interview in 1994, and
16 you have heard testimony at the prior motions hearing that
17 there were similar ruses used. This was the interview about
18 Dion Moore and not about the homicide really, and I don't
19 think it's a fair representation of the entire interview based
20 on the redactions.

21 I tried because our original conversation was how do
22 we take out things that really aren't relevant. I mean
23 there's a discussion at some point about ski passes and,
24 frankly, when I went through trying to take out or make
25 suggestions about things that really weren't relevant to me,

1 those were so minor it didn't reduce the length of the
2 interview significantly and, also, it was just difficult to do
3 that.

4 So I guess that I'm just telling the Court all that.
5 If there is suggestions about taking out things that clearly
6 aren't part of the ruse, aren't part of the whole -- what I
7 would challenge the set up of Agent Grusing and ATF Agent
8 Amon, I'm open to those, but the number -- the amount that was
9 cutout based on this redaction and, frankly, my suggestion, I
10 just don't think are going to make a difference in terms of
11 how long the jury would be listening to it, which is why I
12 didn't make an alternative proposal.

13 THE COURT: Okay. I'm not worried about the length
14 of the recording, it's not particularly long to begin with,
15 but I guess that I need to know what portions of the
16 redactions you're asking to have left in.

17 MS. RING: All of it.

18 THE COURT: You want all of it. All right. Well,
19 that makes that side of the discussion relatively easy. So
20 what I will do, because I think that it is a correct statement
21 that the statements of the Defendant on that April 15th
22 recording need to be in proper context, so that if certain
23 statements either from the Defendant or from either of the two
24 agents are necessary to give proper context to the Defendant's
25 statement, as I review that, I would find that they need to be

1 included. So that's what I'm going to be looking at. So I
2 will take a look -- I have already -- I have already listened
3 to that original recording a couple of times, but I'll take a
4 look at the transcript and the redaction that the People
5 provide to me. I'll try to make a determination over the
6 weekend so that you know Monday morning what -- well, when did
7 you anticipate entering that?

8 MR. KELLNER: Judge, I think that Special Agent
9 Grusing is going to be kind of busy these days, so we'll plan
10 on him probably closer to Wednesday.

11 THE COURT: All right. Well --

12 MR. KELLNER: I think towards the conclusion of the
13 case.

14 THE COURT: -- I'll try to get it to you over the
15 weekend; if not, then by first thing Monday morning. Why
16 don't counsel and Mr. Clark plan to be here at 8:30 on Monday
17 morning so that we can discuss that and take up any other
18 issues that arise over the weekend. And I'll try to do my
19 homework and check the redactions from the April 15th
20 interview with Mr. Clark.

21 MS. RING: So I think that I ended up talking to
22 Mr. Kellner about this until this afternoon, so I actually
23 have the copy of the redacted interview that Mr. Kellner gave
24 me, which I said I would give to the Court so you make sure
25 that you have it.

1 THE COURT: Okay. So I can listen to this as I'm
2 reviewing the transcripts, if necessary.

3 MS. RING: Right. And you have a copy of the entire
4 interview from the previous hearings.

5 THE COURT: Yeah, I hope.

6 MS. RING: And then I'm going to ask if Mr. Kellner
7 would also send me a copy of the transcript that you are going
8 to send the judge because I haven't seen.

9 MR. KELLNER: I will copy you.

10 THE COURT: You need to cc defense counsel on all
11 communications and vice versa. I'm assuming that you were
12 going to do that so...

13 MR. BRACKLEY: I can make you a paper copy now if --

14 THE COURT: All right. Yes, I do have the -- I do
15 have a CD of the complete interview from April 15th, 2011. It
16 was attached to the People's response to the motion to
17 suppress statements two.

18 MS. RING: I think that it caused Mr. Brackley to
19 wake up in the middle of the night.

20 MR. BRACKLEY: Exactly right. And, Judge, you also
21 have the actual paper transcript --

22 THE COURT: Right.

23 MR. BRACKLEY: -- of those as well. Do you want an
24 electronic copy as well?

25 THE COURT: Yeah. I would love it because I would

1 rather take my laptop home than take this file home.

2 MR. BRACKLEY: Perfect.

3 THE COURT: The other thing that I wanted to talk to
4 you about, Exhibit 50 has been admitted subject to redaction,
5 that's the CAD report. Have you taken a look at that?

6 MR. BRACKLEY: I was looking at it now.

7 THE COURT: Can you get a look at that over the
8 weekend? We can talk about it at 8:30 on Monday.

9 MR. BRACKLEY: We'll talk about it now. I'm
10 thinking we may just enter the whole thing, because I asked
11 the witness to look at three separate things, the hospital,
12 the first arrival, the first call out, and those are kind of
13 around the whole thing. Unless you want something out.

14 MS. RING: I think that I asked her -- yeah.

15 THE COURT: Why don't you tell me at 8:30 on Monday
16 what you want to do with Exhibit 50 by the way of redaction.

17 All right. Anything else on behalf of the People?

18 MR. BRACKLEY: No, Your Honor. Thank you.

19 THE COURT: On behalf of the Defendant?

20 MS. RING: No. Thank you.

21 THE COURT: So we'll see you all at 8:30 Monday
22 morning. Have a good evening.

23 (Court adjourned.)

24

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 14th day of March, 2013.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
22
23
24
25

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 15,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

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I N D E X

WITNESSES FOR THE PEOPLE:	PAGE
BARBARA LENNON,	
Direct Examination by Mr. Brackley	20
Cross-Examination by Ms. Ring	29
Redirect Examination by Mr. Brackley	31
KURT MATTHEWS,	
Direct Examination by Mr. Kellner	34
RICH DENIG,	
Direct Examination by Mr. Kellner	40
Cross-Examination by Ms. Milfeld	48
Redirect Examination by Mr. Kellner	53
OFFICER OWEN McKINNEY,	
Direct Examination by Mr. Kellner	55
Cross-Examination by Ms. Milfeld	64
JAMIE UHLIR,	
Direct Examination by Mr. Kellner	66
Cross-Examination by Ms. Milfeld	91
Redirect Examination by Mr. Kellner	103
COMMANDER KURT WEILER,	
Direct Examination by Mr. Kellner	107
RONALD WEYER,	
Direct Examination by Mr. Kellner	119
Voir Dire Examination by Ms. Ring	132
Direct Examination (cont'd) by Mr. Kellner	133
Cross-Examination by Ms. Ring	136
Redirect Examination by Mr. Kellner	142
Recross-Examination by Ms. Ring	142
COMMANDER CAREY WEINHEIMER,	
Direct Examination by Mr. Kellner	148
Cross-Examination by Ms. Ring	153
Redirect Examination by Mr. Kellner	157
DION MOORE,	
Direct Examination by Mr. Brackley	159
Voir Dire Examination by Ms. Ring	180
Direct Examination (cont'd) by Mr. Brackley	181
Cross-Examination by Ms. Ring	193
Redirect Examination by Mr. Brackley	238

1 I N D E X (cont'd)

2 WITNESSES FOR THE PEOPLE: PAGE

3	DAVID BERRING,	
	Direct Examination by Mr. Brackley	244
4	Voir Dire Examination by Ms. Ring	256
	Direct Examination (cont'd) by Mr. Brackley	258
5	Cross-Examination by Ms. Ring	259
	Redirect Examination by Mr. Brackley	270

7 EXHIBITS FOR THE PEOPLE: OFFERED ADMITTED

8	63 - Bullet	38	38
	64 - Property Report	38	38
9	65 - Aerial Diagram	42	42
	66 - Diagram	61	62
10	67 - Diagram	61	62
	68 - Diagram	61	62
11	69 - Photo	132	133
	70 - Photo	134	134
12	71 - Aerial Photo	180	181
	72 - Aerial Photo	182	182
13	74 - Pawn Receipts	256	257

14

15 EXHIBITS FOR THE DEFENDANT: OFFERED ADMITTED

16	A - Memo	212	212
----	----------	-----	-----

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25	REPORTER'S CERTIFICATE * * * * *	275
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1 P R O C E E D I N G S

2 THE COURT: All right. Good morning. This is
3 12CR222, People versus Michael Clark. Mr. Clark is present
4 with his counsel, the prosecution is present, the jury is
5 not.

6 I had an opportunity to review the transcript and
7 the proposed redactions submitted by the People after we
8 recessed on Friday evening. The -- well, let me ask you,
9 Ms. Ring, did you want to make any further argument with
10 respect to the inclusions that you wanted?

11 MS. RING: I would, Judge. And I would cite to
12 Rule 106, the remainder of related writings or recorded
13 statements, and then *People v. Melillo* at 25 P.3d 769. It's
14 a Colorado Supreme Court case from 2001 that actually cites
15 to a historical line of cases that talks about if somebody
16 wants to introduce a statement and only wants to introduce a
17 portion of the statement, that, you know, based on Rule 106
18 the favored rule is to let the entire thing in even if that
19 part is -- part of that is supposedly unfavorable to the
20 other party.

21 And when the case law talks about things that
22 ought to be redacted, which would be in opposition to
23 Rule 106, it's typically because there's some kind of
24 prejudicial component of the statement.

25 And you know, in this case -- and most of the case

1 law obviously is the defense saying we think this is
2 prejudicial. And even if it's relevant, the prejudicial
3 portion outweighs the relevance.

4 And in this instance I think what we're saying,
5 Judge, is that Rule 106 is what it is. And there isn't
6 anything prejudicial to the prosecution. So the reason for
7 their redactions -- I don't know what the reason for the
8 redactions are, but that Rule 106 would say it would all
9 come in.

10 And we haven't heard anything about -- from the
11 prosecution about why it would prejudice them to have those
12 statements come in.

13 And of course the line of cases says even if there
14 is something unfavorable to the other party who is
15 submitting it, you know, the preference is that the entire
16 statement comes in.

17 THE COURT: Mr. Kellner, do you want to respond?

18 MR. KELLNER: Your Honor, it's not an issue of
19 favorability or unfavorability. It's just simply properly
20 using the jury's time and not putting in irrelevant
21 information.

22 Agent Grusing is going to be on the stand to
23 testify about the approach, the reason for the approach, why
24 they say what they said, which I think is actually fairly
25 encompassed in our redactions.

1 With respect to Dion and then the statements the
2 defendant made, it's just simply -- it's a relevance issue.
3 There's a lot of stuff in there that doesn't really have
4 anything to do with anything.

5 What I haven't heard from the defense is how the
6 parts that we've kept out which the People believe are
7 irrelevant somehow are prejudicial to them such that
8 inclusion of the entire audiotape should actually be
9 required and overrule an issue having to do with relevancy.

10 THE COURT: Well, I think the standard recited by
11 Ms. Ring is accurate with respect to the law, and that is
12 essentially what I -- the standard that I applied when I was
13 reviewing this over the weekend.

14 There are portions of the recorded conversation
15 with Mr. Clark that are frankly simply irrelevant. And the
16 portions that have been redacted to my review are not
17 necessary to provide proper context for either the
18 statements being made by the officers, or more importantly
19 and really the only focus is, you know, the statements made
20 by Mr. Clark, are they given a fair and reasonable
21 impression based on the included portions of the transcript.
22 And I would say that based on the redactions that have been
23 submitted they are.

24 I mean, for the most part the portions that have
25 been excluded involve extended statements by law enforcement

1 or -- or irrelevant matters, conversations with the
2 defendant regarding, for example, Dion's family history or
3 Mr. Clark being involved in check writing and stealing jeans
4 and how it hurt to have his -- have the prior felonies that
5 he's talking about, whether or not he's a snowboarder or a
6 skier.

7 And then the portions that are redacted from pages
8 23 to 25 involve essentially law enforcement's statements
9 explaining their actions. There's no relevance there.

10 To the extent there's any statement from the
11 defendant it's an acknowledgment or a response, simple one
12 word or very brief statement. 90 plus percent of the
13 verbiage there is coming from law enforcement, and it's not
14 related to the follow-up conversation which involves
15 disposal of the gun.

16 So I think the redactions -- the proponent of the
17 evidence is the People. Defendant's statements are
18 admissible, statements of a party opponent. To the extent
19 the defendant has the right to seek to admit, insist on the
20 inclusion of the other statements, it has to be within the
21 confines of *Melillo* and 106. And I don't think that the
22 excluded portions are necessary to give the jury a proper
23 understanding of the defendant's situation or his
24 statements.

25 So the redacted version of the interview from

1 April 15, 2011 is admissible as submitted. Do we need to
2 discuss anything else on the record?

3 MS. RING: Judge, I just need to make a further
4 record please if that's all right.

5 THE COURT: All right.

6 MS. RING: I'm going to ask the Court to
7 reconsider its ruling after Dion Moore testifies today,
8 because part of my argument on Friday was it's our belief
9 actually that much of what they're taking out is relevant
10 because it goes to this whole ruse concept that we heard a
11 lot about with the first interview in 1994.

12 If the Court recalls from the motions hearing,
13 again this whole interview was a whole ruse to get my client
14 to talk about the gun, where the gun was in relation to Dion
15 Moore and that they're going after Dion Moore.

16 And that -- the beginning of the interview also
17 sets up the -- part of the tactical decision on the part of
18 law enforcement to just show up at my client's place of work
19 how many years later.

20 And that's what that beginning part of that
21 interview is from pages 1 to 7 is it makes it clear that
22 they just show up unannounced at my client's place of work
23 and that's where they start this whole ruse about Dion
24 Moore.

25 So taking that out, those first pages 1 through 7,

1 I think clearly take away part of the context of the
2 interview and what they're trying to do in terms of getting
3 my client to confess. And so I think the jury should hear
4 about all the tactics they used to try to get Michael Clark
5 to confess and that he doesn't, because I think we get to
6 argue that.

7 THE COURT: Well, but Grusing is going to testify.
8 So Grusing will certainly be subject to cross-examination,
9 which I think resolves your concerns there.

10 But the point about reconsidering after Dion Clark
11 (sic) testifies may be a valid point, but I need to hear
12 what Dion Clark (sic) says.

13 MR. KELLNER: Dion Moore.

14 THE COURT: Yeah, Dion Moore. Why do I keep
15 saying Dion Clark? Sorry. Dion Moore.

16 MS. RING: And then, Judge, for the record in
17 terms of things that I would agree with everyone that
18 weren't relevant starting on page 26 lines 10 to 34, and
19 starting on page 31 line 21 -- 29 to page 32 line 6, my
20 recollection is those are the places we talked about ski
21 boarding and other things that really don't at all go to the
22 case.

23 So I just want to be clear that I'm, you know, not
24 saying that I don't agree there are parts in there that
25 aren't relevant, but the rest of it I think goes to this

1 whole ruse thing. And I think because of Rule 106 taking
2 out things that have relevance is not what the rule and the
3 case law supports. It's taking out things that either have
4 no relevance whatsoever or the prejudice outweighs the
5 probative value. So that's my record.

6 THE COURT: Okay. After Mr. Moore testifies if
7 you want me to reconsider, raise the issue and I'll look at
8 it again in that context.

9 Anything else on behalf of the People?

10 MR. KELLNER: Yes, Your Honor. The People have a
11 calendar here representing September, October, November
12 1994. We're going to ask you to take judicial notice under
13 Rule 201 of this calendar.

14 And what I had proposed to Ms. Ring is that I
15 would provide each member of the jury a copy of this
16 calendar so that they could more easily follow along with
17 some of the dates and times that, you know, have come out
18 throughout the course of the trial.

19 Frankly, if I thought about this earlier I should
20 have asked to put it in the juror notebook at the very
21 beginning. But given that we're a little over the midway
22 point, I still think there's plenty of testimony that's
23 going to come about dates. And having a visual for them to
24 see the timing of certain events in relation to others can
25 be very helpful.

1 THE COURT: Is it just a blank calendar for those
2 three months in 1994?

3 MR. KELLNER: It is a blank copy.

4 THE COURT: I can take judicial notice of that.

5 What's the defendant's position with respect to
6 providing a copy to the jury for their reference purposes?

7 MS. RING: Judge, I don't have a problem obviously
8 with the Court taking judicial notice of it. I don't
9 actually have a problem with in some way if the prosecution
10 wants to label it as an exhibit and have it -- have the jury
11 have access to the calendars during deliberations.

12 I think especially since we're at this stage in
13 the trial in some way it's indicating to the jury they're
14 supposed to pay particular attention to dates, they're
15 supposed to use the calendar.

16 The Court was very clear with the jury about
17 taking notes, that it's within each juror's discretion
18 whether they want to take notes or not take notes. And I
19 think to hand them calendars for them to write on at this
20 point in the trial makes some kind of suggestion about what
21 they ought to be doing as jurors. And I don't think that's
22 appropriate.

23 THE COURT: Do you want to respond?

24 MR. KELLNER: Judge, it would be helpful to the
25 jury I think to maintain and keep track of their notes if

1 they want to write on this copy of the calendar or if not,
2 it could be up to them.

3 THE COURT: I don't think it unnecessarily
4 highlights any particular piece or portion of the evidence,
5 particularly if it's provided to the jury with the
6 advisement that this is simply to augment their note taking
7 if they choose to reference it or use it, but also be clear
8 that they're not required to use it.

9 I mean, I agree it probably would have been better
10 to give it to them at the beginning of the trial. But I
11 don't think it's harmful to give it to them at this point in
12 the trial. So I'll go ahead and allow that.

13 Do you want to mark this as an exhibit or do you
14 want to just give it to them as part of their notes?

15 MR. KELLNER: I would rather give it to them as
16 part of their notes. If you'd like to keep that in your
17 file for appellate purposes should that be necessary, I
18 don't think it needs to be an actual exhibit.

19 THE COURT: Okay. Why don't you place a blank
20 copy of the calendar on each juror's chair. And when they
21 return this morning I'll just explain to them that it's
22 being provided to facilitate or augment their note taking
23 and they can use it or not as they choose.

24 Anything else from the People?

25 MR. KELLNER: No, Your Honor.

1 THE COURT: How about for the defense,
2 Ms. Milfeld?

3 MS. MILFELD: Judge, it's our understanding that
4 the People will be calling Officer McKinney to testify about
5 the slope and the angle of the apartment as well as the
6 concrete outside of the apartment. And if I may approach,
7 this is what the prosecution has handed me.

8 THE COURT: Okay.

9 MS. MILFELD: Judge, Officer McKinney has been
10 endorsed as a witness. He has not been endorsed as an
11 expert witness.

12 Mr. Kellner indicated to us that he's obviously
13 not going to have Officer McKinney draw conclusion about the
14 Carmex or the Carmex rolling. We would argue that this is
15 akin to expert testimony.

16 Specifically Officer McKinney is using CAD,
17 computer aided drafting, to create these graphs. He has
18 taken specific training on laser mapping. We were provided
19 with certificates how he's taken both a beginner,
20 intermediate and advanced courses on this topic.

21 This is I think akin to an officer testifying
22 about an accident reconstruction where they measure the
23 accident and then testify about that.

24 *People v. Stewart*, which is 55 P.3d 107, 2002,
25 makes it clear that an officer who testified about an

1 accident reconstruction and inferences require that he be
2 qualified as an expert.

3 *People v. Veren* is a Colorado appellate case from
4 2005 which also talks about how the Court cannot allow
5 expert testimony that's under the guise of lay opinions.

6 THE COURT: What's -- give me the cite for that
7 2005 case.

8 MS. MILFELD: 140 P.3d 131.

9 THE COURT: And the name of the case again?

10 MS. MILFELD: This is *People v. Veren*.

11 THE COURT: How do you spell that?

12 MS. MILFELD: V-E-R-E-N.

13 Would the Court also like the cite for *People v.*
14 *Stewart*?

15 THE COURT: That's 55 P.2d 107?

16 MS. MILFELD: P.3d 107.

17 So 701 and 702 make it clear that any sort of
18 officer opinion that requires application or reliance on
19 specialized skills or training, that the officer must be
20 qualified as an expert.

21 So what we're asking the Court to do is to
22 preclude the officer's testimony because his testimony is in
23 essence him talking about what only an expert should be
24 allowed to do.

25 THE COURT: Give me just a second, and I'll hear

1 the response from the People.

2 (Pause.)

3 THE COURT: Regarding the testimony of Officer
4 McKinney, do the People want to respond, Mr. Kellner?

5 MR. KELLNER: Your Honor, it's the People's
6 position that this testimony by Officer McKinney does not
7 encompass expert testimony. He's not being asked to opine
8 as to whether a Carmex container fallen out of a pocket how
9 would it roll given the angle and pitch outside of Marty
10 Grisham's apartment.

11 The People propose to ask Officer McKinney whether
12 he used his laser mapping tools, and then if there is a
13 decline and an angle. We weren't going to follow that up
14 with asking some sort of expert opinion about that.

15 Should the Court consider that to be expert
16 opinion frankly, his use of the laser mapping tools,
17 People's contention is that we provided this information,
18 both his background and training as well as the diagrams
19 showing his mapping of that area months ago; so that, if
20 should this be considered expert testimony, the actual
21 angles, the People have complied with Rule 16 by providing
22 that information to the defense.

23 And I'd cite *People v. Greer*, Your Honor, which is
24 262 P.3d 920. That's a Colorado Court of Appeals case from
25 2011 --

1 THE COURT: Go ahead, I'm listening.

2 MR. KELLNER: -- which states that the People do
3 not under Rule 16 have to endorse someone specifically as an
4 expert under Rule 16.

5 The issue here would be one of notice, Judge. And
6 there's no information that we're going to be asking this
7 witness that hasn't been previously provided to the defense
8 with ample opportunity to look at the information provided
9 and then develop cross-examination.

10 THE COURT: Can you be specific as to when you
11 provided the underlying information regarding Officer
12 McKinney's training as well as his analysis of the crime
13 scene and his conclusions to the defense?

14 MR. KELLNER: I believe I can, Your Honor. I just
15 need a moment to try and find my discovery log.

16 MS. MILFELD: Judge, we received it August 3rd.

17 THE COURT: August 3rd, okay. Thank you.

18 It is a correct statement from the prosecution
19 that Rules of Criminal Procedure don't require a witness to
20 be endorsed specifically as an expert or as a lay witness.
21 There are court opinions that reflect it's -- the better
22 practice is to actually do that, but there's no formal
23 requirement that it be done.

24 It does appear to me that the testimony that's
25 going to be tendered through Officer McKinney is likely the

1 type of testimony that does require scientific, technical or
2 other specialized knowledge through the use of the laser
3 mapping tool if I'm understanding what that tool itself is
4 and does.

5 And I have some very vague familiarity with it,
6 but it's not something that an ordinary person would have an
7 experience with or could operate without significant
8 training and experience. So it does appear that Officer
9 McKinney's testimony is going to fall under Rule 702 as
10 testimony by an expert witness.

11 And the distinction isn't whether or not he's
12 going to be asked for opinions that flow from his analysis
13 and mapping of the crime scene. It's the actual analysis
14 and mapping itself that I think requires the specialized or
15 technical knowledge. And that triggers the 702 threshold.

16 But I also agree with Mr. Kellner that providing
17 the officer's background and training and the diagrams that
18 show his mapping of the area were provided more than two
19 months ago. So I think the defense has been on sufficient
20 notice as to the nature of the testimony to be submitted
21 through Officer McKinney.

22 And I would overrule the objection or the request
23 to exclude him because he wasn't properly formally endorsed.
24 Anything else?

25 MS. MILFELD: I'd like to make an additional

1 record.

2 THE COURT: Go ahead.

3 MS. MILFELD: We filed a motion to give notice of
4 any experts and their opinions. This Court granted that
5 motion when our motions deadline came up. We've also had
6 numerous motions hearings. Of course the Court is aware of
7 that.

8 And I guess I'm at a loss for why the People never
9 endorsed him as an expert given that we had a motion that
10 was granted by the Court as well as the fact that we've been
11 here numerous times on various motions issues.

12 THE COURT: Okay.

13 MS. MILFELD: I'd also like to -- I'm sorry,
14 Judge. I'd also like to note that I think this is a due
15 process issue because Mr. Clark does have the right to have
16 notice specifically of whether or not an expert or a lay
17 witness is testifying.

18 And certainly it affects his confrontation clause
19 rights. And even though the Court says that there are cases
20 that say there's no preference to endorse lay or expert
21 opinion, the case law, especially *Greer*, makes it clear that
22 the defendant can request information based upon the
23 endorsement.

24 The information that we did request is within our
25 motion that requests notice from the prosecution, and they

1 did not comply with that.

2 THE COURT: Okay. Well, it sounds like the
3 district attorney disagrees with my assessment that it falls
4 under Rule 702, which is probably why they didn't endorse
5 him as an expert witness.

6 And I agree the defendant is entitled to notice of
7 the nature of the evidence and the witness' qualifications.
8 But I'm finding that you got that sufficiently in advance.
9 I'm not going to say that it's a -- that it's the preferred
10 method to go through, but I think it's sufficient.

11 Anything else at this time?

12 MR. KELLNER: Not from the People.

13 THE COURT: Ms. Milfeld?

14 MS. MILFELD: No, Judge.

15 THE COURT: All right. Before the jury comes in,
16 I got a copy of the redacted April 15th interview. Do you
17 need that, either side?

18 MS. RING: It's my copy.

19 THE COURT: Okay.

20 (The jury entered the courtroom.)

21 THE COURT: Please be seated. Welcome back,
22 ladies and gentlemen of the jury. I hope you had a nice
23 weekend.

24 What you each found on your chair as you walked in
25 was a copy of a three-page calendar for the months of

1 September, October, November 1994. This is just provided to
2 you to supplement or augment your note taking, help as a
3 reference point here. You're welcome to use it if you'd
4 like to. Don't feel obligated to use it. It's just a
5 reference for you.

6 When we recessed on Friday the prosecution was
7 presenting testimony in their case in chief.

8 Would the People call their next witness,
9 Mr. Brackley?

10 MR. BRACKLEY: Good morning. People call Ms. Barb
11 Lennon.

12 THE COURT: Would you step forward please? Come
13 on all the way up here. Face me and raise your right hand.

14 BARBARA LENNON,
15 called as a witness on behalf of the People, having been
16 first duly sworn, was examined and testified as follows:

17 THE COURT: Please have a seat.

18 THE WITNESS: Just give me a minute. Sorry.
19 Change my glasses.

20 THE COURT: All right. Go ahead, Mr. Brackley.

21 MR. BRACKLEY: Thank you, Judge.

22 DIRECT EXAMINATION

23 BY MR. BRACKLEY:

24 Q Good morning, ma'am.

25 A Good morning.

1 Q Can you state your name and spell your last name
2 for the record please?

3 A It's Barbara Lennon, L-E-N-N-O-N.

4 Q Are you currently retired from the Boulder Police
5 Department?

6 A Yes, I am.

7 Q When did you retire?

8 A July of 1998.

9 Q What did you do for the Boulder Police Department
10 prior to your retirement?

11 A I worked as a report specialist investigator in
12 the operations in OSU, Operations Support Unit.

13 Q And what is a report specialist?

14 A We took non-emergency crime reports and other
15 incident reports out of a unit stationed off the lobby of
16 the police department.

17 Q Were you a police officer or a civilian employee?

18 A We had what was called a limited commission. We
19 could issue municipal summonses and we could also issue
20 state summonses if cosigned by a fully commissioned officer.

21 Q But you didn't have a badge and a gun and wear a
22 uniform and that kind of stuff; right?

23 A No, although I at that time was POST certified.

24 Q When you said that you worked off the lobby of the
25 police department, civilians could come in and sit with you

1 and tell you their problems?

2 A Yes.

3 Q And then you would take reports and refer them on
4 to detectives or other folks within the police department?

5 A Yes, although we did do some follow-up on some
6 reports depending on what the report was.

7 Q Let me bring you back to November 1, 1994. Do you
8 remember that day?

9 A Yes, I do, vividly, yes.

10 Q Do you remember that day as the day that Marty
11 Grisham was murdered?

12 A Yes, I do.

13 Q Did you speak with Marty Grisham on November 1,
14 1994?

15 A Yes, I did.

16 Q On the phone and also in person?

17 A Yes, both.

18 Q Were you working at the Boulder Police Department
19 that night when news of Marty Grisham's murder came over the
20 radio?

21 A Yes, I was.

22 Q Tell the jurors how it was that you came to speak
23 with Marty Grisham on the 1st of November 1994.

24 A Initially what happened was Mr. Grisham contacted
25 Detective Jeff Kithcart, who is our fraud and forgery -- one

1 of our fraud and forgery detectives who specialized in fraud
2 and forgery in the detective division. And he contacted him
3 directly. And then Detective Kithcart gave him my direct
4 phone number. And Mr. Grisham then called my line directly.

5 I was working on -- at that time my hours were
6 1:00 in the afternoon to 10:00 p.m. When I came in I got
7 that message and tried to return his call and didn't reach
8 him immediately.

9 But when I did reach him he relayed to me the
10 information that his checks had been stolen from his desk
11 and -- excuse me, a book of checks had been stolen, and
12 additional information regarding forgeries on those checks.

13 Q Okay. So did there come a time when -- well, what
14 else did you learn from Mr. Grisham on the phone? And let
15 me focus you in. Did he talk to you about whom, if anyone,
16 he suspected for stealing his checks?

17 A Well, he -- he wasn't really sure about who took
18 the checks. But what -- in my questioning of him there were
19 only a few people who had access to his apartment. I
20 specifically asked him who had keys to the apartment because
21 there was nothing to indicate a break-in to the apartment.

22 What was missing specifically was one complete
23 book of checks. He had been -- he had been paying bills on
24 the evening of October 31st. And when he got to his -- the
25 last check, which was 1540, he went to get the next book

1 which would have been a book starting -- book of 25 starting
2 with check number 1541, and that box was empty.

3 He was a little confused as to -- because that
4 should have been the next book in the bottom of that box.
5 And that was where he kept that box was in his rolltop desk.

6 At that time he was a little confused about that,
7 but he went then to another location in his house where he
8 kept another box of checks, got that box and took out a new
9 book of checks, continued writing checks, but also realized
10 that a recent statement was also missing. But he thought
11 maybe he had misplaced that. And then this is again the
12 evening of October 31st.

13 And then the next morning is when he discovers
14 that -- when he's contacted by Patti Harris he realizes that
15 something is amiss; in other words, someone has actually
16 taken that book of checks.

17 So when questioning him the only people who have
18 access his apartment via key are his son Loren who lives in
19 Glenwood Springs, his daughter Kristen, and his girlfriend
20 Barbara Burger.

21 So you know, he doesn't really want to indicate,
22 you know, that he's really suspicious of anyone. But I
23 asked him well, what about Kristen, does she have any
24 boyfriends, you know, is that a possibility.

25 And in asking him about that he says well, Kristen

1 has been acting a little odd lately. You know, she's -- she
2 hadn't really gotten in any trouble in the past, but
3 recently she was supposed to have been enrolled in Front
4 Range Community College, but now we found out that she's not
5 enrolled in Front Range Community College.

6 And there's also been a recent incident where she
7 was on a motorcycle with this boy, and the motorcycle turned
8 up stolen. And that incident occurred on September 22nd of
9 that year.

10 Q So did you start the process of trying to -- with
11 Mr. Marty Grisham trying to figure out amounts of checks,
12 how many checks were stolen and to what amounts and whether
13 there was a total?

14 A When I was on the phone with him the only thing
15 that the credit union was able to provide at that time was
16 check numbers. And he told me on the phone that there were
17 14 checks. He had the check numbers, the totals of each
18 check; in other words, the dollar amounts that each check
19 had been cashed for out of that book that had been stolen.

20 So these are check numbers 1541 to 1565 is the
21 total, the 25 checks that were stolen. Out of that book of
22 checks there were he told me at that time 14 checks, and the
23 total was \$2845.

24 And he didn't give it to me at the time we spoke
25 on the phone. He said he would bring it to me. But he had

1 the check numbers, the dates they were cashed and the dollar
2 amounts. And he was going to bring it to me on his way home
3 from work.

4 The police department is located at 33rd and
5 Arapahoe. And since he lived at 5640 Arapahoe unit 413 it
6 would be on his way home so he could drop off that list to
7 me.

8 In actuality just to be clear, it was 13 checks.
9 He was mistaken.

10 Q Did your investigation later uncover two
11 additional checks?

12 A Yes, actually on the 3rd.

13 Q Let me just ask you, bringing the total up over
14 about \$4000?

15 A Yes. On the 3rd there were two additional checks
16 reported by Mr. Nolden from Boulder Municipal Credit Union
17 of two additional checks. That was contact -- he contacted
18 dispatch, and I pulled that call off our dispatch system.
19 It's another way we get calls into our unit.

20 And I contacted him then by phone, Mr. Nolden.
21 And there were two additional checks from that book, one
22 check was for a thousand dollars and one check was for \$550.

23 Q So let's talk about later that night. Were you
24 still in the office at about 9:30?

25 A Yes.

1 Q The 1st of November 1994?

2 A Yes.

3 Q Did you hear radio traffic indicating that there
4 had been a murder?

5 A Yes, I had.

6 Q Let me ask you the question, at Marty Grisham's
7 address?

8 A Yes.

9 Q Did you recognize that name?

10 A I recognized the address, I recognized the name.
11 I had just shortly beforehand finished writing up the
12 report, and it was still on my desk. My notes were on my
13 desk, the list of checks were on my desk.

14 And the tone -- there's a tone that sounds for
15 when there's an urgent call, and the call comes out. And it
16 also appears on this computer screen in my office. And I --
17 to be blunt I was horrified.

18 Q Let me ask this, did you provide information out
19 to officers in the field?

20 A Yes.

21 Q About the information that you had gotten from
22 Marty Grisham?

23 A I had.

24 Q That's a yes or a no?

25 A Yes.

1 Q And did that include information about Loren
2 Grisham?

3 A Yes.

4 Q And Kristen Grisham?

5 A Yes.

6 Q And also did you identify who the person was
7 involved with Kristen Grisham and the stolen motorcycle?

8 A Yes.

9 Q And did you provide that name out over the air?

10 A To dispatch, yes.

11 Q And who was that?

12 A Michael Clark.

13 Q So as of the time that you first met with Marty
14 Grisham and the time that you provided this information out
15 over the air, had charges been filed against Michael Clark
16 for these checks?

17 A No.

18 Q Had any detectives had an opportunity to do any
19 follow-up interviews with Marty Grisham?

20 A No.

21 MR. BRACKLEY: No further questions for you,
22 Ms. Lennon. Thank you.

23 THE COURT: All right. Cross-examination,
24 Ms. Ring.

25 MS. RING: Thank you.

1 CROSS-EXAMINATION

2 BY MS. RING:

3 Q Good morning, Ms. Lennon.

4 A Good morning.

5 Q So my understanding is that Marty Grisham comes
6 down to the police station on his way home from work a
7 little after 5:00 p.m. on November 1st of 1994?

8 A Correct.

9 Q And he gives you what you had requested that he
10 bring to you?

11 A Yes.

12 Q Which is the information he'd gotten from the
13 credit union when he'd been there?

14 A Correct.

15 Q That included the list of checks and the amounts,
16 et cetera?

17 A Correct.

18 Q And what you had learned between that first phone
19 call with Marty Grisham and when he comes by the police
20 station is that he notices checks missing on October 31st,
21 the night before?

22 A Correct, the book of checks.

23 Q Book of checks?

24 A Yes.

25 Q And then he gets the call from the credit union

1 the next day about this balance inquiry; right, from the --

2 A I'm sorry, can you repeat that?

3 Q So October 31st is the night before he notices the
4 missing box of checks?

5 A Yes. But he doesn't tell me -- he doesn't put
6 that all together until -- yes.

7 Q Until the next day?

8 A Correct.

9 Q Right. He's down at the credit union and realizes
10 the checks have actually been cashed that he didn't write.

11 A He doesn't even know about that until he's
12 notified by Ms. Harris.

13 Q Right. So the first time from what Marty Grisham
14 told you that he's aware of any of these checks being
15 written without his permission is on November 1st of 1994?

16 A Correct.

17 Q Okay. And when -- I think Mr. Brackley just asked
18 that you don't have actual copies of the checks; right?

19 A Correct.

20 Q So you're waiting for more information, including
21 the actual checks, to try to determine who possible suspects
22 for the check forgery might be?

23 A Correct.

24 Q And because there aren't any actual suspects yet
25 and you want to get more information, when you see Marty at

1 5:00 at night you tell him don't talk to anybody about this?

2 A That's what I told him, correct.

3 Q And you specifically said don't talk to your
4 ex-wife about this check investigation?

5 A Right.

6 Q Don't talk to Kristen about it?

7 A I told him that.

8 Q Okay. And he as best as you could tell from your
9 conversation with him understood the importance of what you
10 were telling him about not sharing that information?

11 A Yes. As best as I could tell, yes, he understood
12 that.

13 Q He didn't say well, I've already talked to Kristen
14 and told her about it?

15 A He didn't say it, no.

16 MS. RING: Okay. Nothing further. Thank you.

17 THE COURT: Redirect, Mr. Brackley?

18 REDIRECT EXAMINATION

19 BY MR. BRACKLEY:

20 Q Ms. Ring had mentioned the call from the credit
21 union about the account balance. Was the call from the
22 credit union to Mr. Grisham about his account balance or was
23 it about other information?

24 A I'm sorry. I don't understand.

25 Q When the credit union called Mr. Grisham on

1 November 1, 1994 were they calling to inquire of him of his
2 account balance or did they call to give him information?

3 A They called to give him information.

4 Q What information did they give him?

5 A They called to tell him that there was a problem
6 with his account.

7 Q Did they tell him specifically how they knew there
8 was a problem with his account?

9 A Yes.

10 Q What did they tell him?

11 A They told him that he had -- that someone had
12 called, a male had called there inquiring about his account
13 balance.

14 Q And did they say what was suspicious about that
15 male?

16 A Yes.

17 Q What did they say?

18 A They said that the male who had called to inquire
19 about his account balance wanted to -- well, that he wanted
20 to know about the account balance. And in order to verify
21 the identity of the caller, this male caller was asked to
22 provide the account number, which he did.

23 And for further identification, excuse me, they
24 asked for the address on the account. And the caller
25 provided the address that was on the checks. That was no

1 longer Mr. Grisham's current address, it was his old
2 address, which alerted the credit union that that was not
3 Mr. Grisham. And then the caller --

4 MS. RING: Judge, I think this is going beyond the
5 question, so I'll --

6 THE COURT: I'll sustain the objection.

7 Q (By Mr. Brackley) I'll ask one follow-up question.
8 Was it Mr. Grisham's understanding that that call was made
9 to the credit union on November 1, 1994?

10 A Yes.

11 MR. BRACKLEY: Thank you. Now I have no further
12 questions.

13 THE COURT: All right. Any recross?

14 MS. RING: No, thank you.

15 THE COURT: Ms. Lennon, you can step down.

16 Can this witness be excused?

17 MR. BRACKLEY: She may, Judge.

18 MS. RING: Yes.

19 THE COURT: You're excused, Ms. Lennon. Thank you
20 very much.

21 MR. BRACKLEY: Judge, as Ms. Lennon is -- can I
22 approach with Ms. Ring briefly?

23 THE COURT: Yes. Does it need to be on the
24 record?

25 (The following proceedings occurred at the bench

1 out of the hearing of the jury.)

2 MR. BRACKLEY: Judge, Ms. Lennon has asked that
3 she be allowed to remain in the courtroom for the remainder
4 of the trial. I have no objection to that.

5 MS. RING: No objection.

6 (The following proceedings occurred in open
7 court.)

8 THE COURT: Would the People please call their
9 next witness?

10 MR. KELLNER: We call Kurt Matthews.

11 KURT MATTHEWS,
12 called as a witness on behalf of the People, having been
13 first duly sworn, was examined and testified as follows:

14 Go ahead, Mr. Kellner.

15 MR. KELLNER: Thank you, Judge.

16 DIRECT EXAMINATION

17 BY MR. KELLNER:

18 Q Sir, can you please state your name and spell your
19 last name for the record?

20 A Kurt Matthews, M-A-T-T-H-E-W-S.

21 Q Mr. Matthews, are you employed?

22 A Yes.

23 Q What do you do for a living?

24 A I work for the City of Boulder as a manager of
25 parking services.

1 Q Before working for the City of Boulder parking
2 services what did you do?

3 A I was a police officer for the City of Boulder.

4 Q How long were you a police officer for the City of
5 Boulder?

6 A 29 years.

7 Q And is that entire time with the Boulder Police
8 Department?

9 A That 29 years is, yes.

10 Q Law enforcement experience before that?

11 A Yes.

12 Q And where was that?

13 A City of Southfield, Michigan. That was five
14 years.

15 Q I want to talk to you about your experience with
16 the Boulder Police Department. What sort of different jobs
17 or assignments did you have during that 29 years briefly if
18 you could?

19 A Briefly, yeah. I was a patrol officer, I was a
20 detective, I was a patrol supervisor, I was a detective
21 supervisor, and I was a personnel sergeant for a while.

22 Q I want to draw your attention to the November time
23 frame of 1994. Do you recall what your assignment was at
24 that time?

25 A I was a supervisor in the detective division in

1 charge of the narcotics unit.

2 Q What officers did you work with back then -- or
3 detectives that is?

4 A I want to say Rich Denig was one. I think Kurt
5 Weiler was another. And then after that I don't really
6 recall.

7 Q Even though you were working narcotics were you
8 assigned to assist in the investigation into the murder of
9 Marty Grisham?

10 A Yes.

11 Q Do you recall responding to Marty Grisham's
12 apartment on November 7, 1994?

13 A Is that the first day?

14 Q No. I'm asking if you remember November 7, 1994?

15 A Not particularly, no. I know I responded out
16 there several times, but exactly what date it is I don't
17 know.

18 Q If I showed you a property report from November 7,
19 1994, might that refresh your recollection?

20 A Yes.

21 MR. KELLNER: Judge, can I approach the witness
22 with People's 64 and 63 for identification?

23 THE COURT: Yes.

24 Q (By Mr. Kellner) Go ahead and take a look at
25 People's 64 and 63 for a minute.

1 A Okay.

2 Q First I want to talk to you about People's 64. Do
3 you recognize that document I handed you?

4 A Yes. That is a Boulder Police Department property
5 report that I completed.

6 Q How do you know that you completed it?

7 A It's my handwriting.

8 Q Let me ask you about the property reports. Was
9 one of your jobs as a detective to collect evidence and then
10 place that evidence into property and evidence at the police
11 department?

12 A Yes.

13 Q What sort of process would you follow when you
14 collect evidence?

15 A I would respond or wherever it is to where we were
16 at, the evidence would be taken in, I would initial it, seal
17 it, log it in under property with a narrative report of who
18 I received it from, where it was found and a brief summary
19 of the situation.

20 Q After looking at that property report is your
21 memory refreshed as to going to Marty Grisham's apartment on
22 November 7, 1994?

23 A Yes.

24 Q What did you do when you went to Marty Grisham's
25 apartment on November 7th?

1 A I would have met with Loren and Kristen. Based
2 upon my report they would have given me a bullet that they
3 found in a clothes basket. I would have placed it into
4 evidence, marked it and turned it all in.

5 Q Look at People's 63 for me please. Earlier you
6 mentioned you would have collected it and marked that
7 bullet. Do you recognize People's 63? And if so, how?

8 A It's an envelope that would be standard for us to
9 use in property and evidence. I see my handwriting, my
10 initials on it, and a date.

11 Q What date is that?

12 A 11/7/94.

13 Q After you had responded to Marty Grisham's
14 apartment on November 7th, collected People's 63, what would
15 you have done with it?

16 A I would have sealed the envelope and I would have
17 placed it into property where it was secure.

18 Q And is that reflected on the property report
19 People's 64?

20 A Yes.

21 MR. KELLNER: Your Honor, at this time I'd ask to
22 admit People's 63 and 64 into evidence.

23 MS. MILFELD: No objection or voir dire.

24 THE COURT: 63 and 64 will be admitted.

25 Q (By Mr. Kellner) Now, earlier you said something

1 about responding to the apartment and meeting with one of
2 Marty Grisham's kids or maybe both. Do you recall anything
3 about that meeting?

4 A Not specifically, no.

5 Q Other than what's reflected?

6 A Other than what's reflected in the report, yes.

7 Q Can you please tell the jury what is reflected in
8 that portion of the property report exactly?

9 A The report indicates that a bullet was found by
10 Loren in a clothes basket, she (sic) gave it to me. The
11 bullet and the baggy that the bullet was in was placed into
12 evidence. The bullet was found in the same area as the one
13 found on the night of the homicide.

14 MR. KELLNER: Thank you, sir. I have no further
15 questions.

16 THE COURT: Cross-examination?

17 MS. MILFELD: No questions. Thank you.

18 THE COURT: All right. Mr. Matthews, you may step
19 down.

20 Can this witness be excused?

21 MR. KELLNER: He may, Your Honor.

22 MS. MILFELD: Yes.

23 THE COURT: Sir, you're excused. Thank you.

24 Would the People call their next witness?

25 MR. KELLNER: The People would recall Detective

1 Rich Denig.

2 THE COURT: Would you step forward please, sir?

3 Go ahead and have a seat.

4 RICH DENIG,

5 called as a witness on behalf of the People, having been
6 previously sworn, was examined and testified as follows:

7 You were previously sworn in this matter. And
8 I'll just remind you that you're still under oath.

9 Go ahead, Mr. Kellner.

10 MR. KELLNER: Thank you, Judge.

11 DIRECT EXAMINATION

12 BY MR. KELLNER:

13 Q Detective Denig, I want to direct your attention
14 to November 29, 1994. Earlier you had testified you were in
15 the narcotics unit, you assisted with various parts of the
16 investigation into the murder of Marty Grisham.

17 On November 29, 1994 did you take some
18 investigative action to assist in that investigation?

19 A Yes, I did.

20 Q Can you tell the jury what action you took on
21 November 29th?

22 A I assisted Detective Kurt Weiler who was also in
23 the narcotics unit with me. We were to conduct a test drive
24 if you will from the address down on South University in
25 Denver to Boulder, the area of the Fairway Apartment

1 complex, 5640 Arapahoe, and then out to Gunbarrel.

2 Q And where did you start your drive from?

3 A 1871 South University.

4 Q Why did you pick 1871 South University?

5 A I believe it was the residence of a Jamie Uhlir,
6 an acquaintance of Mr. Clark.

7 Q When you left 1871 South University, what time did
8 you leave?

9 A I left at 9:00 p.m., about ten minutes after
10 Detective Weiler left.

11 Q And what is the approximate distance from
12 Mr. Uhlir's apartment to Marty Grisham's apartment?

13 A From the map I looked at about 33 miles.

14 Q You said you left at 9:00. What time did you
15 arrive at Marty Grisham's apartment?

16 A 9:32 p.m.

17 Q And when you arrived was Detective Weiler already
18 there?

19 A Yes. He had arrived just shortly before me
20 according to him.

21 Q So it took you 32 minutes to drive from
22 Mr. Uhlir's apartment to Marty Grisham's apartment?

23 A Yes.

24 Q What did you do next?

25 A From the parking lot at 5640 Arapahoe we left in

1 separate cars again to drive to 5948 Gunbarrel Avenue in
2 Gunbarrel using separate routes.

3 Q Approximately what time did you leave Marty
4 Grisham's apartment to drive to 5948 Gunbarrel?

5 A I believe Detective Weiler noted it was around
6 9:35 p.m.

7 MR. KELLNER: Your Honor, may I approach the
8 witness with what I marked as People's 65?

9 THE COURT: Yes.

10 Q (By Mr. Kellner) Detective Denig, do you recognize
11 this picture?

12 A Yes.

13 Q How do you recognize it?

14 A It's an aerial view of -- showing the terrain and
15 roadways from 5640 Arapahoe out to 5948 Gunbarrel.

16 Q Is this picture a fair and accurate representation
17 of the route that you drove from 5640 Arapahoe to
18 5948 Gunbarrel on November 29, 1994?

19 A Yes, it does appear to be.

20 MR. KELLNER: Your Honor, I'd ask to admit
21 People's 65.

22 THE COURT: Objection or voir dire?

23 MS. MILFELD: No objection, no voir dire.

24 THE COURT: 65 will be admitted.

25 MR. KELLNER: And may I publish it to the jury?

1 THE COURT: Yes.

2 Q (By Mr. Kellner) Detective Denig, I just published
3 People's 65 there on the screen behind you. Can you tell
4 the jury about the route that you took from Marty Grisham's
5 apartment to 5948 Gunbarrel?

6 A Do you want me to approach the screen or use a
7 pointer?

8 Q Yeah, I'll give you a pointer.

9 THE COURT: Should be one of those round black
10 looking -- there you go.

11 THE WITNESS: The area I'm circling now would be
12 the area of 5640 Arapahoe, the Fairway Apartment complex.
13 So my route would have been going west through the parking
14 lot over to 55th street, right turn crossing Arapahoe
15 continuing northbound.

16 And I believe this picture now shows the
17 intersection of Pearl Parkway. This is Valmont. So from
18 55th, a right on to Pearl Parkway. At this point you're on
19 Valmont. This is the intersection of 63rd and Valmont.

20 We took a left turn on to 63rd Street and wind its
21 way -- I believe this is the intersection of Jay Road and
22 63rd continuing. And 5948 Gunbarrel Avenue is our
23 destination -- my destination.

24 Q Thank you, Detective.

25 Now, you said you left Marty Grisham's apartment

1 at 9:35 to head towards 5948 Gunbarrel. Approximately what
2 time did you arrive at the Gunbarrel address?

3 A I believe it was approximately 9:43 p.m.

4 Q Now, as a detective in the narcotics unit what
5 kind of vehicle did you drive when you drove this route from
6 Jamie Uhler's apartment to Marty Grisham's apartment?

7 A It would have been an unmarked City owned vehicle,
8 but unmarked. There are no police or other governmental
9 markings on the vehicle. We have regular license plate
10 tags, no special external lighting.

11 Q So when you drove that distance from Jamie Uhler's
12 apartment to Marty Grisham's apartment, how would you
13 characterize your speed as you were driving on the highway?

14 A Reasonable with the flow of traffic.

15 Q You mentioned that you parked in the parking lot
16 outside of Marty Grisham's apartment. How far is it from
17 that parking lot to Marty Grisham's door? You can estimate.

18 A I couldn't tell you that. I don't recall the
19 distance, what that distance is.

20 Q Do you recall how long it would have taken you to
21 walk from the parking lot to Marty Grisham's apartment door?

22 A I do not.

23 MR. KELLNER: Thank you. I have no further
24 questions.

25 THE COURT: Cross-examination.

1 MS. MILFELD: Judge, may we approach briefly?

2 THE COURT: Yes.

3 (The following proceedings occurred at the bench
4 out of the hearing of the jury.)

5 MS. MILFELD: Judge, I have questions that I was
6 going to ask that are outside the scope of direct. But I
7 wanted to put that on the record in case Mr. Kellner or
8 Mr. Brackley objected. I think for efficiency sake I would
9 do it now as opposed to recalling him.

10 THE COURT: Are you going to recall him?

11 MR. KELLNER: I don't believe we're going to
12 recall.

13 THE COURT: What's your position on questions
14 outside of direct?

15 MR. BRACKLEY: It would depend on what the
16 questions were.

17 THE COURT: That's a good point.

18 MR. BRACKLEY: Because it may be more efficient
19 for us to let them do it in their case so that we can
20 cross-examine rather than whatever. Or if we were in
21 agreement on that perhaps we could make them direct
22 questions as opposed to cross-examination questions.

23 THE COURT: I don't see a clear green light for
24 you, Ms. Milfeld. Why don't you go ahead and start. If
25 there are any objections posed, I'll deal with them

1 contemporaneously.

2 I think it makes some sense if he's not going to
3 be recalled by the People and you have some other evidence
4 that you need to address with him, since he's here now it
5 makes sense to do that. I don't have any problem with it.
6 But we'll see if there are any objections posed.

7 MR. BRACKLEY: My request would be if it's outside
8 of the scope of any testimony he's given then there be no
9 leading questions allowed.

10 MS. RING: It's the line-up that was happening
11 with the person who did the composite drawing during Michael
12 Clark's interview, so it's relevant. It ties into their
13 discussion in the interview we heard on Friday about how
14 we're doing this composite now and this line-up right now.

15 So I don't think we have another reason to call
16 Denig, which is why we would do it now. And I think that's
17 why it's relevant in terms of they've already heard about
18 that. But if you guys want us to call him back as part of
19 our case, that's fine.

20 THE COURT: Well --

21 MR. BRACKLEY: It makes sense to do it as part of
22 their case, Judge. It's completely out of the scope of
23 anything we've asked. Frankly, this is a -- this is a
24 purely defensive position which we can rebut particularly
25 through cross-examination.

1 THE COURT: True you can rebut it. But there was
2 previous testimony about the sketch being prepared and being
3 presented.

4 MR. BRACKLEY: Also, Judge, also that witness has
5 not testified. And I don't know that that witness will
6 testify.

7 So I think what this really is is an attempt to
8 put out there a sketch of someone who has been identified as
9 another resident of the apartment complex. But I think that
10 person needs to testify first about what she saw and what
11 she described. The sketch artist needs to come in and
12 testify about the sketch.

13 This is an attempt to put testimony on the record
14 before there has been any foundation laid at all as to
15 the -- and Judge, this is also -- this is also what we were
16 asking for specifically in that alternate suspect stuff. If
17 you had heard it beforehand I don't think you would let it
18 in. But that's fine, we'll let it in properly at the right
19 time. This is not that time.

20 THE COURT: Okay. I agree. Even though
21 efficiency is one thing that I'm concerned about at this
22 point, I'm going to ask you to confine your
23 cross-examination to the scope of the direct. And then
24 you'll have an opportunity to present testimony in your case
25 if you choose too.

1 MR. BRACKLEY: I just want to be clear on the
2 record what we intend to do -- and I understand the Court's
3 ruling -- is to lay the foundation that Detective Denig
4 showed this other witness a line-up which included Michael
5 Clark, and she did not pick out Michael Clark.

6 That is completely irrelevant, has nothing to do
7 with alternate suspects. The prosecution's going off on
8 some tangent, but that's coming in anyway.

9 THE COURT: The difficulty is I can't tell what's
10 coming up. So what I have to do right now is I have to
11 confine cross to the scope of direct. I understand it may
12 not be efficient if we're required to recall Detective Denig
13 or some other witness, but I'll just have to live with that.
14 For right now let's confine cross to the scope of direct.

15 (The following proceedings occurred in open
16 court.)

17 THE COURT: Cross-examination, Ms. Milfeld.

18 MS. MILFELD: Thank you, Judge.

19 CROSS-EXAMINATION

20 BY MS. MILFELD:

21 Q Officer Denig, one of the last things that you
22 talked about was how -- you didn't know how long it would
23 take to get from the parking lot of Marty Grisham's place
24 directly to his apartment?

25 A That's correct.

1 Q The reason why you don't know that is because you
2 didn't time that?

3 A I don't recall us timing that, no.

4 Q The way that you timed the route is you started
5 the time in your parked car outside of Mr. Uhler's
6 apartment?

7 A Detective Weiler's report just notes the times we
8 left. I wouldn't -- I don't remember or couldn't recall if
9 he had -- we had started some sort of stop watch at the
10 front door or was it simply that we parked in close
11 proximity to the front door and timed it from there. I
12 don't recall the --

13 Q Your recollection today though is that you left
14 Mr. Uhler's apartment at 9:00 p.m. and you left inside of
15 your parked car?

16 A Yes, I believe so.

17 Q Your recollection today is also that when you
18 arrived at the parking lot of Mr. Grisham's apartment you
19 arrived there at 9:32?

20 A In the parking lot, correct.

21 Q You did not arrive at 9:32 at the front door of
22 Mr. Grisham's apartment?

23 A Again, I -- based on Detective Weiler's report and
24 which covered that activity I believe it was in the parking
25 lot. But again, I don't recall if we got out of our

1 vehicles and walked from the parking lot.

2 Q But your memory is today is it was in the parking
3 lot is when you ended the time?

4 A I believe so, yes.

5 Q You talked a little bit about the route that you
6 drove and drove the same route as Officer Weiler from
7 Mr. Uhlir's apartment to Mr. Grisham's apartment?

8 A That's correct.

9 Q And today you don't remember who made the decision
10 to drive that particular route?

11 A According to again Detective Weiler's report that
12 that was a route that was -- whether he chose it or it was
13 in some discussion prior to us being assigned to do that,
14 that was I guess the most direct route.

15 Q But you don't remember specifically why that
16 decision was made?

17 A No. I'm not sure I was part of that discussion.

18 Q As part of the route that you drove you can't tell
19 us today what speed you drove from Mr. Uhlir's apartment to
20 Mr. Grisham's apartment?

21 A I would -- I would be unable to tell you the exact
22 speeds we drove.

23 Q You can't tell us if you were driving over the
24 speed limit or not?

25 A Detective Weiler's report noted a flow of traffic.

1 And I -- I guess the answer to that question is no. We knew
2 what the task was we were given, and didn't want to -- I
3 think reasonable because we knew it was an important
4 exercise.

5 Q Specifically you yourself did not research any
6 traffic conditions from the night of November 1st, the night
7 of the murder?

8 A I did not personally, no.

9 Q You don't know whether the traffic conditions on
10 that night were particularly heavy?

11 A I don't remember the conditions exactly.

12 Q And the converse is also true, you can't tell us
13 today whether or not traffic conditions were light on
14 November 1st?

15 A Correct.

16 Q You only drove these two routes once?

17 A Yes.

18 Q You never drove these routes on any other day?

19 A I don't recall driving those routes on another day
20 related to this case, no.

21 Q So you can only tell us what the time was for that
22 one day, November 29th?

23 A Correct.

24 Q Just to be clear also, you didn't write a report
25 in this -- for your drive?

1 A Correct. Detective Weiler covered that in his
2 report.

3 Q And so when you're talking about referring to
4 Detective Weiler's report, you literally are referring to
5 his report?

6 A That's correct. That's correct.

7 MS. MILFELD: One minute, Detective.

8 (Pause.)

9 MS. MILFELD: Judge, may I approach?

10 THE COURT: Yes.

11 Q (By Ms. Milfeld) Detective Denig, I'm handing you
12 what is Detective Weiler's report. If you could review that
13 and then let me know when you're done.

14 A Okay.

15 Q You testified earlier that you don't have a
16 recollection of ever timing from the parking lot to
17 Mr. Grisham's apartment. And actually what Detective
18 Weiler's report says specifically is that you drove to the
19 parking lot?

20 A That's correct.

21 Q So there's nothing in the report that indicates
22 that you ever left your car from the parking lot outside of
23 Mr. Grisham's apartment?

24 A I didn't read anything in his report that would
25 indicate that.

1 Q There's nothing in your report that indicates that
2 you ever started outside the door of Mr. Uhlir's apartment
3 and then started your time that way?

4 A Nothing specific to that, no, in the report.

5 MS. MILFELD: No further questions.

6 THE COURT: Any redirect?

7 REDIRECT EXAMINATION

8 BY MR. KELLNER:

9 Q Detective, when Ms. Milfeld asked you about the
10 speed, you started to say something about reasonable, then
11 your voice kind of trailed off, then you said something
12 about important exercise. What did you mean by those words,
13 reasonable and important exercise?

14 A Well, the purpose we were doing this drive for was
15 to determine from information in the case that, you know,
16 what exactly a -- what would an approximate time -- a travel
17 time be from Mr. Uhlir's apartment to Mr. Grisham's
18 apartment complex to out to Gunbarrel. And this is an
19 important case.

20 So I believe when Detective Weiler noted we were
21 going with the flow of traffic and we knew what this had
22 involved that we -- we -- there had been no -- trying to
23 replicate, you know, a month later the same night of the
24 week trying to go with what you hope may have been the
25 replication of the traffic conditions on the night of the

1 homicide. But again, not speeding, weaving in and out of
2 traffic, and also not for some other unknown reason going 15
3 to 20 miles under the flow of traffic, the speed limit. So
4 I guess I just determined that it's reasonable with the
5 traffic conditions as they existed on that night.

6 Q When you say important exercise, do you mean
7 that's because this could potentially exclude Michael Clark
8 as having had the ability to be at 5640 Arapahoe at
9 approximately 9:34?

10 A That's correct.

11 Q So were you trying to inflate your speeds or go
12 too slow or anything or somewhere in the middle?

13 A I believe that it would have been somewhere in the
14 middle because we didn't -- we would have no exact --
15 obviously be able to, you know, really know the speeds that
16 somebody would -- that was trying to make it between those
17 locations would have actually gone. But if they were at
18 least going with the flow of traffic, that was the -- seemed
19 to be the best course for us.

20 MR. KELLNER: Thank you, Detective. No further
21 questions.

22 THE COURT: Any recross, Ms. Milfeld?

23 MS. MILFELD: No, Judge.

24 THE COURT: All right. Detective Denig, you can
25 step down.

1 Would the People call their next witness?

2 MR. KELLNER: Your Honor, the People call Officer
3 McKinney.

4 THE COURT: Sir, would you step forward please?
5 Come on all the way up to the witness chair.

6 OFFICER OWEN MCKINNEY,
7 called as a witness on behalf of the People, having been
8 first duly sworn, was examined and testified as follows:

9 THE COURT: Please have a seat.

10 Go ahead, Mr. Kellner.

11 DIRECT EXAMINATION

12 BY MR. KELLNER:

13 Q Sir, would you state your name and spell your last
14 name for us?

15 A Owen McKinney, M-C-K-I-N-N-E-Y.

16 Q How are you employed, sir?

17 A I work for the City of Boulder Police Department.

18 Q How long have you worked for the City of Boulder
19 Police Department?

20 A Since January of 2001.

21 Q Do you have any law enforcement prior to 2001 or
22 is --

23 A Yeah, two and a half years with another agency.

24 Q What's your current assignment with the Boulder
25 Police Department?

1 A Currently I'm in the traffic section, and I'm on
2 the police motorcycle.

3 Q What does it mean to be in the traffic section?

4 A Basically we do traffic enforcement, investigate
5 traffic collisions, work and school zones, focus mainly on
6 traffic related.

7 Q As far as investigating traffic collisions do you
8 have any sort of training or any experience to help you
9 investigate those sorts of accidents?

10 A Yes, I do.

11 Q What kind of training do you undergo for that?

12 A We go to several different reconstruction schools,
13 level one, level two and level three. I've also had
14 training in laser mapping and the software that we use to
15 take those maps and make them into a diagram.

16 Q Tell the jury about -- well, what is laser
17 mapping?

18 A Basically laser mapping is using a laser and an
19 angle encoder. The laser measures the distance. The angle
20 encoder interprets the angle on a 360-degree radius.

21 Those points are then plotted into a handheld data
22 collector which you take back to the police department and
23 you put into a desktop computer, downloads all the points.
24 And we use a program called Crash Zone to render the
25 drawing.

1 Q What kind of training did you get for learning how
2 to use this equipment?

3 A I had a one-week training through IPTM for the
4 laser mapping class, and then a one-week training class for
5 the Crash Zone software that we use.

6 Q When you say laser mapping, is this similar to the
7 sort of equipment that surveyors use?

8 A Yes, it's very similar.

9 Q How accurate is this laser mapping that you use?

10 A RTI makes a laser --

11 MS. MILFELD: Objection, Judge, outside the scope
12 of his knowledge.

13 THE COURT: Sustained.

14 MR. KELLNER: Based on his training and experience
15 with respect to laser mapping tools that he uses, Judge.

16 THE COURT: You need to lay a better foundation.
17 I'll sustain the objection.

18 Q (By Mr. Kellner) Within that one week -- or rather
19 two weeks of training where you became familiar with laser
20 mapping, specifically what sort of studying or training did
21 you receive during that week?

22 A For the laser mapping it was more of a practical.
23 We would go out and shoot intersections, mock traffic crash
24 accidents, and then come back and make diagrams. Throughout
25 the week it was pretty much a progression of -- towards the

1 end of the week it became a little more complex. And then
2 we actually do some reconstructions on the accidents that we
3 shot with the laser.

4 Q Is there a --

5 MS. MILFELD: Judge, may we approach?

6 THE COURT: Okay.

7 (The following proceedings occurred at the bench
8 out of the hearing of the jury.)

9 MS. MILFELD: Judge, I'm going to object to any
10 testimony about his opinion about how accurate the software
11 is. We certainly haven't been given any notice of that that
12 would have been part of an expert disclosure which we
13 requested specifically.

14 And you know, my impression this morning is he was
15 just going to testify about using the lasers and the maps
16 that he drew as a result of that. He wasn't going to render
17 opinions beyond that.

18 THE COURT: Your response.

19 MR. KELLNER: The diagrams and documents we've
20 provided to the defense show the results of the laser
21 mapping. I think it's fairly encompassed in the discovery
22 we provided to ask him when you created this laser map or
23 when you received training on it is it accurate.

24 THE COURT: The difficulty that I see is exactly
25 what Ms. Milfeld has pointed out. You're going beyond the

1 measurement and creation of the diagram. You're asking him
2 to opine about the accuracy of the actual device. And I
3 don't know if it was disclosed in the August 3rd records,
4 and I see Ms. Milfeld adamantly shaking her head no. But if
5 it wasn't, that's a problem.

6 MR. KELLNER: Judge, I understand the distinction.
7 I won't ask the question.

8 THE COURT: All right.

9 MS. MILFELD: And just for part of the record, the
10 only -- what we received was his training logs and
11 certificates and the maps that he drew. So any opinion that
12 he's going to give beyond that we're going to object to.

13 THE COURT: Let's see what the questions are.

14 (The following proceedings occurred in open
15 court.)

16 THE COURT: You may continue, Mr. Kellner.

17 MR. KELLNER: Thank you, Judge.

18 Q (By Mr. Kellner) Officer McKinney, understanding
19 that you're in the traffic section, did you receive a
20 request for assistance from Detective Chuck Heidel to assist
21 in the investigation in the murder of Marty Grisham?

22 A Yes, sir, I did.

23 Q What were you asked to do?

24 A He wanted a diagram of the breezeway of
25 5640 Arapahoe, specifically the section of cement in that

1 breezeway and the slope of that section.

2 Q Sorry. Once you received that request from
3 Detective Heidel what did you then do?

4 A Myself and Detective Sloan went to that location
5 5640 Arapahoe. There's a breezeway in between 413 and 414.
6 And I basically mapped it using the laser.

7 MR. KELLNER: Judge, can I approach the witness
8 with People's 66, 67 and 68 which I provided to the defense?

9 THE COURT: Yes.

10 Q (By Mr. Kellner) Officer McKinney, take a look at
11 People's 66. Do you recognize that document?

12 A I do.

13 Q How do you recognize it?

14 A It's the diagram that I created, made them into
15 some pdf's and gave them to Detective Heidel.

16 Q When you say the diagram that you created, what is
17 it a diagram, a depiction of?

18 A This is 5640 Arapahoe, 413 and 414, the breezeway
19 area between the stairway going up to the next apartments.

20 Q And how did you go about creating that diagram?

21 A The cement slabs were three different sections.
22 So we shot those to scale with laser mapping equipment, and
23 then we hand measured some of the other stuff.

24 Q Go ahead and take a look at People's 67. Do you
25 recognize that diagram as well?

1 A Yes.

2 Q How do you recognize it?

3 A It's my diagram I created.

4 Q When you say it's the diagram you created, what
5 does that diagram depict?

6 A This is a 2-D version of 5640 Arapahoe, the
7 breezeway between 413 and 414.

8 Q Is this a diagram you created using that laser
9 mapping tools and software you previously mentioned?

10 A Yes, the laser mapping and the Crash Zone
11 software.

12 Q Take a look at People's 68 please. Do you
13 recognize that diagram as well?

14 A Yes, I do.

15 Q How do you recognize it?

16 A This is the surface profile of that breezeway
17 between 413 and 414 at 5640 Arapahoe as if you're looking at
18 it from the side.

19 Q This is a diagram you created as well?

20 A Yes.

21 Q And how did you create this diagram?

22 A With those surface profile tools on Crash Zone,
23 with the software Crash Zone.

24 MR. KELLNER: Judge, I'd ask to admit People's 66,
25 67 and 68.

1 THE COURT: Any objection or voir dire?

2 MS. MILFELD: No objection, no voir dire.

3 THE COURT: 67, 66 and 68 will be admitted.

4 MR. KELLNER: May I publish them to the jury?

5 THE COURT: Yes, go ahead.

6 Q (By Mr. Kellner) Officer McKinney, showing the
7 jury now what's People's 66, can you explain to them what
8 they're looking at in this diagram please?

9 A Okay.

10 Q There's a laser pointer as well right there at the
11 bench. It's a little cylindrical tool.

12 A Okay. So basically if you're walking up to these
13 apartments, this is the north side, this is a wall, but I
14 just left it blank so you could kind of see it's a solid
15 wall there.

16 There's three sections of pavement here, three
17 different slabs. Each one of them had a little bit
18 different of an angle to them, so we did each one
19 separately.

20 This first one I labeled section one. This is
21 right by the resident doorways. This is 413 and this is
22 414. Section two had a little bit steeper grade to it, so I
23 shot that one separately. Then section three was the last
24 one that went all the way down to the sidewalk down here.
25 And it was the longest section. These stairs go to the

1 apartment up the stairs.

2 Q Officer McKinney, I'm going to show the jury
3 what's been marked as People's 67. Can you explain what
4 this diagram represents?

5 A When you -- that one you saw, this is the same
6 thing, but it's just 2-D looking straight down at it.
7 Again, here is the three sections of pavement. Over here on
8 the right it has some slope information. And then the
9 overall slope of all three sections. These are just
10 dimensions.

11 That first section was about 4 and a half feet,
12 second section was about 4 and a half feet, and the section
13 three was 3 -- was 15 and a half feet.

14 Q All right. With respect to section one, what is
15 the angle slope according to your laser mapping tool?

16 A The degree of slope that I got was negative 1.1
17 degrees.

18 Q And what about section two, what's the degree of
19 slope there?

20 A This is a steeper area, so it's negative
21 3.1 degrees. And then section three was 0.4. Overall is
22 negative 1.1, negative 2 percent grade.

23 Q And on the far right side of that diagram are
24 those the stairs depicted on the right side as well?

25 A Yeah.

1 Q Can you show the jury where the stairs are?

2 A These are the stairs right here. Starts at the
3 bottom up, the arrow points up.

4 Q All right. Let me show you what's been marked as
5 People's 68. Can you explain to the jury what this final
6 diagram represents?

7 A Yeah. This is -- this is just the side-view of
8 that. Basically the doorways are up here to 413, 414.
9 That's kind of the landing, that first section of cement.
10 This is that one that has a little bit more of a grade to
11 it. And then this is that final section that goes out to
12 the sidewalk.

13 Q And where would the stairs be depicted on this
14 surface profile?

15 A Right in here they would start.

16 MR. KELLNER: Thank you, Officer McKinney. I have
17 no further questions.

18 THE COURT: Cross-examination, Ms. Milfeld.

19 MS. MILFELD: Yes, Judge.

20 CROSS-EXAMINATION

21 BY MS. MILFELD:

22 Q Officer McKinney, you did your laser mapping in
23 the summer of 2012?

24 A Yes, July 26th.

25 Q You based your measurements on how the surface

1 appeared in 2012?

2 A Yes, ma'am.

3 MS. MILFELD: No further questions.

4 THE COURT: Any redirect?

5 MR. KELLNER: No, Your Honor. Thank you.

6 THE COURT: All right. Sir, you can step down.

7 Can this witness be excused?

8 MR. KELLNER: He may, Your Honor.

9 MS. MILFELD: Yes, Judge.

10 THE COURT: Officer, you're excused. Thank you.

11 You can leave those diagrams right up there. Thank you.

12 Would the People call their next witness?

13 MR. KELLNER: Can I have a moment please?

14 THE COURT: Yes.

15 MR. KELLNER: Your Honor, the People call Jamie

16 Uhlir.

17 THE COURT: All right. Sir, come on all the way
18 up by this witness chair please. And would you please face
19 me and raise your right hand.

20 JAMIE UHLIR,
21 called as a witness on behalf of the People, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please have a seat.

24 Go ahead, Mr. Kellner.

25 DIRECT EXAMINATION

1 BY MR. KELLNER:

2 Q Good morning, Mr. Uhler.

3 A Morning.

4 Q Please state your full name and spell your last
5 name.

6 A Jamie Uhler, U-H-L-I-R.

7 Q Mr. Uhler, where do you currently live?

8 A Chicago.

9 Q And what do you do for a living in Chicago?

10 A I own my own business, restaurant.

11 Q Before living in Chicago where did you live?

12 A Many places. Austin, back to Chicago, Europe, and
13 then Boulder.

14 Q Let's talk about the time when you lived in
15 Boulder. When did you live in Boulder?

16 A From 1974 until '93, and then Denver from '94 to
17 '95.

18 Q Mr. Uhler, how old are you now?

19 A I'm 38.

20 Q And in November of 1994 how old would you have
21 been?

22 A 20.

23 Q Where did you go to high school?

24 A Boulder High.

25 Q What years did you go to Boulder High School?

1 A '90 to '93.

2 Q So you graduated in the spring of '93?

3 A Correct.

4 Q Did you play any sports in high school?

5 A Soccer and basketball for a couple years.

6 Q When you finished playing soccer in high school
7 were you trying to continue your career as a soccer player?

8 A Yeah. I went to Europe for a year and played in
9 the highest amateur league in Ireland, and then in Spain
10 before coming back here. Then I ended up playing in college
11 both in Denver and also at DePaul in Chicago.

12 Q When did you get back from Europe?

13 A About July of '94.

14 Q When you got back from playing soccer in Europe
15 where did you go?

16 A Well, I was going to Clemson, and the coach had
17 been fired, so I just stayed local, went to Metro while I
18 reached out to other people who had recruited me from high
19 school.

20 Q You say you went to Metro. Where were you living
21 at that time?

22 A On University right by DU.

23 Q When you say on University were you living at
24 1871 South University Boulevard?

25 A I didn't remember the exact address, but that has

1 been brought up to me. So yes, that sounds correct.

2 Q Well, tell the jury how close your apartment
3 building was to the University and I-25 the intersection?

4 A About four buildings away.

5 Q You say about four buildings away. Can you give
6 an estimate of the distance from your building to I-25?

7 A 150 yards.

8 Q Now, when you played soccer in high school did you
9 come to know a man named Michael Clark?

10 A I knew him from junior high school a little bit,
11 and then kind of became friends throughout high school
12 because we played together, yeah.

13 Q You say you got to know him in junior high school.
14 Would you tell the jury about the nature of the relationship
15 over the years?

16 A Well, junior high just semi-acquaintances. I went
17 to Centennial. He only went there for a while before he
18 transferred to Platte, so we just were acquaintances.

19 We grew up in the FC Boulder system of soccer, and
20 so he was always a year younger. So we didn't -- really
21 weren't that close until high school. And then from there,
22 you know, our team was pretty close. So from basically
23 sophomore year on we were pretty good friends.

24 Q Did you graduate high school together?

25 A We did.

1 Q So outside of soccer what sort of things would you
2 and Michael Clark do?

3 A I mean, just what every teenager does, hanging
4 out, volleyball, basketball. My parents had a big yard, so
5 we always had a pool. And just everyone just doing
6 different normal things I guess.

7 Q Focusing on that time when you lived in Denver on
8 South University and you were going to Metro, did you ever
9 see the defendant in that time frame?

10 A Yes.

11 Q Under what sort of occasions would you see Michael
12 Clark in Denver?

13 A Well, whenever I had some free time from school
14 and he had some free time from what he was doing we'd hang
15 out.

16 Q Did you have a roommate or anybody living with you
17 in your apartment?

18 A I did. I had a roommate who I played soccer with
19 at Metro. His name was Jesse Zerhan. He was from Ethiopia.

20 Q Would the defendant ever spend the night at your
21 apartment in Denver?

22 A I mean, I don't recall exactly, but it might have
23 happened.

24 Q I want to talk to you about Michael Clark and the
25 Marines. Do you remember him ever talking about the Marines

1 or enlisting in the Marines?

2 A I don't know if he ever enlisted, but when we were
3 in high school he would talk occasionally about the Marines.
4 He wanted to be a soldier for sure.

5 Q When you say he wanted to be a soldier for sure,
6 is this something that seemed to be a big deal to Michael
7 Clark?

8 A Something he talked about. I mean, I think he was
9 very interested in doing so.

10 Q How often would he talk about it? Was it just one
11 time in his high school career or throughout the entire
12 career?

13 A I really wouldn't remember that per se. I was
14 assuming occasionally. We talked about a lot of stuff, so
15 that was probably something that came up a few times.

16 Q What kind of vehicle did Michael Clark drive in
17 high school?

18 A The one I mostly remember is the Willie.

19 Q The Willie?

20 A Um-hmm.

21 Q Is that a Jeep?

22 A I think it's a type of Jeep. I don't think it's
23 made by Jeep, but I'm not sure. It's like an old classic
24 Jeep. He kind of restored it. It was memorable because it
25 was a really cool car, classic Jeep.

1 Q Do you remember any other vehicles that he drove
2 towards the end of high school and then in that time frame
3 when you lived in Denver?

4 A He had an old Mustang. I think he had a
5 motorcycle at some point or a couple different motorcycles.

6 Q When you're talking about that Mustang, do you
7 recall what color the Mustang was?

8 A I mean, just from -- from reading about what
9 happened back in the day I -- it was definitely never
10 painted correctly. It was primered with some old colors on
11 it at least from when I saw it.

12 Q What color do you mean by primer?

13 A Like a flat silver.

14 Q What other colors do you remember on it?

15 A Green like a -- not like a flat -- like an old
16 green. Not really no shimmer, just kind of that flat, dull
17 green.

18 Q When you talk about reading stuff from back in
19 1994, what are you referring to?

20 A From when I got questioned by two detectives about
21 an issue that happened in '94. They brought me in and I
22 read the document. I guess the tape played -- I mean, the
23 recording from the interview from that time period.

24 Q Was this an interview on November 7, 1994?

25 A It was.

1 Q And that was with Detective Weiler and Detective
2 Wyton?

3 A It was.

4 Q I want to talk to you about -- well, let's talk
5 about this time frame when you lived in Denver and you were
6 going to Metro. Did you ever see Michael Clark with a gun?

7 A One time he showed me a gun.

8 Q What do you remember about the gun that you saw?

9 A I don't remember anything except for what --
10 basically what we had -- same thing, from the readings of my
11 interview.

12 Q Well, let me ask you what independent memory you
13 have as you sit here today about that gun. Do you remember
14 the caliber?

15 A I just, again, remember it from past conversations
16 and reading. But it was a 9mm.

17 Q Do you remember anything else about the gun?

18 A Nothing.

19 Q Do you remember where you were when you saw the
20 gun?

21 A At my apartment or outside my apartment. Again,
22 that's from reading like where exactly I saw it from that
23 same document, from the interview with the detectives.

24 Q Aside from -- aside from reading the transcript of
25 your interview from November 7, 1994 do you have much of an

1 independent memory of the events that you talked about in
2 that transcript?

3 A Not really, no.

4 Q Well, let me ask you a question. Maybe you do
5 remember. Can you describe Michael Clark's personality to
6 the jury back when you knew him in that 1994 time frame?

7 MS. MILFELD: Objection, relevance.

8 THE COURT: Sustained.

9 THE WITNESS: What does that mean?

10 THE COURT: Means you can't answer the question,
11 but he can ask you another question.

12 THE WITNESS: Okay.

13 Q (By Mr. Kellner) Well, let's focus in on that
14 interview then from November 7, 1994. Do you recall what
15 color the gun was?

16 A I do not.

17 Q Do you remember telling Detectives Weiler and
18 Wyton that the gun was silver?

19 A I remember from when I re-read the transcripts.

20 Q You don't have an independent recollection?

21 A Not really.

22 Q Do you have any independent recollection as you
23 sit here today about the events of Tuesday, November 1,
24 1994?

25 A Again, just from what I read in the transcripts

1 that we -- that Mike and I since we were soccer players we
2 also were coaching some of the younger kids on the Boulder
3 High team were friends of ours, plus they were underclassmen
4 when we were there. We went to some of the games when we
5 both had time. So we went to a -- one of the state playoff
6 games in Lakewood.

7 Q I'm going to focus in on specific things from that
8 interview and ask you if you remember them.

9 A If I remember them or if I remember reading them?

10 Q If you remember them as you sit here today.

11 A Okay.

12 Q Do you remember telling Detectives Weiler and
13 Wyton that you had gotten home from classes around that day
14 at Metro between 4:00 and 4:15 on Tuesday, November 1st?

15 A Not independently.

16 Q Do you remember telling them that there was some
17 people in your apartment when you got home that day?

18 A Not independently. People are in my apartment a
19 lot.

20 Q Do you remember telling the detectives that Dion
21 Moore and two girls, Summer, Vanessa and some other friends
22 were at your apartment on November 1, 1994 when you got back
23 from class?

24 A Not independently.

25 Q Well, do you remember Dion Moore?

1 A I have -- Dion Moore has been a pseudo part of my
2 family since he moved to Colorado when he was about 4 months
3 old.

4 Q When you say a pseudo part of your family, what do
5 you mean by that?

6 A Dion's father and my father were best friends in
7 high school. And Dion's father used to own a bar in
8 Chicago. And when he impregnated a woman, he -- this woman
9 had some trouble. So he took his son -- bought a house for
10 her and her other kids and moved. He -- he was looking for
11 work. He lived with my parents because he just wanted to
12 get away from the Chicago scene.

13 Q So Dion Moore actually lived with you in your
14 house at some period?

15 A A couple different times, yeah.

16 Q Were you and Dion more close?

17 A We were real close growing up since he was, you
18 know, part of my family. But Dion's dad was an independent
19 parent trying to make a living with a child.

20 So my mom is a -- I would just like -- kind of a
21 gatherer of children. She loves having people over at her
22 house. So Dion's brother is my foster brother now and has
23 been living with my family since he was 10 years old. He's
24 now 27. So it's been a family that's been pretty -- pretty
25 important in our lives throughout.

1 Q You said you were close as you were younger. Did
2 that relationship grow apart over the years?

3 A It grew apart because Dion didn't always choose
4 correctly in the paths of the legal issues. So I didn't
5 want to get in trouble because I always wanted to obviously
6 grow my life and my soccer career at that time. That was
7 all I cared about, so I stuck without trying to get in
8 trouble. And he was usually trying to get in trouble.

9 Q Back to November 1, 1994, do you remember telling
10 Detectives Wyton and Weiler that you left around 6:15 along
11 with Michael Clark and drove Dion, Summer and Vanessa to the
12 bus station in Denver so they could take a bus back to
13 Boulder?

14 A Just from the readings, not independently.

15 Q You don't have an independent recollection?

16 A No. I didn't remember Summer until I read the
17 transcript again.

18 Q Do you recall after you dropped Dion off at the
19 bus stop or the bus station where you and Michael Clark went
20 that day?

21 A Again, like we went to a bunch of different
22 soccers games I did recall once I re-read the transcript.

23 Q So after you read that transcript was your memory
24 refreshed as to where you went that day?

25 A Yeah, just in terms of like it was a playoff game

1 for the high school team. And I had some really good
2 friends there, so definitely was something that we would
3 have done.

4 Q Where did you go on the evening of November 1,
5 1994?

6 A To the Lakewood stadium. I don't know the exact
7 name of it. I think it's Memorial.

8 Q Do you recall who was playing a soccer game that
9 day?

10 A I'm guessing they were either playing Bear Creek
11 or Lakewood. I don't recall exactly who they were playing.
12 It was the Boulder High team.

13 Q Do you recall what time you left the Lakewood
14 stadium after watching the soccer game on November 1, 1994?

15 A Just from the readings and also from knowledge of
16 soccer.

17 Q Do you remember telling Detectives Weiler and
18 Wyton that you left between 8:30 and 8:35?

19 A That would have made sense with the time of a
20 soccer game. So yeah, that seems like it's familiar. I
21 don't recall independently, just again from the readings.

22 Q Earlier you mentioned a Mustang that Michael Clark
23 had. Do you know if that was the car that you rode in on
24 November 1st?

25 A From the -- I remember not independently, but from

1 the readings. And if Mike was driving, I didn't have a car,
2 so probably would have been his car.

3 Q Do you remember telling Detectives Weiler and
4 Wyton that you road with Michael Clark in his Mustang on
5 November 1, 1994 to and from the soccer game?

6 A Again, not from the -- from the interview from
7 November 7th. I recall it --

8 Q So if you didn't have a car back then would you
9 have been able to drive?

10 A Yes.

11 Q And you mentioned that you were pursuing this
12 soccer career and playing soccer in college. Were you
13 physically capable to play back then November 1, 1994?

14 A I was not.

15 Q Why not?

16 A I had my first of three ACL reconstructive
17 surgeries.

18 Q Were you on crutches on November 1, 1994?

19 A I believe so.

20 Q So after you left the soccer game between 8:30 and
21 8:35, do you remember where you and Michael Clark went next?

22 A Again, not independently, but from the readings.
23 We went back to my house.

24 Q Do you remember telling Detectives Weiler and
25 Wyton that you went back to -- you and Michael Clark went

1 back to your apartment at 1871 South University?

2 A Yeah. That's where my apartment was.

3 Q But you don't have an independent memory of that
4 here today?

5 A Not from that date.

6 Q Why don't you have an independent memory of what
7 happened on November 1, 1994 as you sit here today?

8 A Well, being that it was 18 years ago and I've had
9 many different events and different things that have
10 happened in my life, that was not any -- like I remember my
11 wedding day and the day of my children's birth. But that's
12 a long time ago to remember a day that we did something
13 normal.

14 Q Is it safe to say that your memory about the
15 events of November 1, 1994 would have been fresher when you
16 were interviewed on November 7, 1994?

17 A I would say since it was six days later I think
18 that would be a very accurate statement.

19 Q Do you recall what happened when you got back to
20 your apartment with Michael Clark on November 1, 1994?

21 A Same. I recalled from reading the transcripts
22 what I told the detectives then.

23 Q What I want to focus in on is whether you have
24 independent memories of what happened on November 1, 1994?

25 A I do not.

1 Q Do you remember telling Detectives Weiler and
2 Wyton that you got back to your apartment and that maybe
3 Michael Clark came in for five minutes at the most?

4 A That again would be -- I remember it from reading
5 my statement from that time, but not independently.

6 Q Do you recall what time Michael Clark left your
7 apartment on November 1, 1994?

8 A Not independently.

9 Q Do you recall telling Detectives Weiler and Wyton
10 that he left between 8:50 and 9:00?

11 A Again, from my readings. That's the only -- I
12 don't have independent recollection, but the readings are
13 what I said then.

14 Q Let me ask you this, have you ever driven from
15 your apartment to 1871 South University to say your parents'
16 house in Boulder?

17 A I have.

18 Q And do you recall approximately how long that
19 would have taken you?

20 A I mean, varied times. But you know, anywhere from
21 20, 25 to probably 45, 50 minutes depending on traffic.

22 Q Do you recall telling the detectives that the
23 drive from your apartment to your parents' house in Boulder
24 would have taken you approximately 25 to 30 minutes?

25 A I recall it from the interview, not independently.

1 But just in terms of mileage that seems correct.

2 Q Approximately where did your parents live in
3 Boulder at the time?

4 A My parents live where they currently live. And
5 that's on the corner of Foothills and Baseline, so basically
6 right when you get off the highway into Boulder.

7 Q When you got back to your apartment with Michael
8 Clark between 8:50 and 9:00 did Michael Clark say anything
9 to you about coming into your apartment that night?

10 A Not independently.

11 Q Do you recall telling the detectives that Michael
12 Clark said he was going to come in to watch Beavis and
13 Butthead, but then said no, he had to leave and go do
14 something?

15 A Not independently.

16 Q Do you recall Michael Clark saying what he had to
17 do that night when he left your apartment?

18 A Not independently.

19 Q Do you recall --

20 A Even from the reading I don't think there was
21 anything in there. I don't recall that at all.

22 Q So Michael Clark didn't tell you what he had to do
23 that night when he left your apartment?

24 A No.

25 Q Just that he had something to do?

1 A Which was pretty typical of Mike.

2 Q Why do you say that?

3 A I mean, if he was doing something, whether it was
4 meeting a girl or something else, he would never really get
5 into the minute details about it.

6 Q Do you know whether Michael Clark had a job back
7 then in November of 1994?

8 A Well, from what I remember he always had a job at
9 some -- in terms like that's all I remembered. Mike worked
10 pretty hard always.

11 Q Do you remember if he had a job back in November
12 1994?

13 A No, I don't remember.

14 Q Do you recall whether or not you spoke to him at
15 all again on the night of November 1, 1994?

16 A I don't remember.

17 Q Let's go back to this handgun that you said you do
18 remember independently seeing and Michael Clark showing you.
19 Earlier you said you recall it was a 9mm?

20 A (Witness nods head.)

21 Q I need a verbal answer yes or no.

22 A Oh, yes.

23 Q You do not recall that it was silver?

24 A I do not recall.

25 Q You do not recall telling Detective Weiler that it

1 was silver?

2 A I recall from my readings of what I said on
3 November 7th.

4 Q Did you know much about guns back in 1994?

5 A About as much as I know now, which is very little.

6 Q Do you have any experience with guns or firearms?

7 A Shot them a couple times. Like my dad has a
8 friend in New Jersey that has a big ranch. And he had a
9 bunch of different guns. But about two or three times in my
10 life I fired a firearm at different places.

11 Q Did you recognize the brand of the gun when
12 Michael Clark showed you the gun?

13 A No.

14 Q Did Michael Clark show you the bullets from inside
15 the gun?

16 A Again, from my readings I recall that he did not,
17 not independently.

18 Q Do you remember telling Detectives Weiler and
19 Wyton that he showed you the bullets inside the gun and that
20 they were hollow points?

21 A I remember from my readings.

22 Q But you don't remember that independently as you
23 sit here today?

24 A Not at all.

25 Q Do you know how Michael Clark got the gun that he

1 showed you?

2 A Just from what I read, I was going back over it,
3 that him and Dion had purchased it somewhere.

4 Q Do you have an independent memory as you sit here
5 today about how he got the gun or how he told you he got the
6 gun?

7 A No, I don't.

8 Q Do you recall where he showed you the 9mm gun when
9 you were outside your apartment?

10 A Outside his car.

11 Q Do you recall that independently as you sit here
12 today?

13 A No, just from what I read and what I said back
14 then.

15 Q Do you recall telling Detective Weiler that you
16 were inside the car when he showed you the gun?

17 A I do not.

18 Q Appeared to reach underneath the seat and pull the
19 gun out?

20 A Just from the reading. But it seemed like I was
21 outside the car because I didn't exactly remember how he
22 pulled it out. From my readings that's what it said when I
23 read the transcripts.

24 Q So you don't recall telling that to Detective
25 Weiler?

1 A No.

2 Q Do you recall whether or not Michael Clark told
3 you he'd ever shot that 9mm gun?

4 A Just again from reading the transcript that I
5 recall that he told me that he shot it a few weeks before,
6 but not independently.

7 Q Do you recall telling Detective Weiler that
8 Michael Clark told me once he shot the gun at something, but
9 he didn't tell me -- he said he was alone or he didn't say
10 he was alone, he didn't mention if he was with anybody, I'm
11 pretty sure he was alone?

12 A Just from the readings.

13 Q I want to talk to you about how Michael Clark got
14 the gun. As you sit here today do you have an independent
15 memory about what Michael Clark told you about how he got
16 the gun, the 9mm gun?

17 A I do not.

18 Q When I say gun, are you -- are we talking about a
19 pistol, rifle, what are we talking about?

20 A A pistol.

21 Q Do you recall telling Detective Weiler that
22 Michael Clark said he went out and bought it at a pawn shop
23 and that's what he told me, it was down in Denver?

24 A Not independently.

25 Q Do you recall who Michael Clark said he bought the

1 gun with at the pawn shop in Denver?

2 A Not independently, just again from readings.

3 Q Do you remember telling Detective Weiler that he
4 went with Dion and bought the gun at the pawn shop?

5 A Again, I remember from the readings.

6 Q Do you recall what day it was Michael Clark said
7 he bought the gun?

8 A No, I do not.

9 Q Do you recall during this interview telling
10 Detectives Weiler and Wyton that it was October 19th that
11 Michael Clark bought the gun?

12 A Again, just from reading the transcripts.

13 Q But no independent memory of that?

14 A None.

15 Q Do you recall during this interview actually
16 speaking to another soccer player to help get a reference
17 point as to when he bought that gun?

18 A I recalled after I read the transcripts, not
19 independently.

20 Q Do you recall telling Detectives Weiler and Wyton
21 that you thought it was October 19th because you and Michael
22 Clark were supposed to go to a soccer game that day, but
23 then he didn't show up?

24 A Again, I recall it from the transcripts, not
25 independently.

1 Q Do you recall the day that he was supposed to go
2 to the soccer game with you after you looked at a schedule
3 was October 19th?

4 A That's from the readings. I didn't have any
5 schedule since that day.

6 Q But no independent memory of that?

7 A No independent memory.

8 Q Did Michael Clark, do you recall, tell you how he
9 bought the gun at this pawn shop?

10 A From the readings apparently he did tell me. I
11 don't recall independently.

12 Q You don't recall independently. Do you recall
13 Michael Clark told you that he paid somebody to buy the gun,
14 he and Dion Moore paid somebody to buy the 9mm pistol for
15 them?

16 A I do not.

17 Q Earlier you mentioned seeing this 9mm gun, him
18 showing it to you outside of your apartment in or around the
19 car. Do you remember what day it was that he showed you the
20 gun?

21 A I do not.

22 Q Do you remember talking to Detective Weiler about
23 the day that he showed you the gun and figuring out that it
24 was October 26th?

25 A Again, only from the readings.

1 Q October 26, 1994 I should say?

2 A Only from my reading the transcript.

3 Q And do you recall Michael Clark telling you
4 approximately how much he paid for the gun?

5 A I do not.

6 Q Do you recall telling Detective Weiler I asked him
7 like probably over a hundred, hundred 50, I don't know the
8 price exactly, but it was around that, maybe 120 to 150?

9 A I recall that sentence from the reading that you
10 just read right there.

11 Q But you don't have an independent memory as you
12 sit here today?

13 A Not at all.

14 Q Do you recall Michael Clark ever told you whether
15 or not he got rid of the gun?

16 A He never told me anything about that.

17 Q Do you recall Michael Clark ever telling you that
18 a reason why he needed a gun?

19 A No. Never was brought up I don't think.

20 Q Do you recall Michael Clark ever telling you that
21 he was being stalked?

22 A Nope, do not recall.

23 Q Talk to you about Dion a little bit then. In your
24 opinion would you say Dion's a scary guy?

25 A To me not at all. He has a little brother that

1 went a little crazy.

2 Q Did you ever see Michael Clark and Dion interact
3 with each other?

4 A Sure.

5 Q From your perspective how would you characterize
6 their relationship?

7 A I mean, I brought Dion into basically all my
8 groups of friends, so I think they would be friends or would
9 have been friends.

10 Q The man we've been talking about, Michael Clark,
11 throughout this morning, do you see him in the courtroom
12 here today?

13 A I do.

14 Q Can you please identify him by some article of
15 clothing he's wearing?

16 A Wearing a blue and red striped tie, blazer.

17 MR. KELLNER: Your Honor, I'd ask the record to
18 reflect that Mr. Uhler has identified the defendant.

19 THE COURT: Subject to cross-examination the
20 record will so reflect.

21 Q (By Mr. Kellner) When was the last time you spoke
22 to Michael Clark?

23 A I don't have an exact date, but it has to be over
24 15 years ago.

25 MR. KELLNER: Can I have just a moment please?

1 THE COURT: Yes.

2 (Pause.)

3 MR. KELLNER: Couple more questions here.

4 Q (By Mr. Kellner) Did you have a phone in your
5 apartment back in November of 1994?

6 A I believe so.

7 MR. KELLNER: No further questions. Thank you.

8 THE COURT: All right. Ladies and gentlemen of
9 the jury, this is a good point to take the mid-morning
10 recess. We'll recess until 11:00.

11 Remember the admonition that I gave you at the
12 recesses previously. It applies at this recess as well.

13 Don't communicate or discuss the case with anyone
14 by any means. If someone does approach you and tries to
15 discuss the case, please let me know about it immediately.

16 Don't read or listen to any news reports of the
17 trial. Don't consult any outside reference materials.
18 Don't do any independent investigation.

19 Remember, it is especially important that you do
20 not form or express any opinion on the case until it is
21 finally submitted to you. We'll be in recess until 11:00,
22 and we should be ready for you promptly at 11:00.

23 (The jury left the courtroom.)

24 THE COURT: Mr. Uhler, if you'd be right back in
25 this witness chair at 11:00 sharp that will be great. We'll

1 see you at 11:00. We'll be in recess.

2 (A recess was taken.)

3 THE COURT: We're back on the record in 12CR222.

4 Defendant and counsel are present. Anything to put on the
5 record before we bring the jury in?

6 MR. BRACKLEY: No, Your Honor.

7 THE COURT: Ms. Milfeld?

8 MS. MILFELD: No, Judge.

9 THE COURT: Would you bring the jury in please?

10 (The jury returned to the courtroom.)

11 THE COURT: All right. Please be seated. All the
12 members of the jury are back.

13 Cross-examination of Mr. Uhlir, Ms. Milfeld.

14 MS. MILFELD: Thank you.

15 CROSS-EXAMINATION

16 BY MS. MILFELD:

17 Q Mr. Uhlir, one of the things that you told us is
18 that it's a long time ago to remember something so normal?

19 A Yes.

20 Q There's nothing unusual that stands out to you
21 about that day?

22 A No. Just hanging out with friends.

23 Q There's nothing out of the ordinary that stands
24 out to you?

25 A No.

1 Q And why you don't remember is what you just said,
2 it was just another day that you were hanging out with
3 Michael Clark?

4 A Correct.

5 Q Mr. Uhlir, you previously met with an investigator
6 from our office, Teresa Villalobos?

7 A I spoke with her on the phone. I live in Chicago.

8 Q And when you spoke with her you told her that you
9 really don't recall much about that day?

10 A Exactly.

11 Q You were provided a copy of the transcript?

12 A I was.

13 Q You've been able to review that?

14 A I read it, yes.

15 Q And it's fair to say that you don't disagree with
16 anything that you said back in 1994?

17 A No. I was pretty stressed out being in that
18 situation, so I definitely didn't want to put myself in any
19 trouble.

20 Q And what you said was accurate at the time?

21 A Yes.

22 Q Another thing that you told Ms. Villalobos is what
23 you stated back then was the truth?

24 A Correct.

25 Q Mr. Uhlir, Mr. Kellner asked you about details

1 about seeing the gun. And you don't really remember those
2 details?

3 A That's correct.

4 MS. MILFELD: May I approach?

5 THE COURT: Yes.

6 Q (By Ms. Milfeld) Mr. Uhler, I'm showing you the
7 transcript that was created. And this shows that you met
8 with Detective Weiler and Detective Wyton, and you met with
9 them on November 7, 1994?

10 A Yes.

11 Q This look like the same transcript that you
12 reviewed before?

13 A It does.

14 Q During that interview you were asked about the
15 gun. And specifically you were asked did you look at the
16 bullets at all. You responded Yeah. Question, Did he take
17 the magazine out? Answer, I saw them. Question, What did
18 they, the bullets, look like? Answer, They had a hole in
19 the top and they weren't closed. I got -- inaudible -- come
20 up in Mike's hand, said they're hollow points. And I heard
21 them from the movies and stuff, but I'd never seen them.
22 Question, Do you remember how many in the magazine when he
23 pulled it out was it? Answer, I just saw the top of it.

24 So you remembered from the interview that you told
25 the detectives that the bullets weren't closed on the top?

1 A Yes, from the interview.

2 Q Mr. Kellner asked you about whether you remembered
3 that Michael Clark told you that he got the gun with Dion?

4 A Right.

5 Q And you didn't really remember a lot of those
6 details?

7 A Right.

8 Q In November of 1994 you actually visited Mr. Moore
9 at the jail?

10 A I probably did, yes. I went to see him whenever
11 he was in jail.

12 Q When you visited him at the jail you apologized to
13 him?

14 A For what?

15 Q One of the things you apologized to him for was
16 telling the detectives that he had helped Mr. Clark get the
17 gun?

18 A Okay. I don't recall that either.

19 Q You don't remember that?

20 A Right.

21 Q I want to move on to the playoff soccer game that
22 you talked about.

23 A Okay.

24 Q One of the things that you do remember is you
25 remember that it was a playoff game?

1 A Yes.

2 Q You remember that a lot of the girls that were
3 playing were girls that you'd coached before?

4 A Actually they were boys.

5 Q Okay. The boys that were playing you remember
6 that you'd coached them before?

7 A Right.

8 Q And going to soccer games was something that you
9 and Mr. Clark normally did?

10 A Correct.

11 Q You'd been to soccer games before with Mr. Clark?

12 A Correct.

13 Q You in fact had been to that same Lakewood
14 Memorial Field before?

15 A We actually played at that field together in a
16 playoff game a couple years before that.

17 Q You'd been there a few times?

18 A Right.

19 Q So you were familiar with getting from your
20 apartment to the field because you'd been there before?

21 A Well, I -- first time I went there was on a yellow
22 bus from Boulder High there. So that was maybe the first
23 time or second time I'd driven there. So --

24 Q So to get to Lakewood Memorial Field you actually
25 had to get on two different highways before you were able to

1 get to the physical stadium?

2 A Correct.

3 Q Once you got off the highways you had to take a
4 few residential streets before you were at the parking lot?

5 A That's something I don't recall.

6 Q It would take you about 15 to 20 minutes to get
7 from your apartment at South University Boulevard to the
8 stadium?

9 A Again, I would have to do it again to drive that
10 time period, but I don't recall that exactly.

11 Q You do remember speaking to Ms. Villalobos on the
12 phone?

13 A Yes.

14 Q One of the things that she talked to you about was
15 the soccer game?

16 A Right.

17 Q One of the things that you told her during that
18 interview was that it took 15 to 20 minutes to get to the
19 game?

20 A Okay. If I was on crutches it probably took a
21 little longer than not being on crutches.

22 Q Let me back up, it took you driving 15 to 20
23 minutes?

24 A I mean, again, that's what I thought it would
25 take, yes, like from -- but I haven't been to either my

1 apartment or the stadium since that time.

2 Q You talked about how you don't remember really the
3 start of the day. Mr. Kellner asked you about you hanging
4 out with some friends before you left for the game?

5 A Correct.

6 Q You then left for the game at about 6:15?

7 A Correct, from the -- from my statement, yes.

8 Q The timing of the game was such that it was two
9 45-minute halves?

10 A That's a typical soccer game, yes.

11 Q And from your experience playing soccer back then
12 and watching a lot of soccer games the game would have ended
13 at about 8:45?

14 A Yeah, with a 10 to 15-minute half-time break,
15 about an hour and a half.

16 MR. KELLNER: Objection, Your Honor. This calls
17 for speculation from the witness.

18 THE COURT: Overruled.

19 Q (By Ms. Milfeld) This game as you talked about
20 earlier was a playoff game?

21 A Correct.

22 Q So it was a big deal for the boys that were
23 playing in this game?

24 A It was.

25 Q It was well attended?

1 A As much as soccer is well attended in Colorado.

2 Q They were playing towards the state title?

3 A They were playing to get through another game,
4 yes.

5 Q During the match you and Mike watched the game
6 like you normally did?

7 A Correct.

8 Q He acted normal during the game?

9 A Correct.

10 Q He didn't act anxious at all?

11 A Not that I've ever remembered.

12 Q He did not act nervous during the game?

13 A Again, not that I remembered.

14 Q He acted like he acted watching any other soccer
15 game?

16 A It was like a normal day.

17 Q You and Mr. Clark stayed for the entire game?

18 A Right. That seems what would have happened for
19 watching my friends play.

20 Q You don't remember leaving early?

21 A I don't.

22 Q Mr. Clark certainly didn't try to leave early?

23 A No, he did not.

24 Q He wasn't trying to rush you out of the stadium
25 when the game ended?

1 A No, not from memory.

2 Q You talked about how you were on crutches at the
3 time from ACL surgery?

4 A Right.

5 Q So he couldn't really rush you out even if he
6 wanted to?

7 A Not very effectively.

8 Q You talked about how you went back to your place
9 after the game?

10 A Right.

11 Q You said you don't remember speaking with
12 Mr. Clark?

13 A I mean, I really don't remember much about that
14 day that many years ago.

15 MS. MILFELD: May I approach, Judge?

16 THE COURT: Yes.

17 Q (By Ms. Milfeld) I'm showing you the transcript
18 again, and I'm pointing you to Question, Like your parents'
19 house from where you live on South University, how long does
20 it take? And then you say Question, When he left did he say
21 he was going to do anything? What was going on? He said he
22 was going to come in and watch Beavis and Butthead. And
23 then he said no, I got to go home, I got to do something. I
24 said okay, and that was the last time I saw him. Question,
25 When he said he had something to do, I mean, did you have

1 any kind of feeling or anything what he was talking about?

2 Answer, He always says stuff like that. I don't think any
3 big deal of anything like that.

4 So the prosecution asked you that when he left he
5 said I've got something to do. And your memory is he said
6 stuff like that all the time?

7 A Correct.

8 Q That wasn't unusual for him to say something like
9 that?

10 A Right.

11 Q In fact, when the police asked you about that you
12 didn't think that was weird?

13 A Not at all.

14 Q You didn't think that was abnormal?

15 A No.

16 Q That was something he always said?

17 A (Witness nods head.)

18 Q When Mr. Clark left your apartment he didn't act
19 like he was in any particular hurry?

20 A Not that I recall.

21 Q He did not seem like he was in a rush?

22 A Again, not that I recall.

23 Q You also talked about how during the game you
24 didn't notice him acting weird at all, he didn't act nervous
25 at all?

1 A Not -- nothing that stood out where I would
2 remember.

3 Q You in fact said that he acted like the same old
4 Mike when he left your apartment?

5 A That's -- yes.

6 Q You talked about how Mr. Clark at one point drove
7 a Mustang?

8 A Right.

9 Q You remember that it was painted a primer?

10 A Right.

11 Q The prosecutor asked you about whether or not you
12 remembered it being green in any way?

13 A Right.

14 Q If someone were to say that it was green, it
15 wasn't green?

16 A Right.

17 Q It was silver?

18 A Right.

19 Q The only parts of the Mustang that were green was
20 a very small part on the front?

21 A I don't recall exactly where it was, but it was
22 definitely more primer than anything else.

23 MS. MILFELD: May I approach, Judge?

24 THE COURT: Yes.

25 Q (By Ms. Milfeld) I'm showing you the transcript

1 again. Your response, He painted it like a week, two weeks
2 ago like he had just painted. Response. A Mustang. Your
3 response, Yeah, he painted it with some like I don't know
4 what it's called, like primer. Response, Um-hmm. Your
5 response, And then there's a couple of green spots. Maybe I
6 didn't think that they could really say green car from just
7 that. There's a little part on the front and like in
8 between the lights on the back is the only green part.

9 So what you told them is that if someone were to
10 say it's green it wasn't green at all?

11 A It wasn't green.

12 Q Mr. Uhler, you saw Mr. Clark the day after,
13 November 2nd?

14 A I don't recall that either.

15 Q You don't remember seeing him that day?

16 A I mean, no, not from now.

17 MS. MILFELD: May I approach, Judge?

18 THE COURT: Yes.

19 Q (By Ms. Milfeld) I'm showing you the transcript
20 again. Your response, And he never -- Tuesday night he
21 didn't seem like weird when he left. He just seemed like
22 same old Mike. And on Wednesday when I saw him he seemed
23 like the same old Mike.

24 A Okay.

25 Q What you told them and what you said before would

1 have been accurate is that you saw him the next day?

2 A Right.

3 Q When you saw him the next day he acted completely
4 normal?

5 A Right.

6 Q Your own words were he acted like the same old
7 Mike?

8 A Correct.

9 Q When you told them that you said when Mr. Clark
10 left the night before he acted like the same old Mike?

11 A Right.

12 Q He acted completely normal?

13 A Right.

14 MS. MILFELD: Nothing further, Judge.

15 THE COURT: Redirect examination, Mr. Kellner.

16 REDIRECT EXAMINATION

17 BY MR. KELLNER:

18 Q So Mr. Uhler, Ms. Milfeld asked you whether or not
19 you recall him being anxious?

20 A Right.

21 Q Do you recall him being anxious or do you just not
22 have a memory of that?

23 A I don't have memory of him being out of the
24 ordinary.

25 Q She asked you whether or not he appeared to be

1 nervous. Do you have a memory of whether or not he was
2 nervous?

3 A Same, just that it was nothing out of the ordinary
4 that I would have remembered.

5 Q You say there's nothing out of the ordinary that
6 day. Did Michael Clark tell you anything about stealing
7 checks and forging checks belonging to Marty Grisham on that
8 day?

9 A Never.

10 Q Did he tell you that on that day he called the
11 bank inquiring about Marty Grisham's account balance?

12 A Never.

13 Q She also asked you whether or not you spoke to him
14 the day after November 2nd I believe was her question.

15 A And I did not recall until I read the transcript.

16 Q And you said that he didn't appear to be nervous
17 or anxious that day either?

18 A From the transcript that's what it says.

19 Q You don't recall that directly?

20 A Not right now, no.

21 Q Did Michael Clark tell you -- I should back up.
22 Were you two friends?

23 A We were, yes.

24 Q And you were friends since junior high?

25 A Yes, and pretty close in high school.

1 Q Did he tell you anything about needing money to
2 pay off court costs for the motorcycle incident that day?

3 A He did not.

4 Q So he didn't tell you anything about the
5 motorcycle incident?

6 A Not that I recall.

7 Q You don't recall him appearing nervous or anxious
8 or speaking telling you anything about checks or the
9 motorcycle?

10 A I don't really ever recall him ever being anxious
11 or nervous anytime.

12 Q This goes back to my earlier question about his
13 general demeanor. When you say anytime, are you saying
14 anytime in this time frame when you saw him between
15 November 1st and then again on November 3rd?

16 A Anytime that I've known him.

17 Q I want to talk to you about Lakewood Memorial
18 Park. Now, you said you played soccer there before; right?

19 A I did.

20 Q So to get to Lakewood Memorial Park from your
21 house you'd get on I-25?

22 A Right.

23 Q The building, your building, is right next to
24 I-25?

25 A Right.

1 Q Then you'd head west on 6th?

2 A Right.

3 Q Then you'd take -- you'd go north heading towards
4 Lakewood Memorial Park off of 6th?

5 A I don't recall the little directions.

6 Q Is that the general route?

7 A Yeah, that's the general route, right.

8 Q So two highways. How far off the highway of 6th
9 would you say the park is?

10 A Not very far from my recollection.

11 Q Do you remember looking at a map just yesterday?

12 A I do remember yesterday. Looks like a few blocks.

13 Q Sorry?

14 A It looked like a few blocks on the map.

15 Q And what do you recall from yesterday about how
16 far it would be from your apartment to the Lakewood Memorial
17 Park?

18 A From Mapquest it looked like just under 9 miles.

19 MR. KELLNER: Thank you. I have no further
20 questions.

21 THE COURT: Any recross, Ms. Milfeld?

22 MS. MILFELD: No questions. Thank you.

23 THE COURT: All right. Mr. Uhlir, you can step
24 down.

25 Can this witness be excused, Mr. Kellner?

1 MR. KELLNER: He may, Your Honor.

2 THE COURT: Ms. Milfeld?

3 MS. MILFELD: Yes, Judge.

4 THE COURT: Mr. Uhler, you're excused. Thank you.

5 Would the People please call their next witness?

6 MR. KELLNER: People call Detective Weiler --

7 sorry, Commander Weiler.

8 THE COURT: Commander, would you step forward
9 please? Sir, you've previously been sworn in this matter.

10 And I'll remind you that you're still under oath. Please
11 have a seat.

12 THE WITNESS: Thank you.

13 COMMANDER KURT WEILER,
14 called as a witness on behalf of the People, having been
15 previously sworn, was examined and testified as follows:

16 MR. KELLNER: Your Honor, can I approach the
17 witness and take that exhibit off the bench?

18 THE COURT: Yes.

19 DIRECT EXAMINATION

20 BY MR. KELLNER:

21 Q Commander, I see you brought some notes up to the
22 witness stand with you. Can you just turn them over? If
23 you need to refer to a report to refresh your recollection,
24 just let us know.

25 A Okay.

1 Q Good morning again.

2 A Good morning.

3 Q Commander Weiler, do you recall having an
4 interview with Jamie Uhler on November 7, 1994?

5 A I do.

6 Q Who else was present during that interview?

7 A Pat Wyton is a detective with the police
8 department.

9 Q And where was that interview?

10 A At the police department.

11 Q Did you record that interview?

12 A Yes, I did.

13 Q And was a transcript produced from that recording?

14 A Yes, it was.

15 Q Have you had an opportunity to look at that
16 transcript?

17 A Yes, I have.

18 Q And have you had an opportunity to listen to the
19 recording?

20 A No, I haven't.

21 Q Did you listen to it back in 1994 after you
22 interviewed him I mean?

23 A I would say more than likely I did.

24 Q I'm going to ask you some questions about the
25 interview and that transcript. And I think I'll just turn

1 directly to page 3.

2 A Do you want me to look at a transcript or not, or
3 you're just doing that for yourself?

4 Q Well, let's just see if you remember first.

5 A Okay.

6 Q What did Mr. Uhlir say about what time he got home
7 from classes on November 1, 1994?

8 A I think it was about 4:00 or 4:15.

9 Q What did Mr. Uhlir say about who was there when he
10 got back from classes at his apartment?

11 A Dion Moore, Michael Clark, female named Summer and
12 I think one other female.

13 Q Is it Vanessa?

14 A Yes.

15 Q What did Mr. Uhlir tell you on your November 7,
16 1994 interview about what time he and Michael Clark left
17 with Dion and Summer and Vanessa?

18 A I think it was about 6:00 because I think they
19 were going to take the two girls and Dion to the bus
20 station. And then Mr. Clark and Jamie were going to go to a
21 soccer game between Boulder and Columbine, and that was
22 going to be in Lakewood.

23 Q When you talked to him about this soccer game
24 between Boulder and Columbine was that the Boulder High
25 School boys team?

1 A It was the girls team.

2 Q Do you have a copy of that transcript in front of
3 you?

4 A I do.

5 MR. KELLNER: Your Honor, with your permission I'd
6 ask the witness to be able to refer to that transcript
7 pursuant to 16-10-202.

8 THE COURT: What's the defendant's position on
9 that request?

10 MS. MILFELD: Your Honor, that's fine as long as
11 he clearly identifies where he is in the transcript.

12 THE COURT: All right. So Commander, you can look
13 at that transcript if it's necessary to refresh your
14 recollection. But I don't want you reading from it directly
15 to the jury.

16 THE WITNESS: Okay.

17 MR. KELLNER: Your Honor, may we approach?

18 THE COURT: Sure.

19 (The following proceedings occurred at the bench
20 out of the hearing of the jury.)

21 MR. KELLNER: Your Honor, what I'm seeking to do
22 at this point is I think it's kind of fruitless for him to
23 try to ask him to remember and then refresh. I think it
24 would be much better use of the time if I just ask him if he
25 asked this question, then what the answer was. I believe

1 that he used other evidence to impeach Mr. Uhler.

2 MS. MILFELD: That's fine.

3 THE COURT: I see the defense nodding vigorously.
4 They agree with you.

5 MS. RING: I think this is what we were talking
6 about earlier in terms of doing that instruction, that I
7 think it would be -- we're fine with that. We want to make
8 sure we can follow along where he is.

9 MR. BRACKLEY: Efficient way to do it is do you
10 remember asking this question, do you remember this answer,
11 just going down without trying to recall.

12 THE COURT: Right. That's a similar method to
13 what Ms. Milfeld used on cross-examination. That's what
14 you're asking to do? All right. That's fine.

15 (The following proceedings occurred in open
16 court.)

17 THE COURT: Commander, let me correct something I
18 told you earlier. The attorneys have a better idea than I
19 did.

20 Mr. Kellner is going to review with you certain
21 portions of that transcript. And you can refer to it as
22 you're being questioned by Mr. Kellner, and then on
23 cross-examination as well.

24 THE WITNESS: Okay.

25 THE COURT: Go ahead, Mr. Kellner.

1 Q (By Mr. Kellner) Commander Weiler, go ahead and
2 turn to page 3 of that transcript. Are you there?

3 A Yeah.

4 Q Towards the bottom you asked the question And so
5 you were there from like 7:00 to -- and then Mr. Uhler
6 answered 8:35-ish, 8:30, something like that?

7 A That's correct.

8 Q You asked did he drive you over there, referring
9 to the defendant, Mr. Clark. And he answered Yeah, he drove
10 me. I don't have a car.

11 A Correct.

12 Q The next line you said Okay. Then what happened
13 after the soccer game? Mr. Uhler said Then we went back to
14 my house and dropped me off and came in for maybe like five
15 minutes at the most and he left. You were then asked What
16 time do you think he left your -- and he answered Ten to
17 9:00 to 9:00, around there?

18 A That's correct.

19 Q On page 4 you asked him Essentially how long would
20 it take you to drive from your parents' house to where you
21 live on South University? Does that usually take -- you
22 responded With no traffic probably be 25 to 30 minutes.

23 A That's correct.

24 Q You then asked Okay. When he left did he say he
25 was going to do anything? What was going on, referring to

1 Michael Clark. Mr. Uhler said He, referring to Michael
2 Clark, he said he was going to come in and watch Beavis and
3 Butthead. And then he said No, I got to go home, I got
4 something to do. I said Okay, and that was the last time I
5 saw him. Is that right?

6 A That's correct.

7 Q Why don't you go ahead and turn to page 13 of that
8 transcript now. Refer you to about midway down the page.
9 You asked Did Mike ever talk to you about having a gun?
10 Mr. Uhler responded Yeah. I mean, I saw it. You asked You
11 saw it? What did it look like? And he responded It was
12 silver. You asked Do you know anything about guns?
13 Mr. Uhler responded I don't, but they mentioned it being a
14 9mm. But I'm not much of a gun person.

15 A That's correct.

16 Q Go ahead and turn to page 14 of the transcript
17 please. At the top you asked Mr. Uhler Did you look at the
18 bullets at all? Mr. Uhler responded Yeah. Did he take the
19 magazine out? Mr. Uhler responded I saw them. You asked
20 What did they look like? Mr. Uhler said They had a hole in
21 the top and they weren't closed. Then I got -- inaudible --
22 come up in Mike's hand -- inaudible -- said they're hollow
23 points. And I heard them from the movies and stuff, but I
24 never seen one.

25 A That's correct.

1 Q Go ahead and turn to page 15.

2 A Okay.

3 Q You asked Where did he get the gun? Mr. Uhler
4 responded No idea. I don't know who he was with. He said
5 he was supposed to meet me that day. Like I said, he got a
6 gun that day because I -- I talked to him and he was
7 supposed to meet me at a soccer game at Regis when the girls
8 played.

9 A That's correct.

10 Q And do you recall later in your interview breaking
11 at some point so that Mr. Uhler could speak to the girl on
12 the phone about some dates of the soccer games, the
13 schedule?

14 A Yeah. Everything in this case kind of related
15 about different soccer dates. And that's how Mr. Uhler was
16 able to remember dates.

17 Q Go ahead and turn to page 42 now please. I'm
18 referring you to the last line of that page. You asked The
19 first date you were talking about what -- and then
20 Mr. Uhler's response was Is the 19th. You responded to
21 Mr. Uhler by saying The 19th of October? And that's the day
22 that, let's see, Metro -- Regis and Metro. And he said --
23 and then you followed up Excuse me. So that's the day you
24 figured he bought the gun?

25 A Correct.

1 Q This is after he spoke to someone about the
2 schedule?

3 A Right, to get those dates.

4 Q I'm going to refer you back now to page 17.

5 A I'm there.

6 Q Towards the top you said And where did he show you
7 the gun? Mr. Uhlir's response, It was outside my apartment.
8 It was in his car.

9 A Correct.

10 Q On the same page you asked him Where did he keep
11 it in his car? And he said It was in the back where --
12 under the seat, one of the seats or something, but I wasn't
13 sure.

14 A That's correct.

15 Q Go ahead and turn the page to page 18 please.
16 Refer you to just above the midpoint. This is Detective
17 Wyton asking Did he ever go shooting with anybody, like
18 just, you know, to go out target shooting? Mr. Uhlir's
19 response was He told me once he shot the gun at something,
20 but he never -- he didn't tell me he said he was alone or he
21 didn't say he was alone. He didn't mention if he was with
22 anybody. I'm pretty sure he was alone. He said he went up
23 and shot somewhere. He didn't say I went up with somebody.
24 He said I went up to shoot.

25 A That's correct.

1 Q Let's go ahead and fast forward to page 27 and 28
2 please. Towards the bottom there you said After you saw the
3 gun in the car that one time, let me get this right. Maybe
4 I'm just getting mixed up here. Did he ever tell you how he
5 got the gun? Mr. Uhler responded He said he went out and
6 bought it -- on to the next page -- he says at a pawn shop.
7 And that's what he told me. You said Okay. And Mr. Uhler
8 kept on saying Down in Denver or -- and that's the
9 conclusion of what I was trying to read.

10 A That's correct.

11 Q So he said he -- Michael Clark bought the gun at a
12 pawn shop down in Denver?

13 A That's correct.

14 Q Towards the middle of the page Detective Wyton
15 asked How much did he pay for it? Mr. Uhler responded I
16 asked him. Like probably over a hundred, 150 maybe. I
17 don't -- that's -- I don't know exactly the price, but it
18 was around that, maybe a hundred twenty to 150?

19 A That's correct.

20 Q And you -- sorry, Detective Wyton asked Well, are
21 you making that up or -- Mr. Uhler said No. He told me a
22 price, but I think that's what it was. I mean, I don't
23 really remember the exact because I -- I mean, I wasn't
24 interested in going to buy a gun.

25 A That's correct.

1 Q Let's go ahead and turn to page 34 of that
2 transcript. Just under the middle of the page you ask a
3 question Okay. Who did he go with, referring to buying the
4 gun in this context? And Mr. Uhlir answered He went with
5 Dion.

6 A That's correct.

7 Q Why don't you go ahead and turn to page 46 now
8 please. At the very top you said But you think there was
9 somebody else involved? And then you said You said
10 there's -- and Mr. Uhlir responded I think that someone paid
11 for -- like actually they gave some guy the money and he
12 bought it. Detective Wyton asked Why do you think that?
13 Mr. Uhlir responded Because I asked don't you need to get --
14 like I thought you had to get whatever, nine days or
15 whatever to buy a gun. And he said No. Detective Wyton
16 says Oh, like a waiting period? Jamie Uhlir says Right.

17 Towards the middle Detective Wyton further asks
18 How did they buy the gun? And Mr. Uhlir says three lines
19 down They just said no, we didn't pay for it, some guy did.
20 They -- I mean, they -- I don't even know if they knew him.
21 I mean, they might have. Dion might have. Mike might have.
22 But they never told me his name or anything.

23 A That's correct.

24 Q So I have one other part to go back to on page 43.
25 You said Okay. And then the next date we're talking about,

1 the 26th, is that day -- is the day that -- and you stopped
2 talking. Mr. Uhler says I saw it?

3 A That's correct.

4 Q What was this conversation in reference to? What
5 did he see on the 26th?

6 A The gun.

7 Q I'd like to go to page 19, excuse me, one other
8 thing. Four lines down Detective Wyton asks you Did he ever
9 talk much about starting with the Marines? And Mr. Uhler
10 says Yeah, he always -- Wyton says Was he going into the
11 Marines? Mr. Uhler says He always said he -- and then it
12 trails off. Detective Wyton says Is that something he kind
13 of aspired to for a while? And Mr. Uhler says First he
14 didn't want -- I mean, he wanted to join the Marines
15 forever, like since high school. Is that right?

16 A That's correct.

17 Q Then he further said He wanted to play soccer in
18 college, so he went to USC last year?

19 A That's correct.

20 Q USC referring to University of Southern Colorado?

21 A Correct.

22 MR. KELLNER: Can I have just a moment, Judge?

23 THE COURT: Yes.

24 (Pause.)

25 MR. KELLNER: Thank you, sir. I have no further

1 questions.

2 THE COURT: Cross-examination?

3 MS. MILFELD: No questions. Thank you.

4 THE COURT: All right. Sir, you may step down.

5 THE WITNESS: Thank you.

6 THE COURT: Would the People call their next
7 witness?

8 MR. KELLNER: Your Honor, the People call Ron
9 Weyer.

10 THE COURT: Sir, would you step forward please?
11 Come on all the way up here into the witness chair. Then
12 would you please face me and raise your right hand.

13 RONALD WEYER,
14 called as a witness on behalf of the People, having been
15 first duly sworn, was examined and testified as follows:

16 THE COURT: Please have a seat.

17 THE WITNESS: Can I get a drink of water?

18 THE COURT: Sure.

19 THE WITNESS: Sort of dry up here for me.

20 THE COURT: No problem.

21 Go ahead, Mr. Kellner.

22 DIRECT EXAMINATION

23 BY MR. KELLNER:

24 Q Good afternoon, Mr. Weyer.

25 A How you doing?

1 Q Would you please state your name and spell your
2 last name for the court reporter please?

3 A Ronald H. Weyer, W-E-Y-E-R.

4 Q Mr. Weyer, where do you live?

5 A I live in Biloxi, Mississippi.

6 Q What do you do for a living in Biloxi,
7 Mississippi?

8 A I run a Mercedes dealership.

9 Q Before living in Biloxi, Mississippi what did you
10 do for a living?

11 A I was a Marine.

12 Q Tell the jury the time frame that you were a
13 Marine, go both active duty and reserve.

14 A I was a Marine from 1988 to 1999.

15 Q What was your rank when you got out of the Marine
16 Corps?

17 A Staff sergeant.

18 Q What sort of different billets did you hold
19 throughout your career as a Marine?

20 A My last billet I ran a county bay video
21 production. I made movies for the Marine Corps basically.
22 Other billets I held was Marine recruiter and just worked my
23 way up through the ranks and the MOS that I did in the
24 Marine Corps.

25 Q When you say MOS, what does that mean?

1 A My speciality. I was trained to make training
2 films, videos, things of this sort.

3 Q I want to talk to you about that time when you
4 were a Marine recruiter. Where were you stationed as a
5 Marine recruiter?

6 A Initially I was stationed in Westminster, Colorado
7 for about six months. And then from that point on I was
8 stationed in Boulder for approximately two and a half years.

9 Q What time frame was that, those two and a half
10 years in Boulder?

11 A Middle of '92 to the end of 1995.

12 Q Where was your office here in Boulder as a Marine
13 recruiter?

14 A It was on Walnut Street. I don't remember the
15 exact address. 3155 maybe. It's been a long time.

16 Q Well, tell the jury what your general
17 responsibilities are as a Marine recruiter here in Boulder.

18 A In Boulder my job was to talk to individuals with
19 high school diplomas, college grads, whatever, and talk to
20 them about the Marine Corps.

21 Boulder is sort of a challenging place, but it was
22 actually pretty easy. The kids you talked to are really
23 smart. You talk to them, they either have an interest or
24 don't have interest. So it makes your job I thought pretty
25 good.

1 Q What was your rank at the time when you were a
2 Marine recruiter in Boulder?

3 A I was a sergeant.

4 Q How many other people were in your office?

5 A It was my -- it was a one-man fighting hole which
6 we call it. It was just my office. From time to time I'd
7 have people come work for me for 30 days at a time.

8 Q These people that come work for you, who would
9 they be?

10 A They'd be typically local kids from the area who
11 went to boot camp. After boot camp maybe they went to their
12 MOS training, then they come back to the community. And you
13 know, they have a lot of pride of earning the title of
14 Marine. They work for me for, you know, 30 days at a time,
15 sometimes longer, but mostly 30 days.

16 Q They'd be used to help further assist in your
17 recruiting efforts?

18 A Yeah, they would have a direct connection in
19 relation to the people their age, their peers. And you
20 know, sometimes they'd assist in talking to one of their
21 friends to join the Marine Corps.

22 Q So you said it was a one-man fighting hole here in
23 Boulder. Were you in charge of the recruiting office then?

24 A I was in charge of my office. My -- I did have
25 a -- my boss who was a master sergeant. He was -- main

1 office was out of Westminster. We had three offices. My
2 office was what when they call PCS, which is an attachment
3 to the main office which would be the Westminster office.

4 Q As the local Marine recruiter in Boulder did you
5 remember -- or do you remember now a recruit that you had
6 named Michael Clark?

7 A I do. Good kid.

8 Q What do you remember about him?

9 A Motivated, great shape, kind of recruit you want.
10 Really eager, really had to have strong desire to be a
11 Marine.

12 Q So because of this strong desire to be a Marine
13 was his recruitment on track towards going to boot camp,
14 enlisting?

15 A Yeah. He went to the military processing center
16 in Denver, downtown Denver. He passed his physical, and he
17 was scheduled to go to boot camp.

18 Q Did something come up that prevented him from
19 going to boot camp?

20 A He had some legal issues. And anytime you have
21 any type of pending legal action you can't go to boot camp.

22 Q You're talking about legal issues. Is this
23 referring to a stolen motorcycle?

24 A Yes.

25 Q Do you remember that?

1 A Vaguely.

2 Q Let me ask you this, do you remember going to the
3 District Attorney's Office and trying to help out this
4 recruit with his legal issue?

5 A I do remember that, yes.

6 Q What would you typically do if you had a person
7 motivated to join and was on track to join but then had some
8 issue like this motorcycle case come up, what would you do
9 on their behalf?

10 A Try to help them out, you know, if they have -- if
11 they want to better themselves and do something, if they're
12 good kids and they're positive people, are kind to you, you
13 go out of your way to be kind back to them.

14 Q So what would you do with respect to the District
15 Attorney's Office?

16 A I talked to the district attorney, explained to
17 him hey, I got this kid, he wants to join the Marine Corps,
18 he can't join the Marine Corps if he has some sort of
19 pending legal action, what can we do to help the kid out.

20 And typically, you know, local law enforcement,
21 they try to help them out because they know that these kids,
22 you know, can better themselves if they're not going to
23 college or actively have a plan, military can typically
24 straighten them out and give them a plan.

25 Q In this case do you recall trying to work out a

1 misdemeanor plea for this recruit Michael Clark?

2 A Vaguely. I vaguely remember it.

3 Q Let me ask you this, if you had someone who was on
4 track, ready to ship out and they had an issue come up and
5 you sort of went to the DA's Office to help them out, what
6 sort of conversation would you have with that recruit about
7 any other future issues he may have?

8 A I -- pretty direct. So you know, the whole deal
9 is look, if I'm going to help you out, this is what you want
10 to accomplish. You just talk to them straight, tell them
11 what they need to do.

12 You know, if I'm going to put myself out on the
13 line, they surely better do something good for me. That
14 means stay out of the trouble, get ready to go to boot camp.
15 It's very important to be in the Marine Corps for you to
16 fulfill your obligation of joining and for me to meet my
17 quota.

18 Q Did you have a conversation with a recruit that
19 you went to bat for about what would happen if he got in
20 anymore trouble?

21 A If I have a kid that I had to help out -- I have
22 that conversation with every one of those kids. I don't
23 directly remember having that conversation with Michael
24 Clark. But when I help a kid out, we definitely have that
25 conversation.

1 Q How does that conversation go?

2 A I haven't did the Marine Corps thing for many,
3 many years, but it's just one of those things. Look, you
4 know, I'm helping you out. This is what we need to do to
5 accomplish the mission. This is the first step in the
6 process for you to earn that title Marine. I need you to
7 don't go to parties, don't drink, don't get open container,
8 so on and so forth.

9 Q What would happen if that person got in anymore
10 trouble?

11 A Then they're out. All my -- if somebody -- after
12 you help some kid out and they do something, then, you know,
13 they're done. I don't waste my effort, my time, my energy.
14 I move on.

15 Q Do you recall Michael Clark ever coming into the
16 recruiting office and showing you a gun?

17 A Yes.

18 Q What do you remember about that?

19 A Only thing I remember it being a silver 9mm.
20 Don't remember the brand. Don't remember that.

21 Q Do you recall when Mr. Clark came into the
22 recruiting office and showed you the silver 9mm gun?

23 A No, I do not.

24 Q Do you recall being interviewed by a detective
25 from the Boulder Police Department on November 3, 1994?

1 A I don't remember the date. I remember talking to
2 a detective, but I don't remember the date.

3 Q Do you recall telling that detective that -- now
4 Commander Weinheimer that you had seen Michael Clark with
5 this 9mm silver pistol just a week prior to November 3,
6 1994?

7 A I don't remember any of the dates it's so long
8 ago. I do remember talking to detectives about Michael
9 Clark. I don't remember exactly what our conversation went,
10 what we discussed other than the fact about a gun, long time
11 ago.

12 Q So as you sit here today you don't recall
13 specifically saying when Michael Clark came in and showed
14 you that gun?

15 A No. I don't remember a specific date, no.

16 MR. KELLNER: Your Honor, can I approach the
17 witness?

18 THE COURT: Yes.

19 Q (By Mr. Kellner) Mr. Weyer, I'm showing you a
20 report based on that contact you had with the detective. Do
21 you recall telling Commander Weinheimer that you saw Clark
22 during the previous week and Clark had a loaded 9mm
23 semi-automatic handgun on him at that time?

24 A I do remember talking to a detective about the
25 gun. I don't remember -- I do know anytime I handle a --

1 anytime someone hands me a gun, first thing I do is if it's
2 a -- I check to see if it's loaded. So I empty the clip.

3 I -- just couple years ago I got a phone call
4 from --

5 MS. RING: Judge, I'm going to ask that we ask a
6 question and have the witness respond to questions.

7 THE COURT: Yeah, I'm going to sustain that
8 objection.

9 So Mr. Weyer, if you could just respond to the
10 questions that are asked by the district attorney?

11 THE WITNESS: Yes, sir.

12 Q (By Mr. Kellner) As a Marine what's the first
13 thing you're taught to do when someone hands you a gun?

14 A Check to see if it's loaded or not.

15 Q How do you go about checking to see if a gun is
16 loaded?

17 A First you remove the magazine, then you pull back
18 the chamber, make sure it's clear.

19 Q Do you recall on this day when Michael Clark
20 showed you this silver 9mm gun checking to see whether or
21 not it was loaded?

22 A Yes.

23 Q What do you remember about checking to see whether
24 or not this 9mm gun was loaded?

25 A Just that, just the fact that I checked the gun.

1 Don't remember any other details really.

2 Q Do you recall Michael Clark's reaction when you
3 checked to see whether the gun was loaded?

4 A I don't recall the reaction.

5 Q Do you recall Michael Clark saying something to
6 you about fingerprints on the bullets?

7 A No, I do not.

8 MR. KELLNER: Your Honor, may I approach the
9 witness?

10 THE COURT: Yes.

11 Q (By Mr. Kellner) Mr. Weyer, do you remember saying
12 that you removed the magazine and observed that it was
13 loaded with 9mm full metal jacket ball rounds that were
14 loaded into brass colored casings?

15 A I don't remember that exact conversation. I do
16 know that if I told that to the detective that's exactly the
17 truth.

18 Q Recognizing it's been 18 years, would you say your
19 memory is better on November 3, 1994 than it is sitting here
20 today?

21 A Saying that it's fresh, yes.

22 Q Do you recall telling Commander Weinheimer that
23 you removed one round from the magazine to examine it, and
24 that Clark got nervous at that point and asked for the gun
25 back. You then said Clark wiped the round off and placed it

1 back into the magazine, placed the magazine into the weapon.
2 Clark then said something to Sgt. Weyer about not leaving
3 fingerprints on the round.

4 A I don't remember that conversation.

5 Q Do you recall saying that Weyer said Clark was
6 very concerned about fingerprints on the rounds?

7 A No.

8 Q You don't recall that conversation or it didn't
9 happen I guess?

10 A I don't recall the conversation.

11 Q What do you recall about the brand of the gun?

12 A Generic.

13 Q Do you remember telling Commander Weinheimer that
14 you thought it was not a common brand and it was a fairly
15 cheap brand?

16 A No. I don't remember the conversation.

17 Q Do you recall telling Commander Weinheimer that
18 the weapon was compact and heavy, and that you were sure it
19 had a double column magazine that held more than eight
20 rounds?

21 A No. I don't remember having that conversation.

22 MR. KELLNER: Your Honor, can I approach the
23 witness with what I marked as People's 69 and 70?

24 THE COURT: Yes.

25 Q (By Mr. Kellner) Mr. Weyer, can you go ahead and

1 take a look at People's 69 and 70 please?

2 A Yes.

3 Q As a Marine did you ever have to carry a weapon on
4 deployment or on a firing range?

5 A Yes.

6 Q Did you ever in fact deploy as a Marine?

7 A Yes, I did.

8 Q Where did you deploy to?

9 A Desert Storm.

10 Q What was your assigned weapon during Desert Storm?

11 A Beretta 9mm, M9.

12 Q Did you have to qualify on a range in order to
13 take that weapon out of the armory?

14 A Yes, I did.

15 Q What kind of rounds do you shoot in the Marine
16 Corps when you're qualifying on the range or in combat?

17 A Ball.

18 Q Go ahead take a look at People's 69.

19 A Okay.

20 Q Do you recognize that picture? And if so, what is
21 it?

22 A That's a ball round.

23 Q Is that a fair and accurate depiction of what a
24 9mm ball round looks like?

25 A Yes, it is.

1 MR. KELLNER: Your Honor, I asked to admit
2 People's 69.

3 THE COURT: Objection or voir dire?

4 MS. RING: May I voir dire please?

5 THE COURT: Yes.

6 VOIR DIRE EXAMINATION

7 BY MS. RING:

8 Q Mr. Weyer, had you seen these photographs prior to
9 testifying today?

10 A No, I have not.

11 Q You were just handed them while you were sitting
12 there?

13 A Correct.

14 Q Okay. You can't tell us what the manufacturer of
15 those rounds is?

16 A No.

17 Q Correct?

18 A I cannot.

19 Q You really can't give us any other detail other
20 than what you just gave the prosecutor that those appear to
21 be a photograph of a 9mm round?

22 A That's a ball round, yes, ma'am.

23 Q That's a ball round, but no other details.

24 A It's not a hydroshock, it's not a hollow point,
25 it's a ball round.

1 Q And that's all you can tell us from looking at
2 those photographs right now?

3 A Yes, ma'am.

4 MS. RING: No objection.

5 THE COURT: 69 will be admitted.

6 MR. KELLNER: Your Honor, may I publish it?

7 THE COURT: Yes.

8 DIRECT EXAMINATION (cont'd)

9 BY MR. KELLNER:

10 Q Sgt. Weyer, go ahead and turn around to the screen
11 behind you please. What is the jury looking at on that
12 screen right there?

13 A That is a ball round.

14 Q All right. Go ahead take a look at People's 70
15 please.

16 A Okay.

17 Q You recognize what that is?

18 A That is a hollow point.

19 Q How do you recognize what a hollow point round is?

20 A The shape of the round itself, the top.

21 Q What's unique about the top of a hollow point
22 round?

23 A Hollow point, it's hollowed out on the top. It's
24 not round and smooth.

25 MR. KELLNER: Your Honor, I ask to admit

1 People's 70.

2 THE COURT: Objection or voir dire?

3 MS. RING: No.

4 THE COURT: 70 will be admitted.

5 MR. KELLNER: May I publish it?

6 THE COURT: Yes.

7 Q (By Mr. Kellner) Looking up on the screen there,
8 what do you see on the right?

9 A A hollow point is on the right.

10 Q Do you recall seeing Michael Clark the day
11 after -- do you recall seeing Michael Clark on November 2,
12 1994?

13 A I don't remember the date. Sorry.

14 Q And again, you were interviewed on November 3,
15 1994 by Detective now Commander Weinheimer?

16 A I do remember talking to a police officer, yes, a
17 detective.

18 Q Do you recall telling Commander Weinheimer that
19 you last saw Clark on November 2, 1994 when Clark came in
20 during the afternoon between 1430 and 1500?

21 A I don't recall those specific times and dates.

22 Q What is 1430 and 1500?

23 A 2:30 -- between 2:30 and 3:00.

24 Q Do you recall telling Commander Weinheimer that
25 you did not talk much with Clark because you were

1 interviewing another candidate?

2 A I don't recall that.

3 Q Do you recall telling Commander Weinheimer that
4 Clark was quote, over -- sorry, that Clark was over-eager to
5 enlist and asked Sgt. Weyer how soon can I get out of here?

6 A I don't recall that conversation.

7 Q You don't recall that conversation with Michael
8 Clark as you sit here today?

9 A I don't, no.

10 Q What would happen to someone's ability to enlist
11 in the Marine Corps if they had a felony conviction?

12 A They have no -- no, they cannot join the Marine
13 Corps at all no matter what.

14 Q Is that a bright line rule?

15 A Yeah. That's a rule that can't be changed.

16 MR. KELLNER: Can I have just a moment?

17 THE COURT: Yes.

18 (Pause.)

19 MR. KELLNER: Thank you, Mr. Weyer. No further
20 questions.

21 THE COURT: How long for cross?

22 MS. RING: Ten minutes maybe.

23 THE COURT: Okay. Cross-examination, Ms. Ring.

24 MS. RING: Thank you.

25 CROSS-EXAMINATION

1 BY MS. RING:

2 Q Mr. Weyer, you're being asked to -- is it Weyer or
3 Weyer?

4 A Weyer.

5 Q Weyer, I'm sorry.

6 A No problem.

7 Q Mr. Weyer, you're being asked to recall some
8 information from 18 years ago; right?

9 A Yes, ma'am.

10 Q You don't remember everything about that
11 conversation you had with detectives back in November of
12 1994?

13 A No, I do not.

14 Q Prior to testifying today were you shown a copy of
15 that report that the district attorney has brought up to you
16 indicating what you said to the detective when you were
17 interviewed?

18 A Yes.

19 Q You did see that before you testified?

20 A Correct.

21 Q Okay. So it sounds like even though you were
22 shown that report earlier and were able to review the
23 details of the interview that you gave to the police in
24 November of 1994 you still don't have an independent memory
25 of that interview?

1 A I remember having an interview. I don't remember
2 specific dates and times. Long time ago.

3 Q Right. Okay. And you knew that you were being
4 subpoenaed by the district attorney to come testify at a
5 trial where Michael Clark was the defendant; right?

6 A Correct. Yes, ma'am.

7 Q And back in 2010 you actually received a phone
8 call from Detective Heidel who is sitting over here at the
9 prosecution table?

10 A Correct.

11 Q And Detective Heidel back in 2010 asked you what
12 you recalled about Michael Clark and you being interviewed
13 by the police back in 1994 over the phone; right?

14 A That's correct, ma'am.

15 Q And in 2010 you didn't have any memory then either
16 of the details of that interview from 1994?

17 A What I told him on the phone is I remember the
18 silver 9mm. You know, it's -- you got to realize I get a
19 phone call from so long ago that -- you know.

20 Q Right. And actually initially when he asked you
21 about Michael Clark you didn't even remember Michael Clark's
22 name at that point when he first called you?

23 A When he first called me, no, I did not, ma'am.

24 Q It took a little bit --

25 A Correct.

1 Q -- of Detective Heidel reminding you about Michael
2 Clark to even remember Michael Clark then?

3 A Right.

4 Q Okay. Certainly when you were interviewed in
5 November -- or on November 2nd of 1994 you would have been
6 truthful with the detective who was asking you questions?

7 A Absolutely.

8 Q You would have been as forthcoming as you could be
9 about what information you had to give the detective?

10 A No reason not to.

11 Q And if you had had additional information after
12 they interviewed you, you know, you're the kind of guy you
13 would have called the police and said I forgot to tell you
14 this other information about Michael Clark or something I
15 remembered?

16 A Yes.

17 Q Okay. Now, do you recall that you actually told
18 the detective who was interviewing you on November 2, 1994
19 that -- that you knew that Michael Clark had been arrested
20 for stealing a motorcycle and that that -- just the stolen
21 motorcycle incident would probably eliminate him from being
22 allowed to enlist?

23 A Yeah. If the charge stood, yes, it would
24 eliminate him enlisting, yes.

25 Q Okay. And I'm going to actually ask to approach,

1 Judge.

2 THE COURT: Sure.

3 Q (By Ms. Ring) And I'm showing you the same report
4 you were looking at with the district attorney. I'm still
5 on page 265. And when you were asked about when you seen
6 Michael Clark recently with the 9mm handgun you said that
7 you saw Clark during the previous week and that's when he
8 had the 9mm handgun on him at that time?

9 A Okay.

10 Q Is that what that says?

11 A That's what it says, yes, ma'am.

12 Q And that interview it says happened on
13 November 3rd of 1994?

14 A Okay.

15 Q Okay. So you couldn't give the officers an exact
16 date when Michael Clark had been at the recruiting office
17 and showed you the gun?

18 A At the time when we talked I'm pretty sure I could
19 have gave him an exact date.

20 Q But what it says is you said the previous week.
21 There is no date in the report?

22 A Okay.

23 Q That's what I showed you?

24 A Yes. That's what you showed me, yes, ma'am.

25 Q You just don't have an independent recollection;

1 right?

2 A I don't. I mean, I don't recall what happened at
3 that time frame, ma'am.

4 Q But when you reviewed this report prior to
5 testifying this morning you didn't say oh, wait, I remember
6 telling the detective something and it's not in that report?

7 A No, ma'am, I do not remember.

8 Q Okay. When Michael Clark was showing you that
9 handgun that day he talked to you actually about being able
10 to get other guns if you were interested in getting a gun?

11 A Okay.

12 Q Do you remember reading that in the report?

13 A I do.

14 Q But you don't have an independent recollection of
15 that?

16 A No.

17 Q And do you recall that he also told you though
18 that the guns that he could get you would probably be dirty?

19 A You know, I don't recall. I read the report and I
20 saw it in the report, but I don't remember.

21 Q Even though you don't remember you do have an
22 understanding if somebody told you it was a dirty gun what
23 that would mean?

24 A We can all form an opinion on that. But yeah, I
25 mean, your opinion is it's not -- I don't want anything to

1 do with a dirty gun. I don't think anyone does.

2 Q Right.

3 Do you recall that you told the officers that you
4 most recently seen Michael Clark driving the Ford Mustang
5 that he usually drove, the car that you typically saw him
6 in?

7 A I don't recall the conversation, ma'am.

8 MS. RING: May I approach?

9 THE COURT: Yes.

10 Q (By Ms. Ring) I'm going to go back and show you
11 that same report we were looking at. So again, they're
12 talking about whether you had seen any other weapons in
13 Clark's car, and that you did state that Clark was driving
14 the Ford Mustang you had seen him driving recently. That's
15 what the report says you said?

16 A If that's what the report says, yes, ma'am, then
17 that's what I said.

18 Q Okay.

19 A I couldn't remember that. But yeah, that's
20 exactly what I said.

21 Q Okay. And also on the paragraph below, again it's
22 Clark talking to you about getting other guns and him
23 describing them that it would be quote unquote, dirty, which
24 is what we just talked about?

25 A Yeah.

1 MS. RING: If I could just have a moment?

2 THE COURT: Sure.

3 (Pause.)

4 MS. RING: Nothing further. Thank you.

5 THE COURT: Any redirect, Mr. Kellner?

6 MR. KELLNER: Briefly, yes.

7 REDIRECT EXAMINATION

8 BY MR. KELLNER:

9 Q Mr. Weyer, do you recall that as Ms. Ring asked
10 you earlier about how the defendant said he could get dirty
11 guns, do you recall telling Commander Weinheimer that he was
12 getting these guns from pawn shops in Denver?

13 A I don't recall the conversation.

14 MR. KELLNER: Thank you.

15 MS. RING: Briefly. I'm going to ask to look at
16 the -- approach again.

17 THE COURT: Yes.

18 RECROSS-EXAMINATION

19 BY MS. RING:

20 Q Looking at the same report, actually it says Clark
21 mentioned that he and his friends had been stealing guns
22 from pawn shops in Denver. That's what it says?

23 A Yes, that's what it says and that's it.

24 MS. RING: Okay. Nothing further.

25 THE COURT: All right. Mr. Weyer, you may step

1 down.

2 Can this witness be excused, Mr. Kellner?

3 MR. KELLNER: He may, Your Honor.

4 THE COURT: Ms. Ring?

5 MS. RING: Yes.

6 THE COURT: Mr. Weyer, you're excused. Thank you
7 very much.

8 THE WITNESS: Thanks.

9 THE COURT: Ladies and gentlemen of the jury,
10 we'll go ahead and take the noon recess.

11 Remember the admonition that I've given you
12 previously. It applies at this recess as well.

13 Don't communicate about or discuss the case with
14 anyone by any means. If someone does try to discuss the
15 trial, let me know about it immediately.

16 Don't read or listen to any news reports of the
17 trial. Don't consult any outside reference materials,
18 including a dictionary, encyclopedia or the internet.

19 Finally, remember that is it especially important
20 that you do not form or express an opinion on the case until
21 it is finally submitted to you.

22 We'll be in recess until 1:30, and we'll continue
23 with the trial at that time. Thank you. Have a good lunch
24 hour.

25 (The jury left the courtroom.)

1 THE COURT: All right. We'll be in recess until
2 1:30.

3 (A recess was taken.)

4 THE COURT: We're on the record in 12CR222.
5 Defendant and counsel are present, the prosecution is
6 present.

7 I received a note from one of the jurors asking
8 the bailiff to define voir dire. How would you like me to
9 respond, if at all, Ms. Ring? By the way, the bailiff did
10 not respond at all to the note.

11 MR. BRACKLEY: I don't see how it could hurt.

12 MS. RING: And I -- I don't disagree that I don't
13 see how responding to that specific question could hurt.

14 I guess what we're trying to do is be clear that
15 we can't answer questions now, and any subsequent questions
16 shouldn't come until after you've heard all the evidence.
17 That's my concern about answering it.

18 THE COURT: Yeah, I mean this has to do sort of
19 with the procedure and terminology that we're using. And I
20 suppose it would be beneficial for the jury to have that
21 term defined just so they understand why I'm saying it when
22 I'm saying it.

23 But I am concerned that it's going to be part of a
24 slippery slope that generates a lot more questions.

25 Well, Mr. Brackley?

1 MR. BRACKLEY: Perhaps it can be done in the
2 context of when we're about to put a piece of evidence in,
3 I'll move something into evidence, you'll ask, you know,
4 defense voir dire, ladies and gentlemen, that means this,
5 and then we just roll from there.

6 THE COURT: That --

7 MS. RING: That's fine.

8 THE COURT: Do you want me to include a statement
9 that I'm not allowed to -- we're not allowed to answer juror
10 questions during the course of the trial, or do you want me
11 to just explain what voir dire means to test the fundamental
12 or foundational knowledge of the witness.

13 MR. BRACKLEY: I think maybe if there's a way that
14 Your Honor could state, you know, since this is a procedural
15 question I will answer it, but reiterate to them that the
16 Court will not be answering questions on anything else and
17 just hope that there are no other procedural type questions.

18 I think that's the last bit of Latin we'll be
19 using in the trial, but you never know. So I just think it
20 makes sense. But I mean, on the other hand it could be
21 simply one juror. And who that juror is I don't know. But
22 makes sense.

23 THE COURT: I think to be able to explain to them
24 just in very basic terms I think it's not harmful, so
25 I'll --

1 MR. BRACKLEY: Judge, something else perhaps
2 before we bring the jury in we can alert the Court of and
3 the Court can get started on it. Seems like we will be
4 needing Mr. Stackhouse tomorrow. I think we originally
5 thought on Wednesday. But if the Court could start the writ
6 process for Mr. Stackhouse for tomorrow?

7 THE COURT: Where is Mr. Stackhouse?

8 MR. BRACKLEY: The Boulder County Jail.

9 THE COURT: What time do you want him?

10 MR. BRACKLEY: Probably mid-morning at the
11 earliest.

12 THE COURT: So we'll ask the sheriff to have him
13 over here tomorrow morning in anticipation of testimony.

14 MR. BRACKLEY: Yes, I would say in the morning.

15 THE COURT: His name is Walter Stackhouse?

16 MR. BRACKLEY: Walter Leon Stackhouse.

17 THE COURT: Anything else to take up before we
18 bring the jury in on behalf of the People?

19 MR. BRACKLEY: No, Your Honor.

20 THE COURT: Ms. Ring, on behalf of defendant?

21 MS. RING: No.

22 THE COURT: All right. Would you bring the jury
23 in?

24 (The jury returned to the courtroom.)

25 THE COURT: Please be seated. Welcome back,

1 ladies and gentlemen of the jury.

2 One of you had submitted a question to the bailiff
3 asking for the definition of a term. Because it has to do
4 with a procedural matter I'll go ahead and answer that
5 question. But I need to caution you that I'm not allowed to
6 answer your questions on substantive issues or the evidence
7 during the course of the trial.

8 You've heard me use the term voir dire. I'll ask
9 counsel if they have any objection or voir dire. Voir dire
10 simply means does the attorney have any questions for the
11 witness regarding the foundation or basis for their
12 knowledge either as it relates to an exhibit or as it
13 relates to their ability to testify to further evidence. So
14 voir dire is basically an attorney's opportunity to ask a
15 witness further foundation questions.

16 At this time would the People call their next
17 witness?

18 MR. KELLNER: We will call Commander Carey
19 Weinheimer.

20 THE COURT: Sir, would you step forward please?
21 Come on all the way up to the witness chair. Would you
22 please face me and raise your right hand.

23 COMMANDER CAREY WEINHEIMER,
24 called as a witness on behalf of the People, having been
25 first duly sworn, was examined and testified as follows:

1 THE COURT: Please have a seat.

2 Go ahead, Mr. Kellner.

3 MR. KELLNER: Thank you, Judge.

4 DIRECT EXAMINATION

5 BY MR. KELLNER:

6 Q Good afternoon, sir. Could you state your name?

7 A Carey Weinheimer, last W-E-I-N-H-E-I-M-E-R.

8 Q How are you employed?

9 A I'm currently a commander with the Boulder Police
10 Department.

11 Q How long have you been with the Boulder Police
12 Department?

13 A Since 1990.

14 Q Any law enforcement experience prior to that?

15 A Yes. I served with two other agencies for a total
16 of four years prior to that.

17 Q What does a commander do in the Boulder Police
18 Department?

19 A I currently supervise a traffic unit, code
20 enforcement unit and manning special events.

21 Q Can you give the jury just a brief outline of your
22 career with the Boulder Police Department?

23 A Sure. I began as a patrol officer in 1990. I was
24 selected as a detective in 1992. I remained a detective
25 until 1998 and was promoted to sergeant. Served as a

1 sergeant in various capacities, including the detective
2 sergeant up until my promotion to commander in 2009. And
3 I've held two different positions as commander since 2009.

4 Q Commander Weinheimer, focusing in on 1994, you
5 said you were a detective in that time frame. What kind of
6 cases were you investigating back then?

7 A Primarily fraud and forgery.

8 Q And as part of your role as a fraud and forgery
9 detective back in 1994 did you sit in on an interview with
10 the defendant Michael Clark on November 3, 1994?

11 A Yes.

12 Q I only mention that because the jury sat through
13 about three hours of that testimony, and they might
14 recognize your voice.

15 I want to talk to you about something else you did
16 on November 3, 1994. Do you recall meeting with a Marine
17 recruiter?

18 A Yes, I do.

19 Q What day was that?

20 A That was November 3rd.

21 Q And specifically what was this Marine recruiter's
22 name and where did you meet him?

23 A Sgt. Weyer. And I met him at the Marine
24 recruiting office which was at that time at 30th and Walnut.

25 Q Why did you approach Sgt. Weyer?

1 A Earlier that day I'd been informed by Detective
2 Hackman who is now Sgt. Kampf that she recalled from an
3 interview with Kristen that Kristen had stated that Michael
4 Clark had a key to the Marine recruiting office. And at
5 that time we were trying to locate Michael to interview him
6 in reference to the fraud and forgery.

7 Q When you spoke to Sgt. Weyer did he recall having
8 met Michael Clark?

9 A Yes, he did.

10 Q How did he say he knew Michael Clark?

11 A He said that Michael had been trying to get into
12 the Marines and Sgt. Weyer had been helping him with that.
13 Sgt. Weyer had helped him work out something with the
14 District Attorney's Office in regards to a criminal mischief
15 that Mr. Clark was involved in.

16 However, he told me that Mr. Clark had recently
17 been arrested for theft of a motorcycle, and Sgt. Weyer
18 thought that would probably exclude him from being recruited
19 into the Marines.

20 Q Did you talk to Sgt. Weyer about whether or not
21 he'd ever seen Michael Clark with a gun?

22 A Yes.

23 Q What did Sgt. Weyer tell you about that?

24 A Sgt. Weyer stated the week prior to the homicide
25 that Mr. Clark had been in the Marine recruiting station and

1 had shown Sgt. Weyer a loaded 9mm handgun that he had in the
2 front part of his waistband.

3 Q Did he tell you what kind of handgun it was?

4 A He wasn't able to tell me what brand it was. He
5 thought it was relatively cheap and a non-common brand. But
6 he described it as being of stainless steel material with
7 gray plastic grips and that it was a 9mm.

8 Q Did he say whether it was a revolver, automatic,
9 semi-automatic?

10 A It was a semi-automatic.

11 Q What does that mean to be a semi-automatic weapon?

12 A That each time you pull the trigger the slide
13 functions and cycles a new round into the chamber.

14 Q Sgt. Weyer tell you anything about looking at the
15 bullets inside of the magazine of that 9mm gun?

16 A Yes. Mr. Clark handed him the weapon. Sgt. Weyer
17 took the magazine out of the pistol, observed that it was
18 loaded with 9mm ball or full metal jacket ammunition. And
19 he described the casings as being brass in color.

20 Sgt. Weyer stripped one round from the magazine,
21 at which point he stated Mr. Clark became very nervous and
22 asked for the weapon and the magazine back, and that
23 Mr. Clark took that one round and wiped it on I believe his
24 shirt, inserted the round back into the magazine, put the
25 magazine back in the pistol and put the pistol back in his

1 waistband.

2 Q Did Sgt. Weyer tell you anything about why Michael
3 Clark wanted to wipe bullets off -- sorry, fingerprints off
4 the bullet?

5 A He said something about not leaving fingerprints
6 on bullets. I don't recall the exact words. I don't think
7 Sgt. Weyer did either. But something to that effect.

8 Q Did Sgt. Weyer tell you when the last time was
9 that he saw Michael Clark?

10 A Yes. He said it was on November 2nd between about
11 2:30 and 3:00 in the afternoon.

12 Q And you interviewed him on November 3rd?

13 A Correct.

14 Q So what did Sgt. Weyer say about his interaction
15 with Michael Clark on November 2, 1994?

16 A He said that Mr. Clark came into the recruiting
17 station between 2:30 and 3:00 in the afternoon, was in
18 Sgt. Weyer's words overeager to enlist, and asked how soon
19 can I get out of here.

20 Q Once you had this conversation with Sgt. Weyer,
21 you learned this information about the 9mm gun that had been
22 seen the week prior, what did you do as far as relaying that
23 information to other people?

24 A I went back to the police station. I don't
25 remember exactly what time it was, but it was not too long

1 prior to the start of the interview with Mr. Clark. And I
2 shared that information with Detective Weiler and Detective
3 Trujillo who were about to interview Mr. Clark. And at that
4 point they asked me to join them in the interview.

5 MR. KELLNER: No further questions. Thank you.

6 THE COURT: Cross-examination, Ms. Ring.

7 MS. RING: Thank you.

8 CROSS-EXAMINATION

9 BY MS. RING:

10 Q Commander Weinheimer, you wrote a report that
11 detailed the information you got from Sgt. Weyer; correct?

12 A Yes.

13 Q And we've already heard that you interviewed
14 Sgt. Weyer on November 3rd of 1994?

15 A Yes.

16 Q And it would be your practice then and your
17 practice now that when you get information as part of an
18 investigation you try to put that information into a report
19 as soon as practically possible?

20 A As soon as practically possible, yes.

21 Q And the reason you do that is you want the report
22 that you do that's detailing the information you gathered to
23 be an accurate report?

24 A Yes.

25 Q You want it to have all the relevant material in

1 the report?

2 A Yes.

3 Q And because you never know when you're going to be
4 asked to recall specific details of any specific
5 investigation?

6 A Yes.

7 Q So here we are 18 years later, and you're being
8 asked to recall details of an interview you did on
9 November 3rd of 1994?

10 A Yes.

11 Q And so prior to testifying today you actually
12 reviewed that report?

13 A Yes.

14 Q And you knew that you were going to be
15 specifically asked about some of the details that you got
16 from Sgt. Weyer when you interviewed him?

17 A Yes.

18 Q Okay. When you reviewed that report before you
19 testified today did it appear to be an accurate reflection
20 of the information you got from Sgt. Weyer back in 1994?

21 A Yes.

22 Q You didn't read your report and say oh, that's
23 absolutely wrong and that's not what he told me?

24 A Correct.

25 Q And you didn't also say oh, I got this very

1 important piece of information that I neglected to put in
2 the report?

3 A As far as I remember, yes.

4 Q Okay. When you -- you just told Mr. Kellner that
5 when you're meeting with Sgt. Weyer, in asking about how he
6 knows Michael Clark Sgt. Weyer tells you on November 3rd
7 that Michael Clark is going to have trouble enlisting
8 because of this stolen motorcycle thing?

9 A Yes.

10 Q You continued to ask him questions about Michael
11 Clark, and he's able to tell you -- one of the things you
12 ask him is what type of gun -- sorry, what type of car
13 Michael Clark drove; right?

14 A Yes.

15 Q And he tells you that he seen Michael Clark in a
16 Ford Mustang?

17 A Yes.

18 Q He tells you about seeing Michael Clark with this
19 9mm gun; right?

20 A Yes.

21 Q And that Michael Clark actually brought it to the
22 recruiting office to show Sgt. Weyer?

23 A Yes.

24 Q And you want to know when that happened?

25 A Yes.

1 Q So you ask Sgt. Weyer when was Michael Clark in
2 here with the gun; right?

3 A Yes.

4 Q What Sgt. Weyer tells you is it was sometime the
5 previous week?

6 A Correct.

7 Q And that's as exact as he got about the date?

8 A Yes, the week of I think that would have been
9 October 24th.

10 Q That would have been the Monday?

11 A Yes.

12 Q And you're talking to him on November 3rd?

13 A Correct.

14 Q Okay. He also tells you that Michael Clark was
15 talking about other guns in addition to the 9mm that he was
16 actually showing Sgt. Weyer?

17 A Yes.

18 Q He talked about being able to get additional guns
19 or a Beretta if Sgt. Weyer is interested?

20 A Yes.

21 Q And talks about the guns that he could be able to
22 get -- that Michael Clark would get would probably be dirty?

23 A Correct.

24 Q And you actually put dirty I think in quotes in
25 your report?

1 A Yes.

2 Q Because it's using the colloquial term like dirty,
3 hot or used in other crimes, that meaning of dirty?

4 A That was if I recall correctly Sgt. Weyer's
5 explanation of that term, yes.

6 MS. RING: If I can just have a moment?

7 THE COURT: Sure.

8 (Pause.)

9 MS. RING: Nothing further. Thank you.

10 THE COURT: Any redirect, Mr. Kellner?

11 REDIRECT EXAMINATION

12 BY MR. KELLNER:

13 Q Commander Weinheimer, just a follow-up on what
14 Ms. Ring was saying. The defendant told Sgt. Weyer that he
15 could actually -- he and his friends have been getting these
16 dirty guns, stealing them from pawn shops in Denver; is that
17 correct?

18 A Yes.

19 MR. KELLNER: No further questions.

20 THE COURT: Any recross?

21 MS. RING: No.

22 THE COURT: All right. You can step down, sir.

23 Can this witness be excused, Mr. Kellner?

24 MR. KELLNER: He may, Your Honor.

25 THE COURT: Ms. Ring, do you want him subject to

1 recall?

2 MS. RING: Judge, I --

3 THE COURT: In an abundance of caution, Commander,
4 you may be subject to recall.

5 Would the People call their next witness?

6 MR. BRACKLEY: People call David Berring.

7 THE COURT: Would counsel approach?

8 (The following proceedings occurred at the bench
9 out of the hearing of the jury.)

10 THE COURT: There was a pretrial issue that you
11 brought to my attention about Mr. Berring and whether or not
12 he's going to have him attempt to identify Mr. Clark. Is
13 that still an issue? You're not going to ask him to
14 identify Michael Clark?

15 MR. BRACKLEY: No.

16 THE COURT: Okay. Thank you.

17 MR. BRACKLEY: The next witness may be Dion. Let
18 me make sure.

19 THE COURT: Well, either way that's fine. That's
20 not going to be an issue.

21 (Pause.)

22 THE COURT: All right. You're not going to --

23 MR. BRACKLEY: Yeah, you never know what he's
24 going to say.

25 THE COURT: Well, Ms. Ring, who is going to cross

1 him?

2 MS. RING: Me.

3 THE COURT: I'm assuming you're not going to ask
4 him if he can identify him for you?

5 MS. RING: (Attorney shakes head.)

6 THE COURT: Okay. Thanks.

7 (The following proceedings occurred in open
8 court.)

9 MR. BRACKLEY: Let me step out and --

10 (Pause.)

11 MR. BRACKLEY: Your Honor, I did have it
12 backwards. People call Dion Moore.

13 THE COURT: All right.

14 All the way up there. Before you sit down would
15 you face me, raise your right hand.

16 DION MOORE,
17 called as a witness on behalf of the People, having been
18 first duly sworn, was examined and testified as follows:

19 THE COURT: Please have a seat.

20 Go ahead, Mr. Brackley.

21 DIRECT EXAMINATION

22 BY MR. BRACKLEY:

23 Q Good afternoon, sir.

24 A Good afternoon.

25 Q Can you for the record state your full name and

1 spell your last name?

2 A Neil Dion Moore, M-O-O-R-E.

3 Q Do you go by Dion?

4 A I do.

5 Q Where are you from?

6 A I was born in Chicago, but I was raised in
7 Boulder.

8 Q Where are you currently living?

9 A I'm currently living in Table Mesa and Broadway.

10 Q Here in Boulder?

11 A In Boulder, yeah.

12 Q What -- how long have you been living in Boulder
13 for?

14 A Off and on for 30 years or more.

15 Q With whom are you currently living?

16 A With my girlfriend.

17 Q Do you have any other family in Boulder?

18 A Yeah, my son and his stepsisters and my father all
19 live here in Boulder up the street from here actually.

20 Q A brother also?

21 A Yeah, my brother Patrick has moved back. He was
22 in Texas after college with my mother, but he's back here
23 now too.

24 Q Are you working currently?

25 A Yeah. I've been working for Bergerville

1 Construction.

2 Q What kind of work -- what kind of jobs do you do
3 for them and how frequently do you work?

4 A Mostly everyday, pretty much any number of
5 miscellaneous things, finish work, prep work, painting,
6 sanding and staining stuff, any digging things, anything.

7 Q So can you tell the jury when it was that you
8 moved from Chicago to the Boulder area and how that came
9 about?

10 A I was very young. My -- my father's friend from
11 high school growing up in Chicago had moved out here, and my
12 dad came to visit them and thought it was a nice place and
13 moved here. So basically like I moved here when my dad did
14 when I was small.

15 Q Did you -- do you know the Uhlir family?

16 A I do.

17 Q How do you know the Uhlir family?

18 A That's the friends I was talking about. My dad
19 went to high school with Rick, which is the father, and I
20 think also with Pat who is the mother. And Jamie and I are
21 around the same age and have been friends since diapers.

22 Q Do you spend a lot of time with the Uhlir family
23 growing up here in Boulder?

24 A Yeah, I did. I -- over the years there was times
25 where I spent everyday with James or the Uhlirs, you know.

1 We always had Thanksgiving there and just things like that,
2 you know. Just being friends, went to high school together
3 for a year.

4 Q Where did you go to high school?

5 A I went to Boulder High my first year, and then I
6 went to Abraham Lincoln in Denver.

7 Q Did you play sports in high school?

8 A I did. I played basketball and football and club
9 league baseball.

10 Q In Boulder and also in Denver?

11 A Yeah, both places.

12 Q So is it fair to say that friends of Jamie Uhler's
13 were friends of yours and vice versa?

14 A Yeah, a lot of the times we had a lot of mutual
15 friends.

16 Q Were you convicted of a felony in 2004 in Denver
17 County, that felony being possession of a controlled
18 substance by fraud, obtaining a controlled substance by
19 fraud and deceit?

20 A I was.

21 Q Are you awaiting sentencing for a felony in Reno,
22 Nevada for possession, felony possession of marijuana?

23 A I am.

24 Q When is your sentencing on that case?

25 A The 24th of this month actually.

1 Q Were you in a county jail in Reno, Nevada until
2 last week awaiting sentencing on that case?

3 A I was. I was in Reno, Washoe County Jail all the
4 way up until the 9th of this month. And then I have to
5 return there after testifying here.

6 Q How long had you been in jail for prior to coming
7 here to Boulder?

8 A A few weeks, like I think three weeks.

9 Q And were you in that county jail because you
10 didn't appear for sentencing on that felony marijuana case
11 back in April of 2012?

12 A Yes.

13 Q And were you released from the Washoe County Jail
14 so that you can come here and testify at this trial?

15 A Yes.

16 Q Were you escorted back to Boulder by an
17 investigator?

18 A I was.

19 Q And are you supposed to be escorted back to the
20 Washoe County Jail by an investigator?

21 A That's my understanding.

22 Q And your understanding is you're going to go back
23 into the jail on the 17th of this -- in a couple of days
24 from now?

25 A Yeah, that I have to return by the 17th and

1 produce myself.

2 Q Other than getting released from jail to come here
3 and testify and then to go back to jail, did anyone make you
4 any promises about testifying here at this trial?

5 A No. This has actually been going on for well,
6 obviously a lot of years. I don't know what's been said
7 here, but this obviously happened a long time ago. And I --
8 no, I haven't been promised anything. I just have been
9 cooperating basically for 15 years or longer.

10 Q But you never said Mr. Brackley or Mr. Kellner,
11 call the DA there and help me out?

12 A No.

13 Q And to the best of your knowledge no one's done
14 that; right?

15 A I can't say I wasn't hoping that somebody would.
16 But yeah, no, I don't think that anybody's done that.

17 Q But you know by now that's not going to happen?

18 A I've come to that decision, yeah.

19 Q Do you want to be here?

20 A Not particularly. I mean, I have pretty mixed
21 feelings about the whole thing. I just -- yeah, I don't
22 really know how to feel because I was --

23 Q Well, let's just -- maybe we'll just stay with no.

24 A Yeah.

25 Q Let's take you back to 1994 and before that. The

1 early '90s when you were in high school were you a guy who
2 had access to and possessed handguns?

3 A I was.

4 Q For what purpose?

5 A I -- I sold guns, like so I would have a lot of
6 different guns at any given time.

7 Q Were you what would be known as a legal gun
8 dealer?

9 A I was not.

10 Q Tell us about selling guns back there in the '90s.

11 A Basically just being from Illinois I had family
12 members there and just access to different people with
13 different price markets. And it turned out that getting
14 guns in Colorado was really cheap relative to those other
15 states. And so we would try to get as many guns as we could
16 here, then travel back east.

17 Q And what kind of -- what kind of access did you
18 have to people back in Chicago?

19 A Just with the right commodities and knowing a
20 couple of different people was easily -- it was easy to get
21 rid of anything that you had.

22 Q For instance, I guess what I'm asking is how did
23 you get involved in this? What was sort of the first step
24 towards your progression into being someone who sold guns in
25 Chicago?

1 A Just supply and demand and just willing to do what
2 somebody else wasn't willing to do I guess. If people would
3 call me and ask me for this or that and I knew that I could
4 get that, then I would. And so I don't -- I don't know if
5 that's an answer.

6 Q Well, did you have family connections in Chicago?

7 A Yeah. Well, like as it turns out my man who used
8 to date my mother was -- grew up with a guy, his name is
9 Larry Hoover who basically started one of the large gangs in
10 Chicago. And so between a call to him or another uncle that
11 was close to him it wouldn't take me very long to sell
12 anything that I had. So it just --

13 Q Would you transport guns yourself back to Chicago?

14 A Most of the time, yeah.

15 Q How would you do that?

16 A I would take the train. Train would leave here in
17 the afternoon at 8:00 or 8:30 and arrive in Chicago the next
18 day at 4:00 in the afternoon. And I would get picked up
19 there either my uncle Ashley or my uncle Rick or someone,
20 and then go to, you know, whatever neighborhood that we were
21 supposed to go to.

22 Q These are things that you weren't doing legally;
23 correct?

24 A No.

25 Q How -- where would you get the guns from that you

1 would bring to Chicago?

2 A We had just different ways. Like we made it known
3 that we had money and that we would buy any guns that
4 anybody could bring to us. And we would also pay people to
5 go to the pawn shops or other gun dealers to buy guns with
6 their license and then report them stolen later.

7 Q When you say we, who do you mean by we?

8 A When I'm saying we, I just -- I'm -- I more mean
9 myself and a couple other friends of mine that I used to
10 hang out with back then, you know, that did a lot of stuff
11 with me.

12 Q How old were you when you started this business so
13 to speak?

14 A I was definitely making several trips by the time
15 I was 16, and had been doing it for a couple of years at
16 that point. So I'd say maybe 14, 15 years.

17 Q Is it fair to say that among your circle of
18 friends if somebody wanted to get a handgun illegally you'd
19 be someone who they can come to?

20 A Oh, yeah. I mean, I don't think that it was a
21 secret at all that we had a lot of guns and that they were
22 for sale.

23 Q Did anyone else in your circle of friends as part
24 of the Uhlir crowd, did any of them carry guns or sell guns?

25 A No, not that I'm aware of. This is kind of a

1 different clique so to speak, you know. I had friends that
2 I hang -- excuse me, hung around with from, you know, Denver
3 that were more shady.

4 And James and these guys were just a different
5 crowd. Like we played sports and we would have parties, but
6 none of us drank like alcohol, you know, growing up. So
7 it's just a different -- it was a different dynamic.

8 Q So when you hung out with the Uhler crowd it was
9 just a bunch of guys who played sports that hung out
10 together?

11 A Yeah.

12 Q Did you know Michael Clark back in the day --

13 A I did.

14 Q -- in the early '90s?

15 How did you know Michael Clark?

16 A I was thinking about this. I feel like I had went
17 to some summer camps with Mike before. But I definitely met
18 Mike through Jamie at, you know, older age. And I think
19 that they were on FC soccer team of some sort.

20 Q Did you spend time with Michael Clark back in the
21 early '90s?

22 A I did.

23 Q Was that when you were hanging around with Jamie
24 Uhler and his friends?

25 A Yeah.

1 Q Did you socialize with him?

2 A Of course.

3 Q Spend time with him as part of a group?

4 A Yes.

5 Q Sometimes spend times with him just one on one?

6 A Yes.

7 Q Sometimes with girls and sometimes with guys?

8 A Yeah.

9 Q Would you recognize Michael Clark if you saw him
10 today?

11 A I think I would.

12 Q If you can take a look around and let us know if
13 you recognize Michael Clark?

14 A This is Mike Clark right here with the
15 multi-colored tie here and blue suit.

16 MR. BRACKLEY: Your Honor, subject to
17 cross-examination indicating the defendant?

18 THE COURT: Record will so reflect.

19 Q (By Mr. Brackley) Okay. I'm going to ask you to
20 take a look at People's 44 which is already in evidence.
21 And it will be behind you. Is that Michael Clark back when
22 you knew him in the early '90s?

23 A It is.

24 Q Thank you, sir.

25 Let me bring you back to the fall of 1994. And

1 I'll wait for you to get yourself some water there. In the
2 fall of 1994 do you recall the murder of a Mr. Marty Grisham
3 here in Boulder?

4 A I do.

5 Q And do you remember him to be the father of a girl
6 named Kristen who was in -- sort of in the periphery of the
7 Uhler-Clark crowd?

8 A I didn't know until after, but yes.

9 Q Do you recall a time before the murder of
10 Mr. Marty Grisham that the defendant Michael Clark asked you
11 for a gun?

12 A I do.

13 Q Tell us what you remember about that as you sit
14 here today.

15 A Just I -- I was with Mike, and he -- he told me
16 that he was being stalked by someone and that he needed a
17 gun to protect himself and could I get it for him.

18 Q Do you remember when the defendant asked you if
19 you could get him a gun in relation to hearing about the
20 murder of Marty Grisham?

21 A It was before.

22 Q Do you have a specific recollection as to when
23 exactly that was?

24 A Not -- not exactly specific, no. But I would say
25 when -- when was he murdered? Like what -- if that was in

1 the fall, and then this would be like late summer I think,
2 maybe August, September.

3 Q Okay. Now, you spoke to the police on at least
4 three occasions after the murder of Marty Grisham; correct?

5 A I have at least three, yeah, I think.

6 Q Do you remember the first time you spoke to the
7 police actually being October 25th, but in 1995,
8 approximately a year after the murder of Marty Grisham?

9 A I do.

10 Q And do you remember when you spoke to the police
11 in October of 1995 you were in the presence of a woman by
12 the named of Lindasue Smollen?

13 A Yeah. That's an attorney.

14 Q And was Lindasue Smollen an attorney who was
15 representing you in the case back then?

16 A She was.

17 Q And did Lindasue Smollen request a meeting with
18 the detectives from Boulder because you could tell them
19 where Michael Clark got a gun back in 1994?

20 A I'd say that's probably accurate.

21 Q Do you remember anything else about that meeting,
22 whether you had had any cases and whether anyone made you
23 any promises or did any favors for you in exchange for
24 providing information?

25 A I can't say that I do. I'm not saying that I

1 didn't have, but I don't remember that, no.

2 Q As you sit here today you just have no
3 recollection of that?

4 A (Witness shakes head.)

5 Q And you met with some detectives from the Boulder
6 Police Department?

7 A Yeah, um-hmm.

8 Q Do you recall meeting with Detective Hickman and
9 Detective Tom Trujillo? If names don't mean anything to you
10 that's fine.

11 A They don't without -- would it have been that day?
12 I don't remember.

13 Q Do you remember them asking you when it was that
14 you and Michael Clark had got -- well, had gotten a gun or
15 when you got a gun for Michael Clark, and do you remember
16 stating I think it was maybe a month before Halloween and
17 then saying maybe like the end of summer or school starting
18 or a little bit -- August, about a year, meaning a year
19 before when you were talking to them?

20 A Yeah, that -- I mean, that sounds accurate. But I
21 don't necessarily remember saying that, no.

22 Q As you sit here today do you remember it being
23 just sometime before the murder of Marty Grisham?

24 A Basically.

25 Q From the summer through before Halloween?

1 A Yes.

2 Q Now, you said that the defendant told you that he
3 was being stalked?

4 A He did.

5 Q Did he tell you any details about who was stalking
6 him or why or under what circumstances?

7 A No. He said he was being stalked and that he
8 needed protection. And I -- I just remember being -- I
9 don't know what the word would be, a little shocked or
10 surprised I guess.

11 I remember telling him that he doesn't need a gun
12 and that, you know, basically just you're bigger than I am
13 and I'm not afraid of anyone and you could -- we could pay
14 this guy a visit and not have to use guns at all. Like I
15 don't think --

16 Q You say pay this guy a visit. Were you suggesting
17 some alternative than to getting a gun?

18 A I believe that I was. I was just more less saying
19 I guess, you know, the threat of a beating I guess or, you
20 know, should be able to get someone to stop harassing you.
21 I -- I don't know. I didn't think that he needed a gun and
22 I couldn't imagine --

23 MS. RING: Judge, I think we're getting into
24 speculation now.

25 THE COURT: Yeah. I'll sustain that objection.

1 THE WITNESS: That's okay.

2 THE COURT: Let the district attorney ask another
3 question, okay?

4 Q (By Mr. Brackley) My next question is were you
5 surprised that the defendant was asking you for a gun in
6 this stalking scenario?

7 A Yeah, but just because I couldn't -- I -- yes, I
8 was.

9 Q Well, you stated before that you testified that
10 both you and the defendant were big guys. What's the point
11 of that in a stalking scenario?

12 A Well, first of all, like I just didn't think that
13 anyone could intimidate, you know, well, myself. And then
14 so I put Mike in that category, you know. Like I wasn't
15 sure if during a fist fight if I could take Michael. And so
16 in that case who are you worried about, like I'm -- I don't
17 know.

18 Q In other words, you're a big guy, but he's bigger
19 than you?

20 A Yeah.

21 Q So did you offer the defendant to get him a gun?

22 A I did.

23 Q And did you offer him a particular type of gun or
24 what did you -- what was your response to that?

25 A Well, he -- I don't know. I just told him that,

1 you know, let's just go talk to the guy, I guess air quotes
2 around talk. And he said no, that wasn't really an option.
3 I didn't understand. But this guy was scary and that he
4 didn't want anything to do with him and he needed a gun.

5 And at that time for some reason I think that I
6 had a couple of .25 automatics and maybe even a .380 or two.
7 I offered Mike I believe a .25, and he said that he didn't
8 need that, he needed something with more stopping power.
9 And so I said I would have to probably go and like procure
10 that or get that.

11 Q So when defendant told you that he probably needed
12 something with more stopping power, were those his exact
13 words?

14 A Yeah.

15 Q You remember him saying that?

16 A I do.

17 Q What does that mean to you, stopping power in the
18 context of a gun?

19 A I just assumed it meant more caliber, you know.

20 MS. RING: Judge, we're talking about assuming.
21 We're actually speculating again.

22 MR. BRACKLEY: Well --

23 THE COURT: I'll sustain the objection and strike
24 the last answer.

25 Ladies and gentlemen, disregard that last answer

1 from Mr. Moore.

2 Q (By Mr. Brackley) When you had offered the
3 defendant a .25 and he said he needed more stopping power,
4 did you know what kind of gun you would need to go get for
5 him in relation to a .25?

6 A I -- I thought that I would have to get a .40
7 caliber or .45 caliber at least, 9mm. But yeah, that's --
8 that's what I thought.

9 Q So do you know a 9mm through a .45 through a .40
10 to be a more powerful gun than a .25?

11 A Yes.

12 Q So did you go get the defendant a gun?

13 A I did.

14 Q Do you recall what type of gun you went to get for
15 the defendant?

16 A I ended up getting some 9's. That would be 9mm's,
17 just not anything more powerful than that. Some 9mm's I
18 think are -- could be more powerful than others, but I don't
19 know.

20 Q Do you recall the make or model of the gun, the
21 9mm gun that you went and got for the defendant?

22 A I believe it was Bryco-Jennings firearms. Or like
23 if I had to say I would say it was that. That was mostly
24 what we got from there.

25 Q Do you remember in that October 25, 1995 interview

1 with the police being asked do you remember what kind of gun
2 it was and giving the answer it's a Jennings, Bryco
3 firearms?

4 A I don't specifically remember that, no. But
5 sounds accurate.

6 Q So as you sit here today you don't have that
7 independent recollection of it being a Bryco-Jennings?

8 A Oh, no, I feel like I do remember that. But I
9 feel like I don't remember saying it on the 5th or October
10 2005. But like I say, you know, that might be combined with
11 the times that we went to that store, I think that's what
12 they have there along with Larson and some Sundance models.
13 But when I was thinking about it it seemed as if to me that
14 was what it was.

15 Q Do you recall whether you purchased full size
16 models or compact models or one of each?

17 A Actually it was one of each. There was one full
18 size 9mm and one compact 9mm which the same caliber, just
19 like what it sounds like. One is physically larger than the
20 other.

21 Q And do you recall which of the 9mms you kept,
22 either the full size or the compact?

23 A I kept the compact.

24 Q Do you recall where you went to purchase the gun
25 for the defendant?

1 A There's a pawn shop that we used to frequent on
2 Colfax and Dayton. It's called ABC Pawn Shops. We would go
3 in there a lot.

4 MS. RING: Judge, I'm concerned the pronouns are
5 getting confusing. If we could for the record be clear
6 about who we is or if Mr. Moore is just talking about
7 himself. But I think the record is going to be unclear when
8 we just keep using the phrase we about who we're talking
9 about.

10 THE COURT: That's a valid point. Could you ask
11 him to clarify please, Mr. Brackley?

12 Q (By Mr. Brackley) Let me try to clarify. When you
13 would go into a gun shop or a pawn shop -- a pawn shop back
14 in those days, you weren't the one who was buying the guns
15 with your own driver's license and your own information;
16 correct?

17 A No. It would never be like that. We'd always get
18 a surrogate.

19 Q When you say we, you'd always have what you were
20 about to call a surrogate with you. And that would be
21 someone who was over 21 without a felony record?

22 A Correct.

23 Q And let me -- let me kind of follow up on that
24 now. Where would you get these surrogates from?

25 A I used to live on 40th and Albrook. It's in

1 Montbello at the low income housing. And in our complex and
2 virtually anywhere else at this point you could find someone
3 for a minimum amount of money to go and shop for you.

4 Q Would you also use friends that you had who were
5 willing to help you with this?

6 A Certainly.

7 Q Both males and females?

8 A Yes.

9 Q And typically do you know how much you would pay
10 someone to do something like this for you?

11 A Usually it was never very much, you know, \$30, \$50
12 a hundred dollars. People have different prices for what
13 they're willing to do, but not very much. It was never very
14 much.

15 Q Let me show you a couple of exhibits. I've marked
16 them People's 71, 72 and 73.

17 MR. BRACKLEY: May I approach, Judge?

18 THE COURT: Yes.

19 Q (By Mr. Brackley) I'm going to ask you to look at
20 71 and actually take a look at 71 and let me know what
21 you're looking at there?

22 A Okay. Well, this looks to be the Sandstone
23 Apartments if this is Albrook. This says Albrook here. And
24 that would make this Peoria. And I used to live here. You
25 can't see it, but in this building. But yeah, the Albrook

1 Apartments and that area of Montbello.

2 Q Is that picture a fair and accurate depiction of
3 the streets in relation to those apartments?

4 A It is.

5 MR. BRACKLEY: Your Honor, I'd move to admit that
6 as People's 71 in evidence.

7 THE COURT: Any objection or voir dire?

8 MS. RING: Voir dire briefly.

9 THE COURT: Go ahead.

10 VOIR DIRE EXAMINATION

11 BY MS. RING:

12 Q Mr. Moore, I think you were telling us that at
13 some point you used to live in Montbello?

14 A Yes.

15 Q Okay. And that -- is that where your mother
16 lived?

17 A She did.

18 Q Okay. So is it fair then you were going back and
19 forth from Boulder to Montbello between your mom's and
20 people -- your dad in Boulder?

21 A I was.

22 Q So I just have to ask you about the picture, so
23 I'm -- I got to stay very focused. That's all I'm allowed
24 to ask you about right now.

25 So in that photograph what you're telling us is

1 that shows the area where your mother's apartment building
2 was?

3 A Yes.

4 Q And where you would often stay in the time frame
5 we're talking about in the '90s?

6 A Yes.

7 Q And that's the address you would stay with your
8 mother at those apartments?

9 A Yes.

10 MS. RING: Okay. Nothing further. No objection.

11 THE COURT: 71 will be admitted.

12 MR. BRACKLEY: If we could publish that to the
13 jury?

14 DIRECT EXAMINATION (cont'd)

15 BY MR. BRACKLEY:

16 Q And I'm going to approach with a laser pointer.
17 And if you could show us the building that you lived in?

18 A Okay. This building here was -- so this is the
19 grass. This is the grass right here. And then there's some
20 stairs that go up right there. We lived in this apartment
21 right here. And that would have been, you know, my mother
22 and two of my sisters and three of my brothers.

23 Q Mr. Moore -- well, let me turn first to 72, the
24 next photo up there and ask what we're looking at in that
25 photo?

1 A Okay.

2 Q What are we looking at there?

3 A No, this one -- if this is Dayton Street like it
4 says and this would be -- that would make this Colfax here.
5 And the ABC Pawn Shop is this building that has the blue
6 indicator. And there's a row of pawn shops and other
7 jewelry stores and stuff on this block.

8 Q Is that a fair and accurate depiction of the
9 streets of Dayton and Colfax and where the buildings were
10 back in 1994?

11 A It appears the same.

12 MR. BRACKLEY: Your Honor, I'd move to admit that
13 into evidence as People's 72.

14 THE COURT: Objection or voir dire?

15 MS. RING: No.

16 THE COURT: 72 will be admitted.

17 MR. BRACKLEY: And can we publish that for the
18 jury on the big screen?

19 THE COURT: Yes.

20 Q (By Mr. Brackley) So if you could show us Colfax
21 and Dayton and the ABC Pawn Shop?

22 A So this is Colfax Boulevard here. And obviously
23 Dayton is marked. And the first store front here is -- is
24 the pawn shop, this building here.

25 THE COURT: I need you to keep your voice up,

1 Mr. Moore.

2 THE WITNESS: This first building here is the ABC
3 Pawn Shop. And I used to go there all the time with my
4 purchaser to this -- to this one here.

5 Q (By Mr. Brackley) Are there other pawn shops on
6 that strip there that you'd go to as well?

7 A There are. Either this building or this building
8 here. I think this one would be Pasternack Pawn Shop. We
9 used to go into there a lot too. Little more strict, had to
10 be a lot more careful with the straw sale language.

11 Q When you say straw sale, what do you mean by that?

12 A Just because I was not eligible to buy handguns,
13 you know, at age requirements you have to be 21 and I
14 couldn't do that. But if someone else is buying that for
15 you, it's illegal in the instance of -- well, it's just
16 illegal. And that's what it's called is a straw sale when
17 you're doing that.

18 Q Is there a particular reason why ABC was more of a
19 preference than other pawn shops?

20 A Because those guys in there, they didn't really
21 care. They filled out the paperwork all correctly, but it
22 didn't have to not be obvious that you were the one
23 shopping.

24 Q So do you recall the day that you went and
25 purchased the 9mm that you eventually gave to the defendant?

1 A What's the question again?

2 Q Do you remember going to ABC to purchase the 9mm
3 that you eventually gave to the defendant?

4 A I do and I don't. So some things I remember, and
5 some things I don't. So I don't know.

6 Q And you've been asked about -- you've been asked
7 to talk about that day and describe the events of that day
8 prior to coming into court today by other police detectives
9 and throughout the years; correct?

10 A Yeah. Yes, I have.

11 Q Do you recall as you sit here today whether the
12 defendant was physically with you when you went into the ABC
13 Pawn Shop that day?

14 A I do not.

15 Q Do you remember in 2004 speaking with two
16 detectives, one of them being Detective Heidel and the other
17 one being a detective named David Spraggs, do you remember
18 speaking to those guys?

19 A I do.

20 Q And do you remember -- do you remember telling
21 them that you don't remember whether you were in the store
22 by yourself or with Mike Clark, whether he came with you or
23 not?

24 A That sounds accurate.

25 Q Do you remember whether you -- do you remember

1 before going to ABC trying to recruit a surrogate or a straw
2 to go with you for this particular transaction?

3 A I do. I was thinking about it. And we had been
4 at a -- I had a neighbor that was older than I, and her name
5 was Bridgette. And she lived catty corner upstairs from
6 where we lived. And I remember going over there and, you
7 know, asking her if she was interested in going to buy us
8 some guns, and she was not.

9 Q By the way, can you tell us where Montbello is
10 kind of generally in relation to Denver and Boulder?

11 A Montbello is east on I-70. And I mean east on
12 I-70 and the parts that are north of I-70 and I believe east
13 of Peoria would be Montbello. It's actually Denver, but
14 Aurora would be in between Denver, that you would think of
15 as Denver and --

16 Q So eastern side of Denver?

17 A Yeah. That's kind of misleading though.

18 Q Would it be north or central to the east?

19 A If Denver is here and on a map-wise facing myself,
20 you know, you would be all the way outside of Denver if you
21 just went east or north and that distance. But it's a
22 little confusing as to why it's still Denver. I don't know.

23 Q So Bridgette having turned you down to be the
24 straw, what did you do in this particular purchase?

25 A Decided just to go to back to the Sandstones,

1 which would be, you know, where we described before, and to
2 see if we could just find someone that was around.

3 Q And do you recall where you found someone
4 specifically if we put that map back up there behind you?

5 A I think so.

6 Q Okay. And there's a pointer there if you want to
7 use that.

8 A Again, this is where I would have stayed at.

9 THE COURT: Mr. Moore, I need you to keep your
10 voice up please. Okay.

11 THE WITNESS: This is where I would have been
12 staying in this here. The gentleman that bought the guns
13 that day either lived on this side of this building here, or
14 I want to say -- I'm trying to think of where it was in
15 relationship to the pool. But definitely in one of these
16 buildings here. I want to say not this one, so either this
17 side or the front side of that one. And I'm 90 percent sure
18 that I had -- that I had done this with him before, but
19 didn't know his phone number or anything to this day.

20 Q (By Mr. Brackley) You took him in your car or did
21 you walk with him? Where did you go once you got --

22 A Actually got him to go -- probably just drove.
23 Again, this would be I believe 40th. So this -- Albrook is
24 equivalent to 40th Street. And then going south, Colfax is
25 equivalent to 15th. And then I don't know what, 100 or a

1 thousand East Peoria is, but Dayton would be in between
2 Peoria and say Havana I think.

3 Q When you got to ABC Pawn did it matter to you what
4 make, model, brand of gun you were looking for?

5 A No, just caliber.

6 Q And why didn't it matter?

7 A When price is an issue people just basically want
8 the cheapest thing that works. And that's basically --
9 usually it's just about cost.

10 Q So did you go and purchase two handguns as part of
11 this particular transaction?

12 A I did.

13 Q And would those be the compact Bryco-Jennings and
14 also the full size Bryco-Jennings?

15 A Yes, sir, them.

16 Q Were those guns new in the box?

17 A Yes.

18 Q And did you give a gun to the defendant at some
19 point after purchasing this?

20 A I did.

21 Q Did you ever hear anything more from him about
22 this stalker situation?

23 A No.

24 Q Did he ever say anything about it?

25 A No.

1 Q Did you ever ask him about it?

2 A No.

3 Q Do you recall whether there was ammunition
4 purchased at that particular time?

5 A Definitely bought either one, maybe even two boxes
6 of full metal jacket cheap ammunition.

7 Q And would that be because it's just the cheapest
8 ammunition?

9 A I believe.

10 Q Do you remember talking to the police back in 1995
11 about the date November 1, 1994 in which you were with James
12 Uhler and two girls, one named Vanessa the other one Summer,
13 and Mike Clark and some folks were heading to a soccer game
14 and others not?

15 A I do.

16 Q And do you remember being dropped off at the bus
17 station with Summer and Vanessa by the defendant and Jamie
18 Uhler?

19 A I do.

20 Q Do you remember that they were heading to a soccer
21 game?

22 A That was my recollection, yeah.

23 Q Do you remember on November 1st of 1994 telling
24 the police that on that date where you were dropped off at
25 the bus station and they went to a soccer game you seen a

1 gun in the defendant's car?

2 A Now, that I don't remember if I remember before or
3 after. That's a little ambiguous. I don't -- like when
4 I -- when I think about it, like I feel like there was a
5 situation where the gun was shown, and Vanessa just went off
6 the deep end. She's just not into that. She just really
7 gets really freaky weird and just can't handle guns around.
8 And then I also -- I also think back to these times and
9 don't remember taking the bus, you know.

10 Q Do you remember being asked this question and
11 giving this answer; Okay. When -- now this happened
12 Tuesday, November 1st. When did this happen that you all
13 were in the car and saw the gun and -- and then you
14 interrupted the question and saying Tuesday, November 1st.

15 A I don't.

16 Q As you sit here today you don't have a
17 recollection of being asked that question and giving that
18 answer?

19 A Oh, well, I do -- I do remember being asked
20 about -- being asked that question and giving that answer,
21 but not actually remembering.

22 Q You just don't remember that day being asked --

23 A Right.

24 Q -- that answer?

25 A Yeah.

1 Q And do you remember in that same conversation you
2 were talking about Summer and Vanessa and being dropped off
3 at the bus station?

4 A Yes.

5 Q Did you ever hear about Michael Clark being
6 arrested for forging -- stealing, forging and cashing some
7 checks?

8 A I do.

9 Q How did you hear about that?

10 A Somebody notified me that he was in the newspaper
11 for it or something, probably James or I don't know.

12 Q Do you remember prior to the murder of Marty
13 Grisham talking the defendant about those checks?

14 A Just not even like a real conversation about it.
15 I just remember like kind of in passing, you know, Mike
16 saying something about it and just saying, you know, I
17 forged this guy's checks and, you know, he knows and I don't
18 know what to do and thinking like well, I don't know, that's
19 too bad for you basically.

20 Q Do you remember being asked when you had that
21 conversation with the defendant? Well, let me ask you
22 first, do you remember when you had that conversation with
23 the defendant as you sit here today?

24 A I don't remember exactly when it would have been.

25 Q Do you remember October 25, 1995 in your

1 conversation with the two detectives from Boulder in the
2 presence of Ms. Smollen stating he just told me that
3 something about some guy's checks, you know, and it was like
4 you -- inaudible -- checks and he knows and stuff and he's
5 probably going to call the police on me. And I was like
6 that's too bad, you know. I didn't know what to tell him.

7 And then you were asked Do you remember when that
8 was? And your answer was That probably was sometime after
9 the thing with the gun.

10 Do you remember as you sit here today being asked
11 those questions and giving those answers to the detectives
12 from Boulder?

13 A I can't say that I definitively do, no.

14 Q Do you remember hearing about the murder of Marty
15 Grisham and talking to the defendant about it?

16 A I do.

17 Q Did you approach the defendant after hearing about
18 the murder of Marty Grisham?

19 A I did.

20 Q Why and tell us about that conversation.

21 A Well, number one, I was -- I was concerned because
22 I'm the one that gave him this gun. And he may have or may
23 not have killed someone or he's being accused of it or the
24 suspicion was in his direction. And I obviously didn't want
25 to have anything to do with somebody like that.

1 Q So did you ask him? What did you say to him?

2 A Well, I went to him and I said -- should I say
3 what I said or --

4 Q Yes.

5 THE COURT: You can say what you said.

6 THE WITNESS: I said what the fuck are you doing,
7 like why would you -- basically why would you get me
8 involved in this, what are you doing, what's going on, like
9 what is going on. And Mike says he doesn't know, but that
10 this guy is dead and he didn't do it.

11 I asked him where the gun was, and he said that he
12 got rid of it. He said I got rid of it. And I said why.
13 And he said I just did. I didn't want to carry around this
14 gun. I got rid of it before this guy even died and that he
15 didn't do it.

16 And then I told him to give me the gun so I could
17 get rid of it. And he said I've already gotten rid of it.
18 Nobody will ever find it. And it's like yeah, I wasn't real
19 sure of anything at that point.

20 Q (By Mr. Brackley) Did the defendant attempt to
21 convince you that he got rid of the gun?

22 A Oh, yeah, a lot of times. Like he just -- I mean,
23 well, where -- where did you get rid of it, you know, did
24 you -- did you bury it, did you sink it, how did you get rid
25 of it, where is it, where -- he just said it's gone, nobody

1 will ever find it.

2 And I -- I remember, you know, asking him, you
3 know, what did you do put it in a river, in a lake or where
4 did you put it. And I don't remember him saying anything
5 back, that it was gone and it would never be recovered.

6 Q Did you ever have any disputes or conflicts with
7 the defendant at all back in the day around 1994 before that
8 or after that?

9 A No, not that I could -- I don't even remember --
10 like, you know, we were all young and athletic and, you
11 know, so tempers flare a lot. But I don't remember ever
12 actually having any -- enmity or anything close to that
13 towards Mike for any given time.

14 Q Know of any reason why the defendant would be
15 afraid of you or scared of you?

16 A No. I mean, I haven't seen Mike in 20 years
17 almost. But when we were kids, you know, like Mike was a
18 big guy and like most of us weren't.

19 MR. BRACKLEY: Thank you, sir. I have no further
20 questions for Mr. Moore at this time.

21 THE COURT: All right. Cross-examination,
22 Ms. Ring.

23 MS. RING: Thank you.

24 CROSS-EXAMINATION

25 BY MS. RING:

1 Q The district attorney talked to you about the
2 circumstances of you being here and able to testify today;
3 right?

4 A Yeah, um-hmm.

5 Q And talked about the fact that you have this
6 felony drug charge that there's a sentencing pending in
7 Reno; right?

8 A There is.

9 Q Okay. So you had previously pled guilty to a
10 felony drug charge in that case; right?

11 A I have.

12 Q Okay. And you were supposed to be sentenced back
13 in April of this year?

14 A Yes.

15 Q And you didn't appear for that court date?

16 A Yes.

17 Q And so there was a warrant out?

18 A Yes.

19 Q Okay. And you knew the warrant was out?

20 A I did.

21 Q And you recently got arrested in Colorado?

22 A Yes.

23 Q And you were taken back to Reno to deal with that
24 warrant?

25 A Yes.

1 Q Okay. And typically, you know, when you fail to
2 appear for a sentencing what happens is the judge then sets
3 a higher bond; right?

4 A I don't know.

5 Q Okay. But when you were back in custody in Reno
6 before you were able to testify today there was a bond set
7 in your case; right?

8 A There was.

9 Q And you just didn't -- weren't able to come up
10 with the money to post that bond?

11 A Yes.

12 Q So --

13 A Or no, whichever one means I couldn't pay it.

14 Q You weren't able to get out of jail?

15 A Yeah, right.

16 Q And you were actually supposed to be -- you're
17 scheduled for sentencing on October 5th, which would have
18 been last week?

19 A Not --

20 Q 9th?

21 A I don't know that.

22 Q You didn't know that?

23 A No.

24 Q Okay. But now you know you've got a sentencing
25 hearing that was pushed out to the end of this month?

1 A You know, actually this is like a little bit
2 misleading because what actually happened was I had a lawyer
3 who had negotiated this case. And what she told me was
4 actually not what was going on.

5 So before my April 20th appointment, sentencing
6 there was a deal in place that I was supposed to get either
7 a deferred sentence or probation. And that -- that was what
8 I was supposed to go to court. So when it was the -- I
9 think the 13th or the 14th of April this lawyer tells me
10 that I need to get some letters from people as references
11 and that we need to be prepared to go into court and maybe
12 get prison for 18 months.

13 Q So that was the confusion from back in April?

14 A Right. So then --

15 Q So you never got sentenced; right?

16 A So I went --

17 THE COURT: Hold on, Mr. Moore. I just need you
18 to answer the questions that the attorney is asking you,
19 okay?

20 THE WITNESS: All right.

21 Q (By Ms. Ring) So that's part of the reason you
22 never got sentenced back in April; right?

23 A I think that's the whole reason.

24 Q Okay. And so right now when you go back in front
25 of that judge in Reno you don't know what's going to happen?

1 A I have no idea.

2 Q But you know from what this lawyer told you back
3 in April which you said was a surprise, but back then you
4 could possibly get prison time for that felony charge?

5 A Yes.

6 Q Okay. And when you took the deal you thought you
7 weren't going to get prison time?

8 A In fact, that was a guarantee to me. So I don't
9 know if that was still going to happen or not.

10 Q Okay. So you're in custody in Reno, Nevada, you
11 get arrested toward the end of September of this year;
12 right?

13 A Right.

14 Q And then you actually get released on what's
15 called a personal recognizance bond; right?

16 A Right now you mean?

17 Q Yes.

18 A To come here, yes.

19 Q Okay. And -- and the only reason you got the
20 personal recognizance bond was so you could come here to
21 testify?

22 A Yes.

23 Q And part of the deal is you've got to go back, and
24 you're supposed to be back there on October 17th to turn
25 yourself in?

1 A Yes.

2 Q And you know that a judge in Reno, Nevada had to
3 authorize the personal recognizance bond for you to get out?

4 A Yes. Yes.

5 Q So since you were brought back to Colorado you've
6 been allowed to you said you live at home with your
7 girlfriend?

8 A Yes.

9 Q In Boulder?

10 A Yes.

11 Q Okay. And you've met with the DA since you got
12 back to Boulder?

13 A Yesterday actually.

14 Q Yesterday on Sunday?

15 A (Witness nods head.)

16 Q Yes?

17 A Yes. Sorry.

18 Q The court reporter is taking everything down.

19 And you met with him to go over what the subject
20 areas that he was going to ask you questions about today?

21 A And -- yeah.

22 Q Okay. And that meeting with the District
23 Attorney's Office or anytime prior to meeting with the
24 district attorney did the district attorney give you copies
25 of the transcripts from your prior interviews?

1 A Yeah, um-hmm.

2 Q So you were able to review what you said in those
3 prior interviews?

4 A Yes.

5 Q Okay. And because you've been interviewed
6 multiple times about what happened in this case?

7 A Since, yeah, 1995.

8 Q Okay. So the first time you talked about was in
9 October of 1995; right?

10 A Yes. As far as I remember, yes.

11 Q So as far as you remember it's about a year after
12 Marty Grisham's murder that you actually meet and do an
13 interview with the police about what you know about the gun?

14 A That's -- all of the dates about when I talked to
15 whom are told to me.

16 Q Okay.

17 A Like I don't remember specifically like.

18 Q Okay. But you would have seen that transcript
19 from the October 1995 interview?

20 A I'm assuming so. I didn't -- nothing that I had
21 had any dates on it.

22 MS. RING: Okay. May I approach, Judge?

23 THE COURT: Yes.

24 MS. RING: Thank you.

25 Q (By Ms. Ring) Okay. So we're looking at a

1 transcript; right?

2 A Okay.

3 Q And it has next to B your name, Dion Moore?

4 A Yes.

5 Q And it has a date of October 25, 1995?

6 A Okay.

7 Q Right. That's what that says; right?

8 A Right.

9 Q And it shows A is Detective Hickman; right?

10 A Yes.

11 Q C is Detective Tom Trujillo?

12 A Yes.

13 Q And D is Lindasue Smollen, who was your attorney
14 at the time?

15 A Okay. Yes.

16 Q Okay.

17 A That's what that says.

18 Q That's what that all says?

19 A (Witness nods head.)

20 Q Okay. Then you -- you've never seen this
21 transcript before?

22 A Just -- just this. That's all right there.

23 THE COURT: Mr. Moore, I know that the attorney is
24 standing right next to you, so logically doesn't make sense
25 to yell or keep your voice up. But I need you to speak up

1 because I need all of the attorneys to be able to hear you
2 as well as all the jurors, okay.

3 Q (By Ms. Ring) For the record I think what
4 Mr. Moore is telling me is that this top part of this
5 transcript where it states the day of the transcript and who
6 all the individuals were and the assigned letters that you
7 have not seen that previously?

8 A This -- this page right here, I don't think I've
9 seen this.

10 Q Okay.

11 A This is one page. I don't know what's on the next
12 page or I don't know if I seen this on a different page.

13 Q Okay.

14 A Or just that.

15 Q But you do think you were given a copy of --
16 couple copies of transcripts to review?

17 A Yes, definitely.

18 Q Okay. And then earlier the district attorney was
19 asking you if you remembered another interview in 2004. And
20 so I'm showing you another page of a transcript; right?

21 A Yes.

22 Q And you haven't seen this before, this page, this
23 part you can't remember?

24 A No.

25 Q Okay. And but you'd agree with me what it says is

1 September 30, 2004?

2 A Yes.

3 Q It says Boulder Police Department at the top?

4 A It does.

5 Q And it says who was present. Under A it says
6 Detective David Spraggs?

7 A Yes.

8 Q Under B it says Neil Dion Moore?

9 A Yes.

10 Q And under C it says Detective Chuck Heidel?

11 A Yes.

12 Q I'm going to show you one more, okay. And we're
13 looking at another transcript, and it says also says Boulder
14 Police Department at the top; right?

15 A Yes.

16 Q It says the date of the interview was March 9th of
17 2010?

18 A Yes.

19 Q And A is again Detective Chuck Heidel?

20 A Yes.

21 Q B is Dion Moore?

22 A Yes.

23 Q And C is Ryan Brackley?

24 A Yes.

25 Q And you haven't seen these cover pages, but you've

1 seen transcripts of interviews that you've done in this
2 case?

3 A Yes.

4 Q Okay. Now, while I'm up here, we talked about the
5 first interview you did was in October of 1995; right?

6 A That's what I thought.

7 Q Okay.

8 A Is that what we're saying so far today?

9 Q And then at that point in time you had some cases
10 pending in Boulder County?

11 A I -- I don't remember that.

12 Q Okay.

13 A But if that's -- it's more likely than not.

14 Q Okay. And you recall that Lindasue Smollen has
15 been your attorney in the past?

16 A Yeah.

17 Q And she represented you in criminal cases?

18 A Yes.

19 Q Okay. And so it's not surprising to you that in
20 1995 if Lindasue Smollen was part of an interview it was
21 because she was representing you at the time?

22 A Yeah, I'm saying that's -- yeah. I don't -- I
23 don't know, but I'd say yes.

24 Q So is it fair that you don't remember, but back in
25 October of 1995 that prior to doing that interview at the

1 Boulder police that there had been a deal negotiated that if
2 you talked to the Boulder police you would get your cases
3 dismissed?

4 A I don't remember that. I'm not saying that it's
5 not true.

6 Q So I'm going to ask you to review this memo that
7 I'm showing you. And I'm on page 2761 of discovery. And I
8 want you to review it and read it to yourself. Then I'm
9 going to ask you some questions about it.

10 A Just this page here?

11 Q Just this page.

12 A Okay.

13 Q So hold on, I'm going to ask you questions, okay.
14 So when you read that memo --

15 A Yes.

16 Q -- you'd agree with me that it says that if you
17 provide certain information about Michael Clark and this
18 gun, cases that you have pending in 1995 will be dropped?

19 A Yes.

20 Q Okay. When you read that does that refresh your
21 memory about what was going on in 1995?

22 A Again, like I was in a lot of different troubles
23 like then. And so but, yeah, I definitely -- if -- you
24 know, it says right there. I don't see -- yeah, I mean.

25 Q Okay. But the things that you do remember were

1 that around that time frame you had some trouble with the
2 law?

3 A No, that's what I'm saying.

4 Q You don't remember that?

5 A Right. So I'm saying I don't remember whether or
6 not those two -- up until it says that, then it says current
7 charges will be dropped. And so I guess if you could tell
8 me what that was, then I would remember when I was in
9 trouble, you know, with that. And then I could say what
10 happened with the case.

11 Q About which cases were pending?

12 A Right.

13 Q Okay. So I understand that what you're telling me
14 is if I told you more about the nature of the cases that
15 were pending that might refresh your memory?

16 MR. BRACKLEY: Judge, can we approach? I'm going
17 to ask to approach.

18 (The following proceedings occurred at the bench
19 out of the hearing of the jury.)

20 MR. BRACKLEY: Judge, I think he accepted the memo
21 and he accepted the terms in the memo. I have no problem
22 with putting the memo into evidence. But to back door that
23 into a way to ask --

24 MS. RING: That wasn't where I was going at all.

25 THE COURT: At least that's not where I thought --

1 MS. RING: What I was about to say is I don't know
2 how to do this because it's so confusing because he actually
3 goes to trial on some of the cases and gets acquitted.

4 The other thing, I'll show you the sheet where the
5 deferred gets dismissed. But I just -- but I don't think
6 going into all the other cases is actually relevant because
7 it's not that clean.

8 THE COURT: Right.

9 MS. RING: So I think that's a fair way to do it.
10 We admit the memo if I show you the one thing.

11 THE COURT: Okay. Do you want to look at that?

12 MR. BRACKLEY: Yeah.

13 THE COURT: How much longer for cross?

14 MS. RING: Why don't we break right now.

15 MR. BRACKLEY: That makes sense.

16 (The following proceedings occurred in open
17 court.)

18 THE COURT: Ladies and gentlemen of the jury,
19 we're going to take the mid-afternoon recess. Remember the
20 admonition that I've given you previously. It applies at
21 this recess as well. We'll be in recess until 3:15, and so
22 we should be ready to continue with Mr. Moore's
23 cross-examination at 3:15.

24 (The jury left the courtroom.)

25 THE COURT: Record should reflect that the jury

1 has left the courtroom.

2 Mr. Moore, go ahead and step down. I need you
3 back in the witness chair at 3:15 sharp.

4 THE WITNESS: Sure thing.

5 THE COURT: Counsel, do you want to just talk
6 about that issue between yourselves and I'll come out a
7 couple minutes early, or do you want to talk about it now on
8 the record?

9 MS. RING: I think we just come back a couple
10 minutes early to make sure I've thought it through.

11 MR. BRACKLEY: I think I want to think it through,
12 but I think --

13 THE COURT: All right. So I'll come out a couple
14 minutes before 3:15.

15 MS. RING: Thank you.

16 THE COURT: By the way, the Sheriff's Department
17 tells us that Mr. Stackhouse will be here tomorrow morning
18 and available for testimony.

19 MR. BRACKLEY: Thank you, Judge.

20 (A recess was taken.)

21 THE COURT: We're back on the record in 02C -- I'm
22 sorry, 12CR222. Mr. Clark is present, all counsel are
23 present.

24 The issue came up about impeaching Mr. Moore with
25 his pending cases at the time he made his statement in 1995.

1 Counsel was discussing a resolution. Have you figured out
2 how you want to do that?

3 MR. BRACKLEY: Yes, Your Honor. I think the
4 easiest -- poor choice of words -- the most efficient way to
5 do it is to admit the memo that was signed by Detective
6 Hickman that Ms. Ring was questioning Mr. Moore about.

7 THE COURT: Okay. Ms. Ring, how do you want to do
8 this?

9 MS. RING: Judge, that makes sense to me.

10 Just to make a little bit better record, this --
11 the memo that I was going over with Mr. Moore I believe is
12 an accurate memo. And if we had Detective Hickman here she
13 would verify it as well.

14 What gets confusing is I think it then ends up
15 that Mr. Moore goes to trial on one of the cases that was
16 pending. And so it's not as clear about what happens after
17 the memo, which is why I'm not objecting.

18 I wasn't trying to go into those specific cases,
19 even though Mr. Moore was asking me about the details of the
20 specific cases.

21 So I think that's an appropriate way to resolve
22 it, to just have the memo go into evidence. And I guess I
23 would suggest when Mr. Moore gets back on the stand I'm
24 going to tell him that I've marked that memo as Defense
25 Exhibit A, it's the memo we were just looking at, and then

1 move to admit it. And Mr. Brackley is telling me that he's
2 not going to make the foundational or other objections that
3 may be --

4 THE COURT: All right. That seems like a
5 reasonable resolution because it really is his mindset at
6 the time that he's making the statement. And that memo at
7 least as I understand it, I don't think I've seen it, but at
8 least as I understand it that accurately sets out the
9 agreement that he had in exchange for the information that
10 he provided in 1995.

11 So I'll go ahead and do that once Mr. Moore
12 returns to the stand. He's not waiting out in the hallway,
13 is he?

14 MR. BRACKLEY: I didn't see him. Let me --
15 (Pause.)

16 THE COURT: Mr. Moore, why don't you come on back
17 up here and take the witness stand.

18 All right. Would you bring the jury in?

19 MS. RING: Judge, I guess before the jury comes in
20 I want to ask you to instruct Mr. Moore that we're not --

21 THE COURT: Hold on, Krista. Can you hold the
22 door for a second?

23 Go ahead.

24 MS. RING: Since I need to go back to that memo --
25 and I know Mr. Moore was asking to talk more about the

1 details of the case that's pending. I think it would be
2 appropriate if Your Honor would instruct Mr. Moore that
3 that's -- that's not relevant. So I'm not going to be able
4 to go into that -- those -- we're going to start with the
5 memo and move forward.

6 THE COURT: That's true. You understand that?

7 THE WITNESS: Yeah.

8 THE COURT: You were talking about the cases that
9 you had pending at the time that you made the statement to
10 the police in 1995. You had asked some clarifying questions
11 about what cases you had.

12 There's a document that apparently was signed by
13 detectives and I think your counsel, and it's a memorandum
14 that essentially outlines the agreement that you had for
15 making that statement in 1995. That document is going to
16 come into evidence. That's what the jury is going to be
17 able to see.

18 But the other questions and the clarifications
19 that you asked for I've determined are not relevant. And so
20 Ms. Ring isn't going to be able to bring them up, you're not
21 going to be able to ask about them, and the district
22 attorney is not going to be able to bring them up. Do you
23 understand?

24 THE WITNESS: I do.

25 THE COURT: Okay. You understand?

1 THE WITNESS: I do.

2 (The jury returned to the courtroom.)

3 THE COURT: Please be seated.

4 All the members of the jury are back.

5 Ms. Ring, you may continue with your
6 cross-examination.

7 MS. RING: Thank you.

8 If I may approach again, Judge?

9 THE COURT: Yes.

10 Q (By Ms. Ring) So Mr. Moore, I had been showing you
11 this memo that was dated October 10th of 1995. I've now
12 marked it Defense Exhibit A. That's the same memo we were
13 looking at before we took the break?

14 A Yes.

15 Q And you know, in the first paragraph the memo
16 talks about that there was a meeting in late August;
17 correct?

18 A Yes.

19 Q And that present was Lindasue Smollen and you?

20 A Yes.

21 Q And that Detective Sgt. Joe Pelle was there;
22 right?

23 A Yes.

24 Q Deputy District Attorney Peter Hofstrom was there?

25 A Yeah.

1 Q And Assistant District Attorney Pete Maguire was
2 there?

3 A Yeah.

4 Q And basically it talks about if you give specific
5 information regarding Michael Clark that there's been an
6 agreement that the pending charges against you would be
7 dropped?

8 A Okay.

9 Q Is that what that says?

10 A It does.

11 Q Okay. Thank you.

12 MS. RING: I'd move to admit Defense Exhibit A
13 please.

14 THE COURT: Any objection?

15 MR. BRACKLEY: No, Your Honor. No objection.

16 THE COURT: A will be admitted.

17 Q (By Ms. Ring) So Mr. Moore, much of what
18 Mr. Brackley was asking you about earlier was about
19 information that you actually provided in an interview that
20 you gave in October of 1995, okay?

21 A Okay.

22 Q And one of the things he asked you specifically
23 about was how many guns were obtained when you went to this
24 pawn shop and got the guns; right?

25 A Yes.

1 Q And you told us that based on Mr. Brackley's
2 questions that you recalled getting two 9mm's; right?

3 A Yes.

4 Q One being a full size 9mm; right?

5 A Yes.

6 Q The other being a compact?

7 A Yes.

8 Q And you also recall back in 1995 saying that you
9 actually thought that you got a third gun that day and it
10 was a .380 Lorcin?

11 A I do.

12 Q You remember saying that?

13 A I do remember saying that.

14 Q So back in 1995 when you were being interviewed
15 you actually thought that there were a total of three guns
16 purchased that day from ABC Pawn Shop?

17 A I thought that there could have been. I -- I've
18 made probably hundreds -- bought hundreds and hundreds of
19 guns from these stores. And you know, only a couple of them
20 stick out at all. And obviously this is one. And even at
21 that point I would think that maybe --

22 Q Let me ask you another question. What you just
23 told me is that in this time frame -- and I think you told
24 us you started doing this when you were about 14 or 15 --
25 you're actually buying hundreds and hundreds of guns?

1 A Yeah.

2 Q Okay. And lots of the purchases of these guns are
3 coming from these pawn shops on Colfax?

4 A Yes.

5 Q ABC Pawn Shop was one of the pawn shops you used
6 most frequently; right?

7 A Yeah, we used it often.

8 Q And then Pasternack, I think you pointed that out
9 being a couple store fronts down?

10 A Yes.

11 Q Then there were lots of other ways that you bought
12 guns during that time period?

13 A Yes.

14 Q So you were buying so many guns that it's really
15 difficult to remember any of the details from any specific
16 gun purchase?

17 A Well, no. It's difficult to remember all of the
18 details of anything.

19 Q Okay. Is it fair at some point you also tell the
20 police that at some point during when you're doing all the
21 gun runs that you're also using some drugs during that time
22 frame?

23 A Using drugs is it?

24 Q Yeah.

25 A Marijuana. I've never really --

1 Q Okay. So in 1995 when you're talking to the
2 police about buying these guns, one of them being for
3 Michael Clark from the pawn shop in 1995, you thought there
4 might have been a third gun purchased which was a .380?

5 A Yes.

6 Q You very clearly remember that you bought
7 ammunition that day?

8 A Yes. I would more commonly buy ammunition every
9 trip.

10 Q Okay. So even -- not even remembering the details
11 of that, typically when you would get someone to do a straw
12 purchase you'd get them to buy ammunition as well?

13 A Yes.

14 Q Okay. That was kind of your habit when you were
15 doing these straw purchases?

16 A Indeed.

17 Q And it would have made more sense is it fair that
18 if you were specifically purchasing two 9mm firearms that
19 you'd also purchase 9mm ammunition?

20 A Yeah, that makes the most sense.

21 Q So Mr. Brackley also asked you about any
22 recollection about who made that straw purchase that day.
23 And you told us first about going to this other neighbor
24 Bridgette?

25 A Yes.

1 Q And that she wasn't interested, so you found
2 another guy in the neighborhood?

3 A Different neighborhood, but yes.

4 Q Okay. But in the general Montbello area?

5 A One would be Aurora, and one would be Montbello.

6 Q Okay. Bridgette because she was a neighbor in
7 Montbello?

8 A Bridgette would have been a neighbor in Aurora.

9 Q Okay.

10 A Now, we -- I guess I should clarify, originally
11 when my mother moved here we lived in the Sandstones which
12 would have been on Albroom and 40th and Peoria, Albroom and
13 Peoria. At this time we were already moved to Elkhart,
14 which is behind west -- southwest corner basically of 6th
15 and Chambers.

16 Q Okay. So make sure we're clear on this. The
17 Sandstones Apartments which is the one on the Albroom
18 address?

19 A Yes.

20 Q That's Montbello?

21 A Correct.

22 Q We saw that on the map?

23 A We did.

24 Q Okay. And you just told us that at some point
25 your mom moves to a different neighborhood, different

1 apartments at 6th and Chambers?

2 A Yes.

3 Q That's in Aurora?

4 A It is.

5 Q Even though as you described earlier kind of the
6 city limits out there are kind of confusing?

7 A Yes, definitely closer than the other Denver --
8 than to the actual Denver, yeah. So like this would be
9 closer to Montbello than Montbello was to Denver even though
10 Montbello is in Denver.

11 Q This being the Aurora address?

12 A Yes.

13 Q Would be closer to the Montbello neighborhood that
14 when people think of downtown Denver?

15 A Yes.

16 Q Okay. And I think you also just told us that at
17 this time -- and I'm clarifying that you mean at this time
18 being in the fall of 1994 -- your mother is living in
19 Aurora?

20 A Yes.

21 Q At the 6th and Chambers, those apartments?

22 A Right.

23 Q Which is why when you're living in Aurora
24 Bridgette is your neighbor in those apartments in Aurora?

25 A Yes.

1 Q Okay. Bridgette says no thank you?

2 A No thank you.

3 Q So then you go to Montbello to your old
4 neighborhood by the Sandstone Apartments?

5 A Yes.

6 Q That's where you find this guy?

7 A Yes.

8 Q Okay. And you told the district attorney that
9 you're 90 percent sure that this was not the only gun
10 purchase you did with this guy?

11 A That's correct.

12 Q Okay. You don't know his name?

13 A I don't.

14 Q Didn't know his name then?

15 A Probably not.

16 Q That you would describe him as either Hispanic or
17 maybe kind of white to Italian looking is how you would
18 describe how this guy looked?

19 A Yes.

20 Q Is that -- it was your understanding he was
21 probably in his mid 30s to 40, that's how old he was back
22 then?

23 A Yeah.

24 Q But that he looked younger than that back then?

25 A Right.

1 Q Okay. You recalled that at the time he had a
2 black mustache?

3 A I -- I don't remember that now if that's what I
4 said then.

5 Q You said it then.

6 And it was a guy that you -- you didn't have a
7 relationship with, but you knew him from around the
8 neighborhood?

9 A I'd say that's accurate, or at least knew him
10 enough -- it's a neighborhood is just different than, you
11 know, what we're thinking about being from Boulder. It's
12 just, you know people and you don't know them in other
13 neighborhoods.

14 Q So you didn't know his name?

15 A I can't say that I didn't, but I don't know it
16 now.

17 Q Okay. But he was somebody who you'd seen around
18 that Montbello neighborhood?

19 A As far as I can remember I -- you know, I had done
20 a buy with this guy before.

21 Q Before the time when you're with Michael Clark?

22 A (Witness nods head.)

23 Q Okay. And if you said in 1995 that he bought
24 other guns for you, probably total of eight guns total in a
25 three to four-month period, does that sound about right?

1 A From that guy?

2 Q Yeah.

3 A Yeah. I mean, like I said, right now I couldn't
4 tell you that that's what happened. But I would definitely
5 say that if that's what I said then, then that's what
6 happened.

7 MS. RING: May I approach?

8 THE COURT: Yes.

9 MS. RING: I'm going to be on page 2186.

10 Q (By Ms. Ring) So we're talking about this
11 transcript I showed you earlier from October 25, 1995, okay.
12 And they're talking about this guy that you bought the gun
13 from. Can you remember first name on this guy, make it
14 easier to try to figure out how this happened. And you said
15 I mean, he could have told me John or Jack; right? And then
16 you're asked so you just saw him that one time and never
17 again, is that what you -- and you say no, two or three
18 times; right?

19 A (Witness nods head.)

20 Q And you say I actually -- I mean, like do the same
21 thing. And they say bought other guns for you? And you say
22 um-hmm, meaning yes; right?

23 A (Witness nods head.)

24 THE COURT: Mr. Moore, I need you to answer out
25 loud to the questions, okay.

1 THE WITNESS: Okay. I didn't hear a question yet.

2 Q (By Ms. Ring) So far what we've gone through
3 that's what's being shown in the transcript about what you
4 were asked and how you responded?

5 A Yes.

6 Q And so you respond that you actually -- it wasn't
7 that you just saw this guy one time, you saw him two or
8 three times; right?

9 A Yes.

10 Q And you're asked okay, how many guns would you say
11 he bought that you got from him, and you say eight probably;
12 right?

13 A Yes.

14 Q And they say over what period of time, and you say
15 three to four months; right?

16 A Yes.

17 Q Okay. Thank you.

18 You told Mr. Brackley that you know you had this
19 life and you had friends from Montbello and Aurora, and that
20 was different than the set of friends that you hung out when
21 you were hanging out with Jamie and Mike Clark and those
22 guys?

23 A It is.

24 Q Okay. And you know, I actually made an objection
25 earlier about the use of we, when you talk about we going to

1 the pawn shop and we getting guns. That wasn't anything you
2 did with Jamie Uhler or Mike Clark other than this one time.
3 The we would have been with those other friends of yours?

4 A Actually we would be more as in we and whoever was
5 buying the guns as.

6 Q Meaning you and whoever else was buying the guns?

7 A Correct.

8 Q Okay.

9 A And way less any other person in the -- like that
10 I was actually friends with.

11 Q Okay. So mostly just you?

12 A Yeah. Like so me, like even my friends that were
13 around in the other cities that were more different from the
14 kids from Boulder, even them was not like they were in on my
15 little business of what I was doing.

16 Q So even though we -- specifically we talked about
17 your Boulder friends weren't in on the business you were
18 doing, your Boulder friends knew though that you had access
19 to guns?

20 A Yes.

21 Q And they knew that you had some connections to
22 Chicago?

23 A Yeah.

24 Q You talked about how close you and Jamie Uhler
25 were, that you basically grew up together?

1 A Yeah.

2 Q Yeah?

3 A Yes, we did.

4 Q Okay. And so you and Jamie were pretty tight?

5 A I liked to think so.

6 Q Do you recall that at one point, you know, after
7 this investigation's going on that Jamie apologizes to you
8 for telling people that you're the one who bought Mike that
9 9mm gun?

10 A I -- I vaguely remember just, you know, yeah
11 Jamie's sort of apologizing just to, you know, I -- I think
12 the way that he put it more was just he didn't really have
13 any options in the situation. And it was, you know,
14 basically Michael that got us both involved and he wasn't
15 going to not tell the police if he knew something. I
16 personally --

17 Q That's what Jamie said?

18 A Yeah.

19 Q But you recall having that discussion with Jamie
20 and Jamie saying I'm sorry I told the cops you're the one
21 that got the gun?

22 A Yeah, something like that. I don't know if that's
23 exactly what he said.

24 Q So I showed you a transcript. And I know you
25 don't remember exact dates, but you do recall that you had a

1 second interview in 2004; right?

2 A Okay. We've been talking about --

3 Q We've been talking about 1995.

4 A Oh, 1995. And then 2004, okay. 2004, okay.

5 Q Does that ring a bell?

6 A Yeah.

7 Q So pretty long time frame goes by before the
8 police contact you again about this case?

9 A Yes.

10 Q And in 2004 when the police contact you about
11 wanting to follow up on any information you have involving
12 Michael Clark and the 9mm gun you actually have another
13 pending case in Denver at the time?

14 A My felony fraud and deceit.

15 Q Right. Okay. You actually meet with a Detective
16 David Spraggs who is investigating this case in Boulder, and
17 you guys meet at Brewing Market and have coffee and talk
18 about whether you're going to provide additional
19 information. Do you remember that?

20 A I do.

21 Q And part of the conversation you have while you're
22 having coffee is about the fact that you've got this pending
23 felony case in Denver; right?

24 A I -- if that's on the record, then yes. I don't
25 remember that though, no.

1 Q And that Detective Spraggs says I'm not going to
2 make you any promises, but I will talk to the DA in Denver
3 who has got your felony case that's pending, you know, if
4 you're -- if you end up helping us out. Does that sound
5 familiar?

6 A It really doesn't. I could tell you how I
7 remember it if you'd like.

8 MS. RING: I'm going to ask to approach again
9 please.

10 THE COURT: Sure.

11 MS. RING: I'm on page 2212 of the '94 -- I mean
12 of the 2004 interview.

13 Q (By Ms. Ring) And again, I'm showing you the front
14 page just so you know we're talking about a transcript from
15 September 30, 2004, David Spraggs, Dion Moore and Detective
16 Chuck Heidel?

17 A Okay. This is now not at the coffee shop anymore
18 then?

19 Q No. So this is Detective Spraggs talking to you
20 and saying that you're here today voluntarily. I had
21 brought up the Denver District Attorney's Office and I told
22 you that I had a call in or I'd spoken actually, played
23 phone tag with Chris Perry who is the district attorney, and
24 that's related to that drug case that's pending in Denver?

25 A Okay.

1 Q Okay. And above it it talks about but that there
2 was nothing specific we discussed over coffee?

3 A That's what we just said.

4 Q Okay. Maybe I'll start up a little bit higher,
5 okay?

6 A Okay. All I was saying is so when I went to meet
7 him for coffee then we didn't say anything about my case in
8 Denver. And then afterwards he's saying that we didn't
9 discuss it, but we're discussing it now.

10 Q So because the interview that you had where you
11 met for coffee wasn't recorded and the only interview that
12 was recorded that we have a transcript happened after you
13 met for coffee, the transcript talks about and it says that
14 you and I previously met for coffee; right?

15 A Yes.

16 Q And we sat at the Brewing Market and talked for
17 about an hour; right?

18 A Okay.

19 Q And then he says I want to get on the record you
20 and I met, and you'd agreed to come down for this formal
21 interview; right?

22 And then the next paragraph he talks about the
23 fact that he's called the Denver District Attorney who was
24 involved in prosecuting the felony case you have pending in
25 Denver?

1 A Okay.

2 Q And which I think would you agree with me it makes
3 it sound like Detective Spraggs must have known and it
4 sounds like you talked about in coffee the fact that you had
5 this felony case pending in Denver?

6 A Yeah.

7 Q Does that sound about right?

8 A It sounds like that's what happened.

9 Q Okay. And you remember having that case pending
10 in Denver?

11 A I do.

12 Q And that you have a felony conviction in that case
13 now?

14 A Yes.

15 Q Originally in that case that was pending at the
16 time you met with Detective Spraggs you originally got a
17 deferred sentence in that case?

18 A Yes.

19 Q And then -- and that was in and around the time
20 frame that you're talking with Detective Spraggs and you
21 interview with Detective Spraggs and Detective Heidel, you
22 get the deferred sentence?

23 A No. I had the deferred sentence before that
24 already. And my problem was that --

25 Q I'm going to hold you up again. I want to make

1 sure we don't talk about anything we're not supposed to talk
2 about. So let's just stick with at the time you meet with
3 Detective Spraggs you've got that felony case pending in
4 Denver?

5 A No. I've already been sentenced to a deferred
6 sentence by the time I talked to them. Then the -- the --
7 the parameters of the deferred sentence was to complete drug
8 court which was told to me after I agreed to go to the
9 deferred sentence. I thought it was just probation.

10 So when I went to the probation department they
11 made me go to the drug court, which is -- I don't know how
12 to explain it except for that they try to have you inside of
13 a courtroom two or three times a week and all types of other
14 things that I didn't sign up for.

15 So short of the long is that I failed. And then
16 this automatically basically went on to my record because I
17 didn't do my deferred. So I don't know what part of that
18 was still active during this at all.

19 Q So it could have been that there was a complaint
20 pending on the deferred sentence when you're talking to
21 Detective Spraggs?

22 A Yeah, that's possible. Well, I -- I don't
23 remember, but I want to say no, like I want to say that it
24 wasn't.

25 Q Okay.

1 A I don't know if it was or not then. By looking at
2 the transcript it says that we were talking about it as if
3 it were. And so that makes me feel like it must have been,
4 but I -- I don't remember.

5 Q So you're not disputing with me what it says in
6 the transcript. But you just don't remember what exactly
7 was going on in the Denver drug case at that time; is that
8 fair?

9 A I wish that I knew what -- I'm 99 percent positive
10 that by the time we're having this interview I'd already
11 been sentenced to the deferred sentence and been on drug
12 court for a while. And because I'm pretty sure that this
13 even happened in 2004. And then so by the time -- you know,
14 I don't remember. I -- I actually don't remember.

15 Q So the last time you interview with the police
16 is -- or with anybody related to this case is in 2010;
17 right, March of 2010?

18 A I -- like I said, I don't know the exact dates of
19 the things, but I -- I would say that sounds accurate.

20 MS. RING: May I approach?

21 THE COURT: Yes.

22 Q (By Ms. Ring) You didn't see these front pages
23 again, but we're talking about a transcript that says a date
24 of March 9, 2010?

25 A Okay.

1 Q Right?

2 A Okay.

3 Q And that's --

4 A Yes.

5 Q -- Detective Heidel, yourself and Mr. Brackley.

6 So Mr. Brackley who is seated at the table and Detective

7 Heidel who is sitting over here?

8 A Yeah.

9 Q Do you remember meeting with them?

10 A I do. I do.

11 Q Okay. You just couldn't remember exactly when?

12 A When it was, right, yeah.

13 Q Okay. So during that interview you're also
14 acknowledging that back in this time in the '90s that you're
15 purchasing hundreds, if not thousands of guns; right?

16 A I -- I did.

17 Q And that there were a couple of girls that you
18 actually used fairly frequently to do a lot of your straw
19 purchases?

20 A Yes.

21 Q Females; right?

22 Okay. That you didn't ever remember actually
23 going and shooting guns with Mike?

24 A No.

25 Q You don't remember doing that?

1 A No.

2 Q Okay. And actually the idea of Mike Clark being
3 in Aurora with you is not something you remember either?

4 A Not too many different occasions that that would
5 happen.

6 MS. RING: So I'm going to ask to approach again
7 please. I'm on that same transcript from that same
8 interview on 2252.

9 Q (By Ms. Ring) So A is the officer asking you
10 questions, okay, and B is you responding. And you respond
11 at some point and say I can't remember any occasion where I
12 would have Mike in Aurora with me?

13 A Yeah.

14 Q Okay. The district attorney was asking you
15 something about seeing a gun, seeing Mike Clark with that
16 gun on November 1st of 1994. Do you remember him asking you
17 about that and you brought up Vanessa?

18 A Yeah, I do.

19 Q And so what I heard you saying is you don't have
20 any specific recollection of seeing Michael Clark with a gun
21 on November 1st of 1994. You don't remember that?

22 A The same day that I was saying that Vanessa was
23 freaking out?

24 Q Right.

25 A Well, I mean, that was why she was doing it. I

1 was in the car.

2 Q But your recollection really is about Vanessa
3 freaking out?

4 A Yeah.

5 Q So that's what your memory is is Vanessa freaking
6 out in the car?

7 A As opposed to?

8 Q You actually seeing the gun. That's what --
9 that's what --

10 A Yeah, I can't say that I remember actually seeing
11 it right then, no.

12 Q Okay. You have this memory of Vanessa being
13 freaked out by seeing a gun because you know Vanessa didn't
14 like being around guns?

15 A I didn't know that before she freaked out.

16 Q Okay.

17 A So like --

18 Q And you were telling the district attorney that
19 originally you had told the police that you and Vanessa and
20 Summer got dropped off at the bus station and took the bus
21 back to Boulder?

22 A Yeah.

23 Q And I think you started to tell us earlier that
24 when you said that that wasn't the truth?

25 A No. What I was saying --

1 Q So let -- it wasn't true that you got dropped off
2 at the bus station; you, Vanessa and Summer took the bus
3 back to Boulder on November 1st of 1994?

4 A No, I think that it was.

5 Q So you don't remember telling everybody that
6 Vanessa and Summer, especially Summer wouldn't get on a bus?

7 A I definitely said that later on, maybe even in
8 this 2010 interview. I definitely remember saying and
9 thinking that -- that that's what happened. And then Summer
10 really wasn't the type of person that would want to get on
11 the bus and that I remember that -- that I should have
12 remembered a situation like that more clearly given as to
13 what happened afterwards and the fact that she wasn't really
14 that type. But --

15 Q But Summer wasn't the type that would take buses,
16 so it didn't make any sense that you would get on the bus?

17 A Right. But then also I remember her taking the
18 bus down to even meet us in the first place, so it happens.
19 In fact, that was what we were talking about before was I
20 don't know what if I could --

21 THE COURT: Why don't you hold off. Let me have
22 the attorney ask you a question, okay?

23 Q (By Ms. Ring) So when this 2010 interview that
24 you're remembering where you talked about the fact that
25 Summer didn't like to take buses; right?

1 A Yes.

2 Q So that didn't sound right to you that you guys
3 had taken a bus?

4 A Right, looking back.

5 Q And then you talked about even though you had a
6 car, at that point you didn't have a license?

7 A I -- and I remember saying that.

8 Q Okay. You do remember saying that?

9 A I do remember saying -- no, let me rephrase that.
10 I remember seeing that that's what I had said. I don't
11 remember saying it and I don't remember not having a car,
12 nor a license. And also I read that.

13 Q But you -- what you're telling us today just so
14 the jury is clear about what you're saying is you remember
15 seeing the transcript when you said those things about the
16 bus and the car; right?

17 A Yes.

18 Q Okay. But you're not remembering that now as you
19 sit here today?

20 A No more where I'm -- I think that's accurate.

21 MS. RING: Can I just have a minute, Judge?

22 THE COURT: Yes.

23 MS. RING: Thank you.

24 (Pause.)

25 Q (By Ms. Ring) In that same interview we're talking

1 about in 2010 earlier Mr. Brackley asked you what you would
2 typically pay somebody who was doing a straw purchase for
3 you to get a couple guns; right?

4 A You're asking me if he asked me that?

5 Q He asked you that earlier today; right, about how
6 much you would pay the person, the straw purchaser, how much
7 you would pay them?

8 A Oh, yeah, um-hmm.

9 Q And today you said I think something like 30 or
10 50, or maybe a hundred dollars depending?

11 A Yes.

12 Q And do you recall in 2010 telling Detective Heidel
13 that you hardly paid them anything at all, like basically,
14 you know, \$20 worth of crack, \$50 worth of crack, \$5 worth
15 of crack, it didn't matter?

16 A That's accurate. I mean, I don't know if I said
17 that that's an accurate portrayal of what you could get this
18 done for.

19 MS. RING: So I'm going to approach, Judge, just
20 so we can clear up the air.

21 THE COURT: Yes.

22 Q (By Ms. Ring) I'm showing you a transcript again,
23 and you're B; right? So A, who is Detective Heidel, says
24 what would you have paid him to do this? And you say, B,
25 hardly anything, if anything at all. Like basically, you

1 know, just like \$20 worth of crack, \$50 worth of crack, you
2 know. Detective Heidel says okay. You say \$5 worth of
3 crack. You say it doesn't matter, people will do whatever,
4 you know?

5 A Yes.

6 Q So not only are you agreeing with me that that's
7 what it says in the transcript of your interview, but you
8 also told us that that would be pretty accurate of what you
9 could give one of your straw purchasers who you walked up to
10 to get them to buy the guns for you?

11 A Just in the sense of it doesn't take a lot.

12 Q And that in -- when you would do this you actually
13 would often instead of paying someone with money you'd pay
14 them with drugs?

15 A Oh, no, that's more of -- that's figurative more
16 than literal. Like just a person, you know, like that
17 that -- that that -- that has that problem, to them, you
18 know, everything is \$5 worth of crack.

19 Q Okay. So you would give them money?

20 A Yeah. Not literally crack, no. I didn't have
21 crack.

22 Q Okay. But the idea being that you'd often choose
23 people who all they really wanted was to get a couple
24 dollars so they could buy themselves some crack?

25 A Yeah, certainly.

1 Q So those people were easier to get them to do this
2 because that's all they wanted to do was get money so they
3 could get their next fix?

4 A Yeah, that's like the typical people, yeah, in
5 that type of position are more easily influenced to go do
6 that.

7 Q Do you recall that when Detective Heidel's
8 interviewing you back in 2010 he was asking you if you
9 remembered who the particular person was and asking about
10 whether you remember his specific name and showed you a
11 photograph?

12 A I can't say that I do. I'm not saying it didn't
13 happen. I just don't remember.

14 Q Okay. Is it fair that the name David Berring
15 doesn't mean anything to you?

16 A Yeah.

17 Q That doesn't ring a bell at all?

18 A (Witness shakes head.)

19 MS. RING: I'm going to approach again, Judge,
20 please. I'm on page 924.

21 THE COURT: Permission granted.

22 Q (By Ms. Ring) I'm showing you a copy of -- it says
23 Boulder Police Department on the top?

24 A Yes.

25 Q It says March 9, 2010, DA Ryan Brackley and I

1 interviewed Neil Dion Moore at the Boulder Police
2 Department?

3 A Yes.

4 Q And at the bottom it says Charles Heidel?

5 A Yes.

6 Q Okay. And it says that I, being Detective Heidel,
7 showed the photos of an old driver's license of David
8 Berring. Moore said he did not recognize this person?

9 A That -- yes.

10 MS. RING: Judge, if I could just have a moment?

11 THE COURT: Yes.

12 (Pause.)

13 MS. RING: No further questions. Thank you.

14 THE COURT: Redirect, Mr. Brackley.

15 REDIRECT EXAMINATION

16 BY MR. BRACKLEY:

17 Q Mr. Moore, when we talk about the particular straw
18 purchaser involved -- well, let me withdraw that for a
19 moment.

20 Of the hundreds of guns that you bought back in
21 this time frame, how many of those transactions had to do
22 with a gun that Michael Clark asked you for?

23 A One.

24 Q And on the particular straw purchaser who you used
25 to assist this purchase for the gun that you bought for

1 Michael Clark, you stated that he's someone who is either
2 white or Hispanic, maybe Italian?

3 A Yes.

4 Q And you gave his age kind of mid 30s maybe to 40,
5 but he looked like he was 27 or 28?

6 A Yeah, that's what I said.

7 Q In 1995 when you met with the Boulder police
8 detectives and Lindasue Smollen, Lindasue Smollen who was
9 your attorney approached and said that Dion Moore can give
10 information about that you know Michael Clark; correct?

11 A Yes, sir.

12 Q Also that you obtained a 9mm handgun for Michael
13 Clark?

14 A Yes.

15 Q And you had a conversation with Michael Clark as
16 to why he needed the gun?

17 A Yes.

18 Q And that there was also ammunition purchased?

19 A Yes.

20 Q And that you knew the source of the gun?

21 A Yes.

22 Q You've testified here that that's ABC?

23 A Yes.

24 Q And you had a conversation with Clark about what
25 happened to the gun after the murder?

1 A Yes.

2 Q And you were with Clark in Denver on that night
3 and you know that what time he left a soccer game to return
4 to Boulder?

5 A Yeah.

6 Q Did you provide all that information to the
7 Boulder detectives in a meeting back on October 25, 1995?

8 A I did.

9 Q And did you do so truthfully?

10 A Yes.

11 Q In 2004 when you met with Detective Spraggs and
12 you talked about this case in Denver, you ended up after
13 that meeting being convicted of a felony in Denver; correct?

14 A Yeah.

15 Q And one of your felonies is the felony that you
16 had pending at the time you spoke with Detective Spraggs, or
17 they were still out there?

18 A That's the one I don't -- like I said, I don't
19 know exactly what the status of it was at that point or that
20 meeting. But yes, that's -- I got a felony from that.

21 Q And you were eventually convicted of a felony;
22 correct?

23 A I was.

24 Q So Ms. Ring was asking questions about the bus
25 ride with Summer and Vanessa and Summer and Vanessa seeing a

1 gun or whether you saw a gun. And she was asking you
2 whether you remembered talking about that in 2010.

3 Do you remember in 1995 a year after the murder of
4 Marty Grisham speaking to the police about that bus ride --

5 A I --

6 Q -- with Summer and Vanessa?

7 A I can't say that I do.

8 Q Do you remember saying to the detectives in 1995 I
9 wasn't driving at that time because my license was
10 suspended, talked about getting a DUI so I wasn't driving
11 anyway at this point. And so we were getting dropped off at
12 the bus station, me and those girls, downtown Denver. And
13 then you talked about the defendant and Jamie Uhlir going to
14 a soccer game?

15 A Yeah, I do remember that.

16 Q And you remember as you sit here today that you
17 took a bus?

18 A See, that's where like I feel like that's what I
19 remember, but I can't say that I'm -- that I a hundred
20 percent remember that.

21 Q When you spoke to the detectives back in 1995 were
22 you testifying to the best of your recollection 17 years
23 ago?

24 A Yes, for sure.

25 Q Do you remember in that same conversation talking

1 about Vanessa's really scared of -- saying these words,
2 Vanessa is really scared of guns, so she was like put it
3 away and she was really freaking out and stuff so we put it
4 back. And then we got dropped off and we went to Boulder,
5 and the three of us -- inaudible. Summer is my
6 girlfriend -- inaudible. We had kind of an argument, so
7 they left. And I got back on my bike and then you went off
8 by yourself.

9 Do you remember making that statement as you sit
10 here today? Do you recall making that statement 17 years
11 ago in 1995?

12 A I actually don't.

13 Q And do you remember being asked when this incident
14 was with the bus and with Summer freaking out about the gun
15 and saying it was November 1st back in 1995?

16 A I -- I don't, no. I don't remember saying that,
17 no.

18 Q When you finish here in Boulder you're going back
19 to Reno, Nevada?

20 A I am.

21 Q And you're going to go back into the Washoe County
22 Jail and wait for sentencing; correct?

23 A Yes. Hopefully, like I said, I thought that I had
24 a different plea bargain worked out when I pleaded to this
25 already. And so if -- if I didn't then I wanted to be able

1 to go backwards and start my process over again because I
2 didn't understand what I was agreeing to then.

3 Q But that's all on you at this point; right?

4 A Yes.

5 Q No help from me or Mr. Kellner or anyone at the
6 Boulder Police Department?

7 A I hope that you guys would, but I didn't -- I
8 don't have any deal.

9 Q All right. And I told you I'm not gonna; right?

10 A Yes, that's what you said.

11 Q Would Jamie Uhler -- did Jamie Uhler apologize to
12 you back in 1994 because he was afraid of you?

13 A No. Just James and I have always been -- Jamie is
14 not a real round about type of person. He's really direct.
15 And so a lot of the stuff that I'd done and was doing at the
16 time, Jamie was really big on you're an idiot for being a
17 criminal asshole basically.

18 And so Jamie knew that I am the last person that
19 needed to be involved in anything like this. And so for him
20 to say anything about me probably bothered him.

21 MR. BRACKLEY: Thank you, sir. No further
22 questions.

23 THE COURT: Any recross, Ms. Ring?

24 MS. RING: No, thank you.

25 THE COURT: All right. Mr. Moore, you can step

1 down.

2 May this witness be excused, Mr. Brackley?

3 MR. BRACKLEY: Yes, Your Honor.

4 THE COURT: Ms. Ring?

5 MS. RING: Yes.

6 THE COURT: Mr. Moore, you're excused. Thank you.

7 Would the People call their next witness?

8 MR. BRACKLEY: People call David Berring.

9 THE COURT: Sir, would you step forward? Come on
10 all the way up here, all the way up by the witness chair.
11 If you would, would you please face me and raise your right
12 hand.

13 DAVID BERRING,
14 called as a witness on behalf of the People, having been
15 first duly sworn, was examined and testified as follows:

16 THE COURT: Please have a seat.

17 Go ahead, Mr. Brackley.

18 DIRECT EXAMINATION

19 BY MR. BRACKLEY:

20 Q Good afternoon, sir.

21 A Hello.

22 Q Can you state your name for the jury and then
23 spell your name so our reporter can get it spelled
24 correctly?

25 A I'm David Louis Berring. Last name is

1 B-E-R-R-I-N-G.

2 Q Mr. Berring, in what state are you currently
3 living? Where do you call home?

4 A It's Ft. Lauderdale, Florida.

5 Q And how long have you called Ft. Lauderdale,
6 Florida your home?

7 A Recently since for about eight years, sir.

8 Q Can you tell us where you were born?

9 A Born in St. Louis, Missouri.

10 Q And tell us about yourself. Where did you go from
11 St. Louis? How did you end up in Ft. Lauderdale?

12 A I've lived in quite a lot of places
13 geographically, but just somewhat St. Louis; Canton, Ohio;
14 Ft. Lauderdale; Phoenix; Atlanta; Las Vegas; Austin, Texas.

15 Q Are you currently working? Are you employed?

16 A No, working as doing remodeling, just two or
17 three-man company.

18 Q Do you have any training?

19 A Electrical engineer by trade.

20 Q Where did you get that training?

21 A Austin Community College and University of Texas.

22 Q And did you ever work as an electrical technician?

23 A Yes, a technician and an engineer.

24 Q Okay. Where did you work? What kind of jobs have
25 you had in that particular field?

1 A I've had several jobs. Honeywell, Motorola,
2 Rockford Fosgate, place called Datum, for Mercedes, Anro
3 Metals, just a host of employers.

4 Q Sir, have you had any military experience?

5 A I have four years in the Navy.

6 Q When?

7 A Avionics technician.

8 Q When did you do your time in the Navy?

9 A July of '88 to August '92.

10 Q In the early '90s were you living here in the
11 Denver area?

12 A Yes.

13 Q When did you live in Denver?

14 A Approximately '93 to '95.

15 Q And how did you find yourself here in Denver?

16 A My father was residing here. I -- I had a job
17 working high tech manufacturing in Thornton, Colorado.

18 Q By the way, did you have any family or do you have
19 any family in Ft. Lauderdale area?

20 A My mom lives there currently since '74.

21 Q Okay. Where did you live in the Denver area back
22 in from '93 to '98?

23 A I was living in Montbello on the eastern portion
24 of Denver.

25 Q Do you recall the name of the apartment complex

1 that you were living in?

2 A No, sir, I do not.

3 Q Let me show you what is marked as People's 71
4 already in evidence. It's going to come up on a screen
5 there behind you. Do you remember your address back?

6 A Yes. That is correct, 12175 Albrook Drive.

7 Q Okay. There's a pointer in front of you there.

8 MR. BRACKLEY: If I may approach and get it for
9 you?

10 THE COURT: Yes.

11 MR. BRACKLEY: This thing, press that red button.

12 Q (By Mr. Brackley) Can you show us where you lived?

13 A Around right here.

14 Q Okay. Did you live back there in that location in
15 November of 1994?

16 A Yes, that's correct.

17 MR. BRACKLEY: And for the record, Mr. Berring put
18 the red dot on the building that has that blue -- blue peg
19 in it in the photograph.

20 Q (By Mr. Brackley) Is it fair to say, Mr. Berring,
21 that in the fall of 1994 you were what -- in what you would
22 consider to be a downward spiral in your life?

23 A Well, that's a good summation. I had just lost my
24 job at high tech manufacturing and was collecting
25 unemployment. Decreased revenue at that time. But I was

1 still residing there.

2 Q Were you involved at that time as part of this
3 spiral in alcohol or narcotics personal use?

4 A I was drinking and smoking marijuana, sir.
5 Narcotics, I wouldn't say that's true.

6 Q And were you drinking and smoking marijuana to
7 your detriment back then?

8 A I'm sure that had some part to do with it.

9 Q Back in March of 2010 did you get a visit in
10 Florida from two folks from Boulder Police Department,
11 Boulder, Colorado one of them being with the police
12 department?

13 A Yes, sir.

14 Q And at the time the folks from Boulder came to see
15 you, where were you staying? Where were you living?

16 A I was kind of like in a transient status at that
17 time staying with a few friends, few different locations.

18 Q Were you also sleeping outside when you had to?

19 A Oh, that particular day, yes.

20 Q And on that particular day or around that
21 particular time what -- where were you sleeping? Where were
22 you staying?

23 A On that particular day I believe a woman and I
24 were residing all night at the beach.

25 Q And were you located by a local law enforcement

1 fellow from the police department and taken back to the
2 sheriff's office to meet with the folks from Boulder?

3 A That is correct.

4 Q And on that date in 2010 did you talk about
5 something that you had done back in the fall of 199 -- back
6 in the fall of 1994?

7 A Yes.

8 Q What did you talk about?

9 A They'd asked my knowledge about the transaction
10 that occurred approximate time of -- time and date of a
11 purchase of two 9mm weapons.

12 Q And did they show you some slips from a pawn shop
13 from back in 1994?

14 A Yes.

15 Q And did they talk to you about getting picked up
16 in your neighborhood and going over to a pawn shop to
17 purchase the two 9mm handguns?

18 A Yes.

19 Q Do you recall -- if you could turn around again.
20 Why don't you tell us what you remember as you sit here
21 today about this situation. What happened?

22 A Well, the best of my recollection I was living in
23 this area right here. And an individual was driving a car
24 approximately right here. And I was walking right here.
25 And the best of my recollection that conversation was hey,

1 would you like to make some money real quick. And then a
2 conversation took place was how so and what it entailed. If
3 I didn't have a felony arrest would I mind purchasing a
4 couple of firearms for me, something around a hundred
5 dollars.

6 Q And did you get in this person's car and agree to
7 help him purchase some firearms?

8 A Yes.

9 Q As you sit here today do you recall what this
10 person looked like?

11 A Not with any degree of certainty.

12 Q Okay. Was he white, black, Hispanic?

13 A He was black.

14 Q When you were talking with -- do you recall this
15 gentleman here, Heidel, there in Florida?

16 A Yes.

17 Q Do you recall the name Dion being mentioned back
18 in 2010?

19 A Yes.

20 Q And did the name Dion, did that strike some cords
21 in your memory?

22 A Yes, sir, it did.

23 Q How so?

24 A Well, after the purchase of the firearms I had
25 made like a little makeshift receipt on the back of the

1 receipts the pawn shop gave me. And I asked to check the
2 individual's name and correlation to his ID he had on him or
3 driver's license at the time. And that name was Dion Moore.
4 So Dion strikes -- I only knew two Dions in my lifetime.
5 One was in the Navy, and this was the other one.

6 Q Tell us what happened when you got picked up by
7 this person -- well, let me ask you this question, do you
8 remember anything -- do you remember this person who you
9 recall as Dion telling you about his past about where he'd
10 come from or what he was involved in?

11 A Not a great deal.

12 Q Okay. Do you remember where he was from?

13 A I believe that he had some ties with Chicago.

14 Q And is that because of something that Dion told
15 you?

16 A Yes.

17 Q What did he tell you if you remember?

18 A I believe he had some family or some friends in
19 the Chicago area. The conversation was very short. Our
20 rendezvous only maybe consisted of an entire hour of time.

21 Q Did he talk about being a member of or affiliated
22 with a gang in Chicago?

23 A I believe maybe briefly he had suggested that.

24 Q Do you remember where you went with this fellow
25 Dion?

1 A It was a very short journey. It went from the --
2 that area where you see right there.

3 Q Maybe hold on one moment, Mr. Berring.

4 A That intersection right there is Albroom and
5 Dayton. We went down Dayton to Colfax, took a right turn
6 heading west on Colfax. And well, that really doesn't
7 strike any -- that's Colfax there I guess heading westward.
8 We stopped at maybe two pawn shops before selecting the ABC
9 pawn shop where the purchase had occurred.

10 Q Do you recall what happened inside the ABC Pawn
11 Shop?

12 A Well, just for a price efficiency for a firearm I
13 selected the two 9mm's that were displayed in the glass
14 case.

15 Q And were they in a box?

16 A Yes, they were with the face open, or it was so
17 you could see the 9mm visibly.

18 Q So these were new guns as opposed to used guns?

19 A They seemed to be completely new and unfired.

20 Q Do you recall whether you had gotten paid for
21 this?

22 A To my knowledge some 20 years ago I remember I
23 purchased each firearm in a range of about \$120 apiece and
24 was paid either 100 for the both of them or a hundred extra
25 per firearm.

1 Q And were you paid for these guns? Were you using
2 your money or money supplied to you by this Dion fellow?

3 A The money was supplied by Dion.

4 Q Did you handle the guns after they were purchased
5 or did you just turn them over?

6 A No, I believe I didn't even check the firing
7 mechanisms or inspect them in any way. I just handed the
8 purchase directly to Dion.

9 Q Do you remember what the guns looked like?

10 A They were chrome Glock imitation type, both
11 identical models, identical size with identical finish.

12 Q Let me ask you this question, do you remember back
13 in March of 2010 saying that you thought the guns were blue
14 or a blue steel color?

15 A Well, at that time I could not recall.

16 Q Sorry?

17 A At that particular time I could not recall.

18 Q Okay. How do you recall differently here today?

19 A Well, thinking about it in length about the whole
20 transaction and the number of firearms we looked at that
21 day, we had looked at some that were blue and chromed and
22 smaller models like .380s, little .22, we looked at a large
23 selection of firearms, but we had eventually selected upon
24 the chrome 9mm Jennings.

25 Q When you say Jennings, do you remember anything

1 else about the name, make, model of these particular guns?

2 A They were full size squared chrome. Where I say
3 squared I mean at the nozzle or the front side of the gun
4 they're squared, not streamlined like the Beretta or the,
5 you know, Ruger type Luger 9mm pistols.

6 Q Do you remember as you sit here today whether Dion
7 was taller than you or shorter than you?

8 A To the best of my recollection he was a few inches
9 taller than I was.

10 Q And how tall are you?

11 A I'm approximately five seven, sir.

12 Q Do you remember as you sit here today the month or
13 the date that you purchased these guns for this Dion
14 character?

15 A Not accurately, no, sir.

16 Q Let me approach with what is marked as
17 People's 74. Do you recognize those?

18 A It's the original receipt, sir.

19 Q Do those help refresh your recollection as to when
20 this purchase took place?

21 A My signature is genuine, authentic. That's about
22 it, sir.

23 Q Is there a date on there?

24 A It says 10/19 of '94.

25 Q Did you have a driver's license back in 1994?

1 A That's correct, sir.

2 Q Let me mark this for identification as
3 People's 75. Do you recognize the photo on there?

4 A It appears to be me, sir.

5 Q And does that information contain your driver's
6 license information from back when you were living in
7 Denver, Colorado area?

8 A It appears to be correct.

9 Q Is there a signature on that particular form which
10 would have appeared on your driver's license?

11 A Yes, sir.

12 Q Okay. Going back to the People's 74, those two
13 receipts, is your name on there on each of those?

14 A Yes, it is.

15 Q And is your address as it applies back in 1994 on
16 each of those?

17 A Yes, it is.

18 Q Is your date of birth on each of those?

19 A Yes.

20 Q What is your date of birth by the way?

21 A It's 3/16 of '70.

22 Q Is your social security number on each of those?

23 A Yes.

24 Q And is your signature on each of those as well?

25 A Yes.

1 Q Did -- are those the forms or receipts that were
2 filled out as part of the purchase of the two 9mm guns that
3 you did for this Dion back in the day?

4 A Yes, sir.

5 MR. BRACKLEY: Judge, I would move to admit those
6 into evidence as People's 74.

7 THE COURT: Any objection or voir dire?

8 MS. RING: Voir dire briefly.

9 THE COURT: Go ahead.

10 VOIR DIRE EXAMINATION

11 BY MS. RING:

12 Q Can I just have a look at those for a second.
13 This isn't the first time you've seen these two slips;
14 correct?

15 A Well, no.

16 Q Okay. And you actually were shown these slips
17 when the district attorney came down to interview you in
18 Florida in 2010?

19 A No.

20 Q You didn't see those forms then?

21 A I saw some photostatic copies, ma'am.

22 Q So you saw photocopies of these two pawn slips in
23 2010?

24 A Yes.

25 Q And that would have been the first time you would

1 have seen them since 1994?

2 A That's correct.

3 Q Okay. And then you saw them again before you
4 testified today when you met with the district attorney?

5 A I believe this is the first time since --

6 Q 2010?

7 A -- the 2010 date.

8 Q That you've seen them?

9 A That's correct.

10 Q Okay. And you'd agree with me that I'm looking
11 at -- this has a weapon sales registration number B01801.
12 And it's very easy to see that it says Berring spelled
13 B-E-R-R-I-N-G?

14 A Yes.

15 Q And then on the other one B01841, the Berring is
16 much less clear, almost looks like Bertuo.

17 A Well, the two R's seem to be a little bit
18 different.

19 MS. RING: Nothing further. Thank you.

20 THE COURT: All right. Any objection to the
21 admission of 74?

22 MS. RING: No.

23 THE COURT: 74 will be admitted.

24 MR. BRACKLEY: If I can publish those, Your Honor,
25 on the big screen?

1 THE COURT: Yes.

2 DIRECT EXAMINATION (cont'd)

3 BY MR. BRACKLEY:

4 Q Okay. Mr. Berring, if I may approach and take
5 that pointer from you. Is this your signature here?

6 A That's correct.

7 Q And is all the information in terms of address and
8 social security number and your pedigree information in
9 terms of height, weight, all that, is that all accurate from
10 back in 1994 as you recall it to be?

11 A Everything is correct on them two forms. However,
12 what is omitted is the apartment number, which was 75,
13 Albrook Drive.

14 Q Mr. Berring, in this day and age since 1994 now
15 into 2012, do you have a felony conviction from the state of
16 Florida from earlier this year?

17 A Three months ago. One is pending, sir, for petty
18 theft.

19 Q And that's essentially kind of a -- it's your
20 third petty theft which becomes a felony?

21 A That's correct.

22 Q Mr. Berring, why was it that when Dion picked you
23 up back on the 19th of October 1994 you agreed to do this?

24 A For sure something to do with financial attrition
25 at that particular moment in time, lack of money.

1 Q You did it to get paid?

2 A Excuse me?

3 Q You did it to get paid?

4 A Yes.

5 MR. BRACKLEY: Thank you. No further questions
6 for Mr. Berring.

7 THE COURT: All right. Cross-examination,
8 Ms. Ring.

9 CROSS-EXAMINATION

10 BY MS. RING:

11 Q Mr. Berring, Mr. Brackley was just asking you
12 about the felony conviction out of Florida. So you're
13 presently on probation for that felony conviction?

14 A The judge placed me on about a two-week
15 probationary period to come out here, testify, and return on
16 Friday to dissolve that probation, that's correct.

17 Q So actually right before you came out here you saw
18 the judge on that felony case?

19 A Approximately three months ago, ma'am, was the
20 actual case.

21 Q Okay. But you're telling me that the judge just
22 put you on this two-week probationary period to let you come
23 up to Colorado to testify?

24 A That's correct.

25 Q So that would have happened two weeks ago?

1 A That's correct.

2 Q So you saw the judge on that felony case two weeks
3 ago?

4 A In regards to this whole scenario taking place,
5 that's correct.

6 Q And you were actually escorted from Florida by
7 someone from the Boulder District Attorney's Office, they
8 were on the plane with you?

9 A That's true. Correct.

10 Q They're going to return you back to Florida when
11 you're done?

12 A Unaccompanied I believe.

13 Q On the way back?

14 A Yes.

15 Q Okay. And then, you know, you got to go see the
16 judge again about this pending felony probation issue in
17 Florida?

18 A That's Friday, yes, ma'am.

19 Q Okay. And you also have a felony conviction out
20 of Nevada from 2005; correct?

21 A No.

22 Q No?

23 A No.

24 Q So in 2005 in Clark County, Nevada you weren't
25 convicted of attempt to commit grand larceny which is

1 considered a felony in Nevada?

2 A That's considered what they call a wobbler.

3 Q A what?

4 A A wobbler, indigenous of Las Vegas, can be treated
5 as a gross misdemeanor or a low felony, which they treat as
6 a misdemeanor, ma'am.

7 MS. RING: So I'm going to approach if I may?

8 THE COURT: Sure.

9 Q (By Ms. Ring) Just want to make sure we're talking
10 about the same thing, Mr. Berring, okay?

11 A Okay.

12 Q So I'm looking at a court document, it's from
13 Clark County, Nevada; correct?

14 A Yes.

15 Q And it has you listed as the defendant?

16 A Yes.

17 Q And I guess when you're talking to me about a
18 wobbler, you're saying it says that you entered a plea of
19 guilty to attempt to commit grand larceny it says category
20 D, felony slash gross misdemeanor?

21 A That's correct.

22 Q But that's the right case, we're talking about the
23 same case?

24 A That's correct.

25 Q Okay. So we're talking about this transaction

1 that happened in Denver in 1994; right?

2 A True.

3 Q And the first time the police contact you about
4 you purchasing this gun at this pawn shop in 1994 is in
5 February of 2010?

6 A Yes.

7 Q 18 -- I mean, 16 years later?

8 A Approximately, yes.

9 Q Okay. And I think what you just told Mr. Brackley
10 is that you actually at that time had been sleeping out on
11 the beach with a female friend of yours?

12 A Yes.

13 Q And you got contacted by a police officer from the
14 local Florida, Ft. Lauderdale Police Department?

15 A Yes.

16 Q And they brought you in their patrol car to the
17 sheriff's department down there?

18 A Yes.

19 Q Okay. And when you got there Detective Heidel and
20 Mr. Brackley were at that sheriff's department?

21 A Yes.

22 Q Okay. And they tell you that they want to talk to
23 you about something that happened in 1994?

24 A Yes.

25 Q You didn't know they were coming?

1 A No.

2 Q They hadn't asked you to think about whether you'd
3 ever purchased a gun in 1994?

4 A No. I was unaware of what the visit was about,
5 ma'am.

6 Q Until you got there?

7 A Yes.

8 Q Then they told you they were there, didn't have
9 anything to do with you being in trouble; right?

10 A Yes.

11 Q But they just wanted to talk about whether you
12 purchased this gun in 1994?

13 A Yes, that's correct.

14 Q Okay. Mr. Brackley was asking you about things
15 about, you know, what you remembered. And you're one of
16 those people who never forgets a face; right?

17 A I'm pretty good about recalling faces, ma'am.

18 Q Okay. And you've described yourself as actually
19 having a photogenic memory when it comes to remembering
20 faces?

21 A At times.

22 Q Okay. And so one of the things that Detective
23 Heidel and Mr. Brackley did was they showed you some photo
24 line-ups?

25 A Yes, approximately 30 different individuals'

1 faces.

2 Q 30 different individuals' faces. You don't
3 remember them showing you two separate photo line-ups?

4 A I believe two separate showings in the
5 neighborhood of total of 30 different --

6 Q Okay. But you certainly remember them showing you
7 some photos and asking you if you recognized anybody?

8 A Yes, ma'am.

9 Q Okay. And one of the sets of photos was a photo
10 line-up would have been the individuals who were black?

11 A To the best of my recollection, ma'am.

12 Q Okay. But you weren't able to pick out anybody
13 out of that array of photos?

14 A I -- I believe I may have said someone looked
15 vaguely familiar out of the entire list of people.

16 Q Okay. And then the other set of photos they
17 showed you would have been of individuals who were white or
18 Caucasian?

19 A That seems to strike a bell, yes.

20 Q Okay. And you didn't identify anybody in that
21 line-up?

22 A No, ma'am.

23 Q Your recollection was that when asked about
24 whether the name Dion rang a bell that that name did ring a
25 bell?

1 A Yes, ma'am.

2 Q And when you were talking about what you remember
3 about that purchase in 1994 was that it was one individual
4 in the car that you went to the pawn shop with?

5 A Yes, that's true.

6 Q Okay. And that was the only time that you ever
7 went to a pawn shop and purchased a gun for anyone?

8 A Yes, that's correct.

9 Q Okay. And that's just because you were down on
10 your luck having a hard time and you just needed some money?

11 A Yes. For lack of better term that's correct.

12 Q And that source -- so that wasn't something you
13 did frequently because that was the only time you did it?

14 A That's true.

15 Q You're -- I think Mr. Brackley asked you about
16 being in the Navy; right?

17 A Yes.

18 Q So certainly when you were in the Navy you were
19 trained with firearms?

20 A Yes, in boot camp.

21 Q Okay. And in general you describe yourself as
22 someone who is fairly familiar with firearms?

23 A Somewhat, yes.

24 Q And back in 2010 when you're meeting with
25 Detective Heidel and Mr. Brackley you're very clear then

1 that your recollection that the guns that you purchased that
2 they were blue?

3 A There was some question to that, yes.

4 MS. RING: If I may approach please?

5 THE COURT: Yes.

6 Q (By Ms. Ring) When you were being interviewed by
7 Detective Heidel and Mr. Brackley did they tell you that
8 your interview was being recorded?

9 A I believe it was a voice recorder.

10 Q Okay. And did you ever get to see a transcript of
11 the recording from that interview?

12 A No, ma'am.

13 Q Okay. So would you agree with me that in the top
14 of this page it says Boulder Police Department?

15 A Yes.

16 Q And that under A it says Detective Chuck Heidel
17 and under B it says David Berring?

18 A Yes.

19 Q And that the date of the interview is February 18,
20 2010?

21 A Yes, that's correct.

22 Q Okay. Does that -- that's what we talked about
23 about when you had that interview at the Ft. Lauderdale --
24 or the sheriff's department?

25 A Yes, around that time.

1 Q Okay. And so it looks like at the top they start
2 asking you about your signature, but then you start talking
3 about the gun and you say I'm an electronic tech, it was
4 blue, I thought they were blue; right?

5 A Yes.

6 Q And that's where you say, you know, I'm an expert
7 in firearms; right?

8 A To the best of my recollection my exact wording
9 that time -- length of time ago is unclear.

10 Q Okay. But you'd agree with me that it does say
11 next to B no, I'm -- I'm a -- you know, an expert in
12 firearms?

13 A Okay. I could have said that.

14 Q And that's what it says in the transcript?

15 A Yes, that's what it appears to say.

16 Q Okay. And then you say going on, you know, these
17 were two blue -- they weren't chrome, they were the cheap
18 model?

19 A I believe that was what I said at the time.

20 Q Okay. And again, you're asked again they weren't
21 chrome, and you answered again they were not chrome?

22 A At that time I did not believe they were.

23 Q Okay. Your recollection when you were talking to
24 Detective Heidel in Florida was that this transaction
25 occurred in the wintertime; right?

1 A Yes, ma'am.

2 Q And I think you just told us your recollection is
3 that you went to one or two pawn shops before you ended up
4 at ABC Pawn Shop?

5 A I believe that's true.

6 Q When you went in there what you bought were the
7 two 9mms; right?

8 A Yes.

9 Q Didn't purchase any ammunition?

10 A No.

11 Q You talked about getting in the car with this one
12 person. Do you remember a description of the car being kind
13 of a big boat, like a brown Impala?

14 A My knowledge of the vehicle is unclear.

15 MS. RING: May I approach again please?

16 THE COURT: Yes.

17 MS. RING: 1496.

18 Q (By Ms. Ring) So again, I'm going to that same
19 transcript we were just looking at, okay. And you said the
20 individual's car I would say like a brown -- it was a brown
21 Impala four-door make, '70s, '80s model, you know, that
22 squared type?

23 A Okay.

24 Q That's what it says; right?

25 A Yes, that appears to be what it says.

1 Q I asked you before about being shown some photos
2 or a photo line-up of some, you know, white males as opposed
3 to black males. Remember we talked about that a little bit
4 earlier?

5 A Yes, I recall.

6 Q And do you recall actually talking about how the
7 fact that in the neighborhood you lived in in Montbello
8 there weren't a lot of white people?

9 A That's true.

10 Q So that would have stood out in your mind if there
11 had been a white guy in part of this transaction?

12 A That's possible.

13 MS. RING: Can I just have a moment, Judge?

14 THE COURT: Yes.

15 (Pause.)

16 Q (By Ms. Ring) So do you recall when the police
17 are -- Detective Heidel is asking you about this transaction
18 that he's the one who actually says let me give you a name
19 and see if you remember this name, and he says the name Dion
20 to you?

21 A I believe that's true.

22 Q So you didn't recall Dion independently until
23 after Detective Heidel says do you remember that name Dion?

24 A That was the first mention of a name, ma'am.

25 Q During the interview?

1 A Yes.

2 (Pause.)

3 MS. RING: Nothing further. Thank you.

4 THE COURT: Redirect, Mr. Brackley.

5 MR. BRACKLEY: Brief.

6 REDIRECT EXAMINATION

7 BY MR. BRACKLEY:

8 Q So you already told both myself and Ms. Ring on
9 both direct examination and cross-examination that Detective
10 Heidel was the one who mentioned the name Dion. But you're
11 the one who mentioned Chicago first; correct, before
12 Detective Heidel did when you were talking about Dion and
13 any connections or his background. Do you recall that?

14 Let me ask you this, do you recall who said the
15 word Chicago first?

16 A Not at this time, no.

17 Q So you don't remember whether you said Chicago
18 first or Detective Heidel said Chicago first?

19 A No, I don't.

20 Q Okay. When you appeared before a judge a couple
21 weeks ago that was so the judge could serve a subpoena on
22 you to come to Colorado; correct?

23 A Yes.

24 Q And he gave you an opportunity to say yes, I want
25 to go to Colorado or no, I don't want to go to Colorado;

1 correct?

2 A Yes, that's true.

3 Q And the purpose of that hearing was for that
4 interstate subpoena to be served on you; right?

5 A Yes.

6 Q And you ultimately agreed to come to Colorado?

7 A Yes, I agreed.

8 MR. BRACKLEY: Thank you, sir.

9 THE COURT: Any recross, Ms. Ring?

10 MS. RING: No.

11 THE COURT: All right. Mr. Berring, you can step
12 down.

13 Can this witness be excused, Mr. Brackley?

14 MR. BRACKLEY: Yes, Your Honor.

15 THE COURT: Ms. Ring?

16 MS. RING: Yes.

17 THE COURT: All right. Mr. Berring, you're
18 excused. Thank you, sir.

19 THE WITNESS: Thank you, sir.

20 THE COURT: Ladies and gentlemen of the jury,
21 we're going to go ahead and take the evening recess at this
22 time.

23 Remember the admonition that I've given you
24 previously. It applies at this recess as well. I told you
25 you were going to get tired of seeing this brown card.

1 But it's important that you remember that until
2 the trial is completed you don't communicate about or
3 discuss the case with anyone by any means.

4 Don't read or listen to any news reports of the
5 trial. Don't do any outside research or investigation.
6 Don't consult a dictionary or the encyclopedia or the
7 internet.

8 And remember, it is finally -- finally remember
9 that it's important that you do not form or express any
10 opinion on the case until it is finally submitted to you.

11 We should be ready for you at 9:00 tomorrow
12 morning. Everybody have a good evening. Have a safe drive.
13 Enjoy the football game if that's what you're going to be
14 doing this evening. We'll see you tomorrow morning at 9:00.
15 Thank you.

16 (The jury left the courtroom.)

17 THE COURT: The record should reflect that the
18 jury has left the courtroom. You can be seated.

19 Couple things. I still need to know what you want
20 to do with respect to People's Exhibit 50, that's the CAD
21 report.

22 MR. BRACKLEY: I have the -- I have it here. I
23 apologize for not getting it earlier. There were two
24 redactions, and I believe they are -- I need to look at it,
25 but I'll give them to Ms. Ring. Oh, she's over there. I

1 believe they're just redactions. But there has been no
2 testimony.

3 THE COURT: But has she seen them?

4 MR. BRACKLEY: She hasn't. I'm getting 50 so that
5 I can bring it all over.

6 THE COURT: Okay.

7 MR. BRACKLEY: Because you can't see what's
8 blanked out.

9 MS. RING: Judge, if we can take it up in the
10 morning so I can just look at it before I --

11 MR. BRACKLEY: I'll give her what I have. There
12 are only two.

13 THE COURT: Okay. We'll talk about it in the
14 morning.

15 Second thing, I need to see the defendant's
16 proposed jury instructions. Hopefully you'll have them
17 available tomorrow so I can start reviewing them.

18 Third, where are we in terms of pace of trial?

19 MR. BRACKLEY: I believe we are --

20 THE COURT: Are we on schedule or ahead of
21 schedule?

22 MR. BRACKLEY: We're ahead of schedule. We're two
23 witnesses behind from what we had expected to get done
24 today, but we're still ahead of schedule. We were thinking
25 about finishing midday Wednesday. I think we'll finish by

1 the end of the day tomorrow with the People's case.

2 THE COURT: All right.

3 MR. BRACKLEY: I'm sorry, that was complicated.

4 But I expect to finish tomorrow.

5 THE COURT: Okay. Anything else on behalf of the
6 People before we recess?

7 MR. BRACKLEY: No, Your Honor.

8 THE COURT: Anything on behalf of the defendant
9 before we recess?

10 MR. KELLNER: Nothing from the People.

11 MS. RING: No. I'm sorry, Judge.

12 THE COURT: It was a long, hard day I understand.

13 All right. Then we'll be in recess until 9:00. I
14 have an 8:15 docket with three cases on it. Someone will be
15 in here once they unlock the doors. I don't expect that
16 they'll disturb your things, but just be aware of that. But
17 I should be ready for you at 9:00.

18 So we'll be in recess. Everybody have a good
19 evening.

20 (The trial concluded for the day.)

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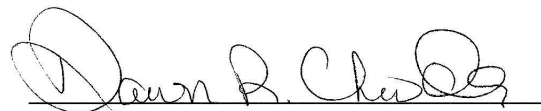
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 25th day of March, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 16,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

1 I N D E X

2 WITNESSES FOR THE PEOPLE: PAGE

3	TED RITTER,	
	Direct Examination by Mr. Kellner	5
4	Cross-Examination by Ms. Ring	36
	Redirect Examination by Mr. Kellner	60
5	Recross-Examination by Ms. Ring	70

6	DETECTIVE THOMAS TRUJILLO,	
	Direct Examination by Mr. Brackley	73
7	Cross-Examination by Ms. Milfeld	77

8	JESSICA HUGGINS,	
	Direct Examination by Mr. Brackley	82
9	Cross-Examination by Ms. Milfeld	87
	Redirect Examination by Mr. Brackley	88

10	WALTER STACKHOUSE,	
11	Direct Examination by Mr. Kellner	89
12	Cross-Examination by Ms. Milfeld	107

13	EXHIBITS FOR THE PEOPLE:	OFFERED	ADMITTED
14	76 - Boulder County Jail Records	84	

15	EXHIBITS FOR THE DEFENDANT:	OFFERED	ADMITTED
16	B - Bullet Work Sheet	59	59
17	C - CBI Report	59	59
	D - GRC Search	59	59
18	E - GRC Search	59	59

19

20

21

22

23

24

25	REPORTER'S CERTIFICATE * * * * *	126
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1 P R O C E E D I N G S

2 (The following proceedings occurred in the
3 morning.)

4 THE COURT: We're on the record in 12CR222, People
5 versus Michael Clark. Mr. Clark is present as are all
6 counsel, jury is not.

7 Any matters to take up on the record before we
8 bring the jury in on behalf of the People?

9 MR. KELLNER: No, Your Honor.

10 THE COURT: On behalf of the defendant?

11 MS. RING: Judge, actually I did look at the
12 proposed redactions from the district attorney on the --
13 from the CAD report from the 911 call. It doesn't -- it's
14 not a marked exhibit. I guess what they were planning on
15 doing was substituting it for the other exhibit. So I'll
16 approach and give you the copy of their proposed redaction.

17 Judge, I guess I can sort of understand why
18 they're proposing to redact the two things that they're
19 redacting, although I think the jury is smart enough to
20 realize the nature of the CAD report and what was coming in.
21 So I guess you need a copy of the unredacted one as well.
22 I'm sorry.

23 THE COURT: That's okay.

24 MS. RING: You know, my major concern is the way
25 those things are blacked out. I'm very concerned that all

1 it does is cause the jury to speculate and want to ask
2 questions about why certain things are blacked out since
3 they're clearly blacked out.

4 And again, it seems to me the one possible female
5 suspect would relate to the information about Kristen
6 Grisham, which is later in the CAD report as well.

7 And the other blacked out piece is the thing about
8 the son, which I think relates to the testimony we heard
9 from Barbara Swider about Marty saying that sounds like a
10 Loren knock and how he went to the door. And of course the
11 district attorney has put on a ton of evidence to show that
12 it couldn't have been Loren Grisham.

13 So I don't think there's a need for those
14 redactions. And my concern is that the jury looks at that
15 and just wants to know what's been redacted and causes more
16 problems.

17 THE COURT: Okay. Mr. Brackley.

18 MR. BRACKLEY: Judge, I'm going to withdraw the
19 redacted copy. We'll keep People's 50 -- is it 50 or 51?

20 THE COURT: 50.

21 MR. BRACKLEY: We'll keep People's 50 as it is.

22 THE COURT: Then let me return these to you,
23 Ms. Ring. And 50 which remains part of the record will
24 simply remain part of the record without any redactions.

25 Ms. Ring, anything else on behalf of the

1 defendant?

2 MS. RING: No, Judge.

3 THE COURT: All right. Would you please bring the
4 jury in?

5 (The jury entered the courtroom.)

6 THE COURT: Please be seated.

7 All the members of the jury are back. Good
8 morning, ladies and gentlemen. Everybody looks bright-eyed
9 and bushy-tailed. Nobody stayed up too late celebrating
10 that amazing comeback and Broncos win.

11 When we recessed yesterday evening we were in the
12 middle of the presentation of the People's case in chief.
13 Would the People please call their next witness?

14 MR. KELLNER: Your Honor, the People call Ted
15 Ritter.

16 THE COURT: All right.

17 TED RITTER,
18 called as a witness on behalf of the People, having been
19 first duly sworn, was examined and testified as follows:

20 THE COURT: Please have a seat.

21 Go ahead, Mr. Kellner.

22 MR. KELLNER: Thank you, Judge.

23 DIRECT EXAMINATION

24 BY MR. KELLNER:

25 Q Good morning, sir.

1 A Good morning.

2 Q Can you please state your name and spell your last
3 name for the record?

4 A It's Ted middle initial A, last name is Ritter,
5 R-I-T-T-E-R.

6 Q Mr. Ritter, you're employed?

7 A Yes, I am.

8 Q How are you employed?

9 A By the Denver Police Department Crime Laboratory.

10 Q What do you do for the Denver Police Department
11 Crime Laboratory?

12 A Well, my primary title I'm a supervisor of the
13 firearms unit there. And I take care of daily case
14 assignments, I review -- those people that work for me, I
15 review their cases, I still work cases periodically, testify
16 in court. And that's pretty much it.

17 MR. KELLNER: Judge, do we need to turn that
18 microphone towards --

19 THE WITNESS: Sorry. Is that better?

20 MR. KELLNER: Yeah, it's fine.

21 Q (By Mr. Kellner) Mr. Ritter, before being the
22 supervisor of the firearms unit at the Denver Police
23 Department Crime Lab where did you work?

24 A I was an agent with the Colorado Bureau of
25 Investigation.

1 Q How long were you an agent with CBI?

2 A 29 and a half years. I retired from there in,
3 let's see, it was August of 2004.

4 Q What sort of work did you do as an agent for CBI
5 during those 29 and a half years?

6 A When I first was employed by them I was a latent
7 fingerprint examiner. I also did crime scene investigation,
8 evidence identification, collection and preservation. I was
9 also a forensic photographer, did specialized photography.

10 As time progressed in 1976 I cross-trained in the
11 area of firearms and tool mark examination, and in the
12 beginning was under the supervision of Agent Claude Cook.

13 I then also had specialized training with him
14 which included reading various texts on the subject of
15 firearms, firearms identification, the assembly and
16 disassembly of firearms.

17 I was given practical exercises in the mechanical
18 functioning of firearms, test firing of firearms for the
19 recovery of bullet and cartridge cases, then comparison of
20 bullet and cartridge cases to determine if they were fired
21 by a specific firearm.

22 I also completed courses given by the FBI at the
23 FBI Academy in Quantico, Virginia. And these courses were
24 in the following areas; the determination of the caliber of
25 fired ammunition, the determination of firing weapon types

1 based on an analysis of fired bullets and cartridge cases.
2 Another course was titled gunpowder pattern testing and
3 proximity testing. Another course was specialized
4 techniques involved in firearms and tool mark examination.

5 I also completed numerous armorers courses from
6 various organizations, and I'll just name a few of those;
7 from the Smith and Wesson company on their revolvers and
8 semi-automatic handguns, from the Ruger company on their
9 revolvers and their rifles, and then from the Beretta
10 company on all of their semi-automatic handguns, and then
11 the Sig Arms on their semi-automatic handguns.

12 From the Glock company I was actually an armorer.
13 I did armorer work because the weapons that the agents
14 carried with CBI were Glocks at that point in time. And so
15 I was -- had armorer status in that particular area. Also
16 from the Colt company on their semi-automatic and full
17 automatic shoulder weapons, from the Remington company on
18 their shotguns.

19 I also have participated -- well, organizations
20 that I belong to, I'm a lifetime member of the International
21 Association for identification. I've been a member of the
22 Association of Firearms and Tool Mark Examiners since 1979,
23 regular member status. I'm a past member of the Rocky
24 Mountain Division of International Association for
25 Identification and the Body Identification Team.

1 I participate in proficiency testing programs.
2 And those have been provided by the Northwest Association of
3 Forensic Scientists, the Forensic Science Foundation, and
4 Collaborative Testing Association.

5 Currently I've testified in the area of firearms
6 and tool mark examination somewhere in excess of 300, 320
7 times.

8 With regard to the science of fingerprints, latent
9 print identification, I was a certified latent fingerprint
10 examiner certified by the International Association for
11 Identification from 1978 until I retired in 2004 from CBI.

12 And also during that time I was the chairman of
13 the identification committee for the Rocky Mountain
14 division.

15 Anything else?

16 Q No, I think you pretty much covered it,
17 Mr. Ritter.

18 Can you tell the jury when you became a firearms
19 examiner with CBI?

20 A Yes. Like I said, my training began in 1976. And
21 I actually started practicing that part of the science in
22 1979.

23 During that period of time I was gaining knowledge
24 and education in that area. And I was training under a
25 direct supervisor Mr. Claude Cook who was a court-qualified

1 firearms examiner with the Colorado Bureau of Investigation.

2 Q And when did you sort of get out from underneath
3 the direct supervision and start doing cases on your own?

4 A 1979 basically. And then there's been numerous
5 firearms courses that I've taken since then. I've just sort
6 of hit the top part of it.

7 Q What does it mean to be a firearms examiner?

8 A Well, firearms examiner is a general term. I kind
9 of think of it as an umbrella. It covers many areas. It
10 covers firearms and how they function. I would examine a
11 firearm to determine if it's functioning properly. If it's
12 not, then I would try and determine why it's not functioning
13 properly. It's the comparison of fired bullets and
14 cartridge cases to see if they were fired by a specific
15 firearm.

16 Another area I mentioned is gun powder pattern
17 testing. That is to determine the distance of the muzzle
18 that it was from an object that has been struck by a bullet.

19 Tool mark examination is another subdivision in
20 firearms examination. So this would be an area where
21 somebody has surreptitiously broken into maybe a building,
22 maybe into a file cabinet. Anytime a harder surface comes
23 in contact with a softer surface it will leave a mark. That
24 mark then can be compared with marks made by a suspect tool
25 to see if in fact the tool taken from a suspect may have

1 made those marks.

2 It's kind of the same way with fired bullets.

3 Fired bullets as they go down the barrel of a firearm
4 they're marked because they're softer than the interior
5 surface of the barrel so they're marked by unique and
6 individual characteristics.

7 Same thing with a fired cartridge case. When it
8 is fired in a firearm it is marked by unique and individual
9 features. And the important thing is whether these are
10 reproducible and repeatable and whether there's a
11 significant amount as to whether or not you are able to
12 establish an identification.

13 Q Can you give the jury an approximate number of
14 times that you've actually examined a firearm or bullets and
15 shell casings for their characteristics?

16 A I can't tell you specifically. I can just tell
17 you thousands of times. I've looked at hundreds and
18 hundreds of different types of firearms, probably thousands
19 of cartridge cases, fired bullets. So I don't carry a
20 specific number. I started doing it before databasing was
21 popular and computers were in offices. It's about the best
22 I can tell you.

23 Q Let's turn now to latent prints. You mentioned
24 the term latent prints. What does that mean?

25 A Latent print is an impression or marking that's

1 rather indistinct that's left upon some object that the
2 fingerprint areas or friction skin areas have come into
3 contact with. It can be paper, it can be a porous or
4 non-porous surface.

5 Q What sort of training did you receive as far as
6 examining for latent prints and making identifications?

7 A Well, my career first started in 1963 when I was
8 hired by the Illinois Bureau of Criminal Identification and
9 Investigation. And during that time I was with them from
10 1963 to 1974. And I started out studying the science of
11 fingerprints. It was a training institution, so I studied
12 science of fingerprints.

13 Then I went into latent fingerprint processing,
14 various techniques used to process and develop latent
15 prints, comparison of latent prints, identification of
16 latent prints.

17 I had courses given again from the FBI also in
18 addition to the courses that I had during that period of
19 time that I was with Illinois.

20 I also was trained in the area of crime scene
21 investigation, evidence preservation, collection from
22 various types of crime scenes. I also was trained in the
23 area of specialized photography there and with the FBI also.

24 Q Over the years after you first started your career
25 in the '60s then transitioned to CBI did you continue your

1 education or maintain certifications in the field of latent
2 print examination?

3 A Yes. Actually certification didn't become --
4 didn't come into fact until 1976. They started preparing
5 testing in 1978. I was certified as a latent -- as a
6 certified latent print examiner. And at that you had to
7 maintain a certain level of education within that
8 discipline.

9 So as I recall when I first started it you had to
10 have 40 hours of training every year as I recall. I think
11 in the beginning it was you were re-certified every five
12 years. So at the end of that re-certification period you
13 had to have at least 40 hours of training documented that
14 you had gone through.

15 Q And were you a firearms examiner and a latent
16 print examiner in 1994 when you worked at the Colorado
17 Bureau of Investigation as an agent?

18 A Yes, sir, I was.

19 MR. KELLNER: Judge, at this time I'd ask the
20 Court to recognize Mr. Ritter as an expert in firearms
21 examination to include cartridge case examination and
22 comparison, bullet examination and comparison, and latent
23 print examination and comparison.

24 THE COURT: Objection or voir dire, Ms. Ring?

25 MS. RING: No objection, no voir dire.

1 THE COURT: All right. Mr. Ritter will be
2 recognized as an expert and allowed as an expert in the area
3 of firearms examination and latent print examination. He'll
4 be allowed to opine as an expert witness pursuant to
5 Rule 702 of the Colorado Rules of Evidence.

6 You may continue.

7 MR. KELLNER: Thank you, Judge.

8 Q (By Mr. Kellner) Mr. Ritter, in November of 1994
9 you just stated that you were working at CBI as a firearms
10 examiner and latent print examiner?

11 A Yes, sir.

12 Q Did you receive evidence from the Boulder Police
13 Department regarding a murder that took place at
14 5640 Arapahoe, apartment 413 on November 1, 1994?

15 A Yes, sir, I did.

16 Q What evidence did you receive from the Boulder
17 Police Department?

18 A I received four fired 9mm cartridge cases, two
19 fired bullets, and then I received a Carmex container.

20 MR. KELLNER: Your Honor, may I approach the
21 witness?

22 THE COURT: Yes.

23 Q (By Mr. Kellner) I'm handing the witness what's
24 been previously marked as People's 28, 29, 30 and 31.

25 MS. RING: Judge, may I just approach just to see

1 what he's giving him right now?

2 THE COURT: Yes.

3 MS. RING: Thanks.

4 (Pause.)

5 Q (By Mr. Kellner) Mr. Ritter, can you take a look
6 at the exhibits that I've just handed you?

7 A Okay.

8 Q Mr. Ritter, do you recognize the packaging and the
9 exhibits that I just handed you? And if so, how?

10 A I recognize the packaging within the plastic bags,
11 the manila envelopes that we see. My initials appear on
12 there as well as the case number and the date that I
13 received them.

14 Q What date did you receive those exhibits?

15 A The mark on there is 11/4 of 1994.

16 Q Can you tell the jury what specifically are
17 contained in those exhibits?

18 A Each one of these exhibits contained a fired 9mm
19 cartridge case.

20 Q I want to talk to you about what sort of
21 examination you were requested to do with those cartridge
22 cases?

23 A It was requested to be processed for latent prints
24 to see if any identifiable -- excuse me, identifiable latent
25 prints were present, and then to compare them, inter-compare

1 them with each other to see if they had been fired by the
2 same firearm.

3 Q Earlier you had mentioned to the jury that you
4 could compare markings on shell casings and bullets during
5 your examination. Did you actually perform an examination
6 of those four fired shell casings?

7 A Yes, sir, I did.

8 Q And did you come to any sort of conclusion as to
9 whether or not they'd been fired by a specific firearm?

10 A I could absolutely identify three of them as
11 having been fired in the same unknown firearm. The other
12 cartridge case had some identifiable markings on them, but
13 not a sufficiency that I could positively identify it with
14 the other three. So it was inconclusive on that particular
15 one.

16 Q And can you tell the jury specifically which --
17 well, rather, can you tell the jury when you receive
18 evidence from any agency that you're asked to examine do you
19 assign specific numbers to them for your own analysis?

20 A Well, when the evidence is brought in it would
21 come to our evidence custodial area. And normally a request
22 form was made up which is also an evidence receipt form.
23 And on that form are the item numbers for each item that is
24 received. So in this instance these were items 1, 2, 3 and
25 4. Is that what you're referring to?

1 Q Yes, sir, that's what I'm referring to.

2 Which bullet cases could you tell were fired from
3 the same firearm?

4 A As I recall it was 1, 2 and 4. Item 3 was
5 inconclusive. Its characteristics were consistent and there
6 were some individual characteristics, but just not with a
7 sufficiency that I felt I could positively identify it with
8 the other three.

9 Q Specifically how do you go about making that
10 determination?

11 A Well, primarily you look at individual
12 characteristics that are left there as the result of the
13 cartridge case being fired in a firearm.

14 The dynamics, basically when a cartridge case is
15 fired in a firearm is that it goes into a chamber and then
16 on the base of that cartridge case is a primer. The firing
17 pin in the firearm would strike the primer that would ignite
18 a priming mixture which then ignites the gun powder that's
19 inside the cartridge case.

20 At that point in time there's tremendous heat and
21 pressure that occurs, and that cartridge case actually form
22 fits to the interior of the chamber that it's in. Otherwise
23 it would fly apart.

24 So there's several markings that can occur on
25 there. You have breach face, firing pin impression

1 markings, you can have chamber marks, you can have extractor
2 and ejector marks depending on the type of firearm that it
3 was fired in.

4 From the chamber marks, firing pin impression and
5 breach face markings you can establish an identification if
6 you have a sufficiency of individual characteristics.

7 Extractor and ejector marks merely show that at
8 some point in time that cartridge case would have been
9 struck by either the extractor or the ejector when the
10 cartridge case was chambered and/or extracted.

11 Q When you say cartridge case is chambered and
12 extracted, what does that mean, extractor marks?

13 A If it's a semi-automatic or a full automatic
14 firearm and a cartridge case is chambered and fired it has
15 to have some way of extracting the cartridge case and
16 ejecting it out so that another live round of ammunition can
17 be picked up and chambered.

18 So an extractor is usually like a claw or a hook
19 that gets on the rim, it attaches on the rim at the time
20 it's chambered so that when it's fired then the extractor as
21 the slide -- and these are a lot of terms I'm sure you're
22 not familiar with, but the slide would move rearward, or the
23 action depending on the type of firearm that it's in, moves
24 rearward and extracts that cartridge case.

25 Then there's usually a stationary object such as

1 my finger that is usually -- the most common extractor
2 ejector positions are three and seven although they're in
3 various other positions.

4 So the extractor is pulling the cart -- fired
5 cartridge case back. As it comes back, the base of the
6 cartridge case then strikes the ejector causing the
7 cartridge case to eject usually to the right, however there
8 are some firearms that extract and eject at 180 degrees over
9 your head, and some that will eject to the left.

10 Q Do revolvers leave extractor marks?

11 A No.

12 Q Did you find extractor marks when you examined
13 these four shell casings?

14 A I'll have to refer to my notes to refresh my
15 recollection.

16 MR. KELLNER: Your Honor, pending approval I'd ask
17 that he be able to refer to his investigative notes in order
18 refresh his recollection.

19 THE COURT: Sure.

20 MR. KELLNER: Go ahead, sir.

21 THE WITNESS: Yes, I saw a slight impression
22 consistent with an extractor mark on 1 through 4.

23 Q (By Mr. Kellner) And what does that indicate to
24 you as an expert in firearms examination?

25 A It would indicate in all probability these had

1 been fired in a semi-automatic or a full automatic firearm
2 of some type.

3 Q Can the markings on the shell casings themselves
4 tell you anything about the manufacturer of a firearm?

5 A In just looking at them they can depending on the
6 nature and the design. And I'll give you an example. For
7 instance, a Glock leaves a very distinctive form of firing
8 pin impression that I can say is -- would probably have been
9 fired from that, but there's also another firearm that
10 leaves a similar one.

11 Q What other firearm is that?

12 A I'm sorry?

13 Q What other firearm is that?

14 A That would be a Sigma that's manufactured by
15 Smith and Wesson.

16 Q Sorry to cut you off. And you were mentioning the
17 Glock, and I think I cut you off. Did you have more to say
18 about that?

19 A No. I was just saying that sometimes yes,
20 sometimes no from what you visually see.

21 Q And in this case when you looked at the four fired
22 shell casings could you make any sort of determination as to
23 the manufacturer of the firearm that fired those shell
24 casings?

25 A No, not just by looking at them, no, sir.

1 Q Earlier you mentioned that when a bullet is fired
2 it can create some unique characteristics on the bullet
3 itself. Can you tell the jury about that and what you look
4 for when you're examining a bullet?

5 A Well, as I explained, when a cartridge is
6 discharged it ignites the powder which then forces the
7 bullet down the barrel. The barrel of a firearm is
8 manufactured in a manner that is made by a tool or tools.
9 And on the inside surface then are class characteristics
10 that we -- well, they're lands and grooves.

11 The land when you're looking down a barrel is the
12 raised portion in the barrel of that firearm. The groove is
13 a cut portion inside of that.

14 Now when you look at the bullet it's the reverse,
15 the land impression on a bullet is the depressed area and
16 the raised area is the groove.

17 So when a barrel is designed, basically it's a
18 piece of solid rod stock that a hole is bored down the
19 center. So during the boring process a drill cuts through
20 that. As that drill cuts through there it leaves
21 microscopically unique individual features on the interior
22 surface of that barrel.

23 After that's done then depending on the process
24 that's used the lands and grooves are cut into the barrel.
25 Those would be cut.

1 There's one other form, it's called polygonal
2 rifling, which is another form of rifling technique when the
3 barrel -- when the rifling is cut in there that also leaves
4 unique individual features on the interior surface of that
5 barrel.

6 And when the bullet is fired down that barrel it
7 goes down the barrel and it's engraved by those unique
8 individual features that are on the interior surface of that
9 barrel.

10 So when I'm looking at a fired bullet
11 microscopically I look for unique individual features that I
12 can see on fired bullets.

13 Q Polygonal cutting, what sort of manufacturers use
14 that process as far as putting the lands and grooves into a
15 barrel?

16 A Do you want names of manufacturers or --

17 Q Sure.

18 A These are just a few, not naming all of them.
19 Glock is probably one of the most prevalent ones, but
20 Heckler & Koch also make them, which are also referred to as
21 H and K. I know there's another one, but right now it
22 escapes my -- I can't think of it right now. But Heckler &
23 Koch, Glock, and I know that there are other manufacturers
24 that also use polygonal rifling.

25 Some of them usually -- although Glock is

1 considered -- it's manufactured in Austria, but we also have
2 a plant in -- well, outside of Atlanta, Georgia. And the
3 actual barrels, they're called hammer forging, are made in
4 Austria because the racket that it puts up. They don't
5 allow that in the United States at this point in time.

6 Q What's the purpose of these lands and grooves that
7 you just described for the jury?

8 A What the lands and grooves do is as the bullet
9 goes down the barrel it causes spin. So it either rotates
10 to the right or rotates to the left. And this is called
11 twist direction. So it either has a right twist or a left
12 twist.

13 So as the bullet goes down the barrel it spins.
14 And you could compare this to the football player that
15 throws the football, causes the football to spin and go more
16 accurately towards its target. So it's based on accuracy.

17 The manufacturer, it's his job more less to
18 determine the rate of twist that he wants to use in a barrel
19 for the type of ammunition that would normally be fired in
20 it to have its best accuracy. So you'll have so many lands
21 and grooves and a direction of twist depending upon the
22 manufacturer.

23 MR. KELLNER: All right. Judge, may I approach
24 the witness again?

25 THE COURT: Yes.

1 Q (By Mr. Kellner) I'm retrieving from Mr. Ritter
2 People's 28, 29, 30 and 31. And I'm handing him People's
3 21, 33 and 52. Why don't you take a look at People's 21 and
4 33 for now.

5 A Okay.

6 Q Earlier you had mentioned receiving evidence from
7 the Boulder Police Department for examination. We talked
8 about the shell casings. Did you receive any bullets?

9 A Yes, sir.

10 Q And how many did you receive for examination?

11 A I received two fired bullets.

12 Q And taking a look at those two exhibits I handed
13 you, do you recognize the packaging or anything about
14 that -- those exhibits specifically?

15 A Yes, sir, I do. It bears the item number, case
16 number, my initials and the date that I received them, which
17 was 11/4 of '94.

18 Q What are your CBI item numbers associated with
19 those exhibits?

20 A 5 and 6.

21 Q And can you tell the jury specifically with
22 respect to People's -- which one of those is CBI 5
23 associated with, the exhibit sticker?

24 A Oh, 5 it would be associated with People's 33.

25 Q And CBI item number 6, which exhibit is that?

1 A Well, it's my item number 6. Oh, sorry, here it
2 is. And it would be People's Exhibit No. 21.

3 Q Before we start talking about your examination of
4 those bullets, can you define the term caliber, what that
5 means with respect to bullets and ammunition?

6 A Well, there's two types of caliber. Basically
7 there's nominal and there's specific. So nominal caliber
8 would be the naming of a caliber that contains numerous or
9 several specific calibers.

10 Caliber refers to basically the diameter of the
11 bullet. And then we also look at the weight when we're
12 talking about sometimes the specificity of a particular
13 caliber.

14 Q So when someone says 9mm bullet, is that referring
15 to the diameter?

16 A That can be a portion of it, yes.

17 Q And what's the weight of a 9mm bullet typically?

18 A That varies, but the normal weight for what we
19 call ball ammunition or a jacketed round-nosed bullet, that
20 usually is about 116 grains.

21 MR. KELLNER: Your Honor, may I approach the
22 witness again?

23 THE COURT: Yes.

24 MR. KELLNER: I'm handing Mr. Ritter what has been
25 previously admitted as People's 69.

1 Your Honor, can I publish People's 69?

2 THE COURT: Yes.

3 Q (By Mr. Kellner) Mr. Ritter, you just said
4 something about ball full metal jacket ammunition. Is that
5 picture I've handed you what's projected on the screen as
6 People's 69, is that an example of ball ammunition?

7 A That's what it's referred to, yes. And it's
8 basically a round nose. But in common terms it's sometimes
9 referred to as ball ammunition.

10 Q What does it mean -- well, what does the term full
11 metal jacket mean?

12 A Well, as you see we have a copper colored
13 jacketing. And that's a jacket that's over usually a lead
14 interior. And it's a jacket that's put on there so that
15 when the bullet is fired in a semi-automatic or full
16 automatic firearm -- this is kind of getting beyond this,
17 but there's a purpose.

18 The jacketing material will leave less residue on
19 a feed ramp that goes into the breach area, thereby having
20 less chance of jams occurring, of the cartridge case jamming
21 on entry.

22 So you will normally see -- on ammunition that's
23 going to be fired in semi-automatics and full automatics it
24 will be a jacketed type of ammunition, although they have --
25 there are various other types. And I won't get into that

1 right now.

2 Q Thanks.

3 Would you identify with that laser pointer that
4 I've handed you the part of the bullet you're referring to
5 as the full metal jacketed portion?

6 A I guess if I turn it the right -- the right way.
7 This will be the full metal jacket area. And then that goes
8 down inside the cartridge case. Sometimes the base is --
9 there's led exposed on the base and the jacket is sealed on
10 there. It just depends on who the manufacturer is and the
11 type of ammunition they've purchased.

12 Q Can you tell the jury the condition of the two
13 bullets you received for examination in this case.

14 A One was pretty damaged at the base area, and the
15 other one was in pretty fair condition.

16 Q Which one specifically referring to your CBI
17 number was in fair condition?

18 A That would be number -- it would be CBI number 5,
19 and it would be People's Exhibit No. 35 (sic).

20 Q Were the bullets in such a condition that you
21 could actually perform some sort of examination on them?

22 A Absolutely.

23 Q Can you tell the jury the caliber of the bullets
24 that you examined?

25 A The caliber, it falls in what we call the .38

1 caliber family. And the specific caliber was more
2 consistent with the type of bullets that we see loaded into
3 a 9mm Luger cartridge case.

4 Q Did you weigh the bullets that you received for
5 examination?

6 A Yes, sir, I did.

7 Q Based on the weight of CBI number 5 did you form
8 any sort of opinion as to the caliber of that bullet?

9 A It was consistent with 9mm.

10 Q All right. So when you have two bullets that you
11 receive for examination what are you looking for here?

12 A Well, I would look at the land and groove
13 impressions. I would compare them on a special comparison
14 microscope.

15 And just briefly what that microscope consists of
16 are two microscopes tied together by an optical bridge that
17 have binocular eye pieces so that I can view them
18 simultaneously under the oculars.

19 Q When you're looking at them through what it sounds
20 like is a powerful microscope did you form any sort of
21 opinion as to whether or not those two bullets had been
22 fired by the same gun?

23 A Yes, sir.

24 Q And what was your opinion?

25 A In my opinion they had both been fired from the

1 same unknown firearm.

2 Q What is the General Rifling Characteristics
3 database?

4 A It's a database that has characteristics,
5 measurements from numerous bullets that have been fired from
6 numerous manufacturers of firearms.

7 Q And who maintains this database?

8 A The FBI, or Federal Bureau of Investigation.

9 Q You said it contains information related to
10 measurements from bullets. What sort of measurements are
11 you talking about?

12 A The primary measurements are the land and groove
13 measurements of those bullets. There are other measurements
14 over a period of time of the evolvement of the GRC database.

15 Q Do you know when the GRC database first came into
16 being?

17 A The first course that I took on that was in 1978
18 at the FBI Academy. I'm sure that there was some work that
19 was done prior to that, but that was when we officially
20 started using a form of that database.

21 And it was -- it was done in two ways. They
22 actually printed out the database so you could physically
23 search through it based on parameters that you had measured
24 on a fired bullet, and then they also had a computerized so
25 that depending on if you had -- at that time that's when

1 computer systems were just coming into being, and they were
2 constantly changing and evolving. So they did have them
3 computerized into a form of a program that was searchable.
4 I'm sorry.

5 Q In 1994 did you have this database in the form of
6 a computer program?

7 A Yes, sir.

8 Q When you're talking about the lands and grooves
9 and twists that you mentioned earlier did you notice any of
10 those particular characteristics on the two bullets you
11 examined in this case?

12 A Absolutely.

13 Q And what can you tell the jury about the number of
14 lands and grooves and the direction of the twist?

15 A Well, the two fired bullets that I examined,
16 People's Exhibit 35 (sic) and 21, both of them were fired
17 from a barrel having six lands and grooves with a right-hand
18 twist.

19 Q That General Rifling Characteristics database, do
20 you just call it GRC for short?

21 A Yes.

22 Q That database, does it contain a list of all
23 manufacturers of all firearms ever made?

24 A No. In the beginning it -- you know, like any
25 database you have to enter the data to establish it. And

1 then as new and different firearms or other firearms are
2 discovered that may not be in the database, then this would
3 be added to the database. So it's -- it's an additive
4 process to keep it up to date. And that's something that
5 the FBI maintains.

6 Myself as an examiner, if I got an unusual
7 firearm, something that I had never run into and if I
8 searched the database maybe by that name and I didn't find
9 it, then I have the ability I could do test fires of that
10 firearm, send those to the FBI, they in turn then could --
11 one of their examiners or people in that particular section
12 could then examine that, take measurements and then enter
13 that data into the database thereby adding to the database.
14 So there were various ways of adding to that database.

15 Q So safe to say this database grows over time?

16 A Yes, sir.

17 Q In 1994 when you examined those two exhibits,
18 those two bullets, did you come up with some measurements
19 associated with the lands and grooves that you then searched
20 in the general database?

21 A Yes. I examined the bullets, took measurements,
22 observed the direction of twist, entered this data into --
23 it's a program form that you enter the data, plug the data
24 in based on your measurements, and then you search the
25 database. And the database will give you back respondents

1 of possible firearms or manufacturers of firearms that could
2 have fired these bullets.

3 Q And in this case when you inputted the
4 measurements you got from your microscopic analysis of those
5 two bullets into the GRC database did you come up with a
6 list of semi-automatic pistol manufacturers?

7 A Well, that was part of the manufacturers, but they
8 were -- there were other weapon types that came up also, not
9 just semi-automatics.

10 Q What other weapon types came up?

11 A As I recall without looking at them, I had like 52
12 manufacturers that I could -- you know, that I could name
13 that were named. And there were semi-automatics, full
14 automatics, there were rifles, carbines. I think that was
15 all.

16 Q You said full automatics. What are sub machine
17 guns?

18 A Sub machine guns in simple terms are a firearm
19 that will shoot full automatic handgun ammunition basically.

20 Q And when you ran your measurements through the GRC
21 database you came up with 16 different manufacturers?

22 A I'll take your word for it. I haven't counted
23 them.

24 Q If you'd like to go ahead and refer to your notes
25 if that would help refresh your recollection?

1 A On my list it says 17.

2 Q Probably take your word over mine as far as
3 counting goes.

4 Well, how many rifles did you come up with as
5 possible manufacturers?

6 A There were five rifles and four carbines.

7 Q What's a carbine?

8 A Carbine is a short-barreled rifle.

9 Q Now I want to talk about the semi-automatic pistol
10 list. Can you tell the jury how many different
11 manufacturers you came up with on that list?

12 A Do you want me to name all of them?

13 Q No, just a number please.

14 A Okay. 26 I believe.

15 Q Among that list of 26 was the manufacturer
16 Bryco-Jennings included in 1994, excuse me?

17 A Wasn't on my list, no.

18 Q Now, for the -- if a manufacturer is not included
19 in 1994, does that mean that they didn't manufacture a gun
20 that had six lands and grooves with a right twist?

21 A No.

22 Q What does it mean?

23 A It just means that my list didn't pick that up if
24 there was one in the database.

25 Q Ask you a little bit more about Bryco-Jennings.

1 Are you familiar with that manufacturer?

2 A I know of it, yes, sir.

3 Q Have you examined firearms manufactured by
4 Bryco-Jennings in the past in your role as a firearms
5 examiner?

6 A Yes, sir, I have.

7 Q How would you characterize I guess the quality of
8 Bryco-Jennings firearm?

9 A Lower class.

10 Q What do you mean by lower class?

11 A Well, you have, for instance, Smith and Wesson,
12 Ruger, these are very well manufactured firearms. Although
13 the Bryco-Jennings, it's gone through many evolutions of
14 actual manufacturers and have gone by various names, but
15 it's -- I would not put it in a class with Smith and Wesson
16 and Ruger.

17 That's why I'm saying it's -- it's not probably
18 made as well as they are. Smith and Wesson is a better
19 manufactured firearm and several others. I'm just using
20 that as an example. I would classify it as a less expensive
21 firearm and that would be about it.

22 Q Earlier you had talked about polygonal rifling.
23 Were you able to determine whether or not the cartridge
24 casings or the bullets were fired by a gun with polygonal
25 rifling?

1 A The bullets that I examined were fired from a cut
2 rifled barrel.

3 Q I'd like to now talk to you about latent prints.
4 You said that back in 1994 you also were a latent print
5 examiner?

6 A Yes, sir.

7 Q Did you look at those four shell casings I
8 previously handed you and examine them for latent prints?

9 A Yes, sir, I did.

10 Q What were your conclusions?

11 A I didn't develop any latent prints on them.

12 MR. KELLNER: Judge, can I approach the witness
13 again?

14 THE COURT: Yes.

15 MR. KELLNER: Thank you. Retrieving People's 69,
16 21 and 33, handing Mr. Ritter People's 52.

17 Q (By Mr. Kellner) Mr. Ritter, do you recognize
18 People's Exhibit 52?

19 A Yes, sir. This is a Carmex container that I
20 received. It was my item number 7, your People's No. 52.
21 Bears my initials, case number, date I received it 11/4 of
22 1994.

23 Q What sort of examination were you requested to
24 perform on that Carmex container?

25 A To process it for latent prints.

1 Q And what were your conclusions?

2 A I didn't come up with any latent prints on it.

3 MR. KELLNER: Thank you, sir. I have no further
4 questions.

5 THE COURT: Cross-examination, Ms. Ring.

6 MS. RING: Thank you.

7 CROSS-EXAMINATION

8 BY MS. RING:

9 Q Good morning, Mr. Ritter.

10 A Good morning.

11 Q Mr. Kellner was just asking you some questions
12 about the cartridge casings and the bullets that you were --
13 that Boulder Police Department asked you to examine as part
14 of their investigation in this case.

15 A Yes, ma'am.

16 Q So I think you've told us that you were able to
17 determine that the ammunition was 9mm ammunition?

18 A Consistent with, yes, ma'am.

19 Q And then I think I heard you describe it as Luger?

20 A 9mm Luger, yes, ma'am.

21 Q And what does the Luger mean?

22 A Luger is a specific distinction of caliber, so
23 that's a specific caliber.

24 Q Okay. And then you were also able to determine
25 that the manufacturer of that ammunition was Speer?

1 A That was what they had stamped on the cartridge
2 case was, yes, ma'am.

3 Q So there's no reason for you to not think it was
4 Speer since it was stamped with that manufacturer?

5 A That's what the cartridge case -- who the original
6 manufacturer was.

7 Q Okay. And the district attorney showed you a
8 picture of a photo of what he described as ball ammunition;
9 right?

10 A Yes, ma'am.

11 Q And you also used the term it's similar to calling
12 it a full metal jacket?

13 A Yes.

14 Q And that's based on showing the rounded nature of
15 the top of that bullet?

16 A And the copper color. It's a copper alloy
17 jacketing that's put on there, yes, ma'am.

18 Q Okay. You're also familiar with ammunition that
19 would be considered hollow point ammunition?

20 A Yes, ma'am.

21 Q And that looks fairly different because it's
22 hollow on the top?

23 A Yes, that's correct.

24 Q And in examining the ammunition that you examined
25 in this case it was clear to you that this was, if you're

1 using those two terms, full metal jacket ammunition?

2 A Yes, ma'am.

3 Q Not hollow point?

4 A That's correct.

5 Q You did this examination back in 1994 when you
6 received the evidence from Boulder Police Department?

7 A Yes, I did.

8 Q And you talked about using a microscope when you
9 were doing the measurements for the land and grooves and the
10 items you are examining?

11 A Yes.

12 Q And you and I met previously so I could talk about
13 the examination you did related to this case; correct?

14 A Yes, ma'am.

15 Q And when I was asking you about the difference
16 between the microscope you would have used back in 1994
17 versus the type of microscope that you'd be using today you
18 said they were fairly similar; right?

19 A Yes.

20 Q But there's been some improvements?

21 A Yes, there have.

22 Q And I think one the analogies you used to me, it
23 was kind of like a car. So you'd have a make and model car,
24 it's still a car, it's just been improved upon over time?

25 A Yes, that's correct.

1 Q The district attorney asked you about this gun
2 rifling characteristic database?

3 A General Rifling Characteristic database.

4 Q I said gun. And I'm going to try to refer to it
5 as the GRC, but that's a common terminology to refer to it
6 as the GRC database?

7 A Yes, ma'am.

8 Q And you'd agree with me that the GRC is what's
9 considered an investigative tool?

10 A Yes, ma'am.

11 Q It can't give you any definitive answers?

12 A That's correct.

13 Q It can't tell you specifically which gun fired --
14 the bullets were associated with a specific gun?

15 A That's correct.

16 Q It can't even tell you typically even a specific
17 manufacturer?

18 A That's correct.

19 Q It's designed to give you some possibilities of
20 what type of firearm may have fired those bullets?

21 A Yes, that's correct, a manufacturer of a firearm
22 that may have fired those bullets.

23 Q Right.

24 And when you were talking about the list of
25 manufacturers that came up in your results, each of those

1 manufacturers may manufacture more than one model of that
2 type of weapon?

3 A Oh, yes, ma'am.

4 Q So when you said I think we agreed there were 26
5 manufacturers of semi-automatic pistols on even the GRC list
6 that you got in your search, that doesn't tell you how many
7 different models of guns meet those characteristics?

8 A That's correct.

9 Q It's just the manufacturer?

10 A Yes.

11 Q Okay. The more information you can put into your
12 GRC search, the fewer manufacturers that should come up?

13 A It can narrow it down, yes.

14 Q So for instance, we talked about putting in that
15 it was 9mm caliber. That's a really broad category?

16 A Yes.

17 Q There are a lot of 9mm guns out there?

18 A Yes, there are.

19 Q There are a lot of 9mm guns out there in 1994?

20 A Yes.

21 Q Not just a lot of individual guns, a lot of
22 manufacturers of those types of guns?

23 A That's correct.

24 Q It's a very common gun?

25 A Yes, it is.

1 Q Okay. So -- and the other thing that you were
2 talking to Mr. Kellner about was the right twist versus left
3 twist. That's another characteristic that you were able to
4 note from your examination of the bullets?

5 A Yes.

6 Q And again, a right twist is actually fairly
7 common?

8 A Yes.

9 Q That's nothing that says wow, this is really going
10 to narrow my search because you -- that's a normal
11 characteristic?

12 A That's correct.

13 Q Not unusual?

14 A That's right.

15 Q Okay. You also mentioned that you were able to
16 see the number of lands and grooves and the number was six?

17 A Yes.

18 Q And again, not unusual?

19 A No, not unusual.

20 Q Right?

21 So if all you had to put into your GRC search was
22 9mm, right twist, six lands and grooves, that's really not
23 going to help you a lot because that's a broad category
24 right there?

25 A Yes.

1 Q So one of the ways you can narrow that somewhat is
2 to actually put in the measurements you took from looking at
3 the bullet under the microscope and measuring the lands and
4 grooves?

5 A Yes, that's right.

6 Q And you did that in this case?

7 A Yes, I did.

8 Q That's what got you to the list of 50 some odd
9 possible manufacturers?

10 A Yes, ma'am.

11 Q Okay. There -- even though you're using this
12 scientific high-powered microscope, there's still some
13 subjectivity in your assessment of what measurements you're
14 giving to each of the lands and grooves?

15 A Yes, that is correct.

16 Q And certainly the quality or the condition the
17 bullet is in will impact your ability to get accurate
18 measurements of those lands and grooves?

19 A It can affect that, certainly. Just measure
20 what's there.

21 Q Right. So for instance, even though you received
22 two bullets, you only used CBI item number 5, you only used
23 the measurements from that to put into the GRC?

24 A Yes, ma'am, I did.

25 Q Because the other bullet was damaged enough that

1 you really were concerned you wouldn't get accurate
2 measurements from that bullet?

3 A Yes, that's correct.

4 Q Now, you're taking these measurements and putting
5 them into the database to try to do a search. And of course
6 there are other things can -- that can impact whether you're
7 going to get accurate search results or not?

8 A Yes.

9 Q So for instance, if the -- if there's some damage
10 to the barrel of the specific firearm that fired the
11 bullets, that's going to impact what lands and grooves and
12 markings are left on the bullets and the cartridge casings?

13 A Yes, it can.

14 Q You've heard, you know, sometimes people actually
15 take their own barrel and they'll modify it in some way so
16 that, therefore, if they were to fire that firearm it
17 wouldn't be consistent with what the manufacturer -- what
18 that barrel looked like?

19 A That could occur, yes, ma'am.

20 Q And when you don't actually have the firearm that
21 they -- that was believed to be involved in the incident,
22 you can't tell any of those things, you can't test fire out
23 of that firearm?

24 A That's correct, yes.

25 Q So that impacts your ability to give us any real

1 opinion about which gun fired these bullets?

2 A That's correct. All I can do is establish a list
3 of possible manufacturers of firearms that could have fired
4 the bullet.

5 Q Right.

6 MS. RING: If I may approach please?

7 THE COURT: Yes.

8 Q (By Ms. Ring) Mr. Ritter, I'm approaching you with
9 what I've marked Defense Exhibit B and C. I think I'm
10 actually going to start with C. C is actually your report
11 that you did showing your results of the testing you did in
12 this case?

13 A Yes.

14 Q Okay. And you'd agree with me that what we're
15 looking at here is the list of manufacturers that you
16 obtained when you made the entry into the GRC, the
17 information we've been talking about?

18 A Yes. That was based on the response I got back.

19 Q Right.

20 And so when Mr. Kellner was asking you about how
21 many rifles or how many sub machine handguns were part of
22 that result, this is the list we're talking about?

23 A Yes, that's correct.

24 Q Okay. And you actually generated this report as
25 part of your duties as working for CBI?

1 A Yes.

2 Q And these reports are kept as a matter of course,
3 CBI keeps copies of these reports?

4 A Yes.

5 Q That's part of how they do business?

6 A Yes.

7 Q Okay. Then you would provide this report to the
8 district attorney to give the district attorney your
9 results?

10 A Yes.

11 Q Okay.

12 A Well, I wouldn't. It would be the agency, usually
13 the agency. So I wasn't with the agency when that was given
14 to them, CBI.

15 Q But if this was related in 1994 you were still
16 with the agency?

17 A Oh, yes.

18 Q That would have been given to them then?

19 A Yes.

20 Q But you're not directly responsible for getting --

21 A I don't know that it had been given to them in
22 '94. It would have gone to the detective on the case.

23 Q Okay.

24 A Boulder Police Department.

25 Q Okay. And the date the report is completed is

1 November 11, 1994?

2 A Yes, ma'am.

3 Q Okay. Now, I was asking you earlier -- and I'm
4 showing you now what's Defense Exhibit B about the
5 measurements that you take of the lands and grooves?

6 A Yes.

7 Q And this is your handwritten report that actually
8 reflects everything you documented for CBI item number 5?

9 A That's a worksheet, yes, ma'am.

10 Q And item number 5 again is the bullet we've been
11 talking about where you noted the characteristics and
12 certain measurements. And that's the item where you put
13 information that you obtained from examining this item into
14 the GRC?

15 A Yes.

16 Q Okay. And these handwritten measurements in here,
17 these land and groove measurements, those are the
18 measurements you used in putting that information into the
19 GRC to try to reduce the number of manufacturers that you
20 got as a result of manufacturers who make firearms that may
21 have fired this bullet?

22 A That looks the same as my worksheet. I see some
23 changes on it, but yes.

24 Q Okay. So you see some changes on it because
25 there's also an Agent Hammond's signature on here as well?

1 A Yes, that's correct.

2 Q Okay. So now I want to show you some actual
3 GRC -- these are the worksheets that show what criteria you
4 put in for your search and then the results that came out.
5 Is that what that looks like to you?

6 A That's one -- one of them, yeah. There were
7 several.

8 Q You did several; right? And it says that the date
9 of the search --

10 MS. RING: Mr. Kellner, do you want to see these
11 as I'm going over them?

12 MR. KELLNER: Can you tell me a page please?

13 MS. RING: The problem is somehow these didn't get
14 Bates stamped.

15 Q (By Ms. Ring) So I'm showing you what's been
16 marked Defense Exhibit D. And you'd agree with me that this
17 says the date of the search was 11/7/94?

18 A Yes.

19 Q And it says CBI investigation firearms section on
20 the very top?

21 A Yes, it does.

22 Q It says Exhibit 5, which would be the CBI number 5
23 that you were using where you got the criteria to put into
24 the GRC search?

25 A Yes.

1 Q Next a twist, it says right?

2 A Yes.

3 Q That says LAG 6 which --

4 A Would indicate lands and grooves, number of.

5 Q And then there's land width and then groove width?

6 A Yes.

7 Q Then cartridge 9mm Luger which we already talked
8 about?

9 A Yes.

10 Q Okay. Under land width there's a range?

11 A Yes.

12 Q Right?

13 And the range comes from you using the
14 measurements from your worksheet, and you're using a range.
15 Actually why don't you explain how you come up with that
16 range?

17 A That range was based on the measurements of the
18 lands in that particular land width.

19 Q So you -- when you were measuring number 5 under
20 the microscope you came up with different measurements of
21 the individual lands that you were measuring?

22 A Yes.

23 Q And you put those measurements in here?

24 A I did in that search, yes.

25 Q And then you did the same thing with the groove

1 width, you took the range of measurements that you
2 documented in Exhibit B and put them in there?

3 A Yes, I did.

4 Q And then you ran that search?

5 A Yes.

6 Q Okay. And you indicated that you ran several
7 searches; right?

8 A Yes.

9 Q Okay. On November 8th it looks like you did
10 another search?

11 A Yes.

12 Q However, those -- all the measurements, et cetera,
13 appear to be the same?

14 A Yes.

15 Q We've got another one on 11/8 that again all the
16 measurements appear to be the same?

17 A Yes.

18 Q Another one on 11/8 where all the measurements
19 appear to be the same?

20 A Yes.

21 Q And then on -- I'm trying to see if there's a date
22 on this one. So we're still talking about the same Exhibit
23 No. 5, and I'm --

24 A May I turn the page? That was FBI. This would be
25 like the cover sheet of the data that you're generating to

1 search in here.

2 Q Okay. So this search also happened on 11/8?

3 A Yes.

4 Q And in this case does that look like your
5 handwriting?

6 A It is my handwriting, that's correct.

7 Q And what you noted is that you expanded search
8 parameters for -- well, I can't read your handwriting, land
9 width and groove width by .005 inches?

10 A Yeah.

11 Q And my understanding is that standard operating
12 procedure allows you in doing this search to actually add
13 plus or minus .005 to what you got on your worksheet to
14 account for any inconsistencies or abnormalities?

15 A Yes, ma'am.

16 Q Okay. So originally all the searches you did you
17 didn't add the plus or minus 5?

18 A Right.

19 Q You just took your own measurements?

20 A Yes.

21 Q Then you did one last search where you actually
22 expanded the search a little bit by adding this allowance?

23 A Yes.

24 Q And based on your experience and your training as
25 a firearms expert that's allowable under the standard

1 operating procedure?

2 A Absolutely.

3 Q Okay. So this would have been the broadest search
4 that you did?

5 A That would have been, yes.

6 Q Okay. Can you tell us from looking at all these
7 searches and your report which search resulted in this list
8 of manufacturers?

9 A I think it's a compendium of all of them.

10 Q Okay.

11 A Just best practices. That's the only thing I can
12 tell you.

13 Q Okay. So you think that best practices mean you
14 would have taken the result from all of your different
15 searches and included all of those manufacturers in the list
16 on your report?

17 A Basically the larger search would have probably
18 taken in more, so probably came -- I can't tell you exactly.

19 Q Okay.

20 A And I was just running various different scenarios
21 at that point in time.

22 Q But you'd agree with me that the broadest search
23 you did was when you added the plus or minus 5 to the actual
24 measurements that you did?

25 A Yes.

1 Q Okay.

2 (Pause.)

3 Q (By Ms. Ring) Mr. Ritter, when I was marking
4 exhibits and going through these searches with you, I marked
5 the search you did on 11/7/94 as Exhibit D. And then you
6 and I went through each of the other searches that I showed
7 you, and they all appeared to have the same criteria entered
8 into them?

9 A As I recall, yes.

10 Q Okay. So then I'm not going to mark those, but I
11 am going to mark as Exhibit E, unless I didn't bring it up
12 here with me, it's possible, there it is. That's the search
13 where you used -- you added the plus or minus .005 inches;
14 correct?

15 A Yes.

16 Q Okay. Mr. Kellner asked you whether -- and you
17 told him that the list of manufacturers that was in your
18 report did not include Bryco-Jennings?

19 A Yes. I didn't see it.

20 Q Okay. And you can't tell us whether that means
21 Bryco-Jennings was in the database at that time or was not
22 in the database at that time?

23 A That's correct.

24 MS. RING: Judge, can we approach?

25 THE COURT: Yes.

1 (The following proceedings occurred at the bench
2 out of the hearing of the jury.)

3 MS. RING: So what I asked Mr. Kellner is what his
4 position was on entering any or all of those exhibits that I
5 just marked.

6 THE COURT: Talking about B, C, D and E?

7 MS. RING: Yes.

8 THE COURT: Okay.

9 MS. RING: My understanding is they don't have an
10 objection to B, but they do have an objection to the rest.

11 MR. KELLNER: Is B his report?

12 MS. RING: That's correct.

13 MR. KELLNER: And that's correct, Judge.

14 MS. RING: I think it's more appropriate that I
15 made a -- that we argue it not in the presence of the jury.
16 I agree I didn't ask them prior to this that I was going to
17 admit that.

18 So I think if we -- I think what I'll do is move
19 to admit B now. I'm going to be showing these, or many of
20 them, to Hammond later this afternoon. So I guess if the
21 Court decides that they are admissible we could do it that
22 way or we could do it some other way. But I'm done with my
23 examination now.

24 THE COURT: So you're offering B as in boy and
25 there's no objection?

1 MR. KELLNER: That's right, Judge.

2 THE COURT: B will be admitted.

3 You're offering C, D and E?

4 MS. RING: Yes.

5 THE COURT: There is an objection. What's the
6 objection?

7 MR. KELLNER: C, D and E, Judge, are fairly
8 lengthy documents containing a lot more information than
9 what has been covered here. I think if we were to
10 present -- that information basically is worksheets and the
11 non-summarized compendium of the GRC database. It would
12 just be incredibly confusing.

13 I think it's very easy for Ms. Ring to approach
14 Mr. Hammond with those exhibits and cross-examine him on
15 them. But the underlying data is just simply too
16 overwhelming to go back to the jury. I think it would very
17 much confuse them.

18 THE COURT: And what's the defendant's response to
19 that?

20 MS. RING: I don't see them as confusing at all.
21 I mean, they're face sheets that show, as I just went over
22 with Mr. Ritter, the criteria he put in, which is everything
23 he explained to the district attorney.

24 I think it actually helps to not confuse the jury
25 to see what actual criteria went into the GRC and the fact

1 that he did different searches with different parameters and
2 that that's how he got the list of manufacturers.

3 THE COURT: Okay. Let me -- can I have C, D and
4 E? Can I look at those?

5 They don't object to B, so B is admitted.

6 MR. KELLNER: I think we need to address that. C
7 is what we were talking about that I don't object to. B I
8 most certainly do.

9 THE COURT: Okay.

10 (Pause.)

11 THE COURT: All right. Then to be clear for the
12 record the People are objecting to the admission of B as in
13 boy. They are not objecting to the admission of C as in
14 cat. So I'll amend my earlier ruling. C is admitted. B is
15 not admitted at this time.

16 The objection with respect to B, D and E is on 403
17 grounds. I'm taking a look at B. It's a single-sided
18 worksheet entitled bullet worksheet.

19 On 403 grounds I don't think it's particularly
20 confusing, overwhelming or voluminous, and so the objection
21 on those grounds will be overruled. I'll allow B to be
22 admitted.

23 D and E are separate database searches D. Does
24 not appear to have a separate summary face sheet, but it
25 appears the criteria for the search which is similar to the

1 face sheet included as the first page of Exhibit E is
2 contained at the top of the first page of Exhibit D. I'll
3 give you a chance to argue and make a record. I need to try
4 and get my head around this.

5 MS. RING: I can make the suggestion that I'm
6 concerned about is just those face sheets. So we could
7 redact the list and just give this -- the top sheets which
8 show the criteria and not the actual --

9 THE COURT: What's the -- if the exhibits admitted
10 are modified in that form what's the People's position?

11 MR. KELLNER: The witness has already testified
12 about the modified search, and that's encompassed in
13 Defendant's Exhibit C. So I don't think there's any need to
14 admit any further information about that. She's questioned
15 him about it.

16 I'm particularly concerned about the following on
17 information in all of these documents, the various types of
18 weapons, some of which are not included in the final
19 analysis because some of them are revolvers, some of them
20 don't match other information in this case. There's been no
21 testimony about that.

22 This is essentially summarized in his report, his
23 search and the resulting database as he said with the
24 firearm manufacturers is already encompassed and admitted.

25 THE COURT: All right. What's your response to --

1 essentially the objection is that it's cumulative, D and E
2 are cumulative of what's contained in C.

3 MS. RING: So but in -- in C it doesn't show what
4 measurements he used to do the search.

5 THE COURT: Okay. So that's -- that's the
6 distinction?

7 MS. RING: Right.

8 THE COURT: If I'm understanding what you are now
9 asking to admit by the first page of Exhibit D redacted to
10 exclude from the double dashed line down, and then the first
11 sheet of Exhibit E so there's a distinction.

12 The information contained on the first pages of D
13 and E redacted as I said earlier, information that does not
14 appear to be cumulative of C does contain and also --

15 MR. KELLNER: Your Honor, with respect to
16 Defendant's Exhibit B which I previously objected to, B as
17 in boy, there's a lot of information and data done there.
18 It's handwritten notes that hasn't been testified to.

19 Without testimony underlying that information I
20 don't know what the jury is going to do with it when they go
21 back. They may use it, I mean, to make speculation. And
22 frankly it's just not relevant without some testimony
23 explaining B further.

24 THE COURT: Well, I've already ruled on B. B will
25 be admitted.

1 With respect to those parts of D and E that are
2 sought to be admitted, it does not appear to be cumulative
3 of either C or B to the extent that the results typed in on
4 the first page of D and E are contained in the analysis from
5 B. D and E are frankly clearer and easier to read than any
6 of the handwritten notes from B.

7 So I will over the objection of the People admit
8 the face sheet of Exhibit E as well as the top portion of
9 Exhibit D redacted to exclude everything below the double
10 dashed line. So B, C, D and E will be admitted over the
11 People's objection.

12 MR. KELLNER: And with -- with that tab off it?

13 MS. RING: Yes.

14 THE COURT: Right. B and C can go directly to the
15 court reporter. Exhibit D and E will need to be redacted
16 and then tendered.

17 For the record right now, Mr. Kellner, to the
18 extent that you need them for redirect examination I'll give
19 you them back now.

20 MR. KELLNER: Okay. Thank you.

21 THE COURT: Okay. Thank you. All right. So I'll
22 ask you if you have any further questions of the witness.
23 You can offer B, C, D and E and I'll tell the jury what my
24 ruling on that is. And then how long is your redirect?

25 MR. BRACKLEY: 15 minutes, Judge.

1 THE COURT: All right. So once you're done with
2 your cross, then I'll tell the jury we need to break for 15
3 minutes.

4 (The following proceedings occurred in open
5 court.)

6 MS. RING: I have no further questions of
7 Mr. Ritter. At this point we would move to admit
8 Exhibits B, C, D and E.

9 THE COURT: All right. And D and E as redacted
10 pursuant to our discussion at the bench will be admitted
11 along with B and C.

12 And ladies and gentlemen, we're going to go ahead
13 and take the mid-morning break. We'll be in recess until
14 ten minutes to 11:00. Gives you about 15 minutes.

15 Remember the admonition that I've given you
16 previously. It applies at every recess, including this one.
17 We should be ready for you again at 10:50. And please enjoy
18 the break. We'll see you then.

19 (The jury left the courtroom.)

20 THE COURT: We'll be in recess.

21 (A recess was taken.)

22 THE COURT: All right. We're back on the record
23 in 12CR222. Mr. Clark and his counsel are present,
24 prosecution is present.

25 Anything for the record before we bring the jury

1 in from the People?

2 Go ahead, Ms. Ring.

3 MS. RING: Just that over the break I redacted as
4 we agreed upon Exhibits D and E. I showed the redacted
5 copies to Mr. Kellner to make sure that it was what he
6 believed we agreed upon. So we now have those marked and
7 admitted as we all agreed upon at the bench.

8 THE COURT: All right. Thank you. And they're up
9 on the exhibit table?

10 MS. RING: Mr. Kellner, I think he's going to use
11 them.

12 THE COURT: All right. Would you bring the jury
13 in please?

14 (The jury returned to the courtroom.)

15 THE COURT: Welcome back, ladies and gentlemen of
16 the jury. Just prior to the break the defense had finished
17 cross-examination of Mr. Ritter.

18 At this time, Mr. Kellner, your redirect
19 examination.

20 MR. KELLNER: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. KELLNER:

23 Q Mr. Ritter, on Defendant's Exhibit C, which is a
24 copy of your report, the bottom of paragraph 2 it says
25 perhaps a stronger conclusion could be rendered when a

1 suspect firearm is submitted for comparison.

2 And my question, sir, is this; what type of
3 examination or analysis can you do when you have a suspect
4 firearm to compare it to bullets and shell casings that have
5 already been provided?

6 A I'm sorry, where was the portion that you were
7 just reading on, which page? The first page was it or --

8 MR. KELLNER: Can I approach and I'll show you?

9 THE WITNESS: Thank you very much.

10 Q (By Mr. Kellner) So my question, Mr. Ritter, was
11 what kind of examination or analysis can you do when you
12 have a suspect firearm in relation to the two bullets and
13 the shell casings that you'd already examined?

14 A Well, the additional would be that I can actually
15 test fire that firearm to see how it is marking on the
16 bullets and the cartridge cases, what types of marks it is
17 leaving.

18 And then this way I can determine whether or not
19 the firearm that's submitted is a suspect weapon of having
20 fired bullets and cartridge cases did in fact fire those by
21 comparing the evidence cartridge cases and bullets with the
22 test fired cartridge cases and bullets.

23 Q So if you have a suspect firearm you can actually
24 come to a firm conclusion by matching up bullets that you
25 would fire from that suspect firearm to the bullets that

1 you've already examined as to whether or not they come from
2 the same gun?

3 A Yes, sir.

4 Q And in this case no suspect firearm was ever
5 submitted to you?

6 A No, sir.

7 MR. KELLNER: Judge, what I'd like to do now is
8 publish to the jury Defendant's Exhibit B.

9 THE COURT: B as in boy?

10 MR. KELLNER: B as in boy, yes, sir.

11 THE COURT: Permission granted.

12 Q (By Mr. Kellner) Mr. Ritter, if you could use that
13 laser pointer again for us and for your own reference if
14 it's hard to see for you. That's of course your worksheet
15 pertaining to --

16 A Yes.

17 Q -- the bullet that you labeled as CBI number 5?

18 A Yes.

19 Q I just want, because some of the handwriting is a
20 little hard to read, to explain to the jury --

21 A May I refer to my notes?

22 Q That's perfectly fine, yes.

23 A Thank you. All right. Thank you.

24 Q Sure. So on date received that's November 4,
25 1994?

1 A Yes.

2 Q And after that it says description of package.

3 Can you decipher your handwriting there?

4 A Certainly, yes. The one with the zero means
5 that's the first piece of packaging. It's an -- S and M
6 stands for sealed and marked manila envelope. That's the
7 ENV that you see here. Then 2 with the zero or sign there,
8 that stands for un -- the next word would be U-N, unsealed
9 plastic film canister, plastic film canister.

10 Q Then the next line markings as received, what does
11 that refer to?

12 A Markings as received, these were markings that
13 would have been on like number 1. Like it was P9419535,
14 item number 6, RJS. That would be someone's initials. Then
15 there's RJ Smith. Number 515 bullet. And then CBI 943196
16 number 5, MJB. Those initials MJB that you see right here,
17 that would be the evidence custodian's initials. And then
18 that next is 2, that means the top of the lid of the
19 canister was marked lid marked number 6. That's what this
20 is right here.

21 Q Well, let's skip down to weight where it says 116.

22 A Yes.

23 Q That's 116?

24 A Grains.

25 Q Grains.

1 I believe you said earlier that's consistent with
2 a 9mm bullet?

3 A Yes, sir.

4 Q Then in the diameter section what does that say?

5 A Diameter section says .353 to .357. Those are
6 measurements that I took of the bullet.

7 Q Is that also consistent with a 9mm bullet?

8 A That would fall in that category.

9 Q Then L and G is 6, and that's a lands and grooves?

10 A Yes.

11 Q Then direction is RT, right?

12 What is cannelure?

13 A Cannelure is usually -- on a bullet it's where
14 like, for instance, on some fired bullets they'll have a
15 cannelure. And it's a depression. And it would be the
16 portion of the bullet that's inside the jacket, the
17 cartridge case itself. And it will sometimes have a
18 lubricant so that it goes down the barrel.

19 But that's normally not seen in bullets that are
20 loaded in semi-automatic ammunition or full automatic
21 ammunition. That's not to say if it's re-loaded somebody
22 may not re-load it with one of those bullets.

23 Q You're talking about maybe a sports enthusiast who
24 loads his own bullets and re-loads them?

25 A Yes.

1 Q Down to nose style, what does RN mean?

2 A Round nose.

3 Q Base style?

4 A Jacketed.

5 Q Is that referring to full metal jacket?

6 A It's fully jacketed. Like I said, some of them
7 will have a deep hollow base and you can see actually the
8 led core material that's inside the jacketing.

9 Q Bullet finish. I can't read the writing after
10 that.

11 A That's the chemical sign for copper, CU.

12 Q Now going down to your land measurements?

13 A Yes.

14 Q On the third box to the right it says .092 or
15 .056. Why is there a difference there?

16 A Because this would have been a land where it -- it
17 wasn't clearly defined.

18 I think I mentioned that when you're doing these
19 measurements the way that goes down the barrel, it could be
20 a design flaw in the barrel, it could be damage that
21 occurred inside, I really don't know. But it wasn't clearly
22 defined. So I took my best measurements that I could take
23 and -- do you want me to explain how those measurements are
24 made?

25 Q Yeah, please do.

1 A I mentioned the comparison microscope, that it's
2 two microscopes tied together by an optical bridge. So you
3 actually have two stages. On one stage a micrometer is
4 mounted. So the jaws of the micrometer are visible through
5 the eye piece. And on the other side the bullet is mounted.

6 So the land or the groove that I'm measuring, I
7 would bring that up using the same magnifications, and then
8 I would bring the jaws to where they came within what I felt
9 were the proper measurements for the land or for the groove,
10 and then I could read that out directly on -- at that time I
11 believe we had digital micrometers that would show exactly
12 what the measurement was.

13 So you'll notice there's two there, that I
14 couldn't be specific, so I took the best that I could.

15 Q Now, the smallest number on the land measurements
16 as I see is .055?

17 A Okay.

18 Q And that appears in more than one location?

19 A Yes, that appears in one of them that I would say
20 I guessed for lack of a better term. It was relatively
21 sloppy, not real clear and concise.

22 Q And you say sloppy. Does the quality of the
23 manufacturer contribute at all to sort of the quality of the
24 rifling inside of a barrel?

25 A It's really hard to say. It could. That's a

1 possibility. There's a lot of variables that can apply.

2 Q The highest number that you have on the land there
3 is .092; is that right?

4 A That was again in the one that, like I said, was
5 not clearly defined. That's the one that's really very
6 faint that you're talking about I believe right here; is
7 that correct, sir?

8 Q Yes. Thank you.

9 And with respect to your groove measurements on
10 the next line down, what's the lowest measurement and the
11 highest measurement?

12 A Looks like the lowest measurement would have been
13 107, and the highest measurement was a 133. And there
14 again, it was in the same area as with the land
15 measurements. So for whatever reason that area just was not
16 clearly defined, what we'd call the edges.

17 Q Now, earlier on cross-examination I believe you
18 said that you used a little bit of a variance between .005
19 and .003 when you are running numbers in the General Rifling
20 Characteristics database?

21 A Well, that can be -- you can use really anything
22 that you want to that you feel how much you want to expand
23 that. That's usually what I would use, anywhere from
24 nothing from plus or minus 1000ths, .001 to plus or minus 5.

25 Q And in this case you used .005 plus or minus with

1 respect to your measurements?

2 A I did use that in one of the runs that I did.

3 Q I believe the question from Ms. Ring was that that
4 was standard operating procedure and perfectly acceptable
5 within the field?

6 A Absolutely.

7 Q Now, when you ran the numbers in the General
8 Rifling Characteristics did you just take the lowest number
9 and the highest number and add or subtract the .005 or did
10 you use an average?

11 A No. What I did was I actually -- because I was
12 looking at these numbers and trying to remember different
13 ways that I would do it. And what I do is I took a mean
14 average to give me the best practice that I could come up
15 with on the measurements that I had. So I took a mean
16 average.

17 Q You took the mean average and then you subtracted
18 or added .005?

19 A Yes, I did.

20 Q And taking the mean average, was that consistent
21 at the time in 1994 with your training and experience?

22 A Yes.

23 Q I'll follow up with some information. I'll take
24 this off the screen.

25 Now, from your report that was admitted,

1 Defendant's Exhibit C where it states no latent prints were
2 developed off of item 7, the Carmex container --

3 MS. RING: Judge, this is outside the scope of
4 cross.

5 THE COURT: It's an exhibit that you admitted
6 earlier.

7 MS. RING: Okay.

8 A Your question again, sir?

9 Q (By Mr. Kellner) Where it says item 7 developed no
10 latent prints.

11 A It actually covers the three cart -- the four
12 cartridge cases, and number 7 no latent prints. None were
13 developed.

14 Q If no latent prints are found on an item like that
15 Carmex container, does it mean no one ever touched it?

16 A No.

17 Q What does it mean?

18 A It means there weren't any there when I tried to
19 develop them with the techniques that I used to develop or
20 render visible.

21 Q Are prints always left behind once someone touches
22 an object?

23 A Not always, no, sir.

24 Q And what process did you use as far as determining
25 latent prints in that case?

1 A I used cyanoacrylate ester, which is commonly
2 referred to as the super glue technique. I processed it in
3 that manner. It's a fuming process.

4 And then after -- well, first, of all, exactly the
5 way I did it was to do a visual examination first to see if
6 you can see anything that is clearly obvious. If you do,
7 then you'd photograph it.

8 The next process is to use the best process you
9 feel for the object that you're processing. So I used the
10 super glue technique. After developing that I examined
11 them, and I really didn't see anything.

12 I then used ultraviolet powders that will
13 sometimes render ridge detail visible that is not clearly
14 visible to the naked eye. And then I examined that with
15 ultraviolet light, and I again didn't come up with anything.

16 MR. KELLNER: Thank you, Mr. Ritter. I have no
17 further questions.

18 THE COURT: Any recross, Ms. Ring?

19 MS. RING: Briefly.

20 RE CROSS-EXAMINATION

21 BY MS. RING:

22 Q Mr. Ritter, in terms of when you're --

23 MS. RING: Would you mind putting that up again
24 please?

25 Q (By Ms. Ring) What's been marked Defense Exhibit B

1 is your handwritten worksheet?

2 A Yes.

3 Q So when we're talking about taking a mean -- you
4 know what? Do you still have that pointer? That's better
5 than me walking up there. I'm going to ask you to use the
6 pointer.

7 A Okay. I get to shake with it.

8 Q What you're talking about is you took that line
9 where it says land measurements and you came up with a mean,
10 a high and a low, that you put in as your search criteria?

11 A That's what I did.

12 Q Okay. And you did the same thing for the groove
13 measurements?

14 A Yes.

15 Q And Mr. Kellner asked you if that was proper
16 procedure in 1994?

17 A Yes.

18 Q Okay. And it's still proper procedure today?

19 A Sure. It can be used today. It's up to the
20 examiner. Basically you're given the tools with which to
21 use, and then you use them how appropriately you feel it is.

22 Q Okay. But when you're looking at the numbers that
23 you put on your worksheet today --

24 A Yes.

25 Q -- and you looked at the numbers that I showed you

1 you put into the GRC search --

2 A Yes.

3 Q -- that all makes sense to you the way you did it
4 back in 1994?

5 A Yes. That's why I had to go back and review it to
6 make sure. This is 18 years ago, yes.

7 MS. RING: Nothing further. Thank you.

8 THE COURT: All right. Mr. Ritter, you can step
9 down.

10 Can this witness be excused, Mr. Kellner?

11 MR. KELLNER: Yes, sir.

12 THE COURT: Ms. Ring?

13 MS. RING: Yes, sir.

14 THE COURT: Mr. Ritter, you're excused. Make sure
15 you leave all those exhibits there.

16 Would the People please call their next witness?

17 MR. BRACKLEY: People call Detective Thomas
18 Trujillo.

19 THE COURT: Detective, would you step forward
20 please. Sir, you've previously testified and been sworn in
21 this matter. I'll remind you that you're still under oath.
22 Please have a seat.

23 THE WITNESS: Thank you.

24 DETECTIVE THOMAS TRUJILLO,
25 called as a witness on behalf of the People, having been

1 previously sworn, was examined and testified as follows:

2 THE COURT: Go ahead, Mr. Brackley.

3 DIRECT EXAMINATION

4 BY MR. BRACKLEY:

5 Q Welcome back, Detective.

6 A Thank you.

7 Q For the record even though we have already seen
8 you, can you state your name for our reporter?

9 A Yes. It's Thomas Edward Trujillo. And it's
10 T-R-U-J-I-L-L-O.

11 Q Okay. I'm going to bring you back to October 25,
12 1995 at a conversation that you had with Mr. Dion Moore
13 along with Detective Hickman and Ms. Lindasue Smollen. Do
14 you recall that conversation?

15 A Yes.

16 Q And have you had an opportunity to review a
17 transcript, an actual word-for-word transcription of the
18 conversation with Dion Moore on that particular date?

19 A I did.

20 Q Detective, do you remember asking the question --
21 well, do you remember Detective Hickman asking the question
22 You helped him get a 9mm, and the answer being Uh-huh, and
23 the question -- the next question being Is that -- do you
24 remember what kind of gun it was, and the answer being Um,
25 it's a Jennings Bryco firearm. Do you remember those

1 questions being asked and those answers being given?

2 A Yes, from the transcript.

3 Q Do you remember Detective Hickman talking with
4 Mr. Moore about a conversation that Mr. Moore would have had
5 with Michael Clark about stealing checks, in colloquial
6 terms, some guy's checks?

7 A Yes.

8 Q And do you remember Dion more making the statement
9 He said that he just told me that something about some guy's
10 checks, you know. And it was like -- and then inaudible,
11 were checks and he knows and stuff and probably going to
12 call the police on me. And I was like that's too bad, you
13 know. I didn't know what to tell him.

14 Do you remember Detective Hickman saying Do you
15 remember when that was, and Mr. Moore stating That probably
16 was after -- sometime after the thing with the gun. Okay.
17 And the next question was Did he mention the guy's name
18 whose checks he took, and the answer being No, huh-uh.

19 Do you remember those statements being made by
20 Dion Moore back on October 25, 1995 in response to those
21 questions being asked by Detective Hickman?

22 A Yes, from the transcript.

23 Q Do you remember Detective Hickman and yourself and
24 Dion Moore talking about the date of November 1, 1994 and
25 what Dion Moore did along with defendant and Jamie Uhler and

1 a couple of young women on the -- in the afternoon into the
2 evening of November 1, 1994?

3 A Yes.

4 Q And do you remember Dion Moore talking about a
5 trip to the bus station?

6 A Yes.

7 Q And then a bus ride back to Boulder?

8 A Yes.

9 Q And that -- well, do you remember Dion Moore using
10 these words, I was kind of thinking about it later, but
11 anyway, we got on the bus. And on the way there that's when
12 I was talking about it and when they would -- they seen the
13 gun because we were playing it in the car. We were playing
14 it in the car because it was under the seat and -- inaudible
15 word -- came out was the back, and we were in the back. And
16 Vanessa is really scared of guns, so she was like put it
17 away. And she was really freaking out and stuff. So we put
18 it back, and then we got dropped off and we went to Boulder.
19 And then the three of us -- inaudible -- Summer is my
20 girlfriend -- inaudible -- we had kind of argument. And so
21 they left. And then I got on my bike and I got about three
22 blocks, four blocks away. Then we all talked there on the
23 corner for ten minutes. Then we went back to my house.

24 Do you recall Dion Moore making those statements
25 about the gun in the car and the bus trip to Denver -- to

1 Boulder?

2 A Yes.

3 Q Do you remember Detective Hickman asking Okay.

4 Now this happened Tuesday, November 1st. When did this

5 happen that you all were in the car and saw the gun? And

6 the answer was Tuesday, November 1st from Dion Moore?

7 A Yes.

8 Q Do you remember Dion Moore talking about seeing

9 the defendant at a girl's basketball game and asking him

10 about the connection between a gun and the murder of Marty

11 Grisham and some checks that were being stolen?

12 A Yes.

13 Q And do you remember Dion Moore saying You know, so

14 I asked him what he did with his gun. And he said I just

15 got rid of it. And I said Why, like why. He said Well, I

16 just didn't -- you know, I didn't need it. I didn't have

17 any use for it. Plus he was getting tired of, you know --

18 inaudible -- just riding around with a gun in my car is --

19 inaudible -- and stuff -- inaudible -- work. Like I want

20 to -- like I -- I want to go -- you know, go to jail or

21 anything again for it, so I got rid of it. And also Michael

22 Clark saying I didn't do it, but they'll never find the gun?

23 A Yes.

24 Q Do you remember Dion Moore talking about the

25 description of the person who they had used -- who he had

1 used to do this straw purchase of a gun down in a pawn shop
2 in Denver? And do you remember Dion Moore's description --
3 well, do you remember the question from Detective Hickman
4 being How old would you say this guy is, and Dion Moore
5 saying He's like 40 something, probably 40 maybe, you know,
6 between 35 or 40, but he looked probably 27, 28, and
7 Detective Hickman responding Well, what's his secret?

8 Do you remember asking and then Dion Moore saying
9 I don't know. I mean people tell you he's older, but he
10 looks really young and stuff. Okay. And he has a black
11 mustache, you know, white or Hispanic, I don't mean -- I
12 mean, it's hard to tell, you know, probably maybe Italian or
13 something. I don't know.

14 Do you recall that statement being made by Dion
15 Moore back on October 25, 1995?

16 A Yes.

17 MR. BRACKLEY: Thank you, sir. No further
18 questions at this time.

19 THE COURT: Cross-examination, Ms. Milfeld.

20 CROSS-EXAMINATION

21 BY MS. MILFELD:

22 Q You just talked to Mr. Brackley about a
23 conversation that you had with Dion about the checks?

24 A Correct.

25 Q According to Mr. Moore, Mr. Clark told him that he

1 stole the checks and the guy knows?

2 A Yes.

3 Q But you know from your investigation that the
4 first time that Mr. Grisham reported the checks being
5 missing was November 1st?

6 A Yes.

7 Q You know from your investigation that the very
8 first time he reported that was 5:00 on November 1st?

9 A Yes.

10 Q He hadn't made any reports before about his checks
11 being missing?

12 A No.

13 Q You know from your investigation that he didn't
14 talk to any family members about his checks being missing?

15 A Correct.

16 Q He didn't tell Kristen?

17 A No.

18 Q He didn't tell Loren?

19 A No.

20 Q I want to talk to you about the context in which
21 this conversation with Mr. Moore was taking place.

22 A Okay.

23 Q The first time you spoke with Mr. Moore was in
24 October of 1995?

25 A Yes.

1 Q That was a little less than a year after the
2 investigation began?

3 A A little bit less than a year, yes.

4 Q At the time that you spoke to Mr. Moore his
5 defense attorney Ms. Lindasue Smollen was present?

6 A Yes.

7 Q Mr. Moore had pending cases at the time?

8 MR. BRACKLEY: Your Honor, this is asked and
9 answered by counsel yesterday, and it's beyond the scope
10 from today's examination.

11 THE COURT: I'll sustain that objection.

12 MS. MILFELD: Judge, may we approach?

13 THE COURT: Yes.

14 (The following proceedings occurred at the bench
15 out of the hearing of the jury.)

16 THE COURT: Go ahead.

17 MS. MILFELD: Judge, I would disagree with
18 Mr. Brackley's characterization that it was asked and
19 answered. Mr. Moore specifically said yesterday when asked
20 about his pending cases, he's like well, I don't really know
21 what cases happened at the time.

22 We get to finish that impeachment through
23 Detective Trujillo that says actually he did have pending
24 cases at the time, those cases were in Boulder County, and
25 there's an agreement.

1 Mr. Moore was very unclear yesterday about whether
2 he remembered any of that. He said well, I think some of my
3 cases might have been dismissed. So we get to finish that
4 impeachment with this detective.

5 THE COURT: First of all, that wasn't his
6 testimony. Second of all, your co-counsel cross-examined
7 vigorously on this very area. And third of all, there was
8 an agreement that the memorandum containing the cooperation
9 agreement and referencing Mr. Dion Moore's priors would be
10 admitted into evidence as an explanation to the jury about
11 Dion Moore's prior criminal history.

12 The knowledge of Mr. Moore of his prior criminal
13 history and how -- I'm sorry, of his pending charges and how
14 that would be affected by his statements in 1995 in his
15 cooperation with the police was more than sufficiently
16 covered on cross-examination. I agree that this is
17 cumulative, and I sustain the objection. Thank you.

18 (The following proceedings occurred in open
19 court.)

20 THE COURT: You may continue, Ms. Milfeld.

21 Q (By Ms. Milfeld) Go back. You didn't talk to
22 Mr. Moore at any time before October 25, 1995?

23 A I did not.

24 Q He did not come to you at any time before that?

25 A No.

1 MS. MILFELD: No further questions.

2 THE COURT: Any redirect, Mr. Brackley?

3 MR. BRACKLEY: No, Your Honor. Thank you.

4 THE COURT: All right. Detective, you can step
5 down. You may be subject to recall.

6 Would the People call their next witness?

7 MR. BRACKLEY: People call Ms. Jessica Huggins.

8 THE COURT: Ma'am, would you step forward please?
9 Come on all the way up here to the witness chair. Would you
10 please face me and raise your right hand?

11 JENNIFER HUGGINS,
12 called as a witness on behalf of the People, having been
13 first duly sworn, was examined and testified as follows:

14 THE COURT: Please have a seat.

15 Go ahead, Mr. Brackley.

16 MR. BRACKLEY: Judge, can we approach real quick?
17 It's kind of procedural, and it's very fast I promise.

18 THE COURT: Do you need to be on the record?

19 MR. BRACKLEY: No.

20 (A discussion occurred at the bench off the
21 record.)

22 THE COURT: Is the issue solved?

23 MR. BRACKLEY: I hope so.

24 THE COURT: Go ahead.

25 DIRECT EXAMINATION

1 BY MR. BRACKLEY:

2 Q Ms. Huggins, thank you for bearing out my
3 disorganization. Are you currently employed and by whom?

4 A Boulder County Sheriff's Office.

5 Q And first let me ask you to state your name and
6 spell your last name.

7 A Jessica Huggins, H-U-G-G-I-N-S.

8 Q And you're currently employed by the Boulder
9 County Sheriff's Office?

10 A Yes.

11 Q What do you do with the Boulder County Sheriff's
12 Office?

13 A I'm a classifications deputy in the jail.

14 Q What does it mean to be a classifications deputy
15 at the jail?

16 A I determine where inmates are housed based on
17 objective classification module.

18 Q I'm going to show you what I'm going to deem
19 marked People's 76 for identification, and I'm going to
20 approach with that. Prior to coming into court today --
21 either today or on a prior date did you have an opportunity
22 to review what those documents are?

23 A Yes.

24 Q And what are those documents?

25 A These are documents that show where Michael Clark

1 was housed in the jail and his movement in the jail.

2 Q Okay. For what dates? Well, let me ask you more
3 simply, are there dates from November 3, through November --
4 the end of November 5th?

5 A Yes.

6 Q Are those records -- are those records kept by the
7 Boulder County Sheriff's Office jail division in the
8 ordinary course of business there at the jail?

9 A In our Tiburon system, yes. We don't have the
10 paper documents. It's just retrievable in our computer.

11 Q Okay. So let me ask a better question. Back in
12 1994 was it the business of the Boulder County Jail to keep
13 and make records like that?

14 A Yes.

15 Q And what was the purpose of records like that back
16 in 1994?

17 A To show who was housed in the modules and where
18 they were housed.

19 THE COURT: Deputy, I'm going to ask you to keep
20 your voice up.

21 THE WITNESS: Okay.

22 Q (By Mr. Brackley) There's a microphone there if
23 you can try to extend that.

24 So when are those records made in relation to the
25 data that's in them?

1 A They're made every single day. Module officers
2 use them at least twice a day.

3 Q And does the Boulder County Jail still make and
4 keep records like that here in 2012?

5 A Yes.

6 Q Do you recognize the different terms and
7 designations and abbreviations and such --

8 A Yes.

9 Q -- on those records?

10 A Yes.

11 MR. BRACKLEY: Your Honor, I would move to admit
12 those as People's 76 subject to the conversation at the
13 bench.

14 THE COURT: Objection or voir dire?

15 MS. MILFELD: No objection, no voir dire.

16 THE COURT: 76 at the bench -- I need to be real
17 clear, the conversation at the bench was not on the record.
18 There were copies being presented at this time. They'll be
19 supplemented by the original documents at the next break.

20 MR. BRACKLEY: Right.

21 THE COURT: All right. You may continue.

22 MR. BRACKLEY: Which to complete the record I left
23 downstairs.

24 Q (By Mr. Brackley) So did the records show on what
25 date Michael Clark came into the Boulder County Jail back in

1 1994?

2 A November 3rd.

3 Q Okay. And did the records show where Michael
4 Clark was housed at the Boulder County Jail over the course
5 of time from the 3rd of November through the 5th of
6 November?

7 A Intake module.

8 Q And what is the intake module?

9 A That is a module for unclassified inmates. And
10 then he moved to general population.

11 Q So was he in intake the night of the 3rd into the
12 4th?

13 A Yes.

14 Q And the 4th into the 5th?

15 A Yes.

16 Q Was there also a gentleman in the intake division
17 on those dates named Stackhouse?

18 A Yes.

19 Q Okay. And was Stackhouse also in the intake
20 division?

21 A Yes.

22 Q By the way, prior to going into the intake
23 division do you go through a place called booking?

24 A Yes.

25 Q And what is booking as it relates to sort of the

1 movement of an inmate through the jail?

2 A It is where an inmate's booked in so that we have
3 their information for what they're being charged with,
4 biographical information, and information on medical issues.

5 Q And I asked about Mr. Stackhouse being in intake
6 the night of the 3rd into the 4th and the 4th into the 5th.
7 Do those records bear that out?

8 A Yes.

9 Q Specifically within the intake module where were
10 Mr. Clark and Stackhouse in relation to each other the 3rd
11 into the 4th and the 5th -- the 3rd into the 4th and the 4th
12 into the 5th?

13 A Michael Clark was in intake 27, and Walter
14 Stackhouse was intake number 1. And on the 5th they were
15 both in intake 1.

16 Q And what does that mean, intake 1?

17 A It's the room number.

18 Q Okay. And when they were both in intake 1, how
19 many other inmates would have been in intake 1?

20 A Only 2.

21 Q So there are two bunks in there?

22 A Yes.

23 Q And are there specific bunk assignments for
24 Mr. Stackhouse and Mr. Clark?

25 A Yes. Michael Clark was in bunk 2, and Walter

1 Stackhouse was in bunk 1.

2 Q Now, on the previous day when Mr. Stackhouse would
3 have been in intake 1 and Mr. Clark in intake 27, would they
4 have been in the same population within the intake module
5 together?

6 A Yes.

7 MR. BRACKLEY: I have no further questions of
8 Ms. Huggins.

9 THE COURT: Cross-examination, Ms. Milfeld.

10 MS. MILFELD: Thank you.

11 CROSS-EXAMINATION

12 BY MS. MILFELD:

13 Q Looking at your list of different rooms there, how
14 many different rooms does it show?

15 A There were -- there's 32 rooms in that module.

16 Q So in 1994 there would have been 32 rooms?

17 A Yes.

18 Q When you're talking about the general population,
19 what you mean is that Mr. Clark would have been able at some
20 point to talk to other people that were in the intake
21 module?

22 A Yes.

23 Q So he would be able to talk to at a very minimum
24 32 other people?

25 A Um-hmm, yes.

1 Q Drawing your attention to the 4th it indicates
2 that Mr. Clark and Mr. Stackhouse were not in the same
3 rooms?

4 A That's correct.

5 Q Then on the 5th they're put in the same room?

6 A Yes.

7 MS. MILFELD: No further questions.

8 THE COURT: Any redirect, Mr. Brackley?

9 MR. BRACKLEY: No, Your Honor. Thank you.

10 THE COURT: All right. Deputy, you can step down.
11 Can this witness be excused, Mr. Brackley?

12 MR. BRACKLEY: You know, Your Honor, may I ask one
13 redirect question?

14 THE COURT: All right. Hold on. Go ahead.

15 REDIRECT EXAMINATION

16 BY MR. BRACKLEY:

17 Q It's actually not the 5th. It's the 4th into the
18 5th; correct?

19 A I'm sorry, yes, it is. At 11:00 in the evening he
20 was moved to intake 1.

21 MR. BRACKLEY: Thank you.

22 THE COURT: Any recross?

23 MS. MILFELD: No, Judge.

24 THE COURT: All right. Now you can step down,
25 Deputy.

1 Can this witness be excused, Mr. Brackley?

2 MR. BRACKLEY: She may now, Your Honor.

3 THE COURT: Ms. Milfeld?

4 MS. MILFELD: Yes, Judge.

5 THE COURT: All right. You're excused. Thank
6 you.

7 Would the People call their next witness?

8 MR. KELLNER: Your Honor, the People's next
9 witness is Walter Stackhouse.

10 THE COURT: All right. This will just take two
11 minutes, ladies and gentlemen.

12 (Pause.)

13 THE COURT: Sir, come on in here and have a seat
14 in that chair right there. Face me and raise your right
15 hand. Your other right, yeah. That's your left. I need
16 your right.

17 WALTER STACKHOUSE,
18 called as a witness on behalf of the People, having been
19 first duly sworn, was examined and testified as follows:

20 THE COURT: All right. Go ahead, Mr. Kellner.

21 MR. KELLNER: Thank you, Judge.

22 DIRECT EXAMINATION

23 BY MR. KELLNER:

24 Q Good morning. Can you state your name and spell
25 your last name?

1 A Walter Stackhouse spelled S-T-A-C-K-H-O-U-S-E.

2 Q Mr. Stackhouse, where do you currently live?

3 A Soledad State Prison.

4 Q Where is Soledad State Prison?

5 A In the state of California.

6 Q And you're living in Soledad State Prison because
7 you were convicted on November 15, 2011 of felony false
8 imprisonment; is that right?

9 A Yes.

10 Q When did you get from California to Boulder?

11 A I believe about nine days ago.

12 Q And where are you now that you've been brought
13 from the Soledad facility?

14 A In the Boulder County Jail.

15 Q Have you ever been to Boulder before you were in
16 California?

17 A Yes.

18 Q Tell the jury when you lived in and around
19 Boulder.

20 A I moved to Colorado in 1988.

21 Q And when did you leave Colorado?

22 A I'm going to say 2002.

23 Q When you were in Colorado what county did you live
24 in?

25 A Boulder County.

1 Q Approximately how long did you live in Boulder
2 County?

3 A Off and on for a period of probably 13 years.

4 Q And Mr. Stackhouse, when you were in Boulder
5 County you were convicted of a couple felonies; is that
6 right?

7 A Yes.

8 Q You were convicted of felony check fraud and
9 forgery in Boulder on April 11, 1997?

10 A That's correct.

11 Q I want to talk to you about November 3, 1994.
12 Were you in the Boulder County Jail that day?

13 A Yes, I was.

14 Q And why were you in the Boulder County Jail?

15 A I was serving a sentence in the Boulder County
16 work release.

17 Q And you were convicted actually of a felony on
18 August 11, 1994 for theft of \$400 but less than 15,000?

19 A That's correct.

20 Q And you say you were sentenced to work release?

21 A That's correct.

22 Q What's work release mean?

23 A I was sleeping at the jail. And I would leave in
24 the morning and I would go out to work, then I'd come back
25 after work and stay in the Boulder County Jail.

1 Q How old were you in around 1994?

2 A 18 years ago, I'm going to say 31, 32 years old.
3 I'm 50 years old now.

4 Q Now, you were sentenced to work release as I said
5 in August of 1994. Why were you in the Boulder County Jail
6 on November 3, 1994?

7 A I was brought back from the Boulder County work
8 release to the main jail.

9 Q Why? Why were you brought back to the main jail?

10 A For positive urinalysis for cocaine.

11 Q So you were brought back for positive urinalysis.
12 Where do you go when you're first brought to the jail on
13 November 3rd?

14 A To booking.

15 Q What's booking?

16 A That's where you come in from the streets if
17 you've been arrested. That's where they process you through
18 fingerprints and pictures and mug shots and dress you out,
19 put you in the jail.

20 Q Do you come into contact with other people who are
21 in custody in booking?

22 A Yes.

23 Q What's you -- can you describe the general area
24 what booking looks like to the jury?

25 A It's an area where they have counters across the

1 back of the booking area where they fingerprint you and take
2 your property from you. And then they're behind that
3 counter. It's an area where we sit and we're sitting there
4 waiting for processing. And there's a television set, and
5 we can watch until our processing is complete.

6 Q I asked you if you come into contact with other
7 inmates while you're in booking. Is that area just sort of
8 an open space for people that are being processed in?

9 A It is.

10 Q Do you recall coming in contact with a person
11 named Mike on November 3, 1994?

12 A I do.

13 Q Tell the jury what you remember about this person
14 Mike as far as what he looked like.

15 A Clean cut, probably 19 years old at that time,
16 very well dressed, very well mannered. What else would you
17 like to know?

18 Q Did you talk to this person named Mike?

19 A Yes, I did.

20 Q What did you talk to him about in booking?

21 A Well, he was concerned about his charges. And I
22 explained to him what I was in there for, and I told him I
23 was in there for fraud by check. More than likely what's
24 going to happen, maybe put you on probation and make you pay
25 back for the checks.

1 Q Was this person Mike you were talking to, was he
2 also in for a fraud by check charge at that time?

3 A I believe he wrote some checks is what he told me.

4 Q What did he tell you about these checks?

5 A He stole some -- a couple checks and wrote some
6 checks.

7 Q So when you talked to this person and you told him
8 you had dealt with check fraud cases of your own and you had
9 to do probation and pay back the restitution, what sort of
10 effect did it have on Mike when you told him that?

11 A Not really too much. He wasn't too eased about
12 it. He was still concerned that something might --
13 something else could happen to him.

14 I told him don't worry about it. All they can do
15 is put you on probation, make you pay back the checks. I
16 said you're probably going to be in jail no more than two or
17 three months at the worst unless you bond out.

18 Q Did he tell you why he was still concerned even
19 though in your experience he got probation for that?

20 A Yes. He said they think I killed somebody. And I
21 said what. And he said yeah, that's what they think. And
22 then we had a conversation about that.

23 Q Well, tell the jury about that conversation. I
24 mean, after he said they think I killed somebody what
25 happened next?

1 A His concern was that if they -- if they don't find
2 the gun they won't find me guilty for the crime. And I
3 explained to him that's not necessarily true. I said if
4 they -- no, let me rephrase that. If they don't find the
5 gun they can't charge me. I said they can still charge you
6 with a crime, but they may not be able to find you guilty.

7 Q Do you remember what time it was during the day
8 approximately when you were at the jail in booking?

9 A I want to say between -- it was in the evening
10 because I came back from work maybe 7:00-ish.

11 Q Did this person you're talking to, the clean cut
12 person named Mike, say anything about the military to you?

13 A Oh, yeah. He said he's signed up to go to the
14 Marines and he's concerned about his recruiter getting
15 involved and finding out about this and that the recruiter
16 already knows about his 9mm pistol that he has. And that's
17 when he started talking about a firearm.

18 Q All right. Well, so he tells you he's concerned
19 about his recruiter knowing about a 9mm pistol. Did he tell
20 you anything else about a gun that you can remember as you
21 sit here today?

22 A There was just a 9mm. No, let me rephrase that.
23 The recruiter knew he had a 9mm at the time. And his
24 concern was that if he did not get caught for what he was in
25 jail today for for writing checks and he -- maybe he

1 wouldn't be in jail today and he may be able to go to the
2 Marines, something about going to the Marines.

3 Q Did he specifically tell you anything about what
4 he thought would happen if he had been able to enlist and
5 ship out and leave for the Marines?

6 A If he did what?

7 Q If he'd been able to enlist in the Marines and
8 leave Boulder. Did he tell you anything about what he
9 thought would happen with these charges?

10 A Yes. He said if he didn't -- if he wasn't
11 arrested for what -- for being in jail right now they
12 wouldn't have been -- he would be out and be able to go to
13 the Marines and they won't find me in regard to the murder.
14 I said the murder? And we started talking.

15 Q Well, tell the jury when you said you started
16 talking about the murder, what sort of questions were you
17 asking him?

18 A I asked him did you kill somebody. He just
19 wouldn't say anything, you know. He kind of just nodded his
20 head yes. I said well, did you. And he said the guy's
21 dead. And then he kind of just hushed up after that and I
22 just --

23 Q I'm sorry, Mr. Stackhouse. Go ahead.

24 A I just shook my head. I didn't know what to
25 think, you know, to be honest with you. I really didn't

1 know what to think. I'm sitting here talking to a guy that
2 just was in here for writing checks, and now he's in here,
3 you know, he's telling me he shot and killed this guy.

4 Q Well, to be clear did he ever say the words, you
5 know, I killed this person?

6 A No. He nodded his head that he --

7 Q Tell the jury the question you asked him and his
8 response.

9 A I said did you kill this guy, and he nodded his
10 head and said he's dead.

11 Q Mr. Stackhouse, when you had this conversation
12 with him -- after you had this conversation with him what
13 did you do with that information?

14 A I spoke with a person at the jail that worked
15 there, sheriff, and I asked to speak to that -- to somebody
16 in regarding some information I have on somebody that told
17 me that he killed somebody.

18 Q And did you actually meet with someone at the jail
19 about that?

20 A I did.

21 Q Was that November 4, 1994?

22 A I believe that was.

23 Q It was the next day?

24 A The next day.

25 Q Do you recall who you met with?

1 A Sgt. Meals.

2 Q Do you know Sgt. Meals from having been at the
3 jail before?

4 A I've been in and out of county -- Boulder County
5 Jail a few times. And I just know him as me and
6 Sgt. Meals.

7 Q Did you speak with Sgt. Meals about what this
8 person Mike had told you?

9 A Yes, I did.

10 Q And it was actually recorded?

11 A Sir?

12 Q It was recorded as well; right?

13 A Yes, it was.

14 Q And a transcript was made?

15 A Yes.

16 Q The next day, the day after you spoke to
17 Sgt. Meals, did you meet with some investigators or
18 detectives from the Boulder Police Department?

19 A I did.

20 Q That was November 5th?

21 A Yes.

22 Q And when you spoke to them did you tell them again
23 what this person Mike had told you?

24 A I did.

25 Q When you spoke to this person did he tell you

1 anything about a motorcycle?

2 A He got pulled over on a motorcycle.

3 Q Did he say anything with regard to whether or not
4 this motorcycle was his property?

5 A He told me he was -- the motorcycle was stolen, he
6 stole the motorcycle.

7 Q And you passed this information on to Sgt. Meals
8 and then the detectives from the Boulder Police Department?

9 A Um-hmm.

10 Q I want to talk to you about what happens after you
11 go from -- after you get booked into the jail. Where do you
12 go next?

13 A To intake.

14 Q Do you recall talking to this person with this
15 stolen motorcycle who was joining the Marines in intake?

16 A I did.

17 Q Did you keep on talking to him about the
18 conversation you had started in booking?

19 A Off and on.

20 Q When you say off and on, what do you mean?

21 A Throughout the day. It was just about lockdown
22 time. We had a lockdown about that time, and then the
23 conversation stopped. And then I spoke with him that
24 evening while we was in our cell.

25 Q Did you eventually learn the last name, Mike's

1 last name?

2 A I didn't know Mike's last name until just
3 recently.

4 Q Okay. Well, I want to ask you about that then
5 now. You said you had this conversation with Mike in
6 intake?

7 A Yes.

8 Q Well, you continued a conversation. Do you recall
9 talking to him about a car?

10 A Yes.

11 Q What did he tell you about a car?

12 A They think it's a Chrysler, but it's not a
13 Chrysler, it's a Ford LTD.

14 Q Give the jury some context as to what he was
15 talking about when he said they think.

16 A They think I was driving a Chrysler at the time,
17 and I was not driving a Chrysler. He was -- he was -- it
18 was a Ford FTD (sic). They think the car was black. I said
19 the car? He said yes, the Chrysler was black. I said well,
20 was it? He said no. I drive a silver and green Ford LTD.

21 Q Do you recall in that interview with Sgt. Meals
22 telling him that Mike said the car they had is not a
23 Chrysler car. It's a 1971 LTD silver and a green -- that
24 green Monico, whatever the kind of car?

25 A No, it was '74 LTD.

1 Q Your recollection is that it was an LTD?

2 A That's what he told me.

3 Q Do you recall when you met with the detectives on
4 November 5th saying he said they can't find that gun, he
5 said it's not a Chrysler, it's not -- it's not a Chrysler,
6 it's a Ford car?

7 A Correct.

8 Q Did Mike tell you anything about a composite?

9 A Yeah. He told me that they think I have a longer
10 hair than what I have and I have a square chin and I part my
11 hair in the middle. I don't have a square chin and I don't
12 part my hair in the middle.

13 Q Did he tell you anything about this composite and
14 glasses?

15 A Oh, yes. He said I don't have glasses. I don't
16 wear glasses.

17 Q Do you know what he was referring to when he said
18 that?

19 A That somebody said that he had a squared chin and
20 he wore glasses and he parted his hair in the middle.

21 Q Did he have hair parted in the middle?

22 A No, he did not.

23 Q What was his hair like?

24 A Military cut, clean cut.

25 Q Did this person Mike wear glasses?

1 A No, I didn't see him in glasses.

2 Q Did he do anything unusual with the newspapers in
3 the jail?

4 A Oh, yes.

5 Q You get newspapers in the jail?

6 A Yes, every morning.

7 Q What would this -- what would he do with the
8 newspapers?

9 A He would grab the newspapers before any of us got
10 to see the newspapers and he would take different clippings
11 out of it and then give the one -- the ads to the newspaper
12 and put it back on the table.

13 And several of us asked him about it. And I asked
14 him what are you doing with the paper. And he says -- I
15 believe at the time he says I'm reading the newspaper. When
16 we get the newspaper back it would be in shambles, pieces
17 cut out, wouldn't be completed.

18 Q Do you recall having a conversation with Mike
19 about where he got the stolen checks from?

20 A From the guy that's dead.

21 Q What did he say about the guy who is dead and his
22 apartment?

23 A Never told me it was an apartment.

24 Q Did he say anything about going -- wanting to go
25 back to the place where he got the checks?

1 A Yes. He said he -- he's going back there or he
2 wanted to go back there, I can't recall exactly word for
3 word, but he wanted to go back there and remove a VCR, take
4 a VCR, 13-inch color TV.

5 Q Now, this is a lot of detail for something that
6 happened 18 years ago. Did you have an opportunity to look
7 at the transcripts before?

8 A I did for a short time.

9 Q Why do you say for a short time?

10 A That's long enough to read through them.

11 Q Did you want to keep them in the jail?

12 A No.

13 Q Why not?

14 A Well, where I'm at if a person is caught with some
15 transcript or a witness on a case I'm in right now it
16 would -- it could be a very bad situation for that person,
17 you know. I don't believe -- I didn't believe at that time
18 I had needed it. I seen enough of it, I read it and I was
19 done.

20 Q As you sit here today do you have an independent
21 memory of that conversation where he nodded his head yes
22 when you asked if he killed the guy?

23 A Yes, I do. I recall that.

24 Q Why do you remember that all these years later?

25 A Something I've always stuck in the back of my mind

1 talking to this guy, he nodded his head.

2 Q Have you ever testified like this before?

3 A Never.

4 Q Ever testify before?

5 A Never in my life.

6 Q When you went and talked to Sgt. Meals on
7 November 4th did he make you any promises that he could do
8 anything for you?

9 A None. No promises were made.

10 Q Did you ask for anything?

11 A I asked to be put back to work release.

12 Q You were put back on work release; right?

13 A I was.

14 Q When you met with the detectives did you ask them
15 for anything?

16 A I'd like to know if I can go back to work release.

17 Q Did they promise you anything --

18 A No, they did not promise me anything.

19 Q -- in exchange for you to talk to them on
20 November 5th?

21 A Nope.

22 Q What about years later when you had more trouble,
23 legal trouble in Boulder, 1997 did you bring this back up?

24 A No. I went ahead and just done my time. I
25 thought it was a done dead issue. I thought it was over

1 with. Never thought about it after that.

2 Q When did you learn this issue had not gone away?

3 A When I was asked to go to my case counselor's
4 office there in Soledad Prison. I received a phone call.

5 Q And you spoke to a district attorney?

6 A Oh, no, I'm sorry. I apologize. That's not
7 correct. I was at my mother-in-law's house, and I received
8 a phone call from a federal agent out of Denver. That's
9 when I found out about it.

10 Q Do you have any recollection as to when that
11 happened, when you got that phone call from the federal
12 agent?

13 A I want to say 2011, probably around April, March,
14 April, I can't recall. Maybe then.

15 Q And then you mentioned you heard about it when you
16 were back in prison in California?

17 A Yes, I was sentenced to prison.

18 Q How did you learn about this case still coming
19 back around in prison?

20 A I was called to my counselor's office, and I spoke
21 to a -- I believe it was an officer or I spoke to somebody
22 in regards -- might have been a DA at that time regarding
23 this case. It was, matter of fact it was, it was the DA's
24 Office.

25 Q And what happened in this counselor's office?

1 Were you served with any papers?

2 A Not at that time.

3 Q Okay. Tell the jury about that time.

4 A I explained -- they questioned me about it, about
5 the case. And I explained to them what I knew about it,
6 just what I'm explaining to you folks. And they asked me if
7 I'd come to court if needed to, and I said not a problem.
8 So I'm here.

9 Q Were you given an opportunity to have a hearing as
10 to whether or not you needed to come here to Colorado?

11 A Yes, I was. I was told that if you don't want to
12 come I can go to Monterey County, have a hearing in regards
13 of this case.

14 Q Did you have that hearing?

15 A No, I did not.

16 Q So you just agreed to come back here and testify?

17 A Yes, I did.

18 Q Bringing you here from California did anyone from
19 the District Attorney's Office make you any sort of
20 promises, anything at all with respect to helping reduce
21 your sentence or anything at all?

22 A No, nothing at all.

23 MR. KELLNER: Can I have just a moment please?

24 THE COURT: Yes.

25 (Pause.)

1 Q (By Mr. Kellner) Let me make sure I got this
2 point. When you asked him about the gun what did he say
3 about whether or not it could be found?

4 A I asked him, I said where is the gun. He said I
5 got rid of the gun. I said where is the gun. He says I got
6 rid of it, they won't be able to find it.

7 MR. KELLNER: Thank you. No further questions.

8 THE COURT: Cross-examination, Ms. Milfeld.

9 CROSS-EXAMINATION

10 BY MS. MILFELD:

11 Q Mr. Stackhouse, you talked about how you're in
12 prison now?

13 A Yes.

14 Q You were convicted of false imprisonment?

15 A False imprisonment, yes.

16 Q For that crime you were sentenced to prison for 32
17 months?

18 A Yes, that's correct.

19 Q You're still serving that sentence now?

20 A Yes, I am.

21 Q The way that you got here was a member of the
22 District Attorney's Office came out to California?

23 A I don't know. Yes, I guess it was a member of the
24 DA's Office in California. I'm not -- I thought it was one
25 of the sheriffs. I'm not sure who it was. He was plain

1 clothes though.

2 Q You were transported on a plane?

3 A I was.

4 Q You were transported in normal clothes, not jail
5 clothes?

6 A That's correct.

7 Q And that's why you're here?

8 A That's right.

9 Q I want to turn your attention to something that
10 you talked about in 2011, receiving a phone call from a
11 federal agent?

12 A I believe it was 2011.

13 Q In 2011 part of that story is that you were
14 driving home and an officer pulled you over?

15 A That's one time.

16 Q I'm sorry?

17 A That's one time. The first time was a telephone
18 call at my mother-in-law's house.

19 Q So let's back up. First time you received a phone
20 call from a federal agent was at your mother-in-law's house?

21 A Yes, ma'am.

22 Q And then the second time you had contact with
23 agents was after that?

24 A I had contact with the police officer that pulled
25 me over.

1 Q The officer pulled you over for running a stop
2 sign?

3 A That's correct.

4 Q When he pulled you over just as a normal course he
5 asked for your license?

6 A That's correct.

7 Q He ran your license and then came back to talk to
8 you?

9 A Had me -- yes, that's right. He had me step out
10 of the vehicle.

11 Q And one of the things that he told you is there's
12 a warrant out for your arrest?

13 A We have a federal warrant in regards of a phone
14 call you need to make.

15 Q You were told that you had to contact someone in
16 Boulder?

17 A Yes.

18 Q But you knew that wasn't true at the time, you
19 didn't have a federal warrant for your arrest?

20 A That's what the officer said, from the federal
21 agents out of Denver. I didn't know.

22 Q That scared you?

23 A Yeah. I was wondering what was going on regarding
24 that.

25 Q You were concerned about that?

1 A Yes.

2 Q And that officer told you that there would be
3 consequences if you did not make that phone call?

4 A He told me -- he asked me if I will make that
5 phone call. I said yeah, I will make that phone call.

6 Q He told you that you could go to jail if you
7 didn't make that phone call?

8 A He told me if it wasn't this hour of the night I
9 would take you in and confirm that you make this phone call
10 is what he told me.

11 Q So because you were scared you ended up calling
12 Boulder?

13 A I went home and I called that phone number that
14 he'd given me.

15 Q And you ended up speaking to Detective Heidel?

16 A Yes, I did.

17 Q Mr. Stackhouse, I want to turn your attention to
18 conversations that you had with Mr. Clark at the jail and
19 some of the things that he told you. One of the things that
20 Mr. Clark told you in your conversations with him is that he
21 was up in Castle Rock or Coal Creek area for the past few
22 weeks?

23 A He told me he was -- that's where the -- I asked
24 him where the vehicle was. That's when Coal Creek Canyon
25 came up, I believe it was Coal Creek Canyon.

1 Q As part of that conversation he told you that he
2 had been on the run for the past few weeks?

3 A He didn't tell me --

4 MR. KELLNER: Objection, Your Honor.

5 THE WITNESS: I don't recall.

6 THE COURT: Hold on, Mr. Stackhouse.

7 What's the objection?

8 MR. KELLNER: Judge, may we approach?

9 THE COURT: Okay.

10 (The following proceedings occurred at the bench
11 out of the hearing of the jury.)

12 THE COURT: What's the objection?

13 MR. KELLNER: Judge, with respect to the
14 motorcycle, your ruling, obviously I've told him not to say
15 anything about the speeding aspect of that. And where --
16 the questioning as far as Coal Creek and whatnot, that he's
17 been on the run for a couple weeks, that is not in the
18 transcript at all. And I don't want to say that obviously
19 in front of the jury, but it's just simply not in there.
20 And he doesn't know what -- talking about Meals passed away.

21 At this point if I'm going to have to admit the
22 entire audio recording it's going to have to be without
23 Sgt. Meals to rehabilitate anything that may have been said
24 that's incorrect with respect to what he said on
25 November 4th.

1 THE COURT: I think I'm hearing two different
2 issues. One is that this line of questioning may involve
3 the defendant's actions at the time he was pursued on the
4 stolen motorcycle. Is that what I'm hearing?

5 MR. KELLNER: That is one part, yes, sir.

6 THE COURT: And the other part your concern is
7 it's not accurate to -- with respect to any prior statements
8 and you may have difficulty --

9 MR. KELLNER: Do you want me to --

10 THE COURT: No. I just want to make sure I'm
11 understanding the issues. So let me ask you for your
12 response. What about the issue that it involves where your
13 client was driving a stolen motorcycle?

14 MS. MILFELD: Judge, the testimony that I was
15 seeking to elicit was that he -- according to
16 Mr. Stackhouse, Mr. Clark told him that he had been on the
17 run for the past few weeks and that he had been on the run
18 and he believed he was in the Castle Rock, Coal Creek area.
19 The reason why we're seeking to elicit that is because that
20 that wasn't true. And officers --

21 THE COURT: Let me ask -- let me be more direct.
22 What's the good faith basis that you have to ask those
23 questions? I mean, is it in the transcript?

24 MS. MILFELD: Yeah. I mean, I can bring the
25 transcript up here right now.

1 MR. KELLNER: Judge, maybe I misread --

2 THE COURT: Okay. Hold on.

3 MR. KELLNER: Are you just referring to a page in
4 the transcript during your cross-examination?

5 MS. MILFELD: Yeah.

6 THE COURT: Well, she can do it however she wants.
7 She can ask him openly or she can refer to a page in the
8 transcript. I suspect we may be hearing both. But as long
9 as you've got a good faith basis to ask for it -- ask the
10 question, I'm going to allow it. And then to the extent you
11 need to rehabilitate on redirect, I'll allow you to do that.

12 Now look, if this is getting into issues that
13 involve that stolen motorcycle and the chase and crash, I
14 previously ruled that inadmissible because it was not
15 relevant.

16 MS. MILFELD: I agree.

17 THE COURT: And frankly, it's substantially
18 prejudicial. If you open that door with your questioning,
19 then it may well be that I allow the People to get into that
20 evidence on redirect. Just telling you that as a caution.

21 MS. MILFELD: I agree.

22 THE COURT: All right. You may continue.

23 (The following proceedings occurred in open
24 court.)

25 Q (By Ms. Milfeld) Mr. Stackhouse, one of the things

1 that Mr. Clark told you was about a Ford LTD?

2 A Yes, ma'am.

3 Q He said that he had that car?

4 A He had that car hidden.

5 Q During the conversation Mr. -- you asked
6 Mr. Clark -- or you were talking about where he'd been
7 living or hanging out for the past few weeks?

8 A I believe I asked him.

9 Q And he told you that he had been on the run?

10 A I don't recall that. I can't say I remember that.

11 MS. MILFELD: Judge, may I approach?

12 THE COURT: Yes.

13 Q (By Ms. Milfeld) Mr. Stackhouse, I'm showing you a
14 transcript back from November 4, 1994. It shows that
15 Sgt. Meals was present, you were also present?

16 A Um-hmm.

17 Q I'm showing you page 2290. Question, Did he say
18 where he's been living at or hanging out? There's a
19 question mark, dot, dot, dot, question continues, the last
20 few weeks? No, he's been on the run on a motorcycle. He
21 didn't tell me where he was hanging out. Any particular
22 area? Up in the Castle Rock area.

23 So from that conversation he told you that he had
24 been up in the Castle Rock area and that he'd been on the
25 run for the past few weeks?

1 A I guess I would assume that's what he -- yeah.

2 Q That's what the transcript says?

3 A That's what the transcript says.

4 Q I want to focus your attention about the felony
5 convictions that you've received over the years.

6 A Um-hmm.

7 Q You've been convicted of not just one, but
8 multiple felonies?

9 A Four.

10 Q You've been convicted of felonies in both Colorado
11 and California?

12 A Yes, ma'am.

13 Q And it would be fair to say that you've been in
14 and out of jail or prison since 1994?

15 A Yes.

16 Q In 1993 you were convicted of a misdemeanor for
17 false reporting?

18 A I don't know. I can't recall that.

19 MS. MILFELD: May I approach?

20 THE COURT: Yes.

21 THE WITNESS: That was 90 what?

22 Q (By Ms. Milfeld) '93.

23 A False information to a police officer I believe.

24 Q I'm showing you a certified copy of a conviction.

25 At the top here it says Boulder County, Colorado?

1 A Um-hmm.

2 Q Has a case number 93CR1223. Shows your name,
3 Walter Stackhouse?

4 A That's correct.

5 Q That's your name?

6 A Um-hmm.

7 Q It shows that on December 23, 1993 that the
8 following actions were taken. And then if we move below it
9 says that you pleaded guilty to false reporting to
10 authorities?

11 A That's correct. That's what it says.

12 Q And it also says that you received a sentence for
13 two years on probation for that?

14 A Yes.

15 Q So looking at that certified copy you did have
16 that misdemeanor conviction for false reporting to
17 authorities?

18 A Yes, ma'am, I did.

19 Q But before 1993 you actually had your first felony
20 conviction, and that was felony theft?

21 A I believe that was theft. It was plea bargained
22 to theft.

23 Q And you pleaded guilty to this theft charge in
24 1989?

25 A Yes, ma'am.

1 Q Mr. Kellner had talked to you about 1994. But
2 what we're really talking about is that case from 1999 (sic)
3 was still ongoing in 1994?

4 A What do you mean by still going if I wasn't on
5 probation? I was in a halfway house regarding that.

6 Q Okay. So in 1989 when you pleaded guilty to
7 felony theft you were sentenced to probation originally on
8 the case?

9 A Yes.

10 Q You were sentenced to probation for four years?

11 A Whatever, however. I can't remember all those
12 years back. I remember being placed on probation, I do
13 recall that.

14 MS. MILFELD: Judge, may I approach?

15 THE COURT: Yes.

16 Q (By Ms. Milfeld) Mr. Stackhouse, I'm showing you
17 another certified record. Again, this has different
18 initials here, but it says WL Stackhouse. And L is actually
19 your middle initial, it's Leon?

20 A Yes, ma'am.

21 Q And it shows here that on December 22, 1989 the
22 following actions were taken, that you pleaded guilty to
23 theft?

24 A Yeah.

25 Q It was a Class 4 felony?

1 A Um-hmm.

2 Q And it says as part of this -- we're on the second
3 page -- that the judgment is entered and probation was
4 granted for four years?

5 A That's correct.

6 Q So now looking at that you remember that you were
7 sentenced to probation initially for four years?

8 A Yes, ma'am.

9 Q Mr. Kellner talked to you about other felony
10 convictions that you've received in Boulder County?

11 A Yes.

12 Q You were convicted of another felony in 1996?

13 A Yes, ma'am.

14 Q You were convicted of a felony in Denver County?

15 A I guess. I can't recall.

16 Q You were convicted of a felony, possession of a
17 Schedule I or Schedule II substance?

18 A Yes, ma'am, that is correct.

19 Q You pleaded guilty to this felony on July 26,
20 1996?

21 A Yes.

22 Q As part of that the judge sentenced you to
23 Community Corrections?

24 A That's correct.

25 Q And just so the jury knows what that means,

1 Community Corrections is a fancy phrase for halfway house?

2 A Exactly what it is.

3 Q That's where you're required to stay at a
4 facility?

5 A Stay at the facility, yes.

6 Q You can't live at home?

7 A No.

8 Q You're allowed to go work or take classes during
9 the day?

10 A Or go home.

11 Q But ultimately you have to stay there at night?

12 A Yes.

13 Q In addition to that felony conviction in 1996 for
14 the drug possession you had two other felonies in Boulder
15 County that same year?

16 A That's correct.

17 Q You were convicted of felony fraud by check?

18 A Yes, ma'am.

19 Q You were convicted of this in Boulder?

20 A Yes.

21 Q And we just talked about how you had this felony
22 conviction in Denver in July, and you pleaded guilty to this
23 one in August of 1996?

24 A Yes, ma'am.

25 Q As part of that we already talked about Community

1 Corrections, you were sentenced to Community Corrections as
2 part of that?

3 A Yes.

4 Q That same year you had another felony conviction?

5 A What is that?

6 Q You had a third felony conviction in 1996 for
7 forgery?

8 A Okay.

9 Q Do you not remember that?

10 A I do remember that.

11 Q That was another felony conviction in Boulder
12 County?

13 A Yes, ma'am.

14 Q You pleaded guilty to this in October of 1996?

15 A Okay.

16 Q You don't remember that or --

17 A To be honest with you, no. But I do remember
18 being charged for a crime. I can't give you -- tell you the
19 dates or the years.

20 MS. MILFELD: Judge, may I approach?

21 THE COURT: Yes.

22 Q (By Ms. Milfeld) Mr. Stackhouse, I'm showing you
23 another certified copy. Again, it shows your name up here,
24 Walter Stackhouse. It shows Boulder County, Colorado. It
25 shows that on 11 October 1996 the following actions were

1 taken in this case?

2 A Um-hmm.

3 Q We go down to advisement and plea, it says that
4 defendant being advised Rule 11 entered the following plea,
5 forgery, guilty.

6 A That's correct.

7 Q And we talked about, Mr. Stackhouse, how that was
8 your third felony conviction that year?

9 A Yes, ma'am.

10 Q I want to move to your felony convictions in
11 California. In 2009 you were convicted of a felony?

12 A That's correct.

13 Q You were convicted in California of felonious
14 criminal threat?

15 A No. Incorrect.

16 MS. MILFELD: Judge, may I approach?

17 THE COURT: Yes.

18 Actually, ladies and gentlemen of the jury, we're
19 going to go ahead and take the noon recess. This is going a
20 little longer than I'd initially anticipated.

21 So remember the admonition that I've given you
22 previously. Until the trial is over you must not
23 communicate about or discuss this case with anyone by any
24 means. This includes members of your family, people
25 involved in the trial, other jurors or anyone else. If

1 someone does approach you and tries to discuss the trial
2 with you, please let me know immediately.

3 Don't read or listen to any news reports of the
4 trial. Don't do any outside research or investigation.

5 Remember, it is especially important that you do
6 not form or express any opinion on the case until it is
7 finally submitted to you.

8 We'll be in recess until 1:30. When we return at
9 1:30 we'll continue with the cross-examination of
10 Mr. Stackhouse.

11 (The jury left the courtroom.)

12 THE COURT: Mr. Stackhouse, just hold on. Sit
13 down.

14 Record should reflect the jurors have left the
15 courtroom.

16 Deputy, if you would have Mr. Stackhouse back here
17 on the witness stand at 1:30 sharp prior to my bringing in
18 the jury?

19 MR. KELLNER: Your Honor, can we address this
20 issue of what Ms. Milfeld is approaching with that we do not
21 believe is a felony conviction?

22 THE COURT: Well, the witness is excused if you'd
23 like to take him, Sheriff. Whatever works for your
24 security.

25 The issue that was raised just prior to the recess

1 is that the alleged conviction was for felonious criminal
2 threat. And that was disputed by the defendant.
3 Ms. Milfeld had asked to approach and had not actually done
4 so.

5 What are the records for this conviction? Should
6 be pretty easy to determine whether or not it's a felony.

7 MS. MILFELD: Judge, the records that I have
8 indicate that he pleaded guilty to Count 2, which was
9 criminal threat, and as part of that there was a sentencing
10 range of 16 months -- two to three years in prison. I mean,
11 I'm sorry, 16 months to two years, three years of parole.

12 MR. KELLNER: Nothing on that document says this
13 is a felony. And I have some limited experience with
14 California. I believe this is one of those wobbler type
15 issues that we dealt with yesterday. My records don't
16 indicate that he has a felony from this case.

17 MS. MILFELD: Judge, I mean, the first question I
18 asked him was about if he had a felony in 2009, and he says
19 yes, I did.

20 THE COURT: Actually that I recall. Is this the
21 only conviction from 2009 in California that you have?

22 MS. MILFELD: Yes.

23 MR. KELLNER: You followed that up with, Judge --
24 he said actually no, that's not felony towards the end there
25 when she approached him on this criminal threat issue.

1 I mean, Mr. Stackhouse has said a couple times
2 here he doesn't remember the dates of these various
3 convictions. It's clear he's got multiple convictions. And
4 he's been agreeing with Ms. Milfeld as far as the dates of
5 these things. But when confronted with specifics he said
6 actually no.

7 MS. MILFELD: And Judge --

8 THE COURT: Hold on. Hold on. Hold on.

9 MS. MILFELD: Okay.

10 (Pause.)

11 THE COURT: Let me see your copy of the records
12 for the 2009 conviction if you would please, Ms. Milfeld.

13 (Pause.)

14 MR. KELLNER: What was original Count 1?

15 THE COURT: Corporal injury to spouse, cohabitant,
16 child's parent in violation of penal code section 273.5.

17 So the --

18 MR. KELLNER: Judge, can you tell me the statute
19 that he actually did plead guilty to on Count 2?

20 THE COURT: 422 crime is described as threatened
21 crime. I'm looking at the abstract of judgment, paragraph
22 1, and it says defendant was convicted of the commission of
23 the following felonies, Count 2, code PC, Section 422, crime
24 threatened crime. So I'm going to overrule the objection.

25 I'm allow -- when Mr. Stackhouse returns I'm going

1 to allow Ms. Milfeld to continue to impeach him with that
2 conviction. He's admitted it's a felony.

3 To the extent that the defense is entitled to
4 establish the nature of the felony I'll allow that, but it
5 shouldn't be an extended conversation.

6 All right. We'll be in recess until 1:30.

7 (A recess was taken, whereupon this reporter's
8 portion of the trial concluded.)

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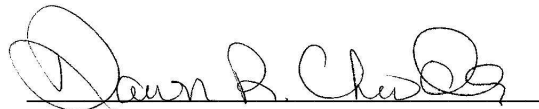
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 1st day of April, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

DISTRICT COURT
BOULDER COUNTY
COLORADO

1777 6th Street
Boulder, CO 80302

Plaintiff:

People of the State of Colorado

Defendant:

Michael Clark

FOR COURT USE ONLY

Case No. 12CR222
Division 6

For the People:

Ryan Brackley and John Kellner
Deputy District Attorneys

For the Defendant:

Megan Ring and Nelissa Milfeld
Deputy State Public Defenders

The matter came on for jury trial on October 16th,
2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
Boulder District Court, and a jury of 12 persons, and the
following proceedings were had.

1 **P R O C E E D I N G S**

2 The matter came on for hearing on October 16th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: We are on the record in 12 CR 222. The
8 Defendant and his counsel are present. The prosecution is
9 present. The witness, Walter Stackhouse, is back on the
10 witness stand and the jury is not present. Any matters to
11 discuss on the record before we bring the jury in from the
12 People?

13 MR. KELLNER: Yes, Your Honor. Your Honor,
14 Ms. Milfeld asked to witness a question about and elicited
15 testimony regarding a statement that he's been on the run on a
16 motorcycle. And earlier as we approached the bench I told you
17 that I was around about what that would mean as far as being
18 on the run on a motorcycle. And Mr. Stackhouse clarifies and
19 expands on that, page 2312, of the discovery where he says, I
20 guess a motorcycle was stolen or something a while back. He
21 was telling me how was he was going on the motorcycle with all
22 these cops around me then he kind of dropped that and he had
23 stopped talking.

24 My concern, Judge, is with the testimony that
25 Ms. Milfeld has elicited, I think it's going to leave a false

1 impression as to what he meant as far as being on the run on a
2 motorcycle. I think that it's going to be necessary for me to
3 ask him to clarify that.

4 THE COURT: What's your response, Ms. Milfeld?

5 MS. MILFELD: Judge, what I elicited from
6 Mr. Stackhouse was that Mr. Clark had told him he
7 specifically -- we're talking about where had you been in the
8 past few weeks, and he said, I had been on the run on a
9 motorcycle. The facts of the motorcycle, the stolen
10 motorcycle, are completely different from that in which he
11 leads an officer. He was asked a question about where he had
12 been, and Mr. Stackhouse's impression was that Mr. Clark had
13 been on the run on a motorcycle for the past few weeks.

14 THE COURT: Well, this is --

15 MS. MILFELD: We know that the stolen motorcycle
16 happened in September. This interview was in November. And
17 the past few weeks would have been in October.

18 THE COURT: Let me -- can I see the transcript of
19 the interview with Mr. Stackhouse where that phrase is
20 referenced?

21 MR. KELLNER: Yes, Your Honor. And --

22 THE COURT: So let me just look at it for a minute.

23 MR. KELLNER: Okay. It goes on to the next page,
24 Judge.

25 THE COURT: All right. Thank you. So I'm looking

1 at Bates 2290 and 2291. Where is the segment that you want to
2 admit? This is at Bates 2312. Thank you.

3 You wanted to respond, Mr. Kellner.

4 MR. KELLNER: Judge, I just wanted to clarify I
5 think as far as the question goes. On page 2290 the question
6 by Sergeant Meals, Did he say where he has been living at or
7 where he has been hanging out the last few weeks. The answer
8 was no. That's the very next word followed by a period. Then
9 he goes on to say that he's been on-the-run on a motorcycle.
10 He didn't tell me where he was hanging out at. So the
11 question about where he has been the last few weeks, he says,
12 no. Then he makes another statement about a motorcycle which
13 is followed up later as far as more details to being
14 on-the-run. The statements elicited by Ms. Milfeld that are
15 contained at pages 2290 and 2291 Bate stamped are from an
16 interview with the Defendant on November 5th, 1994. And they
17 are contained in the transcript approximately 12:12:30 where
18 Ms. Milfeld questions the Defendant directly using the --
19 almost a direct quote from what's contained at 2290 and 2291.

20 The statement that the People are seeking to admit
21 regarding the motorcycle chase and crash is contained at Bates
22 2312, it comes from an interview conducted with the witness on
23 November 4th, 1994.

24 The statement that the People seek to admit at 2312
25 is not contained within the same conversation as the

1 statements elicited on cross-examination. They relate -- they
2 overlap with the issue raised by Ms. Milfeld on
3 cross-examination to a certain extent, but not directly. I
4 will state for the record that it is close. It is exactly the
5 issue that I cautioned Ms. Milfeld about when we were at the
6 bench, because if that door is opened, then the People would
7 be entitled to on redirect clarify. But I cannot at this time
8 find that the statement at 23:12 directly relates to or
9 provides necessary context to the cross-examination by
10 Ms. Milfeld, and so I'm going to deny the request to use that
11 statement at 23:12 in the redirect of this witness or
12 otherwise.

13 Ms. Milfeld, I'll tell you again, it's this close.
14 There is a 403 analysis that I have also gone through because
15 of the prejudice involved in that statement. To the extent
16 that the statement at 23:12 has more relevance at this point
17 than I'm willing to give it. There is significant prejudice
18 from the statement and it's also part of the rationale from my
19 ruling.

20 Anything else before we bring the jury in for the
21 People, Mr. Brackley.

22 MR. BRACKLEY: Judge, I have the People's 76.

23 THE COURT: Okay.

24 MR. BRACKLEY: It is -- I will say that I removed
25 Bate stamped page 726, so it's a full copy, but for 726. And

1 that was simply a computer screen which showed an FTA for a
2 traffic ticket at some other time so...

3 THE COURT: All right. So is the defense in
4 agreement that 76 with that page removed is accurate and
5 correct with respect to the exhibit that was previously
6 admitted?

7 MS. MILFELD: Yes.

8 THE COURT: All right. Thank you. Anything else
9 from the People?

10 MR. BRACKLEY: No, Your Honor.

11 THE COURT: All right. Anything on behalf of the
12 defense?

13 MR. KELLNER: Yeah.

14 THE COURT: Oh, sorry, Mr. Kellner.

15 MR. KELLNER: Your Honor, I understand your ruling
16 with respect to the different conversations. One was,
17 obviously, with the detectives and another was with Sergeant
18 Meals. And that same conversation with Sergeant Meals he does
19 later on even mention the fact that the Defendant was on a
20 stolen motorcycle and he says, um, Whereas to the effect that
21 he is going 185 miles an hour on the run. I can figure how
22 misleading this will be on closing argument by the defense by
23 saying that he wasn't on-the-run on a motorcycle, and not
24 giving any context to his knowledge about where that fact
25 comes from. And when that question is asked, where was he at,

1 he says No, and he goes on to say, I don't know where he is
2 at. This is going to fundamentally mislead the jury as to
3 this witness' knowledge about what he said about a motorcycle
4 and putting it in an inappropriate context.

5 THE COURT: I understand the point you're making. I
6 disagree that it's -- I mean, look, that's the whole reason
7 that this is such a close call, and that is the reason that I,
8 frankly, went back to, among other things, a 403 analysis. I
9 don't disagree with some of the things that you said, but I
10 don't think that the statement at 23:12 is as direct on the
11 issue as you're crediting it, nor is it essential to provide
12 the context.

13 So -- all right. Anything further from the People.

14 MR. KELLNER: No, thank you.

15 THE COURT: All right. Would you bring the jury in.

16 (The jury entered the courtroom.)

17 THE COURT: All right. Please be seated.

18 Welcome back, ladies and gentlemen of the jury.

19 When we recessed for lunch, we were in the process of the
20 cross-examination of Mr. Stackhouse.

21 Ms. Milfeld, you may continue.

22 **CROSS-EXAMINATION**

23 **BY MS. MILFELD:**

24 Q. Mr. Stackhouse where we left off was I had asked you
25 about a felony conviction in California in 2009.

1 A. Yes, ma'am.

2 Q. I asked you about whether that felony conviction was
3 for criminal threat and you said that it was not?

4 A. It was not for criminal threat.

5 MS. MILFELD: Judge, may I approach?

6 THE COURT: Yes.

7 A. It was for terrorist threat.

8 Q. (By Ms. Milfeld) Mr. Stackhouse, I'm showing you a
9 certified copy record of correction?

10 A. Mm-hmm.

11 Q. It shows Walter Leon Stackhouse at the top. It
12 shows that it was in Victorville District in the County of San
13 Bernardino?

14 A. Correct.

15 Q. And it shows on this page here that Defendant was
16 convicted of the commission of the following felonies. Count
17 2, threaten a crime from 2008, and the date of conviction was
18 January 23rd, 2009?

19 A. The paperwork says threaten a crime, but I pleaded
20 to a terrorist threat. If that means the same, I apologize.

21 Q. The Court sentenced you to two years in prison as a
22 result of that?

23 A. Yes.

24 Q. And that was your fifth felony conviction.

25 A. Okay.

1 Q. That was your fifth felony conviction?

2 A. All right.

3 Q. All right. You talked about -- earlier about how
4 you were in prison now for another felony?

5 A. Yes, ma'am.

6 Q. That the Court sentenced you for that felony to
7 prison for 32 months?

8 A. That's correct.

9 Q. And you are not expected to be released until 2013?

10 A. About 10 months from now.

11 Q. I want to go back to where you were in 1994.

12 A. Okay.

13 Q. Back in 1994, we had talked about earlier how you
14 had a conviction for felony theft?

15 A. Mm-hmm.

16 Q. You have to answer out loud --

17 A. Yes.

18 Q. -- for the court reporter.

19 You also had a conviction for false reporting to
20 authorities?

21 A. That's correct.

22 Q. You had been to court on these cases many times?

23 A. Yes, ma'am.

24 Q. When you pleaded guilty to felony theft back in
25 1989, the judge gave you an advisement?

1 A. Yes, ma'am.

2 Q. The judge advised you of your rights at that time?

3 A. Yes, he did.

4 Q. The judge told you that you could receive a prison
5 sentence as a result of pleading guilty?

6 A. That's correct.

7 Q. And the judge actually did not sentence you to
8 prison originally?

9 A. That's right, he did not.

10 Q. The judge gave you probation?

11 A. Yes.

12 Q. In August of 1994, you violated that probation?

13 A. That's correct.

14 Q. You came back in front of the judge?

15 A. Yes.

16 Q. You admitted that you violated your probation?

17 A. Mm-hmm. Yes, ma'am.

18 Q. As part of that, the judge sentenced you to a work
19 release sentence?

20 A. Yes. Yes, he did.

21 Q. At that time you were given -- you were told by the
22 judge that you had to follow certain conditions as far as your
23 probation?

24 A. Yes.

25 Q. The judge told you that you couldn't use any drugs?

1 A. That's right.

2 Q. The judge told you that you couldn't use any
3 alcohol?

4 A. Yes.

5 Q. That you couldn't commit any new crimes?

6 A. That's correct.

7 Q. Back in November of 1994 when you came back into the
8 jail, before that, what was going on in Boulder is you owned
9 an appliance store?

10 A. A few of them.

11 Q. You owned a few appliances stores in and around
12 Boulder County?

13 A. Yes, ma'am.

14 Q. Those appliance stores were providing you with
15 income at that time?

16 A. Yes, ma'am.

17 Q. You relied on these stores to basically make a
18 living?

19 A. Yes, I did.

20 Q. When you were brought back into jail, you risked
21 losing those properties?

22 A. That's right.

23 Q. You risked having the hardware stores go under?

24 A. The appliance stores go under.

25 Q. I'm sorry, the appliance stores go under?

1 A. Yes.

2 Q. That's because you were in charge of the stores?

3 A. Yes, ma'am.

4 Q. There was no one else that could run those stores
5 for you?

6 A. No.

7 Q. You talked about how when you came back into jail,
8 the reason why you were there is because you had tested
9 positive for cocaine?

10 A. That's correct.

11 Q. You had used cocaine recently?

12 A. Yes.

13 Q. You used cocaine two to three days before you were
14 brought in?

15 A. Um, I can't recall if it was two or three days
16 before that -- before I was brought in.

17 Q. But you used it shortly before you were tested
18 positive?

19 A. Obviously, yes.

20 Q. The reason why you were taking these urine tests is
21 because probation required you to take them?

22 A. Yes, ma'am.

23 Q. They were required to do this because one of the
24 conditions that was imposed on you back in 1994 was to not use
25 any drugs?

1 A. That's right.

2 Q. When you were on probation, this wasn't the first
3 time that you had used cocaine?

4 A. On probation?

5 Q. Right.

6 A. You are correct. That's right, it was not the first
7 time.

8 Q. In fact, you were using cocaine regularly back in
9 1994?

10 A. No.

11 Q. You were saying that you were not regularly using?

12 A. Not regularly, no.

13 Q. Mr. Stackhouse, I know that we had talked earlier
14 about you having conversations with people from the District
15 Attorney's Office?

16 A. Mm-hmm.

17 Q. You also had a conversation with an investigator
18 from our office?

19 A. Yes.

20 Q. And if you remember, we had to talk to you over the
21 phone because you were in California?

22 A. You see regularly that's -- I'm assuming you are
23 saying an every day usage.

24 THE COURT: Mr. Stackhouse --

25 THE WITNESS: Yes, sir.

1 THE COURT: -- I need you to listen to the question
2 that's being asked and answer that question.

3 THE WITNESS: All right.

4 Q. (By Ms. Milfeld) When you spoke to my investigator
5 over the phone, you told us that you used cocaine regularly
6 while on probation and you used it two to three days a week?

7 A. If that's what I told you, um, obviously, it's what
8 it is, but I don't recall that at the time.

9 Q. You don't recall saying that to us or you don't
10 recall using cocaine two to three days a week?

11 A. I don't recall saying that to you.

12 Q. You talked about before how you -- this wasn't the
13 first time that you had used cocaine while on probation?

14 A. Yes, ma'am.

15 Q. And, in fact, in order to pass urine tests, you
16 would dilute your urine?

17 A. Yes, I would.

18 Q. You would drink a lot of water?

19 A. Yes.

20 Q. You drank a lot of water to flush the cocaine out of
21 your system --

22 A. That's correct.

23 Q. -- because you didn't want to get caught?

24 A. Right.

25 Q. You didn't want to violate probation?

1 A. That's correct.

2 Q. The reason why you weren't caught before is because
3 you were diluting your urine and that allowed you to pass the
4 drug tests?

5 A. Yes, ma'am, you are right.

6 Q. You were trying to trick the tests, so-to-speak?

7 A. I was trying to get away with what I was doing.

8 Q. And because you were using this method of trying to
9 have the drug tests not detect your cocaine use -- I mean at
10 the time it really didn't matter to you whether or not you
11 were on probation, you were going to use cocaine?

12 A. You're right, nothing matters at the time.

13 Q. You would described yourself as a drug addict at
14 that time?

15 A. Yes.

16 Q. When you were brought into jail for your positive
17 urine test, you were immediately taken off work release?

18 A. Yes, ma'am.

19 Q. We talked about before your work release allowed you
20 to go take care of your appliance stores?

21 A. Yes.

22 Q. It allowed you to go home at some points?

23 A. Not home, I never went home.

24 Q. Okay. But allowed you to go to the stores?

25 A. Yes.

1 Q. You just had to stay at the facility at night?

2 A. Yes, ma'am.

3 Q. When you went back into jail, a probation complaint
4 was filed as a result of that -- of the positive urine tests?

5 A. Yes, ma'am.

6 Q. When you were in jail, I couldn't tell you in the
7 beginning of November, that probation violation complaint had
8 not been resolved?

9 A. I don't know if it had been resolved or has not been
10 resolved.

11 Q. You hadn't been to court on it yet?

12 A. No.

13 Q. By the time you spoke to the detectives at the jail,
14 your probation complaint had not been resolved?

15 A. I haven't been to court on it.

16 Q. You talked about how you were the one who contacted
17 Sergeant Meals at the jail?

18 A. Yes, ma'am.

19 Q. The reason why you contacted him is because you had
20 known him from the jail before?

21 A. Yes, ma'am, from being out at the jail.

22 Q. Specifically, you knew him because of disciplinary
23 actions that were taken against you?

24 A. No, incorrect.

25 Q. So --

1 A. Not because of that, because he worked at the jail.

2 Q. We talked about this before, how you spoke with our
3 office over a secured phone line?

4 A. Yes.

5 Q. You were in California in prison when you were
6 talking to us?

7 A. Yes, ma'am.

8 Q. And one of the things that you told us was that you
9 knew Mr. -- or Sergeant Meals from jail before, and you knew
10 him because of previous disciplinary actions?

11 A. I don't recall telling you that, but I recall
12 Mr. Meals -- Sergeant Meals from working in the county jail.

13 Q. You also told us that when you were in jail you had
14 disciplinary actions taken against you.

15 A. Well, I'm sure I have, yes, throughout the times I
16 have been there.

17 Q. And, actually, as a result of those disciplinary
18 action, you were sent to solitary confinement?

19 A. No, ma'am.

20 Q. So when you said you were sent to the hole, when you
21 told us that back when we had the conversation, you were
22 saying that you don't remember that or that's not true?

23 A. I was sent to the hole in reference to what?

24 Q. Back when we talked to you on the phone and you
25 remember that conversation?

1 A. I have -- I remember talking to you -- one of you
2 ladies --

3 Q. Okay.

4 A. -- on the telephone.

5 Q. And when you talked to one of us, we asked you about
6 you being in jail at the time?

7 A. Okay.

8 Q. You said that you had had disciplinary actions taken
9 against you?

10 A. Yes, ma'am, I have.

11 Q. You also said that you had been to the hole while
12 you were in jail?

13 A. I don't recall that. Me saying that I had been to
14 the hole.

15 Q. You said specifically that you knew of Sergeant
16 Meals and you had had contact with him because of going to the
17 hole and other disciplinary actions taken against you?

18 A. I don't recall mentioning anything about going to
19 the hole.

20 Q. And just so that we're clear, when -- with the jail
21 lingo, when you we talk about "hole" that means that you are
22 alone, you are in solitary confinement?

23 A. Punitive segregation, yes, by yourself.

24 Q. You testified today that you weren't promised
25 anything by Sergeant Meals?

1 A. I was not promised, no, anything.

2 Q. You certainly remember speaking with the detectives
3 and Sergeant Meals?

4 A. Yes, ma'am.

5 Q. You know that that conversation was recorded?

6 A. Yes, I do.

7 Q. And you talked to them at a room at the jail?

8 A. I did.

9 MS. MILFELD: May I approach, Judge.

10 THE COURT: For what purpose?

11 MS. MILFELD: Judge, he is saying that he wasn't
12 promised anything that I'm showing him the part of the
13 transcript.

14 THE COURT: All right.

15 MS. MILFELD: 2309.

16 Q. (By Ms. Milfeld) So I'm showing you what is at the
17 top a transcript?

18 A. Mm-hmm.

19 Q. It shows Sergeant Tom Trujillo?

20 A. Yes, ma'am.

21 Q. You have to answer out loud. It shows "B" which is
22 you, Walter Stackhouse?

23 A. That's correct.

24 Q. And Sergeant Joe Pelle?

25 A. Yes.

1 Q. And sergeant Bob meals?

2 A. That's correct.

3 Q. Down here there's a question and that's "C" sergeant
4 meal. I mean -- I'm sorry -- Sergeant Pelle, who says, yeah,
5 in the jail or with your criminal case just tell us what's
6 going on. Um, not -- nothing has been promised, but, um, I
7 was told that somethings may happen for me that like -- that
8 might look better on my behalf. And what would that be a
9 specifically. Answer, um, specifically be put back in work --
10 and then there's a question mark -- in Boulder County.

11 A. Yes, ma'am.

12 Q. So --

13 MR. KELLNER: Objection, Your Honor, I would ask
14 that she read the next line and actually put that in context.

15 THE COURT: Well, if she wants to, she can,
16 otherwise, you can do it on redirect.

17 Q. (By Ms. Milfeld) And then it says, Okay. And any
18 promises made by criminal prosecutions charges being dropped,
19 charges being... And you say, No.

20 What I'm trying to get at, Mr. Stackhouse, is you
21 say when you speak with all the detectives that nothing has
22 been formally promised, but that you were specifically told
23 things are going to look better on your behalf.

24 A. I wasn't told things would look on my better, I
25 asked for things to look better on my behalf.

1 Q. Because you wanted to get back on work release?

2 A. That's what I wanted to do, yes.

3 Q. And what I just read to you is part of the
4 transcript was I told that -- quote from you, I was told that
5 somethings may happen for me that might look better. And you
6 would agree with me that what you meant by that is work
7 release?

8 A. Yes, but nothing was promised, but nobody said I
9 promise you this, Mr. Stackhouse, for you telling me about
10 this.

11 Q. They didn't use the word "promise"?

12 A. No.

13 Q. Okay.

14 A. That's correct, they didn't. And I never was
15 promised anything.

16 Q. I want to talk to you about what happened as a
17 result of this. And ultimately you did not get a worse
18 sentence for violating your probation?

19 A. No, I did not get a worse sentence for violating my
20 probation.

21 Q. We had talked about how this was actually your
22 second probation violation on that case?

23 A. On the urinalysis.

24 Q. So just to refresh you. We had talked earlier how
25 you had been to court back in August for a probation

1 violation?

2 A. Yes.

3 Q. That would be the first time.

4 A. Yes, ma'am.

5 Q. The second time would be after the positive urine
6 test?

7 A. That's correct.

8 Q. And as a result of this, as a result of the
9 probation violation you didn't get sent to prison?

10 A. Nor was I -- that's right, and I didn't go to court
11 on a probation violation on the second time.

12 Q. What happened as a result is you got put back on
13 work release?

14 A. I was going to get put back up on work release
15 either way.

16 MS. MILFELD: No further questions.

17 THE COURT: Mr. Kellner, redirect examination?

18 MR. KELLNER: Yes, please.

19 **REDIRECT EXAMINATION**

20 **BY MR. KELLNER:**

21 Q. Mr. Stackhouse --

22 A. Yes, sir.

23 Q. -- you've got felony convictions?

24 A. Yeah.

25 Q. And you've agreed that you have those felony

1 convictions?

2 A. I do, that's right.

3 Q. And you haven't fought that, have you? I mean it is
4 what it is?

5 A. It's what it is, it's my past.

6 Q. Let me ask you this. Ms. Milfeld asked -- you said
7 something to the effect that there was a warrant -- a federal
8 arrest warrant out for you on your stop for running a stop
9 sign. Were you placed under arrest?

10 A. I was -- never was arrested for that.

11 Q. In fact, there is no arrest warrant that you were
12 actually just given?

13 A. Excuse me -- I was given a telephone number.

14 Q. Right. The officers pulling me over for running a
15 stop sign told me that it was for -- to call the -- a federal
16 agent in Denver, Colorado. And I called that agent, and come
17 to find out it was not a federal agent, it was Detective
18 Heidel.

19 Q. Right. And earlier Ms. Milfeld asked you a question
20 about Castle Rock and where the Defendant had been hanging
21 out.

22 MR. KELLNER: What I would like to do is actually
23 approach, Judge, if I may, and actually read the next few
24 sentences and put that in context.

25 THE COURT: Sure.

1 MR. KELLNER: This is 2291, 2290 through 2291.

2 THE COURT: Okay.

3 Q. (By Mr. Kellner) Mr. Stackhouse --

4 A. Yes, sir.

5 Q. -- this is the interview you had with Sergeant Bob
6 Meals on November 4th, 1994?

7 A. Yes.

8 Q. Sergeant Meals asked you, did he say where he has
9 been living at or hanging out the last few weeks, you
10 responded, no. He -- he's been on-the-run on the motorcycle,
11 he didn't tell me where he was hanging out. Sergeant Meals
12 asks you, Any particular area, you responded, Up in Castle
13 Rock area. He said, Castle Rock, and you said, Castle Rock
14 and Pueblo area is where he has been at.

15 So the defendant told you that he had been in Pueblo
16 at some point?

17 A. Yes, he did. He told me that he was in Pueblo, as
18 well.

19 Q. She asked you about being on the run on a
20 motorcycle. Earlier you testified that the Defendant had told
21 you that he had been arrested on a motorcycle; isn't that
22 correct?

23 A. That's correct. It was -- that's what he told me,
24 he was arrested on a motorcycle.

25 Q. And is that what you were referring to when he said

1 that he had been on the run on a motorcycle?

2 A. Yes.

3 Q. She asked you some questions about Sergeant Meals
4 and how you knew him. What kind of guy was Sergeant Meals?

5 A. Very outspoken, very calm, cool, collective guy,
6 very --

7 MS. RING: Judge, can we approach. Objection.

8 THE COURT: What's the nature of the objection?

9 MS. MILFELD: Improper character.

10 THE COURT: I'll sustain the objection.

11 MS. MILFELD: And relevance, Judge.

12 THE COURT: I'll sustain that objection as well.

13 MR. KELLNER: Your Honor, may I be heard on this.

14 THE COURT: The character of Sergeant Meals is not
15 relevant.

16 MR. KELLNER: I'm trying to establish how he knew
17 him through the jail.

18 THE COURT: That's a different question that may be
19 relevant. What you asked is irrelevant.

20 MS. RING: Judge, I'm going to ask to approach,
21 sorry.

22 THE COURT: Okay.

23 (Whereupon, counsel for the parties and the reporter
24 approached the bench and the following proceedings were had
25 out of the hearing of the jury.)

1 THE COURT: Go ahead.

2 MS. RING: I understand that part of the questioning
3 talked about Sergeant Meals and his relationship with Sergeant
4 Meals, but we subpoenaed Sergeant Meals' records from the
5 Boulder County Sheriff's Department specifically as they also
6 related to Stackhouse, because Sergeant Meals is deceased. We
7 were denied getting any of those records. That puts us in a
8 position, depending on what questions he asked, about whether
9 he was put in discipline by Sergeant Meals. We don't have the
10 ability to cross on that because we were denied access to
11 those records.

12 THE COURT: Well, the fact of the matter is
13 Ms. Milfeld brought it up on cross-examination. She
14 specifically asked if he knew Sergeant Meals because of
15 disciplinary actions that he had with Sergeant Meals. I'm
16 going to allow the District Attorney to redirect on that area
17 that's relevant. What started this conversation was questions
18 about the character and personality of Sergeant Meals, that's
19 not relevant. How does the Defendant know Sergeant Meals and
20 what context, and if there was some basis to believe that
21 Sergeant Meals would be a better conduit for the information
22 or for assistance, those are all issues that are proper for
23 examination of this witness.

24 MR. KELLNER: My next question for him would be why
25 would you tell Sergeant Meals about this particular statement

1 of the Defendant because of how he knew him. How he had
2 treated him in the past. So if it was an inartfully worded
3 question as to what kind of guy he was.

4 THE COURT: The reason in a very limited context,
5 the reasons that the Defendant sought out Sergeant Meals is
6 relevant.

7 MR. KELLNER: Thank you.

8 (Whereupon, the following proceedings were had in
9 the presence and the hearing of the jury.)

10 THE COURT: You may continue.

11 MR. KELLNER: Thank you, Judge.

12 Q. (By Mr. Kellner) Now you met and told Sergeant
13 Meals about the things that Defendant, Michael Clark, had told
14 you?

15 A. Yes.

16 Q. Why would you trust Sergeant Meals with this
17 information?

18 A. I didn't ask to speak to him personally, I just
19 asked to speak to a -- somebody that had some -- that I could
20 speak to regarding some information I have on a crime that was
21 committed in regards to a murder case. Sergeant Meals came to
22 me at that time, the next day.

23 Q. November 4th?

24 A. Yes, sir.

25 Q. Okay. Let me talk to you about some of the

1 statements you made on November 5th, 1994, when you were
2 interviewed by Sergeant Tom Trujillo and Sergeant Joe Pelle at
3 the Boulder County jail.

4 When you met with them, you told them that Mike
5 Clark was going into the Marines and that he says, If I would
6 go -- if I had already went into the Marines they would never
7 have linked me to them. They would have nothing on me, but
8 now I cannot go to the Marines because I'm charged. I said,
9 When you supposed to go to the Marines, he said, In about a
10 week.

11 A. That's correct.

12 Q. Do you remember that?

13 A. I do remember that.

14 Q. Later on page 6 of the interview you were asked a
15 question during the conversation with him, you talked about
16 the gun and you responded, quote, they can't find that gun.
17 He said they can't find that gun? And then you were asked by
18 Sergeant Tom Trujillo, Did he make any references as to where
19 the gun might be, and you said, No, he told me that, um, his,
20 um -- what's the guy called, recruit officer, he knows about
21 the gun. Sergeant Trujillo says, Uh-huh, and you said, He
22 knows he had a gun, a 9mm gun. Sergeant Trujillo then asked
23 you, But he didn't say where the gun might be now, and you
24 responded, He said they can't find the gun, he said it's not a
25 Chrysler, it's a Ford car.

1 A. That's correct.

2 Q. Do you remember that?

3 A. I do.

4 Q. And is that correct?

5 A. That is correct.

6 Q. You were then asked about where this car was and he
7 said --

8 MS. MILFELD: Judge, I'm going to object to this
9 line of questioning. Mr. Stackhouse is clearly indicated that
10 he admitted that he made all these statements before, so
11 there's no further impeachment that needs to be done.

12 THE COURT: Overruled.

13 Q. (By Mr. Kellner) You said, No, he didn't say
14 anything about where the car was, he did tell me that they
15 can't find the gun. I know they can't suspect -- they can't,
16 um, link me -- let's see, what's the word he used. They can't
17 charge me for murder because if they don't have the weapon,
18 they can't charge me.

19 Then the next question by Sergeant Joe Pelle, The
20 defendant ever say that he didn't kill him, and I substitute
21 the Defendant for Michael Clark's name. Did Michael Clark
22 ever say that he didn't kill him, you responded, He never
23 actually said, yes, Leon, I did it. He just nodded his head,
24 yes, you know when you ask him, you know, then he just changed
25 the subject, you know.

1 A. Sure.

2 Q. Is that right?

3 A. That's correct. It is right.

4 Q. Later on in that interview they asked you about a
5 statement you had made about -- the Defendant made about not
6 having glasses and about the hair. You said -- and this is in
7 quotes, They will never find the gun, they can't get me. He
8 says, quote, Plus, I don't wear glasses and my hair is bald.
9 Sergeant Trujillo asked you, So he's saying that the person
10 that this witness saw in the drawing in the newspaper. You
11 responded, I don't know about -- and then Sergeant Trujillo
12 interrupts you, he says, Is not -- he says -- and you said, I
13 don't know about no witnesses. Sergeant Trujillo says, Okay,
14 because there's -- there's a picture in the newspaper, I don't
15 know if you ever seen it, you responded, No. You don't want
16 no one to see the papers. Sergeant Trujillo asks, How come,
17 and you said, I don't know, whenever there's a newspaper, he
18 takes the newspaper.

19 Is that right?

20 A. That is right.

21 Q. When he -- when you asked him, Did you do it, and he
22 nodded his head?

23 A. He nodded his head like as in yes, he did, like, I
24 did it.

25 Q. Was there any doubt in your mind what he meant when

1 he nodded his head?

2 A. No, not at all.

3 Q. Mr. Stackhouse, I want to ask you about what you had
4 going at Solidaridad, at the prison there. What happens when you
5 leave the prison and -- and came out here to testify, brought
6 here to testify?

7 A. What happens?

8 Q. Yeah. Do you keep the same cell when you go back?

9 A. No.

10 Q. What happens to your cell?

11 A. My cell is given to another inmate that's coming
12 from reception area.

13 Q. Did you have a job at Solidaridad?

14 A. I had a good job.

15 Q. What was a good job in Solidaridad?

16 A. Fix all the air conditioners and refrigeration and
17 heating situation for the whole complex at Solidaridad state
18 prison.

19 Q. What's happened to your job now?

20 A. No job.

21 Q. Why not?

22 A. Because when I go back to Solidaridad, I'm going to have
23 to go to an area, it's where I have to sit four to six months
24 until I'm at -- able to get that area to the main line. Um,
25 it's pretty much -- it's not the hole, it's a place where they

1 put us until there's a bed available for us. Due to the fact
2 that I'm coming back to -- to the reception area of the
3 prison, there's other inmates that are -- already came off the
4 bus that already has a bed spoken for, so I have to wait in an
5 enclosed area, and then once there's a bed available to
6 whatever wing, hopefully I can get back to that as soon as
7 possible. But when I get back, no, I won't have my -- my job
8 nor my cell. The living conditions that I had while I was
9 there won't be there.

10 Q. Is that important to you?

11 A. Well, yes, it's very much so.

12 Q. You said earlier when you were testifying that this
13 would be bad for you if people knew that you were here
14 testifying. What did you mean?

15 A. This would be a death sentence for me.

16 Q. All right. Mr. Stackhouse, this happened 18 years
17 ago?

18 A. Yes.

19 Q. And when you were presented with that subpoena, you
20 had the right to a hearing?

21 A. That's correct, I did.

22 Q. Did you ask for that hearing?

23 A. I -- I was told that I could have a hearing
24 regarding -- if I want to come out here.

25 MS. MILFELD: Objection, Judge, this is asked and

1 answered?

2 THE WITNESS: I told him no --

3 THE COURT: Hold on, Mr. Stackhouse. I'll sustain
4 that objection.

5 Q. (By Mr. Kellner) Why did you come here today,
6 recognizing all the things you just said about losing your
7 cell and your job and now this could be a death sentence for
8 you?

9 A. I have morals that I need to be closure here. Um,
10 if something happened to a person that I loved, I loved one of
11 mine and a person that has been on -- has not been arrested
12 for this crime for 18 years, I would hope to god somebody
13 would come forward. There needs to be closure here.

14 MR. KELLNER: Thank you, Mr. Stackhouse.

15 THE COURT: Recross, Ms. Milfeld.

16 MS. MILFELD: No, Judge.

17 THE COURT: No recross.

18 MS. MILFELD: No recross.

19 THE COURT: All right. Mr. Stackhouse, you can step
20 down. Thank you, Sheriff.

21 SHERIFF: For the day?

22 THE COURT: Yes, actually, Mr. Kellner, is he
23 excused from his subpoena for the rest of the trial?

24 MR. KELLNER: He is, Judge.

25 THE COURT: And does the defense need him subject to

1 recall?

2 MS. MILFELD: No.

3 THE COURT: No. All right. Yes, thank you.

4 Would the People call their next witness.

5 MR. BRACKLEY: Sheriff Joe Pelle.

6 THE COURT: Sir, would you step forward please. Come
7 all the way up to the witness chair.

8 **JOSEPH PELLE,**

9 a witness herein, having been first duly sworn, was examined
10 and testified on his oath as follows:

11 THE COURT: Please have a seat. Go ahead,
12 Mr. Brackley.

13 MR. BRACKLEY: Thank you, Judge.

14 **DIRECT EXAMINATION**

15 **BY MR. BRACKLEY:**

16 Q. Good afternoon, sir.

17 A. Good afternoon.

18 Q. Please state your name, and spell your last name for
19 our court reporter?

20 A. Joseph Pelle, P-e-l-l-e.

21 Q. You currently employed?

22 A. I'm the Boulder County Sheriff.

23 Q. And how long have you been the Boulder County
24 Sheriff?

25 A. Almost 10 years.

1 Q. Okay.

2 A. A little over nine years.

3 Q. As the Boulder County Sheriff, were you an elected
4 official?

5 A. Yes.

6 Q. And generally what is your -- what's your job? What
7 do you do?

8 A. I have approximately over 400 employees. I am
9 responsible for the jail, law enforcement in the county, the
10 communications system, 911, search and rescue. I'm the -- I'm
11 responsible for wild fire coordination and suppression in the
12 county. It's sort of a public safety manager for the county.

13 Q. Do you sometimes wear uniforms, sometimes where suit
14 and tie?

15 A. Yes.

16 Q. Why do you sometimes wear the uniform?

17 A. Because I don't have to wake up and figure out what
18 matches in the morning, because, um -- seriously, because I
19 still very much consider myself a police officer and sometimes
20 engage in the business still, and I think that it helps gain
21 the respect of the people that work for me to know that I'm
22 still engaged and still active as a police officer.

23 Q. So tell us about your career in law enforcement from
24 the beginning and kind of generally going up through the time
25 you were elected as the Boulder County Sheriff?

1 A. I have been in policing -- I have been a police
2 officer in this county for almost 33 years. I started
3 actually as a cadet in the 1970s in high school, got an
4 interest in this profession, became a deputy sheriff. Went to
5 college, obtained a bachelor's and a master's degree in
6 criminal justice, worked at the sheriff's office initially for
7 four years.

8 Q. Okay. Sheriff Pelle, do you recall on November 4th,
9 1994, the context of this investigation receiving a call or a
10 communication from Sergeant Bob Meals at the Boulder County
11 jail in relationship to work that was being done on the Marty
12 Grisham homicide investigation?

13 A. I do. Sergeant Meals called me and let me know that
14 he had -- Sergeant Meals was a sergeant at the sheriff's
15 office, he worked at the jail, he called me and told me that
16 there was an inmate in the jail who wanted to share
17 information or possibly had information about this case.

18 Q. Okay. Is Sergeant Meals still with us?

19 A. Sergeant Meals is deceased.

20 Q. And did you as a result of receiving that call from
21 Sergeant Meals go to the Boulder County jail on the 5th of
22 November, 1994?

23 A. Yes, as I recall it was the following day, it was
24 the day after the phone call. It was in the evening after
25 Sergeant Meals had come to work night shift and myself and

1 Detective Trujillo went to the jail.

2 Q. Okay. And did yourself and Detective Trujillo talk
3 to a particular inmate?

4 A. Yes, we did.

5 Q. Who did you talk to?

6 A. Walter Leon Stackhouse.

7 Q. And was he at the time an inmate at the Boulder
8 County jail?

9 A. Yes, he was.

10 Q. And did you learn from Mr. Stackhouse as a matter of
11 context that he had shared a cell and/or an -- and also a -- a
12 module area with Mr. Michael Clark?

13 A. Yeah. If I remember correctly, they were in the
14 intake module together, and it's -- spent time together in the
15 day room area and, also, eventually I think that they did
16 share a cell.

17 Q. Okay. Now prior to receiving the call from Sergeant
18 Meals, was the name Michael Clark on the radar of the
19 investigation into the murder of Marty Grisham?

20 A. Yeah, Mr. Clark's name came up as a person of
21 interest immediately.

22 Q. And for further context, do you know that prior to
23 Mr. Clark going into the Boulder County jail he had been
24 interviewed by some -- some of your detectives, Trujillo,
25 Weiler and Weinheimer?

1 A. Yes.

2 Q. And that interview took place at the Boulder Police
3 Department?

4 A. Yeah, I believe so, yes.

5 Q. When you began your interview with Mr. Stackhouse,
6 did you specifically talk to him about whether any promises
7 had been made to him about what he is doing in jail or pending
8 cases, or anything along those lines?

9 A. I did.

10 Q. Okay. And why did you do that?

11 A. One of the concerns with inmate witnesses, of
12 course, is their motivation, their motivation for sharing
13 information, obtaining information and sharing information
14 with the police. So I asked him a number of questions about
15 whether he was getting anything in return, if anyone had made
16 him any promises of leniency or dropping charges or dismissing
17 charges or anything, and he, um, denied that any promises had
18 been made.

19 Q. Now do you remember an issue involving work release
20 and possible work release status for Mr. Stackhouse at or
21 around that time?

22 A. Yes. So I said, Has anybody made any kind of
23 promises or anything, and to the best of my recollection he
24 said, no, and he said except maybe with work release. But
25 then I had spoke to Sergeant Meals and the work release

1 situation was already in place, he was going on work release,
2 that's the reason he had been transferred. He was -- the
3 decision to share information with the police had no impact or
4 connection to the decision to put him in work release.

5 Q. So -- and after your conversation with
6 Mr. Stackhouse, and also following up with Sergeant Meals, was
7 it your belief that whether or not Mr. Stackhouse went on work
8 release had nothing to do with his conversation with you?

9 A. Correct. The other thing that I guess that I should
10 point out is the cops don't make decisions about who goes up
11 on work release, those are decisions made by the judge, that's
12 a sentencing decision and that decision apparently had already
13 been made.

14 Q. Okay. So there was no information about talking to
15 a judge?

16 A. No.

17 Q. Talking to the DA?

18 A. No.

19 Q. A decision for work release had been made prior to
20 you sitting down with Mr. Stackhouse?

21 A. That's my understanding, yes.

22 Q. And that's your understanding from Sergeant Meals
23 and also from Stackhouse himself?

24 A. In fact, when I asked specifically about leniency or
25 the charges that he was facing he said, Hey, I'm already

1 sentenced, the decision has been made so...

2 Q. Okay. Without any specific details, do you recall
3 Mr. Stackhouse telling you that the Defendant had told him --
4 or that Michael Clark had told him that he had been arrested
5 on a stolen motorcycle?

6 A. Mr. Stackhouse told me and Trujillo that there was a
7 conversation about a motorcycle, Coal Creek Canyon, some
8 speed.

9 Q. But no details, just was there a conversation about
10 a motorcycle?

11 A. Yes, there was.

12 Q. Okay. Did Mr. Stackhouse tell you that Michael
13 Clark said he says, um, if I would go -- if I had already went
14 into the Marines, they never would have linked me to them.
15 They wouldn't have had -- they wouldn't have nothing on me,
16 but now I cannot go into the Marines because I am charged.
17 And he asks Mr. Clark, When are you supposed to go into the
18 Marines, and he said, In about a week.

19 Do you remember that conversation with
20 Mr. Stackhouse?

21 A. Yes, I remember the conversation about the Marines
22 for sure.

23 Q. Do you remember asking Mr. Stackhouse --

24 MS. MILFELD: Judge, I'm going to object to this as
25 cumulative.

1 THE COURT: Yeah, it is cumulative at this point.
2 Is it foundational for some other area of inquiry?

3 MR. BRACKLEY: It is, Your Honor. Well, this is
4 a -- I'm eliciting prior consistent statements from the
5 sheriff pursuant to 801(d)(1) in response to cross-examination
6 by counsel.

7 THE COURT: Your co-counsel already did that on
8 redirect, so I'm going to sustain the objection.

9 Q. (By Mr. Brackley) Do you recall speaking with
10 Mr. Stackhouse and -- well, you know what, let me build the
11 foundation.

12 Do you recall Mr. Stackhouse telling you that the
13 Defendant said, They can't get me, he says, Plus --

14 MS. MILFELD: Objection, Judge.

15 THE COURT: What's the objection?

16 MS. MILFELD: Cumulative.

17 THE COURT: Your response?

18 MR. BRACKLEY: This is foundational.

19 THE COURT: Overruled.

20 Q. (By Mr. Brackley) They can't get me, he says, Plus,
21 I don't wear glasses and my hair is bald.

22 Do you recall that?

23 A. I do.

24 Q. Limiting it to the context of your conversation with
25 Mr. Stackhouse, do you recall issuing a press release in this

1 case with a -- a composite drawing of someone who had glasses
2 and longer hair than Mr. Clark had at the time?

3 A. We did.

4 Q. And do you recall after this conversation with
5 Mr. Stackhouse, the person in that composite was identified as
6 a resident of the building who had nothing to do with the
7 homicide?

8 A. That's correct.

9 Q. Okay. Was it your understanding when Mr. Stackhouse
10 was talking about the Defendant, Mr. Clark, talking about I
11 don't have glasses and my hair is shorter, he was saying they
12 don't have the right picture of me?

13 A. I do recall that, because it led to a whole
14 conversation about the newspaper and the newspaper --
15 availability of the newspaper in the jail, that kind of thing.

16 Q. Okay. Do you recall whether there was ever a press
17 release where you mentioned that the Defendant -- that Michael
18 Clark had gone -- had spent some time in Pueblo prior to the
19 fall of 1994?

20 A. I do not.

21 Q. Was there ever a press release stating that the
22 Defendant -- that Michael Clark was interested in going into
23 the Marines?

24 A. No.

25 Q. Was there a press release that Michael Clark showed

1 his 9mm to a Marine recruiter?

2 A. No, we were being very protective of that
3 information at the time.

4 Q. Was there a press release which talked about Michael
5 Clark ever being arrested on a stolen motorcycle?

6 A. You know, I don't know, I can't answer that
7 question.

8 Q. And you are not prepared to say I have read all the
9 newspapers from that time, and there's nothing in there about
10 a stolen motorcycle?

11 A. No, I'm not, not at all.

12 MR. BRACKLEY: Okay. Thank you, Sheriff.

13 I have no further questions at this time.

14 THE COURT: All right. Cross-examination, Ms. Ring.

15 MS. RING: Thank you.

16 **CROSS-EXAMINATION**

17 **BY MS. RING:**

18 Q. Sheriff, actually what Mr. Brackley was asking you
19 about was what information came out of the press releases,
20 right? That's the word that Mr. Brackley used was a "press
21 release" issue?

22 A. Yes.

23 Q. Okay. So as part of your role as the supervisor of
24 the crimes against persons unit, et cetera, you would have
25 known what information the Boulder police was authorizing to

1 release in press releases?

2 A. Yes, I would have actually been the one doing that
3 task or authorizing it.

4 Q. Okay. And so if Mr. Brackley showed you the
5 different press releases that came out, that's how you would
6 be able to tell us today exactly what information came out in
7 those press releases?

8 A. Correct.

9 Q. And you didn't review those before you testified
10 today?

11 A. No.

12 Q. Now even though you were trying to control what
13 information was coming out to the public, you couldn't control
14 everything that was reported in newspaper articles?

15 A. That's also true.

16 Q. Okay. And prior to testifying today, you didn't
17 review the newspaper articles that came out on November 2nd or
18 November 3rd or November 4th or November 5th of 1994?

19 A. I did not.

20 Q. Okay. So you can't tell us now what information may
21 have come out in the newspapers during that time frame, as you
22 sit here today?

23 A. That's true.

24 Q. Okay. Initially Mr. Brackley was asking you
25 questions about your interview with Mr. Stackhouse at the

1 jail, right?

2 A. Correct.

3 Q. Is it fair that you were provided a copy of the
4 transcript of that interview prior to you testifying today?

5 A. That's true.

6 Q. So that you could refresh your memory about an
7 interview that you did back in 1994?

8 A. Correct.

9 Q. Okay. Mr. Brackley just asked you specifically a
10 question about a composite drawing, right?

11 A. Correct.

12 Q. And it's your memory that that composite drawing was
13 released through a press release?

14 A. Yes.

15 Q. And do you recall as you sit here today, and I
16 understand you may not, whether or not that composite drawing
17 was also released in the newspaper article?

18 A. I believe it was.

19 Q. Okay. And you just told us that you would have
20 authorized the release of that composite drawing?

21 A. Yes.

22 Q. And, in fact, you were part of the team that decided
23 that the composite drawing would actually be done?

24 A. Correct.

25 Q. That there was this witness that Mr. Brackley just

1 referred to who had seen someone right near Marty Grisham's
2 apartment that night right before the shooting supposedly
3 occurred?

4 A. That's correct.

5 Q. And based on getting that information about this
6 person, Tanya Jerome seeing this individual, you requested
7 that a composite -- that she come into the police department
8 to do a composite drawing?

9 A. Yes. I'm not sure I requested her to come in, but I
10 requested -- or I was part of the decision-making that she
11 should come in and that it be done. I did not contact her
12 myself --

13 Q. Right.

14 A. -- personally.

15 Q. Right. You would have been part of the decision to
16 send some other officer out to make sure that was done?

17 A. Yes. Correct.

18 Q. And you knew at the time that she was -- the next
19 day, either November 2nd or 3rd, she came into the police
20 department and did the composite drawing?

21 A. It was -- it was within a day or two, yes; I don't
22 know the date.

23 Q. And the composite drawing that Ms. Jerome did at the
24 Boulder Police Department was the composite drawing that was
25 released through the press release and into the newspaper?

1 A. Yes.

2 Q. Okay. Do you recall Mr. Brackley just asked you
3 about whether or not Michael Clark was on the radar in this
4 investigation rather quickly and I think that you told us he
5 was?

6 A. That's true.

7 Q. Okay. And do you recall that because Michael Clark
8 was on the radar as part of this investigation early on, that
9 you also -- in addition to asking that Tanya Jerome do a
10 composite, you also asked that she be shown a photo lineup?

11 A. I believe she was shown a photo array, including
12 Mr. Clark's photo.

13 Q. Right. Specifically including Mr. Clark's photo?

14 A. Yes.

15 MS. RING: Okay. Nothing further.

16 THE COURT: Okay. Redirect, Mr. Brackley.

17 **REDIRECT EXAMINATION**

18 **BY MR. BRACKLEY:**

19 Q. As part of the decision-making process, did the
20 person that Tanya Jerome saw remain a person of interest or
21 anyone of interest for long in this investigation.

22 A. No, it was actually a resident who called us and
23 said, Hey, I'm the guy in the picture.

24 Q. Okay.

25 A. I believe Tom Trujillo is the one that came in and

1 said this guy just came in and he looks exactly like the
2 composite, and he was in the area and he would have walked by
3 there on the way. So there seemed to be a reasonable
4 explanation and a dead ringer for the composite.

5 Q. And that's the person that Tanya Jerome saw, not the
6 Defendant?

7 A. I believe so, yes.

8 Q. Okay. In fact, Tanya Jerome didn't even describe
9 hearing any gunshots or seeing police running around or
10 ambulances or anything?

11 A. No, she was just describing a person that she saw in
12 the area at the approximate time and we were trying to
13 generate leads, so we --

14 Q. And that's a lead that was kind of a distraction?

15 A. Well, it's sometimes just helpful to eliminate
16 questions as it is to include them so... yeah.

17 Q. No doubt.

18 MR. BRACKLEY: Thank you.

19 THE COURT: Any recross, Ms. Ring?

20 MS. RING: Just briefly.

21 **RECROSS-EXAMINATION**

22 **BY MS. RING:**

23 Q. It's your understanding that when Tanya Jerome was
24 shown the photo lineup with Michael Clark in that lineup, she
25 did not pick Michael Clark out of the photo lineup?

1 A. Correct.

2 MS. RING: Nothing further.

3 THE COURT: All right. Sheriff, you can step down.

4 Can this witness be excused, Mr. Brackley?

5 MR. BRACKLEY: Yes, Your Honor.

6 THE COURT: Ms. Ring, do you need him subject to
7 recall?

8 MS. RING: I believe that we can release the
9 Sheriff.

10 THE COURT: All right. Sheriff, you are excused.
11 Thank you very much.

12 THE WITNESS: Thank you.

13 THE COURT: Would the People call their next
14 witness, please.

15 MR. BRACKLEY: The People call Allison Hackman.

16 THE COURT: Would you step forward, please, ma'am.

17 **ALLISON HACKMAN,**
18 a witness herein, having been first duly sworn, was examined
19 and testified on her oath as follows:

20 THE COURT: Please have a seat.

21 Go ahead, Mr. Brackley.

22 MR. BRACKLEY: Thank you, Judge.

23 **DIRECT EXAMINATION**

24 **BY MR. BRACKLEY:**

25 Q. Good afternoon, ma'am.

1 A. Hi, Ryan.

2 Q. Can you state your name for the jury and spell your
3 last name.

4 A. Allison Hackman, H-a-c-k-m-a-n.

5 Q. Ms. Hackman, where are you currently living?

6 A. New Jersey.

7 Q. And how long have you been in jersey for?

8 A. Eight years.

9 Q. You married?

10 A. Yes.

11 Q. Children?

12 A. Yes.

13 Q. How many?

14 A. One.

15 Q. Okay. Where did you grow up?

16 A. Boulder.

17 Q. Did you go to Boulder High School?

18 A. I did.

19 Q. What year did you graduate?

20 A. 1996.

21 Q. Do you recall Michael Clark from your days at
22 Boulder High School?

23 A. Not from my days at Boulder, I didn't go to school
24 with him, but, yeah, when I was in school there --

25 Q. Okay.

1 A. -- I knew him.

2 Q. Do you know that Michael Clark -- do you know
3 whether Michael Clark went to Boulder High School?

4 A. Yes, he did.

5 Q. Before you or after you?

6 A. I think when I was a freshman he was a senior and
7 then he graduated.

8 Q. Okay. So --

9 A. It was like a year overlap, but I didn't know him
10 during that time.

11 Q. At what point during your -- at what point did you
12 meet Michael Clark?

13 A. Like middle of my junior year.

14 Q. And had he graduated already?

15 A. Yes.

16 Q. Okay. When is the last time you saw him?

17 A. I guess -- sorry -- beginning of my junior year,
18 like during volleyball season.

19 Q. Do you recall the last time -- how many years ago
20 you saw Michael Clark?

21 A. I saw him -- he came out to visit when I went to
22 Michigan one time and then that was it, so maybe '97.

23 Q. Okay. Would you recognize him if you saw him again?

24 A. Yes.

25 Q. Okay. If you could take a look around and let us

1 know you see Michael Clark?

2 A. I do.

3 Q. Okay. And if you can identify something that he is
4 wearing?

5 A. Oh he is over in the suit jacket and pants.

6 Q. I'm going to publish for you People's Exhibit 44.
7 It's going to be over your left shoulder there on the big
8 screen. Do you recognize this photo?

9 A. Yes.

10 Q. Okay. And who is that?

11 A. Mike, Mike Clark.

12 Q. Back in the high school -- your high school days?

13 A. Mm-hmm. Yeah.

14 Q. Thank you. Do you recall a time when Michael Clark
15 was in the Boulder County jail?

16 A. I do.

17 Q. And do you recall visiting Michael Clark in the
18 Boulder County jail?

19 A. Yes.

20 Q. Do you recall at some point you started dating
21 Michael Clark?

22 A. Yes.

23 Q. When was that in relation to him being in the
24 Boulder County jail?

25 A. I think we started getting close when he came out of

1 jail, so then sometime thereafter.

2 Q. Okay. Do you recall back in 1994 talking with the
3 Defendant about his interest in joining the U.S. Marine Corps?

4 A. Yes.

5 Q. Was he interested in that?

6 A. Very much.

7 Q. Was that a dream of his?

8 A. Yes.

9 Q. And was that something that he was looking to do to
10 get himself out of Boulder?

11 A. Yea.

12 Q. Okay. Something that he talked about throughout the
13 time you knew him?

14 A. Yeah, I think he, um, you know, didn't have a lot of
15 opportunities that other kids that grow up in Boulder did, and
16 he felt like that was his way to, you know, like a successful
17 path and possibly college and stuff like that.

18 Q. Do you recall learning that Michael Clark had been
19 arrested for stealing checks?

20 A. I didn't know him as well at the time, but I knew --
21 I mean I knew why he was in jail, that it was for the check
22 forgery.

23 Q. And do you recall the -- the eventual conviction for
24 stealing the checks ended his chances at becoming a U.S.
25 Marine?

1 A. I thought that he still had aspirations to join the
2 Marine Corps, I didn't know, you know, exactly, you know, the
3 stuff that I know now, that I have read that, you know,
4 another -- another conviction would have perhaps --

5 MS. MILFELD: Objection, sustained.

6 Q. (By Mr. Brackley) Um, let me ask you this. You
7 were a high school junior back in November of 1994?

8 A. Yes.

9 Q. Since 1994, and last week sometime in October of
10 2011, did you speak with a number of police officers,
11 investigators, lawyers, about a telephone call that you
12 received from Michael Clark on November 1st, 1994?

13 A. I'm sorry between when?

14 Q. Between November 1st of 1994 --

15 A. Uh-huh.

16 Q. -- and just last week?

17 A. Yes.

18 Q. Have you received a bunch of phone calls from people
19 wanting to talk to you about a telephone call that the
20 Defendant --

21 A. Yes.

22 Q. -- um, that you and the Defendant may have had
23 November 1st, 1994?

24 A. Yes.

25 Q. Do you remember that telephone call as you sit here

1 today?

2 A. I do not.

3 Q. Do you remember talking with a detective from the
4 Boulder Police Department on November 13th, 1994 about a
5 telephone call that, um, you may or may not have received from
6 the Defendant on November 1st, 1994?

7 A. No, I don't remember any of that.

8 Q. Do you remember talking with a police detective from
9 the Boulder Police Department on November 7th, 1994, about
10 that same telephone call?

11 A. No.

12 Q. So is it fair to say that as you sit here today you
13 have no recollection at all?

14 A. That's true.

15 Q. And that's not for lack of anyone trying to help you
16 remember --

17 A. No.

18 Q. -- correct?

19 A. No, I mean I'm 34 years old, it was 18 years ago,
20 more than half my life ago.

21 Q. Do you -- so do you remember telling the
22 detective -- both detectives who called you, the one on the
23 7th of November and the one a week later that Defendant called
24 you at approximately 10:00 p.m. on November 1st 1994?

25 A. I don't remember that.

1 Q. Do you remember talking about -- do you remember
2 telling the detective that you and the Defendant talked about
3 someone named Jessica McCutcheon?

4 A. I don't remember that.

5 Q. And let's step outside of the context of these
6 questions and say -- I'll ask you, do you remember someone
7 named Jessica McCutcheon back from your high school days?

8 A. Yeah, of course.

9 Q. Do you recall, was she a classmate of yours?

10 A. She was.

11 Q. Do you recall that Defendant was dating Jessica
12 McCutcheon just prior to dating you?

13 A. Yeah, like eight months or a chunk of time before,
14 yeah.

15 Q. And do you remember telling the detectives who you
16 spoke to back in November of 1994 that one of the things you
17 and Defendant talked about in this November 1st, 1994,
18 telephone conversation was that Defendant had broken up with
19 Jessica McCutcheon and he was concerned whether that would
20 effect his friendship with you?

21 A. I don't remember anything about the call.

22 Q. Do you recall -- so stepping outside of the context
23 of the call again, do you recall that the Defendant was at
24 some point living with Jessica McCutcheon and her family prior
25 to you and the Defendant having a relationship?

1 A. Yes.

2 Q. And do you also recall the Defendant living with a
3 gentleman by the name of Bob Mann around that time?

4 A. Yeah.

5 Q. Back to the telephone call. Would it refresh your
6 recollection or help you remember if you were told that one of
7 the things you told the detective who you spoke to was that
8 the Defendant told you that on November 1st, 1994, he had been
9 to see his Marine recruiter earlier that day?

10 A. I don't remember any of it.

11 Q. Okay. Do you recall telling the detectives,
12 specifically the one who you spoke to on the 7th of November,
13 1994, that it would have been unusual for the Defendant to
14 call you after 9:00 p.m.?

15 A. I don't remember anything in that conversation.

16 Q. Okay. As you sit here today, do you recall talking
17 with detectives within the last two or three years about
18 whether it would have been unusual for you to take a phone
19 call after 9:00?

20 A. Yes.

21 Q. Would it have been unusual for you to take a call
22 after 9:00 back --

23 A. Yes --

24 Q. -- while you were a high school junior?

25 A. -- it would have been.

1 Q. Why would that have been unusual?

2 A. Because I went to bed really early and I played
3 sports after school and did my homework and just went to bed.
4 I have always just been a person that needed a lot of sleep.
5 I don't know.

6 Q. So if you were to tell a detective in 2011, for
7 instance, that would be unusual for Mike Clark to call you
8 after 9:00, it certainly would have been unusual for him to
9 call you at 10:00?

10 A. Yes.

11 Q. Okay. Do you recall back -- so after the Defendant
12 got out of the Boulder County jail and you and he started
13 dating him, do you recall him ever telling you that he had a
14 gun?

15 A. No.

16 Q. Or that he had gotten a gun from a pawnshop?

17 A. No.

18 Q. Or that he had gotten a gun from a stranger down in
19 Denver?

20 A. No.

21 Q. Did he ever tell you that he was being stalked by
22 anyone?

23 A. No.

24 Q. Did he ever tell you in the context of your
25 relationship with him that he needed protection or he felt

1 threatened by someone?

2 A. No.

3 Q. Did he ever tell you in the context of your
4 relationship that, um, he needed protection or a gun from
5 someone who was stalking him?

6 A. No.

7 Q. Do you recall him ever being concerned about a
8 stalker?

9 A. No.

10 Q. Or a -- warning you to be concerned about his
11 stalker?

12 A. No.

13 Q. Did he tell you that he was stealing checks?

14 A. No.

15 Q. Cashing those checks --

16 A. No.

17 Q. -- and stealing the money?

18 A. No.

19 MR. BRACKLEY: No further questions at this time,
20 Your Honor.

21 THE COURT: All right. Cross-examination,
22 Ms. Milfeld.

23 **CROSS-EXAMINATION**

24 **BY MS. MILFELD:**

25 Q. Ms. Hackman, you said that you don't really remember

1 anything about the phone call back in 1994?

2 A. True.

3 Q. But what you would have told police back then would
4 have been true?

5 A. Yes.

6 Q. In high school you describe yourself as a
7 good-headed kid?

8 A. I was.

9 Q. You had no reason to not tell the truth to police
10 officers?

11 A. True.

12 Q. You had no reason to lie to them?

13 A. True.

14 Q. You had no reason to protect Michael Clark at that
15 time?

16 A. No.

17 Q. You spoke to numerous officers around that time
18 period, do you remember that?

19 A. No. I mean --

20 Q. Okay. One of the officers you spoke to was a
21 Detective Weiler and Wyton, and I take it you don't remember
22 that?

23 A. No.

24 MS. MILFELD: Judge, may I approach?

25 THE COURT: Yes.

1 MS. MILFELD: Page 259.

2 Q. (By Ms. Milfeld) I'm showing you a police report by
3 Detective Weiler and it says that you -- that they spoke to
4 you and that you said that you received a phone call from
5 Mr. Clark at 21:45 or 9:45 on November 1st?

6 A. Uh-huh.

7 Q. That it lasted from 45 minutes to one hour?

8 A. Okay.

9 Q. You also advised that you were positive about the
10 time being 9:45 because of homework, another phone call and
11 talking to your mom just before, prior to the phone call that
12 you had received from Mr. Clark?

13 A. Mm-hmm.

14 Q. And you don't remember saying that?

15 A. No.

16 Q. But, again, what you had said before is -- what you
17 would have told police officers back then would have been
18 true?

19 A. Yes.

20 Q. You had no reason not to tell them the truth?

21 A. True.

22 Q. If you told them that you had received the phone
23 call at 9:45, because that's because you received a phone call
24 at 9:45?

25 A. Right.

1 Q. It's because -- and if you would have told them that
2 you were positive of the -- due to the various things, that's
3 because you were sure of the time?

4 A. Yes.

5 Q. You talked about how you don't remember really
6 anything about the phone call?

7 A. Right.

8 Q. That you don't remember details about that phone
9 call. And it's safe to say that nothing about that phone call
10 sticks out in your mind?

11 A. True.

12 Q. In fact, it doesn't stick out at all?

13 A. At all.

14 MS. MILFELD: Judge, may I approach again?

15 THE COURT: Yes.

16 Q. (By Ms. Milfeld) I'm showing you that same police
17 report. We just talked about you receiving the phone call at
18 9:45. Later we talk about Hackman relaying that Clark sounded
19 calm during the phone call and there was no background noise?

20 A. Okay.

21 Q. Do you remember saying that?

22 A. No.

23 Q. But, again, what you told us is that what you would
24 have told officers back then would have been the truth?

25 A. Correct.

1 Q. That if you told the officers that he sounded calm
2 during the phone call, he sounded calm?

3 A. Yes.

4 Q. That if you told officers that there was no
5 background noise, that's because you didn't hear any
6 background noise?

7 A. True.

8 Q. If you would have heard anything unusual in the
9 conversation, you certainly would have told the officers?

10 A. Yes.

11 Q. You would have told the officers because you were a
12 good-headed kid?

13 A. Yes.

14 Q. You certainly wanted to help the police, if you
15 could?

16 A. Yes.

17 Q. If you described Mr. Clark as being calm, certainly
18 you didn't -- you would have told them if he sounded scared or
19 nervous?

20 A. I would have.

21 Q. You would have told them if he sounded out of breath
22 when he first answered the phone because that would be
23 unusual?

24 A. True.

25 Q. When you talk about not hearing any background

1 noise, if you heard anything that was weird in the background,
2 you would have reported that to the police?

3 A. Yes.

4 Q. You would have reported if you heard, like, he was
5 calling on a pay phone and you could hear street noise?

6 A. Sure.

7 Q. You would have reported if you heard any other type
8 of noise in the background because that would be unusual?

9 A. Yes.

10 Q. You talked about how you came to know Mr. Clark and
11 as you knew him as Mike back then?

12 A. Mm-hmm.

13 Q. That you started to get to know him during the
14 junior year of your high school?

15 A. Mm-hmm.

16 Q. And -- I'm sorry -- you have to say yes or no for
17 the record because --

18 A. Yes.

19 Q. -- because of the reporter.

20 A. Sorry.

21 Q. You started dating him around the time when he
22 was -- around the time after he got out of jail?

23 A. Yes.

24 Q. You weren't dating him before that point?

25 A. True.

1 Q. You didn't know a lot of the things that had
2 happened before that point?

3 A. That's right.

4 Q. Mr. Brackley talked to you about how you visited him
5 at the jail, and you do remember visiting him?

6 A. I do.

7 Q. You visited at the jail a few times?

8 A. Mm-hmm.

9 Q. When you visited him, he acted normal?

10 A. I mean I can't remember any of it. I remember -- I
11 mean I was 16. I went to a jailhouse, so I remember that
12 pretty vividly, but I don't remember conversations or actions
13 or anything like that.

14 Q. But you started dating Mr. Clark --

15 A. After.

16 Q. -- after he got out of the jail?

17 A. Mm-hmm.

18 Q. And certainly if you had visited him and he had
19 acted strange, you wouldn't have dated him?

20 A. True.

21 Q. If when you had talked to him in the jail he was
22 acting suspicious, you wouldn't have dated him after that?

23 A. Right.

24 Q. If there were anything that raised a red flag when
25 you visited him at the jail, you wouldn't have talked to him

1 after that?

2 A. Right.

3 Q. During that time when he was in jail you also wrote
4 letters to him?

5 A. Mm-hmm.

6 THE COURT: I need you to say yes or no.

7 THE WITNESS: Yes. Sorry.

8 THE COURT: That's okay.

9 Q. (By Ms. Milfeld) He wrote letters back to you?

10 A. Yes.

11 Q. And, again, if there was anything that really
12 sounded your alarm bells you wouldn't have talked to him any
13 more?

14 A. Right. Yes.

15 Q. And there was nothing in those letters that made you
16 suspicious of him?

17 A. No.

18 Q. From any of those conversations, if you thought that
19 he was involved in any criminal activity, you would have
20 reported that?

21 A. True.

22 Q. If you thought that he was involved in the murder,
23 you would have reported that?

24 A. Yes.

25 Q. You didn't do any of those things?

1 A. That's right.

2 MS. MILFELD: No further questions.

3 THE COURT: Redirect.

4 **REDIRECT EXAMINATION**

5 **BY MR. BRACKLEY:**

6 Q. Let me show you something that Ms. Milfeld maybe
7 decided not to show you. Can you read that first paragraph to
8 yourself there.

9 THE COURT: What page are you referencing for
10 defense?

11 MR. BRACKLEY: 137.

12 Q. (By Mr. Brackley) Did you -- do you recall -- and,
13 again, I have to ask this question even though I know the
14 answer, but do recall speaking with the Detective Linda Arndt
15 back on November 12th, 1994?

16 A. No.

17 Q. And do you recall telling Detective Linda Arndt that
18 the Defendant called your home at approximately 10:00 on
19 November 1st?

20 A. No.

21 Q. What you told the officers would have been the
22 truth, correct?

23 A. Yes.

24 Q. You wouldn't have lied to the officers?

25 A. No.

1 Q. I think you said you were a good kid and that's why
2 you wouldn't have lied?

3 A. I was a good kid.

4 Q. So really do you know -- as you sit here today, can
5 you tell the jury whether it was 9:45 or 10:00 that the
6 Defendant called your house?

7 A. No, I mean whatever I said I think --

8 Q. So --

9 A. -- would be my best answer.

10 Q. If you told one officer 9:45 at the time, you would
11 have been doing your best to tell the truth, right?

12 A. Yes.

13 Q. If you told another detective 10:00, you would have
14 been doing the best to tell your truth, right?

15 A. Yes.

16 Q. Ms. Milfeld asked you if Mr. Clark was acting normal
17 when you visited him in the Boulder County jail. What exactly
18 is "normal" for the Boulder County jail?

19 A. I don't know.

20 Q. You told the police -- you told Detective Heidel in
21 2011 that when you went to visit the Defendant in the Boulder
22 County jail, you did not think that he stole, forged and
23 cashed those checks, right?

24 A. Honestly I don't remember, so whatever I said I
25 would stand by, I mean I had zero reason to lie.

1 Q. Okay. If you had known that the Defendant had, um,
2 possessed an illegally obtained handgun, is that something
3 that would have changed your mind about dating him?

4 A. Yes.

5 Q. And that's certainly nothing that he told you,
6 right?

7 A. Right.

8 Q. And if you had known that the Defendant had, um,
9 been arrested on a stolen motorcycle, would that have changed
10 your mind about dating him?

11 A. Probably.

12 Q. And that is certainly something that he didn't tell
13 you about, right?

14 A. Right.

15 Q. Okay. Sounds like Defendant is someone's who's
16 pretty cool and calm under pressure?

17 A. I mean I don't know if I could answer that.

18 Q. When you talked to him on November -- well, do you
19 recall, um, ever telling the police that when you spoke to the
20 Defendant on November 1st, 1994, um, him telling you that that
21 very day he probably did something that was going to get him
22 caught for stealing these checks?

23 A. Yeah, I don't know about any of that.

24 Q. So he didn't tell you that he called a bank
25 pretending to be Marty Grisham and the bank essentially busted

1 him --

2 A. No.

3 Q. -- that very day?

4 A. No.

5 Q. Yet, um -- and he didn't appear to be stressing or
6 anxious about that?

7 A. No.

8 MR. BRACKLEY: Thank you. No further questions.

9 THE COURT: Any recross, Ms. Milfeld.

10 MS. MILFELD: No, Judge. Thank you.

11 THE COURT: All right. Ms. Hackman, you can step
12 down.

13 Can this witness be excused, Mr. Brackley.

14 MR. BRACKLEY: She may, Your Honor.

15 THE COURT: Ms. Milfeld.

16 MS. MILFELD: Yes, Judge.

17 THE COURT: All right. Ms. Hackman, you are
18 excused. Thank you very much.

19 THE WITNESS: Thank you.

20 THE COURT: If you would give that piece of paper
21 back to Mr. Brackley. Thank you.

22 Ladies and gentlemen of the jury, we'll go ahead and
23 take the mid afternoon recess at this time. We'll recess
24 until 3:15. Remember the admonition that I have given you
25 previously, it applies at the recess as well. Don't talk

1 about the case amongst yourself or with anyone else. Don't
2 read or listen to any news reports, don't do any outside
3 research or investigation, don't form or express any opinion
4 on the case until it's presented to you. We'll see you back
5 at 3:15. Thank you.

6 (The jury exited the courtroom.)

7 THE COURT: The record should reflect the jury has
8 left the courtroom.

9 Before you guys leave, how are we doing timing wise?

10 MR. KELLNER: Judge, I think that we're doing pretty
11 well.

12 THE COURT: Do the People intend --

13 MR. KELLNER: We have Mr. Hammond from CBI followed
14 by -- I think we are going to get Mr. -- Special Agent Grusing
15 on because of his other commitments and we have Detective
16 Heidel.

17 THE COURT: So maybe this afternoon, maybe early
18 tomorrow morning.

19 MR. KELLNER: I would say, if anything, we might
20 have one witness tomorrow morning.

21 THE COURT: Okay. All right. We'll be in recess
22 until 3:15. Thank you.

23 (Whereupon, the afternoon recess was taken.)

24 THE COURT: All right. We are back on the record in
25 People versus Michael Clark. The Defendant is present, all

1 attorneys are present.

2 Anything to take up on the record before we bring
3 the jury in, from the People?

4 MR. KELLNER: No, Your Honor.

5 THE COURT: For the defense?

6 MS. RING: No.

7 THE COURT: Would you bring the jury in, please.

8 (The jury entered the courtroom.)

9 THE COURT: Please be seated. All the members of
10 the jury are back.

11 For the People, call their next witness.

12 MR. KELLNER: The People call Kristin Buchanan.

13 THE COURT: Step forward please, ma'am. Come all
14 the way up here by the witness stand.

15 **KRISTIN BAULSIR BUCHANAN,**

16 a witness herein, having been first duly sworn, was examined
17 and testified on her oath as follows:

18 THE COURT: Please have a seat.

19 Go ahead, Mr. Kellner.

20 MR. KELLNER: Thank you, Judge.

21 **DIRECT EXAMINATION**

22 **BY MR. KELLNER:**

23 Q. Good afternoon, ma'am. Can you state your name and
24 spell your last name for us.

25 A. It's Kristin Buchanan, B-u-c-h-a-n-a-n.

1 Q. And was there a time you went by the last name
2 Baulsir?

3 A. Yes.

4 Q. When was that?

5 A. That was my maiden name.

6 Q. Okay. Where do you live, ma'am?

7 A. In Colorado.

8 Q. And where did you grow up?

9 A. In Boulder.

10 Q. When did you live in Boulder?

11 A. Until I was 18.

12 Q. Did you go to high school in Boulder?

13 A. I did.

14 Q. What high school did you go to?

15 A. Boulder high.

16 Q. And what year did you graduate?

17 A. 1995.

18 Q. How old would you have been in 1994?

19 A. 17.

20 Q. In the November timeframe of 1994, did you know a
21 man in high school well you were in high school named Michael
22 Clark?

23 A. Yes.

24 Q. Okay. How did you know Michael Clark?

25 A. He was a friend of a friend.

1 Q. Well, how would you characterize your relationship
2 with Michael Clark back in 1994?

3 A. I would say he was more of an acquaintance.

4 Q. Do you remember back in 1994 learning that the
5 Defendant, Michael Clark, had gotten in some kind of trouble
6 and ended up in the Boulder County jail?

7 A. I read in the paper that he was a suspect in a
8 murder.

9 Q. Now back then when you had read about that in the
10 paper were you ever contacted by detectives from the Boulder
11 Police Department?

12 A. I was not.

13 Q. When were you first contacted by a detective from
14 the Boulder Police Department about the Defendant, Michael
15 Clark?

16 A. That was December 2009.

17 Q. And do you recall who contacted you?

18 A. Detective Heidel.

19 MR. KELLNER: Now before we move on, Judge, I would
20 like to publish People's 44.

21 THE COURT: Sure.

22 Q. (By Mr. Kellner) Ms. Buchanan, can you take a look
23 behind your left shoulder and tell us if you recognize the
24 person in the picture?

25 A. Yes.

1 Q. Who is it?

2 A. Michael Clark.

3 Q. Is that a fair picture of what he looked like back
4 in November of 1994?

5 A. Yep.

6 Q. And when you say that you were mostly acquaintances,
7 were you, you know, ever boyfriend/girlfriend? Did you ever
8 date?

9 A. We dated I would say, but -- I mean I think I saw
10 him in person maybe three or four times, so...

11 Q. Three or four times total?

12 A. Total.

13 Q. Did you have your own phone line in your room back
14 in 1994 that you can recall?

15 A. I didn't have my own line, but I had my own phone.

16 Q. Did you have a cell phone back in November of 1994?

17 A. No.

18 Q. Do you recall receiving a phone call from the
19 Defendant on November 1st, 1994?

20 A. I don't remember.

21 Q. I understand it was a long time ago. So really what
22 I would like to ask is if you had received a call from Michael
23 Clark after 10:30 p.m., would that have been an unusual time
24 for him to call you?

25 A. Yes.

1 Q. Why would that have been an unusual time?

2 A. It would have been late on a school night, and my
3 mom was a teacher and she probably would have been woken up.

4 Q. Speaking of November 1994, then, in November 1994
5 would you have been actually attending high school?

6 A. Yes.

7 Q. And if November 1st, 1994, was a Tuesday, that would
8 be a school night?

9 A. Mm-hmm.

10 THE COURT: Is that a yes?

11 THE WITNESS: Yes.

12 THE COURT: I need you to say yes or no.

13 MR. KELLNER: Thank you, Your Honor.

14 Q. (By Mr. Kellner) Ms. Buchanan, have you had any
15 contact with the Defendant since 1994?

16 A. Nope. No.

17 MR. KELLNER: Thank you. I have no further
18 questions.

19 THE WITNESS: Okay.

20 THE COURT: Hold on for a second.

21 THE WITNESS: Okay.

22 THE COURT: Do you have any questions on
23 cross-examination, Ms. Milfeld?

24 MS. MILFELD: Thank you.

25 **CROSS-EXAMINATION**

1 **BY MS. MILFELD:**

2 Q. Ms. Buchanan, the first time that you were contacted
3 about anything in this case was when Detective Heidel called
4 you?

5 A. That's right.

6 Q. You testified that no one back in 1994 talked to
7 you?

8 A. That's right.

9 Q. And by no one, I mean police officers, detectives,
10 anyone --

11 A. That's correct.

12 Q. -- from the District Attorney's Office?

13 When you spoke to Detective Heidel, you told him
14 that you didn't really have a clear memory of Michael Clark?

15 A. That's true.

16 Q. And it's fair to say that you haven't really thought
17 about the events of 1994 because you, in your mind, really
18 have had no reason to?

19 A. That's true.

20 Q. There are a lot of things you don't remember back
21 from 1994?

22 A. That's true.

23 MS. MILFELD: No further questions.

24 THE COURT: All right. Any redirect, Mr. Kellner?

25 MR. KELLNER: No, Your Honor. Thank you.

1 THE COURT: Ms. Buchanan, you can step down.

2 Can this witness be excused, Mr. Kellner?

3 MR. KELLNER: She may.

4 THE COURT: Ms. Milfeld.

5 MS. MILFELD: Yes, Judge.

6 THE COURT: Ms. Buchanan, you are excused. Thank
7 you very much.

8 THE WITNESS: Thank you.

9 THE COURT: Would the People call their next
10 witness.

11 MR. KELLNER: Your Honor, the People call Alan
12 Hammond.

13 THE COURT: Sir, would you step forward. Come all
14 the way up here by the witness chair.

15 THE WITNESS: Yes, sir.

16 **ALAN SCOTT HAMMOND,**

17 a witness herein, having been first duly sworn, was examined
18 and testified on his oath as follows:

19 THE COURT: Please be seated.

20 Go ahead, Mr. Kellner.

21 MR. KELLNER: Thank you, Your Honor.

22 **DIRECT EXAMINATION**

23 **BY MR. KELLNER:**

24 Q. Good afternoon, Mr. Hammond.

25 A. Hello.

1 Q. Please state your name and spell your last name for
2 us.

3 A. My name is Alan Scott Hammond, H-a-m-m-o-n-d.

4 Q. Where are you from, Mr. Hammond?

5 A. Originally I'm from Pennsylvania and grew up in
6 Kentucky.

7 Q. Everyone could have guessed that. Mr. Hammond, did
8 there come a time when you left Kentucky and came to Colorado?

9 A. Yes, sir.

10 Q. When was that?

11 A. I accepted a position with the Colorado Bureau of
12 Investigation forensic laboratory working as a firearms
13 examiner at the CBI forensic laboratory in Lakewood, Colorado.

14 Q. Now, Mr. Hammond, when did you accept that position
15 at CBI?

16 A. That was in -- making me think, that was in --
17 September 1st of 1987.

18 Q. You said that you took a position doing firearms
19 examination?

20 A. Yes, sir.

21 Q. Can you just, generally speaking, tell the jury what
22 that means?

23 A. At the time I was offered the position I was working
24 for the Kentucky state police laboratory system as a firearm's
25 examiner, I accepted a position with CBI. A firearm's

1 examiner is a forensic scientist that exams firearms, firearm
2 bullets, fired cartridge casings to determine the caliber of
3 the bullets and cartridge casings and to determine, if
4 possible, if they were fired by a specific firearm. It also
5 involves the muzzle to target distance determine on items that
6 were fired into to try to determine at what distance those
7 items were shot.

8 Q. Now you mentioned that prior to coming to CBI to be
9 a firearm's examiner, you also worked in Kentucky. Were you a
10 firearm's examiner in Kentucky as well?

11 A. Yes, sir, I was.

12 Q. And how long were you a firearm's examiner in
13 Kentucky?

14 A. I was with the Kentucky state police as a firearm's
15 examiner for 10 years and three months.

16 Q. So all told, how long have you been a firearm's
17 examiner?

18 A. 35 years and 3 months.

19 Q. That's a lot of ground to cover, so I'm just going
20 to ask you to summarize, if you can, the sort of training and
21 experience that you had to get in order to become a firearms
22 examiner?

23 A. I have a bachelor of science with major in biology,
24 a minor in chemistry from Kentucky State University. I have
25 graduate degree in criminalistics course from Kentucky

1 University and Marshall University. And I had a regimented
2 training program at Kentucky state police forensic laboratory
3 during which I attended the FBI category for muzzle in --
4 muzzle-to-target distance determination and gunshot residue
5 crime scene investigations -- excuse me.

6 The 10 years and 3 months I was with Kentucky State
7 Police I testified as an expert witness over 100 times in the
8 state and federal courts of Kentucky. And the 25 years and
9 4 months I have been in Colorado, I've testified as an expert
10 in state and federal courts 309 times, including several times
11 in Boulder County.

12 Q. When you testified those 309 times and then that
13 100-plus times back in Kentucky, were you qualified as an
14 expert in firearms examination?

15 A. The majority of it was firearm identification, but I
16 also did crime scene investigation, served on a restoration
17 and tool mark examinations.

18 MR. KELLNER: Judge, at this time I would tender the
19 witness as an expert in firearms identification and
20 examination.

21 THE COURT: Any objection or voir dire, Ms. Ring?

22 MS. RING: No objection or voir dire. Thank you.

23 THE COURT: Mr. Hammond is accepted as an expert in
24 firearms identification and examination. He'll be allowed to
25 opine pursuant to Rule 302.

1 Q. (By Mr. Kellner) Mr. Hammond, when you worked at
2 CBI, did you know Ted Ritter?

3 A. Yes, I did.

4 Q. How did you know him?

5 A. Ted was an employee with CBI when I was hired. I
6 worked with Ted I believe 14 or 15 years.

7 Q. I want to focus you specifically in on this case.
8 Did you receive any evidence from the Boulder Police
9 Department, specifically any ballistics evidence, for
10 examination in this case?

11 A. Yes, sir, I did.

12 Q. What evidence did you receive?

13 A. I received numerous fired cartridge casings, 9mm. I
14 also received bullets and bullet fragments also 9 mm.

15 Q. Specifically how many cartridges did you receive?

16 A. I'll need to refer to my notes.

17 Q. If that would help refresh your recollection, please
18 do?

19 A. I received four fired spear 9mm luger caliber
20 cartridge cases, four fired copper jacketed bullets, and one
21 fired copper jacketed bullet fragment.

22 Q. Those cartridge casings, did they have a CBI
23 identifying number?

24 A. Yes, sir.

25 Q. What were these?

1 A. They were items 1 through 4.

2 Q. And the did you also receive item number 5 as well?

3 A. Yes, sir.

4 Q. What was that?

5 A. That was a fired copper jacketed bullet from the
6 scene.

7 Q. And did you receive an item number 6?

8 A. Yes, sir.

9 Q. What was that?

10 A. That was a fired copper jacketed bullet from the
11 victim's back recovered during the autopsy.

12 Q. Now specifically items 1 through 4, the cartridge
13 casings, and 5 and 6, the bullets, had they previously been
14 submitted to CBI before you got them for analysis?

15 A. Yes, sir.

16 Q. And those would be the cartridges and the two
17 bullets that were examined by Ted Ritter prior to you?

18 A. That is correct.

19 Q. What new evidence did you receive?

20 A. I received three bullets and a bullet fragment.

21 Q. Did you label those with a particular CBI number?

22 A. Yes, sir, I did.

23 Q. And what was CBI 8?

24 A. 8 was a fired copper jacketed bullet found later at
25 the scene.

1 Q. And item 9?

2 A. Was a bullet fragment from the victim's skull
3 recovered at the autopsy.

4 Q. What's a bullet fragment?

5 A. It is a portion of a bullet that has broken, sheered
6 or somehow separated from a larger piece.

7 Q. Did you receive another bullet as well?

8 A. Yes, sir.

9 Q. What item was that?

10 A. That was item 12. It was a fired copper jacketed
11 bullet from the scene also.

12 MR. KELLNER: Your Honor, may I approach the
13 witness?

14 THE COURT: Yes.

15 Q. (By Mr. Kellner) I want to retrieve some exhibits
16 there. I'm handing the witness what has been admitted as
17 People's 63. I'm also handing the witness what's been marked
18 as People's 32.

19 Mr. Hammond, do you recognize any identifying
20 features on the packaging of those exhibits I just handed you?

21 A. Yes. The packaging is marked with my laboratory
22 case number, my exhibit number and my initials on each of the
23 outer packaging. I have seen these items before in connection
24 with this case.

25 Q. When did you receive this evidence for examination

1 while you were at CI?

2 A. I'll have to again refer to my notes.

3 Q. Please do.

4 A. They were submitted to the laboratory on the 11th of
5 May, 2004.

6 Q. What were you requested to do as far as examination
7 or analysis of this evidence?

8 A. I was requested to examine these bullets to
9 determine their caliber, to compare these bullets with the
10 other previously submitted bullet to see if I could determine
11 if they were fired all by the same firearm.

12 Q. When you say you were to compare it to previously
13 submitted bullets, would that be item 5?

14 A. That is correct, yes.

15 Q. So when you compared items 8 and 12, so the fired
16 copper jacketed bullet found later at the scene and the fired
17 copper jacketed bullet from the scene, items 8 and 12 to item
18 5, what were your conclusions?

19 A. Based on the microscopic comparisons of those two
20 items I found matching these class characteristics and also
21 sufficient individual unique characteristics, I can say that
22 they were all fired by the same firearm.

23 Q. With respect to item 9, the bullet fragment from the
24 victim's skull from the autopsy, were you able to make any
25 sort of conclusions when you examined that fragment?

1 A. It was a copper and lead fragment, it did not have
2 rifling impressions that I could use for identification or
3 elimination to the other bullets. I could not determine if it
4 had been fired by the same firearm. It did not have any
5 rifling for the comparison.

6 Q. When you say "rifling for comparison," what do you
7 mean by "rifling"?

8 A. When a bullet travels through the barrel of the
9 firearm there is a series of raised and lowered surfaces that
10 have been machined into the interior of the barrel of the
11 firearm by the manufacturer and they travel down the length of
12 the barrel in a spiral, that is so that when the bullet passes
13 through them, the bullet will be made to spin. It is a
14 spinning of the bullet as it follows the rifling that gives
15 that bullet the jibe stopping stability to hit whatever the
16 firearm is aimed at.

17 That rifling impression that's in the bullet, it's
18 in the barrel, are impressed on the bullet as it passes
19 through and those unique machine surfaces leave unique
20 identifiable characteristics on the bullets that have been
21 fired through that barrel.

22 Q. With respect to item 12, I want to ask you some more
23 detailed questions about that. Specifically, item 12 -- and
24 you may need to refer to your bullet worksheet. What sort of
25 condition was that bullet in?

1 A. Item 12, um, was deformed, it was damaged, it had a
2 portion of the bullet weight that was missing. It had been
3 damaged by whatever it struck after leaving the firearm.

4 Q. I want to ask you about the markings as received
5 that you indicate in your worksheet there. What markings were
6 on that packaging when you received it?

7 A. It has a -- the markings of P 9419535, item 5 RJS,
8 RJ Smith 515, bullet fragment and then on the second layered
9 packaging it had the 5.

10 Q. So when you are looking at by my count -- correct me
11 if I am wrong -- there's item 5, item 6, item 8, item 12 are
12 fired copper jacketed bullets?

13 A. Yes, sir.

14 Q. And then item 19, a bullet fragment?

15 A. Yes, sir.

16 Q. So can that bullet fragment have come from one of
17 the fired copper jacketed bullets, items 5, 6, 8 or 12?

18 A. Because of the damage to item 12 and the missing
19 bullet weight, um, it could have come from this item.

20 Q. What is -- what is NIBIN?

21 A. NIBIN is the initials of a system called the
22 National Integrated Ballistic Information Network. It is a
23 database to store images that is run by the ATF. It is
24 provided to forensic laboratories so that they may enter
25 images of fired bullets and fired cartridge casings to see if

1 those images can associate with other images that were
2 previously entered into the database to try to find out if --
3 if there are multiple crimes being performed or being enacted
4 by the same firearm.

5 Q. Did you input any information related to this case
6 into that database?

7 A. Yes, sir, I did.

8 Q. And did you get any results?

9 A. Yes, sir, I did.

10 Q. What were they?

11 A. When I entered the images of one of the cartridge
12 casings and one of the bullets in this case into the NIBIN
13 database, I was able to determine that there were no images
14 already in the system that matched the images of these two
15 items.

16 Q. With respect to any sort of examination or analysis
17 you did in 2004 -- well, did you do any other examination or
18 analysis in 2004?

19 A. In 2004, no, sir, except for the comparison of the
20 bullets, the NIBIN entry, um, that's all the items -- all the
21 analysis I did at that time.

22 Q. Were you again asked to do some work on this case?

23 A. Yes, sir.

24 Q. When was that?

25 A. 2011.

1 Q. And who requested you to further investigate this
2 case?

3 A. I was contacted by a Detective Chuck Heidel and
4 asked to -- if it would be possible to -- for him to submit
5 the bullets and do an updated general rifling characteristic
6 database search.

7 Q. Are you aware if a general rifling characteristic
8 database search had previously been conducted by Agent Ted
9 Ritter back in 194?

10 A. Yes, sir, I was.

11 Q. And what would be the purpose of running a search
12 again some 17 years later?

13 A. If a firearm was newly manufactured at the time that
14 this originally occurred, it may not have been in the database
15 at the time when the first search was run. It takes a
16 year-and-a-half, 2 years from the time that a firearm is
17 manufactured, gets out in the public, has been used in a
18 crime, recovered by a forensic laboratory, submitted to the
19 FBI, the FBI then updates their database, and we -- the
20 database updated versions are only sent out once ever year or
21 18 months. It can be 1-and-a-half to 2 to 3 years from the
22 time a firearm first hits the marketplace before it may start
23 showing up in the database.

24 Q. So it's essentially a growing and evolving database?

25 A. That is correct.

1 Q. When you receive this request from Detective Heidel,
2 what did you do?

3 A. I first had to check with the supervisor there at
4 CBI because they are very, um, stringent about re-analysis of
5 evidence. If evidence had been analyzed before, they want to
6 have a good reason for a new analysis, and generally it has to
7 be new and improved technique, a new capability of their
8 laboratory or a type of analysis that has not been done
9 before.

10 Q. Based on that did you re-examine the bullets for
11 some new technique with some new techniques?

12 A. I did not re-examine the bullets, no, sir.

13 Q. Well, how did you run the information through the
14 general rifling characteristics database then?

15 A. I used -- as I was instructed, I used the rifling
16 measurements that had been previously determined, measured by
17 Ted Ritter.

18 Q. When you ran the rifling characteristics, um,
19 obtained by Ted Ritter through this general rifling
20 characteristics database, did you use some sort of, um -- some
21 give or some variance as far as when you put the numbers in?

22 A. Yes, sir.

23 Q. What did you use? What sort of variance did you
24 use?

25 A. Because of the, obviously, damaged condition of the

1 bullets and because I saw on Ted Ritter's worksheet that it
2 had been difficult for him to determine the accurate
3 measurements, I added 5,000ths of an inch to the -- to both
4 sides of the diameter of the lens and the diameter of the
5 grooves. This would make allowances for mistakes or
6 inaccuracies or difficulties in measuring, not only by Ted and
7 his initial examination, but by the people that compiled the
8 database, perhaps their measuring devices weren't quite
9 calibrated. And so because this had just an investigative
10 lead, it is very common to add a variance so that
11 possibilities aren't excluded when they should not be.

12 Q. So you added .005 plus or minus variance to the
13 rifling characteristics that Ted Ritter had on his worksheet?

14 A. That is correct.

15 Q. And you ran it through the GRC database?

16 A. Yes, sir.

17 Q. Based on the results from the database, is it
18 possible that a Bryco Jennings semiautomatic pistol fired the
19 bullets that you received for examination?

20 A. Yes, it is. Bryco Jennings was one of the
21 manufacturers that used the same number of lands and grooves,
22 the same direction of a twist, the same or similar
23 measurements as the bullets that are involved in this case.

24 Q. And to be clear, you also received other results in
25 addition to Bryco Jennings?

1 A. Yes, sir, I did.

2 Q. And, in fact, you received a number of different
3 manufacturers?

4 A. Yes, sir.

5 Q. Can you say approximately how many different
6 manufacturers you received that had the rifling
7 characteristics that could have been associated with these
8 bullets?

9 A. There were approximately 90 or 92 different
10 manufacturers that used similar rifling as what was found on
11 these bullets.

12 MR. KELLNER: Judge, if I may, I would like to
13 publish to the witness one of the Defendant's exhibits. I
14 believe that it is C, the worksheet. May I?

15 THE COURT: Yes.

16 MR. KELLNER: Thank you.

17 Q. (By Mr. Kellner) Mr. Hammond, I hope that you can
18 read what I have just put up there on the screen. Do you
19 recognize this as Ted Ritter's bullet worksheet for item 5,
20 bullet found at the scene that he analyzed for rifling
21 characteristics?

22 A. Yes, sir, I do. 15 years I worked with Ted,
23 approximately 15 years, um, I reviewed and he reviewed my
24 cases on many, many, many occasions.

25 Q. What is the low -- the lowest or smallest number

1 that Mr. Ritter has up there on his land measurements?

2 A. Can you move the little cursor.

3 Q. You know, it might even help if I just approached
4 you with a copy of that and then you could look at it
5 yourself.

6 A. For the land impression width, he has two
7 measurements of .055.

8 Q. And what is the highest land measurement that he has
9 there?

10 A. He has one measurement of .092.

11 Q. What is the lowest measurement that he has for the
12 groove measurements?

13 A. His lowest measurement is listed as being .096.

14 Q. And the highest measurement for the grooves?

15 A. .133.

16 MR. KELLNER: Your Honor, can I approach the witness
17 with what I have just marked as People's 79?

18 THE COURT: Yes.

19 Q. (By Mr. Kellner) Mr. Hammond, I'm handing you what
20 I have marked as People's 79.

21 A. Yes, sir.

22 Q. Do you recognize that as page 3 of -- of your
23 results from the general rifling characteristics database?

24 A. Yes, sir, it is.

25 Q. Can you go ahead and read down to, um -- or do you

1 see the manufacturer Bryco?

2 A. Yes, sir.

3 Q. Now the general rifling characteristics database
4 actually says what the comparison bullet is inside the
5 database, what the land and groove measurements are for a
6 specific model of a firearm; is that right?

7 A. That is correct, yes, sir.

8 Q. Now with respect to the Bryco firearm there, what
9 model is it talking about? What model does it reference?

10 A. It references or listed model 59.

11 Q. Now model 59, we'll come back to that later, but
12 tell us what are the minimum and maximum land measurements
13 associated with the Bryco model 59?

14 A. They are listed to be .057 to .062.

15 Q. Now are those numbers actually the land measurements
16 that Ted Ritter found on bullet item 5?

17 A. Yes, sir, they are.

18 Q. Are they within the land measurements without even
19 putting any -- any of the variance that you had searched for?

20 A. Yes, sir, they are.

21 Q. With respect to the groove measurements, what are
22 the groove measurements for the Bryco model 59?

23 A. .118 to .124.

24 Q. And are those numbers within the groove measurements
25 determined by Ted Ritter?

1 A. Yes, sir, they are.

2 Q. Are they within the measurements, without inputting
3 any of the variances, that .05 that you did when you did a
4 general search?

5 A. Yes, sir, they are.

6 Q. Talk to you a little bit about the Bryco Jennings,
7 just the manufacturer in general. Are you familiar with Bryco
8 Jennings firearms?

9 A. Yes, sir. Yes, sir.

10 Q. How are you familiar with them?

11 A. They seem to be a firearm that I receive quite a bit
12 in my work.

13 Q. Are you familiar with the general quality of a Bryco
14 Jennings firearm?

15 A. Yes, sir.

16 Q. How would you characterize the quality of a Bryco
17 Jennings?

18 A. They are an inexpensive, mass produced, relatively
19 low quality firearm.

20 Q. Inexpensive, mass produced, low quality firearm. Do
21 firearms such as those sometimes have rifling characteristics
22 that are difficult to measure?

23 A. Yes, sir.

24 Q. What some might call sloppy in terms of the
25 construction or the rifling down that barrel?

1 A. Yes, many of them do.

2 Q. Now I'm going to hand you what has been marked as
3 People's Exhibit 80, which is page 6 in your results from the
4 general rifling characteristics database.

5 Mr. Hammond, do you recognize page 6 as one of the
6 result pages from your search in the general rifling
7 characteristics database?

8 A. Yes, it is.

9 Q. Now specifically do you see listed on there two
10 manufacturers of Jennings -- or Jennings Bryco (sic)?

11 A. Yes, sir.

12 Q. Are there model numbers associated with the results
13 from the general rifling characteristics there?

14 A. Yes, sir.

15 Q. Is one of them model 59?

16 A. Yes, sir.

17 Q. And the other one just says 9?

18 A. Yes, sir.

19 Q. Now can you take a look at those numbers and tell us
20 whether or not they fit within the variance that you searched
21 for with respect to Ted Ritter's numbers?

22 A. Yes, sir. The rifling measurements that are listed
23 for both of these are also within the measurements that Ted
24 Ritter made.

25 Q. So essentially if you hadn't searched for this

1 variance of .005, you could receive a much smaller search
2 result?

3 A. Yes, sir.

4 Q. And that search result would have contained Bryco
5 Jennings model 59 firearms?

6 A. Yes, they would.

7 Q. I want to talk to you about the model 59
8 specifically. Have you ever seen a photograph or are you
9 familiar with a model 59?

10 A. I have seen photographs and I have handled and fired
11 them, yes, sir.

12 Q. What about model 58?

13 A. Yes, sir.

14 Q. How are you familiar with them?

15 A. I have seen photographs and I have handled and fired
16 them also.

17 MR. KELLNER: Your Honor, may I approach the witness
18 with what I have marked as People's 77 and 78.

19 THE COURT: Yes.

20 Q. (By Mr. Kellner) What are People's 77 and 78, sir?

21 A. They are photographs of Bryco pistols, specifically
22 number 77 is, um -- I can see the markings as Bryco 59, and
23 People's 78 is -- the markings say Bryco 58.

24 Q. Is there a difference between the two models, Bryco
25 59 and model 58?

1 A. Yes, sir.

2 Q. What is the difference between those two models?

3 A. The difference in the two models is the 58 is the
4 smaller version. The barrel length, the slide length is
5 approximately three-quarters of an inch shorter than the model
6 59.

7 Q. So the model 58 has a shorter barrel?

8 A. Yes, sir.

9 Q. It is a more compact firearm than the model 59?

10 A. Yes, sir.

11 MR. KELLNER: Your Honor, at this time I would
12 request to admit People's 77 and 78 and publish.

13 THE COURT: Objection or voir dire.

14 MS. RING: Object to relevance.

15 THE COURT: Overruled. 77 and 78 will be admitted.

16 (People's Exhibits 77 and 78 were admitted into
17 evidence by agreement of the parties.)

18 Q. (By Mr. Kellner) Now, Mr. Hammond, what are we
19 looking at here?

20 A. What we are looking at here or what is on the screen
21 is a Bryco model 59 9mm semiautomatic pistol.

22 Q. And again, sir, what was the length of the barrel of
23 the model 59?

24 A. It is approximately three-and-three-quarter inches.

25 Q. Actually, I'll probably not use the laser pointer,

1 I'll let you use it. I'm going to go ahead and flip to
2 People's 78. What are we looking at here?

3 A. This is a photograph of a Bryco model 58 9mm
4 semiautomatic pistol.

5 Q. And the barrel length is?

6 A. Is approximately three to three-and-a-half inches.

7 Q. Can you see a difference between the two guns, model
8 58 and 59?

9 A. Yes, sir.

10 Q. Can you sort of point out with the laser pointer to
11 the jury, and I'll flip to the other picture if you would
12 like.

13 A. As you can see for the model 58, the slide and the
14 barrel stops -- barrel in front of the end of the frame. Here
15 the end of the frame, the slide and the barrel proceed farther
16 for approximately three-quarters of an inch showing that this
17 is the larger version of this pistol.

18 Q. So the model 58, is it then known as a compact
19 version of the 9mm?

20 A. Yes, sir.

21 MR. KELLNER: Judge, at this time I would ask to
22 admit People's 79 and 80.

23 THE COURT: Any objection or voir dire?

24 MS. RING: Voir dire, please.

25 THE COURT: Go ahead.

EXAMINATION

BY MS. RING:

Q. I'm going to approach with what I have marked as defense Exhibit G. The People's Exhibit 79 and 80 are single pages from the GRC search that you did?

A. Yes, sir -- yes, ma'am -- excuse me.

Q. And then what I'm showing you, defense Exhibit G, that's the first page that shows the search criteria?

A. Yes, ma'am.

Q. And that says page 1 of 12?

A. That is correct.

Q. And so the two pages that we are looking at here are just two out of -- one page was search criteria and then 11 pages of results?

A. These are two of the pages of results, yes.

Q. Okay. They would have been -- they would be included in the entire list that I'm showing you in defense Exhibit G?

A. Yes, ma'am.

MS. RING: Okay. No objection.

THE COURT: 79 and 80 will be admitted.

(People's Exhibits 79 and 80 were admitted into evidence by agreement of the parties.)

DIRECT EXAMINATION (Resumed)

BY MR. KELLNER:

1 Q. So in conclusion, based on the rifling
2 characteristics found on item 5, the bullet fired at the
3 scene, could that bullet have been fired by Bryco Jennings 9mm
4 model 59?

5 A. Yes, sir, it could.

6 MR. KELLNER: Thank you. I have no further
7 questions.

8 THE COURT: All right. Cross-examination, Ms. Ring.

9 MS. RING: Thank you.

10 **CROSS-EXAMINATION**

11 **BY MS. RING:**

12 Q. Agent Hammond, you told us that from your
13 examination of the ballistics evidence that you were provided
14 in this case, you were able to determine that they were spear
15 9mm ball luger ammunition?

16 A. That's how they were marked, yes.

17 Q. Okay. And that would have been consistent with the
18 evidence that previously had been submitted to Ted Ritter to
19 review back in 1994?

20 A. Yes, those same items had been also looked at by
21 him --

22 Q. Okay.

23 A. -- or many of the same items.

24 Q. Okay. And Mr. Kellner was asking you about in 2004
25 your additional items which were given CBI numbers 8 -- is it

1 8, 9 or 12? Or am I missing one?

2 A. That is correct, yes.

3 Q. And you can't tell us why those additional items
4 weren't submitted in 1994 for Ted Ritter to analyze?

5 A. I cannot.

6 Q. Okay. You just told Mr. Kellner when he was asking
7 you about, um, what you know about Bryco Jennings 9mm
8 handguns, you told us that you are familiar with them through
9 your work?

10 A. Yes, ma'am.

11 Q. And you also told them that you described them as
12 being mass produced?

13 A. Yes, ma'am.

14 Q. Okay. Meaning there's a lot of them out there?

15 A. There's a lot of them out there, yes, ma'am.

16 Q. So not only are there a lot of those 9mm Bryco
17 Jennings out there, there are a lot of 9mm guns out there?

18 A. Yes, ma'am.

19 Q. It's a very common type of gun?

20 A. Yes, ma'am.

21 Q. Okay. The ammunition we're talking about, this
22 speer 9mm ball luger ammunition, also very, very common type
23 of ammunition?

24 A. Yes, ma'am.

25 Q. Nothing unusual or unique about it?

1 A. No.

2 Q. Okay. It's fair that in 2004 you were not asked to
3 do an additional GRC or general rifling characteristic search?

4 A. I was not.

5 Q. Okay. The additional items that you were asked to
6 analyze, including just so I'm clear to them seeming to be
7 from the same manufacturer, et cetera, as the items that
8 Mr. Ritter analyzed. They are also ball or full metal jacket
9 ammunition?

10 A. Yes, ma'am.

11 Q. Nothing you looked at was a hollow point?

12 A. Not to my memory, no.

13 Q. You told Mr. Kellner on direct examination that
14 Detective Heidel asked you in 2011 to do a new GRC search,
15 that it's typically CBI prefers not to redo analysis?

16 A. That's correct.

17 Q. And you actually had to ask permission to do an
18 additional GRC search?

19 A. Yes, ma'am.

20 Q. And because Mr. Ritter had already done a
21 measurement of the lands and grooves for item 5, those are the
22 measurements that you used?

23 A. That is correct, yes, ma'am.

24 Q. Okay. And even though you had gotten additional
25 items sent down from the Boulder Police Department, you didn't

1 do land and groove measurements on the additional items you
2 got?

3 A. I did not.

4 Q. And is it fair that in terms of looking at all of
5 the bullets or bullet fragments that you received, that it was
6 item 5, the item that Mr. Ritter had done the measurements,
7 that bullet was in the best condition to actually do land and
8 groove measurements?

9 A. I believe it was, yes.

10 Q. So it then made sense to use information or -- or
11 data from number 5?

12 A. Yes.

13 MS. RING: Okay. Would it be possible to put --

14 MR. KELLNER: Yeah.

15 MS. RING: -- this back up, please.

16 Q. (By Ms. Ring) So we're talking about what's on the
17 screen now what was defense Exhibit B, which is Mr. Ritter's
18 handwritten worksheet from when he analyzed item 5, correct?

19 A. That's correct.

20 MS. RING: Okay. And if I may approach?

21 THE COURT: Yes.

22 Q. (By Ms. Ring) Because you can't see the whole
23 thing. At the bottom of this worksheet are -- actually,
24 that's your signature as well, correct?

25 A. Yes, ma'am.

1 Q. And that's because you looked at this worksheet, and
2 this is what you used when you were putting measurements into
3 the GRC?

4 A. And I included this in my new report, yes, ma'am.

5 Q. Right. So --

6 MS. RING: Actually, if I may approach again, Judge.

7 THE COURT: Yes.

8 Q. (By Ms. Ring) So you have what's in front of you
9 marked laboratory report, that's your report that you
10 generated from what you did in 2011 in this case?

11 A. Yes, ma'am.

12 Q. And it's similar, but not an exact copy of what I'm
13 showing you, which I marked defense Exhibit F.

14 A. Actually, I believe that it's the same, you just
15 don't have all the pages.

16 Q. Okay. But the page I'm showing you, which appears
17 to be just a couple pages back in your report, lists all of
18 manufacturers that you generated in that GRC report?

19 A. That was generated by the GRC, yes.

20 Q. Okay. And then what you were just explaining to us
21 is that you included Ted Ritter's worksheet that he did back
22 in 1994 as support for you generating the information in your
23 report?

24 A. Not as support, but to show that those were the
25 measurements that I used.

1 Q. Right. You, of course -- even though you were
2 working at CBI in 1994, you didn't participate and you weren't
3 present when Mr. Ritter actually did the measurements that he
4 put on to that worksheet?

5 A. That's correct.

6 Q. Okay. And in 2011, when you were asked to do this
7 new GRC, Mr. Ritter is no longer with CBI, he is at the Denver
8 Police Department?

9 A. That's correct.

10 Q. And so you didn't have a conversation with him about
11 where he got these measurements?

12 A. I did not have a conversation with him, no.

13 Q. You've known Mr. Ritter for a very long time, you
14 already told us that?

15 A. Yes, ma'am.

16 Q. So you had no reason to question his measurements?

17 A. That's correct.

18 Q. But you just didn't ever have a discussion with him
19 about his measurements?

20 A. No.

21 Q. Or ask him whether -- what his concerns were?

22 A. No.

23 Q. Or the difficulties of why in certain boxes there's
24 actually more than one measurements in an individual box?

25 A. That's correct.

1 Q. So when you were telling Mr. Kellner about your
2 understanding of why in certain boxes there are more than one
3 measurement in each box, and you could use the pointer to make
4 sure the jury knows what we're talking about. So, for
5 instance, if we start with land measurements, in the first two
6 boxes going left to right, there's a single measurement in
7 each box, right?

8 A. Yes, ma'am.

9 Q. .072 and .055, correct?

10 A. Yes.

11 Q. And then we get to the third and fourth box, and in
12 both of those boxes there's two different measurements?

13 A. Yes, sir. Yes.

14 Q. And it says -- or in between the two measurements?

15 A. That's correct.

16 Q. And based on your experience and how long you've
17 been doing these types of measurements, that indicates that
18 Agent Ritter must have had difficulty determining exact
19 measurement at this point?

20 A. That's correct.

21 Q. So he would have put in those different measurements
22 there?

23 A. Yes, ma'am.

24 Q. Okay. And the -- ideally, in a perfect world, you
25 would have a bullet that wasn't damaged at all --

1 A. Yes, ma'am.

2 Q. -- right? That it was very easy to determine what
3 the land and groove measurements were?

4 A. That would be an ideal situation, yes, ma'am.

5 Q. And you wouldn't have the situation where you are
6 putting in the either/or in a certain box?

7 A. Yes, ma'am.

8 Q. But you're a scientist --

9 A. Yes, ma'am.

10 Q. -- so if you are observing a measurement and it's
11 not clear what that measurement is --

12 A. Yes, ma'am.

13 Q. -- it's your job as a scientist to put as much
14 information as you can on your worksheet?

15 A. That's correct.

16 Q. And it appears to you that that's what Mr. Ritter
17 did when he did that?

18 A. Yes, ma'am.

19 MS. RING: May I approach again, Judge?

20 THE COURT: Yes.

21 Q. (By Ms. Ring) I'm going to approach with what was
22 previously marked and admitted as defense Exhibit D and E, and
23 what I have marked as defense Exhibit G. So defense Exhibit G
24 I already showed you previously. The cover sheet indicates
25 the criteria that you put into the GRC database to get the

1 results of the search?

2 A. Yes, ma'am.

3 Q. Okay. And we talked about that it indicates a right
4 twist?

5 A. Yes, ma'am.

6 Q. A 6 land and grooves?

7 A. That's correct.

8 Q. And those are also fairly common?

9 A. Yes, ma'am.

10 Q. And then under a -- under minimum land width you put
11 .050?

12 A. Yes, ma'am.

13 Q. And under maximum land width you put -- here is
14 where my glasses are becoming a problem -- .097?

15 A. That's correct.

16 Q. And under minimum groove width you put .091?

17 A. Yes, ma'am.

18 Q. Are you looking at the similar thing I'm looking at,
19 because we both need glasses?

20 A. We do.

21 Q. And the maximum groove width of .138?

22 A. Yes.

23 Q. And under caliber it says .38?

24 A. Mm-hmm.

25 Q. And under cartridge it says 9mm luger?

1 A. That's correct.

2 Q. Now I'm showing you what's previously been marked
3 defense Exhibit D and E. You would agree with me that all the
4 face sheets look different than the one I just showed you.
5 They are similar face sheets because they indicate putting in
6 criteria to do a GRC search?

7 A. Yes, ma'am.

8 Q. And for purposes of our discussion, you knew
9 Mr. Ritter testified earlier today?

10 A. I wasn't aware that he testified today, no.

11 Q. Okay. So were you aware that Mr. Ritter back in
12 1994 also did a search in the GRC --

13 A. Yes, ma'am.

14 Q. -- using item 5?

15 A. Yes, ma'am.

16 Q. Okay. And you would agree with me that this says
17 that the date of the search was 11-7-94?

18 A. Mm-hmm.

19 Q. And we're talking item 5?

20 A. Yes, ma'am.

21 Q. And this one doesn't have a date on it, but do you
22 remember Mr. Ritter's handwriting well enough to know that's
23 Mr. Ritter's handwriting there?

24 A. It appears to be.

25 Q. That's how long you have known him?

1 A. It appears to be, yes.

2 Q. Okay. So you would agree with me in looking at
3 these that when Mr. Ritter did the -- his search, he used a
4 different range than you did?

5 A. He did.

6 Q. Okay. And one of the searches that he did, he also
7 notes that he did something similar to what you did where he
8 expanded the search parameter by adding the .005?

9 A. Yes, ma'am.

10 Q. Which we talked about previously?

11 A. Yes, ma'am.

12 MS. RING: Okay. Judge, I'm going to move to admit
13 defense Exhibit G.

14 THE COURT: Objection or voir dire to G?

15 MR. KELLNER: Judge, can I just take a look at it
16 again real quick?

17 THE COURT: Sure.

18 MR. KELLNER: I have no objection to G, Judge.

19 THE COURT: G will be admitted.

20 (Defendant's Exhibit G was admitted into evidence by
21 agreement of the parties.)

22 MS. RING: And then, Judge, I'm also going to move
23 to admit F. And when it actually goes into evidence, I'm
24 going to make sure it has the top copies that Mr. Hammond just
25 showed me, not just the last sheet, which has the results on

1 it, which I think is the prosecution's preference and makes
2 more sense to me.

3 THE COURT: All right. So any objection or voir
4 dire to the admission of F with the two top sheets?

5 MR. KELLNER: Can I just have one moment? I have no
6 objection to the --

7 THE COURT: All right. Let me --

8 MR. KELLNER: -- defense Exhibit F.

9 THE COURT: Let me be clear, the F with the two top
10 sheets, that's exactly what Mr. Hammond has in front of him?

11 MS. RING: Yes.

12 THE COURT: Would you take that and make a copy of
13 it and we'll mark it as F.

14 MS. RING: Thank you.

15 THE COURT: Don't you need the two top sheets?

16 MS. RING: We're agreeing those are the two top
17 sheets, but my third sheet has results as well, but that
18 includes all the information.

19 THE COURT: Okay.

20 (Defendant's Exhibit F was admitted into evidence by
21 agreement of the parties.)

22 Q. (By Ms. Ring) The amount of paper we get from CBI.

23 Mr. Hammond, you told us -- or you described the GRC
24 database as being an investigative tool?

25 A. Yes, ma'am.

1 Q. And you, um, indicated that the database only -- it
2 changes in terms of how many manufacturers are actually in
3 this database?

4 A. It increases as more data is entered, yes, ma'am.

5 Q. Okay. Now since you put in different numbers than
6 Mr. Ritter put in in 1994, you don't know whether the Bryco
7 Jennings was in the database or not in 1994?

8 A. I do not.

9 Q. Okay. And you don't know today whether or not the
10 Bryco Jennings -- you don't know if you were asked to do a GRC
11 search in 2004 when you got the additional evidence from
12 Detective Spraggs whether the Bryco Jennings would have showed
13 up in that search in 2004?

14 A. Because I did not do a search in 2004, I cannot know
15 whether it would have been in there or not.

16 Q. And you can't tell us when those Bryco Jennings guns
17 were entered into that database?

18 A. I cannot.

19 Q. Okay. Now I think you told Mr. Kellner that when
20 you did your GRC search in 2011, you came up with somewhere
21 over 90 manufacturers met the criteria that you put into the
22 GRC?

23 A. There were 90 that were listed, yes, ma'am.

24 Q. Okay. And, again, 90 means 90 manufacturers, right?

25 A. Yes, ma'am.

1 Q. And many of those manufacturers manufacture
2 different makes and models of guns?

3 A. They manufacture a different make and model, that's
4 correct.

5 Q. So within each manufacturer, there may be more than
6 one type of gun that fits one of the criteria?

7 A. Yes, ma'am.

8 MS. RING: Okay. May I have just one moment?

9 THE COURT: Yes. Do you have anything else?

10 MS. RING: No further questions. Thank you.

11 THE COURT: All right. Redirect, Mr. Kellner.

12 MR. KELLNER: Yes, please.

13 THE COURT: Go ahead, Mr. Kellner.

14 **REDIRECT EXAMINATION**

15 **BY MR. KELLNER:**

16 Q. One of the last questions that Ms. Ring asked you
17 was whether or not you could tell back in 2004 -- or whether
18 or not if you had run the rifling characteristics in 2004
19 whether or not the Bryco Jennings model 59 would have popped
20 up and you said, no?

21 A. I said I couldn't determine that.

22 Q. You couldn't determine that, but you can tell us
23 now, here in 2012, that the rifling characteristics associated
24 with item 5, the bullet fired and recovered at the scene, that
25 they are consistent with a Bryco model 59?

1 A. Yes, sir.

2 Q. Now the jury is going to get to look at 12 pages --
3 I'm sorry -- 11 pages of your results as far as different
4 model firearms?

5 A. Yes, sir.

6 Q. It's been admitted as evidence. So I need to ask
7 you what the SA code is.

8 A. Yes, sir.

9 Q. What does SA codes represent in this 11 pages? So
10 can you tell the jury what PI means as far as SA codes go?

11 A. The PI designation means that that is a pistol
12 semiautomatic.

13 Q. And what about RC?

14 A. That means it's a rifle carving style.

15 Q. And carving style? And letter B, is that also a
16 designator?

17 A. Yes, sir.

18 Q. What does that mean?

19 A. That means that it's a fully automatic version of a
20 9mm firearm.

21 Q. And there are models -- and in here 9mm models that
22 have a designation code of PR, what does that mean?

23 A. That means that it's a pistol, but it's a revolver.

24 Q. So even though there are extractor marks on the
25 bullet casings in this case, you still have pistol revolver

1 results that come in on this result page?

2 A. Yes, sir, because I searched the characteristics of
3 the bullet, not of the cartridge case.

4 Q. And there's also some designators for the letter S,
5 what does that mean?

6 A. That means that it is a shotgun insert that allows a
7 person to shoot a 9mm cartridge in a 12 gauge shotgun.

8 Q. Is there anything in this case that would make you
9 think that these bullets were fired from a shotgun converter?

10 A. No, sir.

11 Q. There's also a designator on many of the models for
12 PS, what does that mean?

13 A. That is a pistol with a single shot capability, that
14 is it is only capable of unloading one cartridge at a time and
15 firing one cartridge at a time. It would then have to be
16 extracted, ejected and another cartridge loaded in manually to
17 fire another cartridge.

18 Q. And if in this case there are four shots fired in
19 rapid succession, is that consistent at all with a pistol
20 single shot?

21 A. No, it is not.

22 Q. But it's still included in your results?

23 A. Because I was searching for bullet characteristics,
24 yes, sir.

25 Q. What about RI, I think that's the last designator.

1 A. The RI would be a rifle semiautomatic.

2 Q. When you talked B represents submachine guns, those
3 are automatic weapons?

4 A. That is correct, automatic or selective fire, that
5 is, they could fire either full automatic or semiautomatic.

6 Q. Can you tell this jury how many different 9mm
7 firearm manufacturers there are in the world?

8 A. I cannot give an exact number, it would be many
9 hundred. If someone was to tell me it was in the thousands, I
10 would believe that also.

11 Q. Because this -- you know, rifling characteristics
12 database, um, it goes back to sometime in the 70s; is that
13 right?

14 A. That is correct.

15 Q. And it -- included on here are even some what would
16 be antique model weapons or model firearms; is that right?

17 A. Yes, sir.

18 Q. And very expensive firearms?

19 A. Yes, sir.

20 Q. Did you look at the shell casings in this case?

21 A. Only to enter them into the database.

22 Q. Specifically, did you see any unique breach face
23 characteristics?

24 A. No, sir.

25 Q. When a Glock fires a pistol out of -- I'm sorry -- a

1 bullet out of the pistol, does it leave a unique impression on
2 the -- from the breach face on the bottom of the shell
3 casings?

4 A. Yes, it does.

5 Q. And in this case you saw no such markings?

6 A. It did not have those type of markings, no.

7 Q. Does Kahr firearms -- are you familiar with Kahr
8 firearms?

9 A. Yes.

10 Q. Do they do the same thing, leaving a breach marking
11 on the bottom of the shell casing?

12 A. Yes.

13 Q. And Kahr firearms and Glock firearms are included in
14 your database results?

15 A. That is correct.

16 Q. Are there any other pistols that have -- that leave
17 unique breach face characteristics?

18 A. There are some that leave unique characteristics on
19 the breach face and also on the side of the cartridge case
20 that were also included in this list because, again, I was
21 searching the bullet characteristics.

22 Q. And since a firearm was never recovered in this
23 case, you couldn't, frankly, narrow it down to a specific
24 manufacturer?

25 A. I could not.

1 Q. On this list of approximately 90 different
2 manufacturers, are there some manufacturers on the list that
3 you have never even seen for analysis in your 25 years here in
4 Colorado?

5 A. Yes, that's correct.

6 Q. Can you tell the jury which ones?

7 A. There's a firearm called the Agram, I don't believe
8 I have seen Agrams, but -- I have never seen an Agram.
9 Husqvarna, H-u-s-q-v-a-r-n-a, is a Czechoslovakian brand. I
10 do not remember ever firing those or having one of those.

11 Q. For analysis that is?

12 A. For analysis, that's correct. IM Metal, I don't
13 remember ever having one of them coming in on a case. A Laht,
14 L-a-h-t, I -- I have seen them in museums, they are a full
15 automatic submachine gun. I have read about them, I have seen
16 pictures of them, I have never actually had one come in in a
17 case. I have not seen the shotgun converter that allows you
18 to fire a 9mm in a shotgun, but I have read about them. I
19 have seen pictures of them. A Pletter, P-l-e-t-t-e-r, is a
20 Croatian made firearm, I have not had one of those come in in
21 a case. I have seen pictures of Schmeissers, which is a
22 German submachine gun of the World War 2 era, I have always
23 wanted to have one come in, I have always wanted to fire one,
24 I have seen pictures of them, I have seen them in museums and
25 FBI collection, but I have never had one come into my

1 possession in a case. Sky Industries, SKYY, I am not familiar
2 with that firearm, I have not seen one come in in a case.
3 Zastava, Z-a-s-t-a-v-a, I believe that is also a Serbian or
4 Croatian made firearm, I have not ever seen one of them come
5 in in a case that I have been involved in - - - - -

6 Q. Do some of models that are included in the GRC
7 printout come from manufactures that weren't even in existence
8 in 1994?

9 A. -- that's possible, yes, sir.

10 Q. Are you familiar at all with Jimenez firearms?

11 A. Yes.

12 Q. Are you aware Jimenez firearms weren't in existence
13 in 1994?

14 A. That's correct.

15 Q. And yet it's still included in the database
16 printout?

17 A. Yes, sir.

18 Q. I'm concerned that when the jury looks at that
19 exhibit that they are going to see something that says caliber
20 .38 and then states 9mm spear. Why would it say caliber .38?

21 A. Caliber is the family designation showing the
22 diameter of the bullet, and the caliber .38 is 357s, 9mm is 38
23 specials, 38 Smith & Wessons, 38 long coats, 38 short coats.
24 It is just a measurement of the diameter of the bullet that
25 they -- all these firearms use. The specific cartridge

1 designates the bullet diameter, the overall length of the
2 cartridge case, the operating pressures that that cartridge is
3 manufactured for, the weight of the bullet that is safe to
4 use, so it won't generate too much pressure. So it's -- a
5 caliber .38 means that the bullet is of the .38 caliber
6 family, but the 9mm luger tells us that it's a certain weight
7 of bullet meant to travel at a certain speed, generate a
8 specific pressure using a cartridge of a certain length, and
9 that will show the type of firearm that that particular
10 combination of those measurements and capabilities will be
11 used in.

12 Q. So to be clear, although the report may have some
13 designations saying caliber .38, the cartridge casings and the
14 bullets in this case were 9mm caliber; is that right?

15 A. That is correct.

16 Q. Ms. Ring asked you about, um, different numbers that
17 you put in as far as the variance from Ted Ritter?

18 A. Yes, sir.

19 Q. And he used a -- I believe it was the mean average,
20 as far as the numbers that he put into the GRC database?

21 A. That's what I have come to learn, yes.

22 Q. How were you trained to do it?

23 A. If you put in the mean average, I've always thought
24 that you're going to exclude some possibilities that are
25 higher and lower. So to get a more comprehensive list to be

1 of more assistance to the investigators I believe you should
2 put in whatever the measurements were so that some aren't
3 excluded because you averaged out the numbers, different ways
4 of doing the same thing.

5 Q. But to be clear, mean average aside, in this case
6 when you look at the GRC characteristics, lands and grooves,
7 width, the right twist, and compare them to the measurements
8 that Ted Ritter took on his worksheet, the Bryco model 59
9 actually falls into that without any variance?

10 A. That's correct.

11 Q. Can you tell this jury how many models, different
12 models of 9mm firearms there are in the world?

13 A. No, I cannot.

14 Q. Over 1,000?

15 A. It wouldn't surprise me.

16 Q. Would it be over 2,000?

17 A. It would be several thousand, yes, sir.

18 Q. One final question. Is the Bryco model 58 the
19 compact version?

20 A. Yes, sir.

21 Q. Is that included in your GRC database printout with
22 similar bullet characteristics?

23 A. I'll have to look.

24 Q. Please do.

25 A. It is not listed in this printout, no, sir.

1 MR. KELLNER: Thank you, sir. I have no further
2 questions.

3 THE COURT: Recross, Ms. Ring.

4 **RECROSS-EXAMINATION**

5 **BY MS. RING:**

6 Q. Agent Hammond, you can't tell us that those bullets
7 came from a Bryco Jennings 9mm firearm?

8 A. No, ma'am, I cannot.

9 MS. RING: Nothing further.

10 THE COURT: All right. Mr. Hammond, you may step
11 down.

12 May this witness be excused?

13 MR. KELLNER: Yes.

14 THE COURT: Ms. Ring.

15 MS. RING: Yes.

16 THE COURT: All right. Ms. Ring, the face sheets
17 for your exhibit are there.

18 MS. RING: Thank you.

19 THE COURT: Do you want to put those together.

20 Mr. Hammond, you are excused. Thank you very much,
21 sir. Would the People call their next witness.

22 MR. KELLNER: The People call Special Agent Johnny
23 Grusing.

24 THE COURT: And, ladies and gentlemen of the jury, I
25 know it's getting late in the afternoon. Why don't you take

1 10 seconds, stand, stretch shake your arms or legs.

2 **JONATHAN GRUSING,**

3 a witness herein, having been first duly sworn, was examined
4 and testified on his oath as follows:

5 THE COURT: Go ahead, Mr. Kellner.

6 MR. KELLNER: Thank you, Judge.

7 **DIRECT EXAMINATION**

8 **BY MR. KELLNER:**

9 Q. Would you please state your name and spell your last
10 name.

11 A. Jonathan Grusing, G-r-u-s-i-n-g.

12 Q. Mr. Grusing, what do you do for a living?

13 A. I'm a special agent with the FBI here in Denver.

14 Q. How long have you been a special agent with the FBI?

15 A. A little over 16 years.

16 Q. Did you have any law enforcement experience prior to
17 joining the FBI?

18 A. I did not.

19 Q. What did you do prior to joining the FBI?

20 A. I worked for a small business in Dallas, Texas, for
21 four years.

22 Q. What is sort of the application process to join the
23 FBI like?

24 A. It took about a year for me to get in. You submit
25 an initial application, they do a background check. Then if

1 you are competitive, you take a test that involves
2 decision-making, honesty basically, and problem solving
3 skills. If you pass that test then you go on to more of an
4 interview phase, a thorough background check, a physical test,
5 et cetera.

6 Q. Did you undergo some sort of basic training at
7 Quantico?

8 A. Yes, I do.

9 Q. What do you do there?

10 A. They teach you to be -- scope of your employment as
11 far as what federal laws we are supposed to enforce as
12 especial agents, as well as interviewing skills. You know,
13 you learn to handle a firearm, et cetera.

14 Q. After you finished your, quote/unquote, basic
15 training in Quantico, where were you stationed next?

16 A. I was sent directly to Denver.

17 Q. And you have been here in Denver this entire time,
18 your approximately 16 years in the FBI?

19 A. Yes.

20 Q. What sort of crimes do you investigate?

21 A. For the last 14 years I have investigated violent
22 crimes, and I'm assigned to the Rocky Mountain Safe Streets
23 Task Force. It used to be called the violent crime and major
24 offender crime. We investigate kidnaps, fugitives, bank
25 robberies and we assist local police with homicide as needed.

1 Q. I want to talk to you about that last part,
2 assisting local police with homicide. Were you asked by a
3 member of the Boulder Police Department for assistance in the
4 investigation and murder of Marty Grisham?

5 A. Yes, I was.

6 Q. Who were you contacted by?

7 A. Detective Chuck Heidel with the Boulder Police
8 Department.

9 Q. What sort of assistance did Detective Heidel request
10 from you?

11 A. He requested to speak with our behavioral analysis
12 unit on an older case he was working on, an old homicide case.

13 Q. Were you eventually assigned to -- to speak -- to
14 help Detective Heidel on this case?

15 A. Yes.

16 Q. Did you and Detective Heidel also pull in another
17 federal agent?

18 A. Yes, we did.

19 Q. Who is that?

20 A. Chris Amon, A-m-o-n, with the ATF here, he was here
21 in Denver, he has since been transferred to Washington, DC.

22 Q. Why was Chris Amon from the ATF -- and that's the
23 Alcohol Tobacco and Firearms Agency?

24 A. Yes.

25 Q. Why was he brought in to help?

1 A. I brought him in after finding that ABC Loan -- pawn
2 and loan, had a roll in this case, and upon doing some
3 research I found that it had been under investigation by the
4 ATF (sic).

5 Q. What was ABC Pawn and Loan under investigation for
6 by the ATF?

7 A. I don't know the scope of their investigation, but
8 as soon as I heard ABC Pawn and Loan, I saw that the ATF was
9 involved in an investigation, I contacted Agent Amon to see
10 what their interest was in ABC Pawn.

11 Q. Did you meet with Detective Heidel and Agent Amon
12 and come up with a plan in order to approach the Defendant,
13 Michael Clark?

14 A. Yes, we did.

15 Q. When you guys met and you discussed an approach,
16 what was the approach you settled on?

17 A. The approach we settled on was to find out what
18 happened to a gun that was in Michael Clark's possession in or
19 around 1994. And we used Chris Amon's investigation into
20 ATF -- from the ATF into ABC Loan, since the gun had gone
21 through there. And I also had an FBI reference to a Dion
22 Moore, who was involved in this investigation as well. So
23 between Dion Moore, the investigation that we had into Dion
24 Moore, and also with ATF and ABC Pawn and Loan, we decided to
25 approach Mr. Clark solely on what happened to the gun that

1 went from ABC Pawn and Loan to Mr. Clark.

2 Q. When you decided to approach the Defendant in this
3 case, did a member of the Boulder Police Department go with
4 you?

5 A. No, they did not.

6 Q. So Detective Heidel did not. It was just you and
7 Agent Amon?

8 A. That's correct.

9 Q. Can you generally tell the jury what the
10 investigation into ABC Pawn was about?

11 A. You know, it's -- again, I let Agent Amon handle
12 most of that because they were ATF records, but it had to do
13 with two Russian males that were involved in some sort of
14 illegal scheme and allowing guns to go out to possibly people
15 that should not have them, such as someone with a felony on
16 their record.

17 Q. And they would do that through straw purchasers?

18 A. Yes.

19 Q. And you mentioned Dion Moore as well.

20 A. Yes.

21 Q. Did -- you had some information about Dion Moore.
22 Was he part of your, um, approach to the Defendant in this
23 case?

24 A. He was.

25 Q. How did you use Dion Moore's name in your approach?

1 A. I spoke with Dion Moore about six days prior -- or
2 four days prior to contacting Mr. Clark, and from my review of
3 the case file with Detective Heidel and our interview in 2011
4 of Dion Moore, his statements seem to remain consistent. So
5 I -- I used Mr. Moore's statement when I approached Mr. Clark
6 to see if he agreed with Mr. Moore or if he said something
7 besides what Mr. Moore told us.

8 Q. You actually spoke with the Defendant on April 15th
9 of 2011?

10 A. Yes, I did.

11 Q. I'm sorry, are we talking April 15th, 2011?

12 A. Yes.

13 Q. Where did you approach the Defendant on April 15th,
14 2011?

15 A. At his place of employment, the Big Horn Ace
16 Hardware in Silverthorn.

17 Q. And it was you and Agent Amon?

18 A. Yes.

19 Q. Did you tell him that you were coming?

20 A. No, we did not.

21 Q. And why not?

22 A. We didn't know if that would cause him not to want
23 to talk to us.

24 Q. When you met with him, where did you meet with him?

25 A. We didn't know where he was in the store, we didn't

1 know what his job was, we just knew that he worked there. So
2 we went to the front desk and asked to speak with Michael
3 Clark. They referred us back to the back. We went to the
4 back desk and we also asked to speak with Michael Clark and
5 they referred us to his office, so we walked back to his
6 office.

7 Q. Did you, in fact, meet with him in his office?

8 A. Yes, we did.

9 Q. When you met with him in his office, how did you
10 explain, you know, the presence of an ATF and an FBI agent?

11 A. We simply told him that we were investigating guns
12 that flowed through ABC Pawn and that they went through a
13 friend of his named Dion Moore, and that we believe one of the
14 guns actually wound up with Mr. Clark. We did also tell him
15 that from our research some of those weapons were used in
16 violent crimes to include bank robberies and even homicides.

17 Q. Was that, in fact, accurate?

18 A. That was, yes.

19 MR. KELLNER: Your Honor, at this time I would seek
20 to admit People's 81, which I have previously provided a copy
21 to the defense. It is a redacted version of the interview
22 between Special Agent Grusing, Special Agent Amon, and the
23 Defendant on April 15th, 2011.

24 THE COURT: Is it stipulated that 81 is admissible?

25 MS. RING: May I approach, please?

1 THE COURT: Yes.

2 (Whereupon, counsel for the parties and the reporter
3 approached the bench and the following proceedings were had
4 out of the hearing of the jury.)

5 THE COURT: Go ahead.

6 MS. RING: We agreed that I would stipulate that
7 knowing that Agent Grusing didn't have time to look at the
8 redacted copy that I don't have an issue with that.

9 THE COURT: Okay.

10 MS. RING: I do need to renew my motion, which I
11 said that I would do after Dion Moore testified, and I would
12 include in that that my concern that the foundation we just
13 heard from Agent Grusing about the ruse for going in there and
14 Dion Moore, that much of that's what is cut out in the
15 redacting copy. So I'm renewing that motion and adding that
16 Dion Moore's testimony about his running guns to Chicago, that
17 Agent Grusing said that they were investigating Dion Moore
18 separately, that's how they knew about him. And I think that
19 it takes away context from the ruse that they were using with
20 Mr. Clark and it actually also affirms what Dion Moore said
21 about his running guns when he testified. Certainly there are
22 a lot of issues around Dion Moore's testimony and how credible
23 he was about certain things and other things.

24 THE COURT: Okay. I'm going to deny the renewed
25 motion. I do think that the redacted portions of the

1 interview are not necessary to help explain or necessary to
2 explain or to give context to the statements provided by
3 Mr. Clark, so, respectfully, I'll deny the motion.

4 Do you need to have the recording played before you
5 cross-examine.

6 MS. RING: Well, what's Agent Grusing's availability
7 tomorrow morning if we need it.

8 MR. KELLNER: Can we ask him, because I didn't ask
9 him, Judge.

10 THE COURT: Let me ask him.

11 Agent Grusing, can I talk to you for just a second.

12 THE WITNESS: Yes.

13 (A brief discussion was had off the record.)

14 THE COURT: Agent Grusing indicated that he could
15 come back tomorrow morning, but he would have to postpone
16 certain items that he is currently ligating, so let's see if
17 we can complete his testimony today.

18 The other investigation that he is working on is a
19 high priority. I'm not saying that it's higher priority than
20 this trial, but I think that there's some basis to try to
21 complete his -- to make the effort to complete his testimony
22 today. So let me now ask. I see the raised eyebrows.

23 MS. RING: Just that the jury, Judge, who has been
24 here, who has worked really, really hard in asking them the
25 stay the additional time. And I -- obviously, this is

1 critical testimony. I understand Agent Grusing's testimony.
2 I think this we can play the interview now and get that done
3 and have Mr. Grusing come back for the direct and cross. We
4 won't need him for that long and --

5 THE COURT: Okay. Do you have more direct
6 examination?

7 MR. BRACKLEY: If -- there's not a lot. I'll ask
8 some clarifying questions after playing the audio.

9 THE COURT: Okay.

10 MR. BRACKLEY: Seems to be necessary, but not much,
11 Judge.

12 THE COURT: All right.

13 (Whereupon, the following proceedings were had in
14 the presence and the hearing of the jury.)

15 THE COURT: 81 will be admitted.

16 Ladies and gentlemen of the jury, we are going to
17 have to go a little past 5:00 to try to be judicious about
18 that, but I know it's been a long day, but I need to get
19 certain parts of the the testimony in today.

20 81 is admitted. Did you want to publish it at this
21 time.

22 (People's Exhibit 81 was admitted into evidence by
23 agreement of the parties.)

24 MR. KELLNER: I do, Your Honor.

25 THE COURT: Permission granted.

1 Q. (By Mr. Kellner) Agent Grusing, when you
2 interviewed the Defendant, what -- did you actually record
3 this interview?

4 A. Agent Amon did.

5 Q. Agent Amon did?

6 A. Yes.

7 THE COURT: Is that the conclusion of that back
8 or -- the record -- is that the conclusion of Exhibit 81.

9 MR. KELLNER: It is, Your Honor.

10 THE COURT: Do you have any further direct
11 examination at this time?

12 MR. KELLNER: Judge, I do have some questions, but
13 given the time, would you like to break now.

14 THE COURT: No, I would like you to complete your
15 direct examination, if you would, please.

16 Q. (By Mr. Kellner) There was some discussion there
17 about throwing the gun in a dumpster. Have you ever searched
18 in a dumpster or a dump site for evidence?

19 A. Yes.

20 Q. And how does that happen?

21 A. If we have information that something is there in a
22 dumpster, we'll find out what waste management company
23 services that neighborhood area, or even a specific dumpster,
24 and if that evidence is not in the dumpster, then we'll
25 contact that company, have them try to halt their procedures.

1 If we can't search that truck, then we'll go to the landfill
2 where the truck is taken.

3 Q. And then you actually search a landfill?

4 A. Correct.

5 Q. The Defendant mentioned something about shooting a
6 pistol with Dion Moore. Did you actually go look for bullets
7 or rounds in any place?

8 A. We did.

9 Q. And where did you go look?

10 A. We went out to some open space that's behind an
11 apartment complex where Dion Moore used to live.

12 Q. And did you search for expended rounds or
13 cartridges, bullets?

14 A. Yes, we did.

15 Q. Did you find anything?

16 A. I believe the only round we found was a used shotgun
17 shell.

18 Q. With respect to searching dumpsters, this is some 17
19 years later, um, you didn't go look in the dump site for a
20 gun, did you?

21 A. No, we did not.

22 Q. When you met with the Defendant on April 15th, at
23 any point did he tell you that he was scared of Dion Moore?

24 A. No, I don't remember him saying that he was scared
25 of Dion Moore. I remember him saying that it was his friend.

1 MR. KELLNER: Thank you, Special Agent. I have no
2 further questions.

3 THE COURT: Thank you, Mr. Kellner.

4 All right. Ladies and gentlemen of the jury, let's
5 go ahead and recess for the evening. When you return in the
6 morning we'll have a cross-examination of Agent Grusing. Let
7 me ask you, would you be able to start at 8:30 tomorrow
8 morning? And if you are not, I understand. I told you the
9 normal work day is 9:00 to 5:00, but if you could start at
10 8:30, I would prefer to do that. Is there anyone for whom
11 8:30 would not work, is not reasonably convenient? Anybody?
12 You okay, Mr. Crowley?

13 JUROR: Yeah.

14 THE COURT: Okay. Then let's be in recess until
15 8:30 tomorrow morning. Remember the admonition that I gave
16 you previously, it applies at this recess as well. Don't
17 communicate about or discuss the case with anyone by any
18 means. If someone approaches you and tries to discuss the
19 trial with you, let me know about it immediately. Don't read
20 or listen to any news reports of the trial. Don't do any
21 outside research or independent investigation.

22 Remember, it is especially important that do not
23 form or express any opinion on the case until it is finally
24 submitted to you. Please have a good evening. We should be
25 ready for you at 8:30 tomorrow morning. Thank you.

1 Agent Grusing, if you would please be back on the
2 witness stand at 8:30, we'll complete your testimony.

3 (The jury exited the courtroom.)

4 THE COURT: The record should reflect the jury has
5 left the courtroom. Agent, you can step down, if you would
6 like.

7 Anything else to take up on the record before we
8 recess for the evening on behalf of the People?

9 MR. KELLNER: No, Your Honor.

10 MR. BRACKLEY: No, Your Honor.

11 THE COURT: On behalf of the Defendant?

12 MS. RING: Judge, typically when I dealt with a
13 redacted interview, it's been redacted because there's been an
14 argument that something's prejudicial and shouldn't come into
15 evidence. When Mr. Kellner actually entered the exhibit, he
16 said this is a redacted interview.

17 THE COURT: Right.

18 MS. RING: So I guess that I'm asking the Court for
19 clarification about whether I'm allowed to go and ask Mr. --
20 Agent Grusing whether what they heard was the full interview,
21 and if I'm allowed to ask questions about the fact that it's
22 not the full interview.

23 THE COURT: Well, I think that you can ask general
24 questions about whether or not it's been redacted, that would
25 be fair. But the redacted portions were not relevant and not

1 necessary to give context to Mr. Clark's statements.

2 MS. RING: Okay.

3 THE COURT: Is that clear as mud?

4 MS. RING: Sure.

5 THE COURT: Okay. Anything else before we recess?

6 MR. KELLNER: No.

7 THE COURT: Ms. Ring.

8 MS. RING: No.

9 THE COURT: All right.

10 (Court adjourned.)

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 9th day of May, 2013.

18
19 Kimberly A. Ritter, RPR
20 Certified Court Reporter
21
22
23
24
25

1 -----

2 **DISTRICT COURT** !

3 **BOULDER COUNTY** !

4 **COLORADO** !

5 1777-6th Street !

6 Boulder, CO 80302 !

7 ----- !

8 THE PEOPLE OF THE STATE OF COLORADO !

9 **Plaintiff** !

10 MICHAEL MARTIN CLARK !

11 **Defendant** ! ***FOR COURT USE ONLY***

12 ----- !

13 Case No. 2012CR222 !

14 Division 6 !

15 ----- !

16 **For Plaintiff:** !

17 RYAN BRACKLEY & JOHN KELLNER !

18 **For Defendant:** !

19 MEGAN RING & NELISSA MILFELD !

20 ----- !

21 The matter came on for jury trial on October 17,

22 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the

23 District Court, and the following proceedings were had:

24 -----

25

I N D E X

1			
2	WITNESSES FOR THE PEOPLE:		PAGE
3	SPECIAL AGENT JONATHAN GRUSING,		
	Cross-Examination by Ms. Ring		5
4	Redirect Examination by Mr. Kellner		29
5	DETECTIVE CHUCK HEIDEL,		
	Direct Examination by Mr. Kellner		32
6	Cross-Examination by Ms. Ring		59
	Voir Dire Examination by Mr. Kellner		71
7	Cross-Examination (cont'd) by Ms. Ring		74
	Redirect Examination by Mr. Kellner		117
8	Recross-Examination by Ms. Ring		136
9	WITNESSES FOR THE DEFENDANT:		
10	WENDY AHRENDT,		
	Direct Examination by Ms. Milfeld		144
11	Cross-Examination by Mr. Brackley		148
12	EXHIBITS FOR THE DEFENDANT:	OFFERED	ADMITTED
13	H - Pawn Slips	71	rejected
	I - Line-Up Admonition	77	77
14	J - Photo Line-Up	77	77
	K - Line-Up Admonition	82	82
15	L - Photo Line-Up	82	82
	M - Newspaper Article	96	99
16	N - TV Show Listing	101	101
17			
18			
19			
20			
21			
22			
23			
24			
25	REPORTER'S CERTIFICATE * * * * *		152

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

2 (The following proceedings occurred in the
3 morning.)

4 THE COURT: Good morning. We're on the record in
5 12CR222. Mr. Clark and his counsel are present, the
6 prosecution is present.

7 Agent Grusing, you want to resume the witness
8 stand? Good morning by the way.

9 THE WITNESS: Good morning.

10 THE COURT: Any matters to take up on the record
11 before we bring the jury in on behalf of the People?

12 MR. BRACKLEY: No, Your Honor.

13 THE COURT: Ms. Ring?

14 MS. RING: Just to be clear about everything, when
15 I entered Exhibit G yesterday with Agent Hammond, the face
16 sheet of G had some highlight on there that I had done. So
17 I made a copy without highlight. I showed it to Mr. Kellner
18 and just substituted the face sheet without the
19 highlighting. So that's the exhibit that's actually
20 physically in evidence right now.

21 THE COURT: That's all right with the People,
22 Mr. Kellner?

23 MR. KELLNER: It is, Judge.

24 THE COURT: Two points that I wanted to make for
25 the record. Yesterday after we went off the record I

1 clarified for the defense that with respect to their
2 cross-examination of Agent Grusing relative to the April 15,
3 2011 interview of Mr. Clark I did not mean to state or imply
4 that the defense would be unable to cross-examine Agent
5 Grusing about relevant portions or circumstances from the
6 redacted portions of the interview.

7 I want to be clear the defense has full authority
8 to conduct whatever cross-examination regarding that
9 interview and the circumstances of it as allowed by law.

10 Second of all, there was a pair of instructions
11 that I read to the jury in the initial set of instructions
12 after the jury of 14 was sworn that explained to the jury
13 the potential use of prior statements.

14 Those two separate instructions which were given
15 by agreement of the parties I've combined into one proposed
16 jury instruction. I've placed that on each counsel table.
17 And we'll take that up at the time we discuss jury
18 instructions.

19 With that, would you please bring the jury in?

20 (The jury entered the courtroom.)

21 THE COURT: Please be seated. Welcome back,
22 ladies and gentlemen of the jury.

23 When we recessed yesterday evening we just
24 completed the direct examination of Agent Grusing. At this
25 time I'll call on the defense for their cross-examination.

1 Ms. Ring.

2 MS. RING: Thank you.

3 SPECIAL AGENT JONATHAN GRUSING,
4 called as a witness on behalf of the People, having been
5 previously sworn, was examined and testified as follows:

6 CROSS-EXAMINATION

7 BY MS. RING:

8 Q Good morning, Agent Grusing.

9 A Good morning.

10 Q Yesterday when Mr. Kellner was asking you
11 questions you told us that you were initially contacted from
12 the Boulder Police Department in terms of they're being
13 interested in the FBI and kind of behavioral forensics and
14 what information or assistance the FBI could give the
15 Boulder Police Department in that area?

16 A That's correct.

17 Q Okay. And you previously told us that you're
18 based in Denver?

19 A Yes.

20 Q Not in Quantico?

21 A That's right.

22 Q But you're the FBI liaison for local law
23 enforcement agencies to any FBI resources?

24 A That's right.

25 Q So the reason that Detective Heidel of the Boulder

1 Police Department would have reached out to you specifically
2 is because of your position as that liaison?

3 A Yes.

4 Q And so whether it's wanting investigative
5 resources in Quantico or any other part of the FBI agency,
6 if you're a local Denver metro area law enforcement agency
7 they would go through you?

8 A In matters such as this like homicides,
9 kidnappings, et cetera, yes.

10 Q Okay. I get it. So then narrow it a little bit
11 to the area you're involved which are the types of crime
12 that you investigate also for the FBI?

13 A That's right.

14 Q So obviously since this was a murder investigation
15 it qualifies?

16 A Yes.

17 Q So is it fair that you did actually forward
18 information that you got from the Boulder Police Department
19 to Quantico to see if there was anything in the forensic
20 behavioral science psychology area that could help with this
21 investigation?

22 A I did.

23 Q Okay. And because you're the liaison, is it fair
24 that when information's passed through you and you're
25 determining where you're going to forward it within the FBI,

1 you actually review all of that information?

2 A Yes.

3 Q Okay. So in working with Detective Heidel you
4 would have reviewed at least the essential information about
5 what they had gathered in their investigation at that point?

6 A That's right.

7 Q And the timing around when you get contacted is
8 sometime in 2010?

9 A I believe so, yes.

10 Q Now, we heard yesterday in your testimony that you
11 also ended up becoming more involved, you individually in
12 this investigation?

13 A Yes.

14 Q You told us yesterday that you spoke to Dion
15 Moore?

16 A That's right.

17 Q That you interviewed him?

18 A Yes.

19 Q And that was prior to your interview of Michael
20 Clark on April 15th of 2011?

21 A Yes.

22 Q Okay. You also spoke to Walter Stackhouse?

23 A I did.

24 Q And if we heard in earlier testimony that Walter
25 Stackhouse was pulled over at some point and told that there

1 was some kind of warrant or something for him, a federal
2 warrant, the idea was you were trying to get him to contact
3 you by phone?

4 A I remember speaking to Walter Stackhouse over the
5 phone. I don't remember about him having warrants.

6 Q Do you remember putting out some type of
7 information to law enforcement generally so that if Walter
8 Stackhouse was contacted he would be told to contact you?

9 A No, ma'am.

10 Q Okay. But you do recall speaking to him, Walter
11 Stackhouse, over the phone?

12 A Yes.

13 Q And it was related to this case?

14 A Correct.

15 Q Okay. You also interviewed Jamie Uhler as another
16 piece of your investigation in assisting the Boulder Police
17 Department?

18 A Yes.

19 Q Now, we listened to a portion of an interview that
20 you did with Michael Clark in April 15th of 2011 yesterday?

21 A Right.

22 Q And you told us that actually it was ATF Agent
23 Amon who recorded that interview?

24 A Yes, he did.

25 Q And he actually had a recording device on his

1 person where you wouldn't see it, it wouldn't be obvious?

2 A That's right.

3 Q The other interviews you did that we just talked
4 about, Dion Moore and Jamie Uhlir and Walter Stackhouse,
5 those interviews were not recorded?

6 A They were not.

7 Q We talked yesterday about the interview that you
8 did with Michael Clark that there were a number of kind of
9 ruses that you used in initiating that interview with
10 Michael Clark?

11 A Yes.

12 Q And one of them involved information around Dion
13 Moore?

14 A That's right.

15 Q You also told us yesterday that ATF Amon became
16 involved in this investigation at your request?

17 A Yes.

18 Q And the reason you requested that ATF Amon become
19 involved was because you learned that ABC Pawn Shop was part
20 of the investigation?

21 A Yes, that's correct.

22 Q And that's a pawn shop in Denver on Colfax?

23 A Yes.

24 Q And so when you're looking at information related
25 to ABC Pawn Shop you realize that the ATF is also doing

1 investigation involving that pawn shop?

2 A Yes. I knew it was at one time under
3 investigation. I didn't know if it was current at that time
4 or not.

5 Q Okay. But that's -- your knowledge about it being
6 part of a prior investigation with ATF is what causes you to
7 contact the ATF?

8 A That's right.

9 Q And that's how you get in touch with Agent Amon?

10 A Yes.

11 Q And he's familiar with that investigation into ABC
12 Pawn Shop?

13 A Yes, he was.

14 Q When you learned that Dion Moore is also a person
15 who has been named as part of this investigation you do the
16 same thing, you look up what there is to know about Dion
17 Moore?

18 A Right.

19 Q And you know that Dion Moore had previously been
20 investigated by the FBI?

21 A Yes.

22 Q Related to guns?

23 A Yes.

24 Q And possibly related to the ABC Pawn Shop?

25 A I didn't learn that through the FBI, but through

1 Detective Heidel.

2 Q But you did learn through the FBI that Dion gun --
3 Dion -- Dion Moore was involved in guns that had been
4 connected to Chicago?

5 A Yes.

6 Q And had been connected to some pretty serious
7 crimes?

8 A That's right.

9 Q The type of crimes that you investigate; bank
10 robberies, homicides, et cetera?

11 A Yes.

12 Q So when you talked to Dion Moore before
13 interviewing Michael Clark you're actually talking to Dion
14 Moore with two purposes, one being the investigation from
15 the Boulder Police Department of Michael Clark; right,
16 that's one of them?

17 A Yes.

18 Q And also if there's any other -- any information
19 to be gained through Dion Moore about any of the FBI related
20 investigation related to guns and bank robberies and all
21 that stuff?

22 A Yes.

23 Q Mr. Kellner asked you about doing a search in a
24 field in Aurora for cartridges or bullets or any type of
25 ballistic evidence?

1 A Yes, he did.

2 Q Okay. And you decided where to search based on
3 the conversation you had with Dion Moore?

4 A Yes.

5 Q Okay. And based on what Dion Moore told you about
6 where he said he may have gone shooting with Michael Clark,
7 that's how you determined where to go look in Aurora?

8 A That's right.

9 Q And what you were looking for was any of that type
10 of, you know, cartridge casings, bullets, et cetera that you
11 could bring back to try to have it compared to what the
12 Boulder Police Department already had in evidence?

13 A Yeah, that's what we searched for.

14 Q And I think you told us yesterday that search was
15 fruitless?

16 A Correct.

17 Q Prior to the interview you did with Michael Clark
18 on April 15th of 2011 you'd never met Michael Clark?

19 A That's correct.

20 Q When you're working on an investigation you do
21 things with a purpose?

22 A I try to.

23 Q That's what you're trained to do in the FBI?

24 A Right.

25 Q Right?

1 So before you go into any situation, any
2 interview, any investigation there's a plan?

3 A Yes.

4 Q Okay. And that was certainly the case when you
5 and Agent Amon went to interview Michael Clark on April 15th
6 of 2011?

7 A Yes, we had a plan.

8 Q Okay. And part of your plan was that that
9 interview on April 15, 2011 wouldn't necessarily be the only
10 interview you did with Michael Clark?

11 A We didn't know how it would go. So yes, it was
12 primarily to meet Mr. Clark and see what he had to say in
13 regards to the gun, the same story that Dion Moore told us.

14 Q So there certainly was an idea that depending on
15 how that interview went there could be a follow-up
16 interview?

17 A That's right.

18 Q And there was a follow-up interview?

19 A Yes.

20 Q It was certainly part of the plan that part of the
21 conversation with Michael Clark about the gun and Dion
22 Moore, et cetera, might cause Michael Clark to do some
23 things after the interview that would assist the
24 investigation?

25 A Yes.

1 Q So there was going to be a GPS device put on
2 Michael Clark's car --

3 A Yes.

4 Q -- during the interview?

5 A Yeah. And that was -- and I'm learning about this
6 secondhand through Boulder police. Those weren't at my
7 direction. But yes, during the planning that's what I
8 understood.

9 Q During the planning before the interview?

10 A Before the interview.

11 Q On April 15, 2011?

12 A Correct.

13 Q And you were part of the planning?

14 A Yes.

15 Q Although you're saying it wasn't your decision?

16 A Right.

17 Q Because it's still their investigation?

18 A Correct.

19 Q That while Michael Clark's being interviewed on
20 April 15, 2011 a GPS is going to be put on Michael Clark's
21 car?

22 A To the best of my recollection, yes, I think it
23 was about that same time.

24 Q That's because you know in your experience as an
25 FBI investigator that after an interview like that someone

1 might go do something that would aid in the investigation?

2 A They might, yes.

3 Q So for instance, the focus of this investigation
4 is this gun?

5 A Right.

6 Q And trying to find the gun?

7 A Yes.

8 Q And so if Michael Clark gets nervous during the
9 interview about realizing that you guys are back looking for
10 this gun he might go find the gun?

11 A That was our reasoning, yes.

12 Q So you want to know where he went after the
13 interview?

14 A Right.

15 Q Okay. You told us you never met Michael Clark
16 before; right?

17 A Right.

18 Q And I think you told us yesterday that part of the
19 plan was to just show up unannounced at Michael Clark's
20 work?

21 A Yes.

22 Q Okay. And obviously at that point you knew where
23 Michael Clark worked?

24 A We did.

25 Q In Silverthorne; right?

1 A Yes.

2 Q And it was at Bighorn Ace Hardware up in
3 Silverthorne?

4 A That's right.

5 Q So you had the information about where he worked,
6 but you never contacted him previously?

7 A I had not.

8 Q You had a pretty good idea of when he would be at
9 work, so you knew when to show up at work?

10 A Yes.

11 Q And based on that information you showed up on a
12 day that you assumed he would be there?

13 A We did.

14 Q And he was there?

15 A He was.

16 Q You just walk up and just say we want to meet with
17 Michael Clark; right?

18 A Yes, we did.

19 Q It's you and Agent Amon?

20 A Correct.

21 Q I think you told us eventually you just get
22 brought to Michael Clark's office where he's working?

23 A Yes.

24 Q And that's how the interview starts?

25 A That's right.

1 Q All of that was recorded because Agent Amon put on
2 the recording, he turned it on as soon as you get to Bighorn
3 Hardware?

4 A Yes, that's right.

5 Q You don't go to his home to interview him; right?

6 A We did not.

7 Q You knew where he was living at the time?

8 A Yes.

9 Q But you thought it was more likely if you showed
10 up unannounced at work he'd be more likely to speak to you
11 at work --

12 A Yes.

13 Q -- than if you showed up at his door unannounced
14 at his private home with his family there?

15 A Correct.

16 Q You heard the interview yesterday that was played
17 to the jury. And I think we've already gone over this
18 briefly, but that's not the entire interview?

19 A No, it was not.

20 Q Okay. So for instance, that part that we talked
21 about when you show up at Ace Hardware unannounced, that's
22 not on the tape that was played yesterday?

23 A That's right.

24 Q But you'd agree with me that throughout the
25 interview even in the parts that weren't played you continue

1 to tell Michael Clark that the main focus of this interview
2 is Dion Moore and this gun?

3 A Yes, we did.

4 Q Okay. And you're telling Michael Clark that you
5 know that he had this 9mm gun from Dion Moore from back in
6 1994?

7 A Right.

8 Q And you're trying to trace the specific gun;
9 right?

10 A Yes.

11 Q You even talk about there being two guns and one
12 of them hasn't shown up yet?

13 A Right.

14 Q You talk about being concerned that this gun was
15 involved in another very serious crime which is one of the
16 reasons you're trying to find the gun?

17 A Yes.

18 Q And then you also were talking about how you're
19 really not focused on Dion right now in your investigation?

20 A We told him we were also focused on Dion, that we
21 didn't know if Dion was telling us the truth or not as well.

22 Q So one of the things you were trying to do was
23 find out if Dion was telling the truth?

24 A Yes.

25 Q And you actually say something like you're trying

1 to make sure that what Dion's telling you about the guns and
2 what happened with the guns he's telling you guys the truth
3 versus taking care of his homies back in Chicago?

4 A Something like that, yes.

5 Q But you're also telling Michael Clark that the
6 reason ATF Amon is there is because there are these Russians
7 that are really involved with the pawn shop?

8 A Right.

9 Q And that that's the focus of that investigation is
10 all these guns that have been going illegally through the
11 pawn shop?

12 A Correct.

13 Q And that if Dion's being straight with you Dion
14 won't be in that much trouble, but you need to know if Dion
15 is being straight?

16 A That's right.

17 Q So those are all the types of things that you're
18 telling Michael Clark throughout that interview?

19 A Yes.

20 Q Okay. We heard yesterday that in the beginning of
21 the interview you tell Michael Clark that he can't get in
22 trouble for anything he tells you that day on April 15,
23 2011?

24 A Yes.

25 Q That's not true?

1 A That day, yes. That's why I put the qualifier in
2 there.

3 Q You told us earlier that depending on what
4 information you get out of the interview with Michael Clark,
5 then you'll go back and have another planning session and
6 decide where to go from there?

7 A Yes.

8 Q Your interview with Michael Clark, even though you
9 show up unannounced at his work, he actually spends a fair
10 amount of time with you?

11 A Yes, he did.

12 Q He answers most of the questions you had for him
13 that day?

14 A Yes.

15 Q He was actually fairly cooperative in that
16 interview?

17 A He was cooperative.

18 Q Okay. And so as the interview's progressing, part
19 of the thing you're realizing is that you can keep Michael
20 Clark talking?

21 A We would -- yes, we would continue to talk to him
22 as long as he would talk to us.

23 Q And so one of the things that you're doing when
24 you're investigating a suspect and you've got them talking
25 is you want to if you can keep them talking?

1 A Right.

2 Q The more they talk, the more likely you are to get
3 information that might help your investigation?

4 A That's right.

5 Q So one of the things you do to try to keep people
6 talking in an interview like that is part of it is building
7 some kind of rapport?

8 A Right.

9 Q And so in building that rapport you may talk about
10 things like their family?

11 A Yes.

12 Q Where they work?

13 A Right.

14 Q You're up in Silverthorne, you talk about skiing?

15 A Okay. Yes.

16 Q But those are the kinds of things you talk about,
17 you talk about his kids and where he lives and that he's
18 been living up there for a while, whether he likes
19 Silverthorne?

20 A Right.

21 Q Those are all designed to kind of build this
22 rapport?

23 A That's what we hope to do, yes.

24 Q You at that point as part of your planning with
25 the Boulder Police Department, you know a fair amount about

1 Michael Clark and the details of his life then?

2 A Right.

3 Q You knew where he worked?

4 A Right. Yes.

5 Q Knew where he lived?

6 A Right.

7 Q Knew who he was living with?

8 A Yes.

9 Q Knew his family structure, that he was married?

10 A Yes.

11 Q Had kids?

12 A Yes.

13 Q One of the other things that kind of you throw in
14 throughout the interview is that clearly the FBI is involved
15 in this investigation?

16 A Correct.

17 Q That the ATF is involved in this investigation?

18 A Right.

19 Q That the US District Attorney is involved in this
20 investigation?

21 A Yes.

22 Q And that it's very important that they find this
23 gun?

24 A Yes.

25 Q And it's something that you're telling Michael

1 Clark is something significant from your perspective that's
2 going to keep going until they find this gun?

3 A Right.

4 Q So at the end of the interview you basically give
5 Michael Clark your card; right?

6 A Yes, I did.

7 Q Tell him, you know, if he's got any follow-up
8 information he should contact you?

9 A Correct.

10 Q And tell him you might be in touch with him again?

11 A Yes.

12 Q Because this is an ongoing investigation, it's not
13 done yet?

14 A Yes.

15 Q You told us earlier that there wasn't a plan at
16 that time, but it was a possibility that there would be a
17 follow-up interview with Michael Clark?

18 A Yes, that's correct.

19 Q So after the interview on April 15, 2011 there's
20 another meeting with all of the main players who are
21 involved in this investigation about what's the next step?

22 A Yes, we had a meeting.

23 Q Okay. You're part of that meeting?

24 A Yes.

25 Q Detective Heidel is part of that meeting?

1 A He was.

2 Q And as part of that meeting you decide to call
3 Michael Clark to see if he'll come in for another interview?

4 A Yes, we did.

5 Q And you do that, set up the other interview?

6 A Right.

7 Q And Michael Clark agrees to come in and interview
8 with you again?

9 A He did.

10 Q And this time it happens at the police station in
11 Frisco?

12 A That's correct.

13 Q And that was a location that you sorted out based
14 on him living in Silverthorne and finding an appropriate
15 place to conduct the second interview?

16 A I think Boulder police chose that one.

17 Q You'd agree with me that the first interview is
18 consistent in what we heard yesterday that it's a relatively
19 non-confrontational interview?

20 A Right.

21 Q Throughout the whole interview?

22 A Yes.

23 Q And the plan in the second interview is that the
24 tactic is going to change?

25 A Yes.

1 MR. KELLNER: Your Honor, I object. May we
2 approach?

3 THE COURT: Yes.

4 (The following proceedings occurred at the bench
5 out of the hearing of the jury.)

6 MR. KELLNER: Your Honor, my objection is based on
7 the fact that the statements of the defendant on the second
8 interview have not been elicited by the People. It's
9 self-serving hearsay and inappropriate to bring up any
10 further discussions about what the defendant may or may not
11 have said as far as being willing to be there, showing up
12 there and any statements contained within.

13 THE COURT: Well, that's true. But she hasn't
14 asked about those statements yet. If there is, then I would
15 certainly expect a contemporaneous objection.

16 But in the mean time, with respect to the second
17 interview it may technically be beyond the scope of the
18 initial direct for Agent Grusing, but the fact of the matter
19 is I would allow the defense to go beyond the scope of that
20 April 15, 2011 interview because the alternative would be to
21 allow the defense to recall Agent Grusing.

22 Not only is that inefficient for the Court and
23 inconvenient for the defense, but it also imposes on Agent
24 Grusing additional time constraints that as I mentioned last
25 night because of the nature of the investigation that he's

1 involved in separate and apart from this case it makes sense
2 to complete his testimony in this case now rather than
3 later.

4 MR. KELLNER: Judge, I do agree that certainly
5 makes sense. But for instance, when she says he agrees to
6 meet with you, that's already getting into a statement just
7 without saying the words that he didn't say.

8 THE COURT: I would suggest to the extent that you
9 believe that the defendant's statements are being elicited
10 by defense counsel, then interpose a contemporaneous hearsay
11 objection, and I'll rule on it at that time.

12 Because frankly, depending on the context of the
13 statement, it may or may not be being offered for the truth
14 of the matter. If it's not offered for the truth of the
15 matter, then it's not hearsay.

16 Now Ms. Ring, you've been standing there patiently
17 for the last five minutes. Is there anything that you
18 wanted to state or argue for the record?

19 MS. RING: No.

20 THE COURT: Okay. Thank you.

21 (The following proceedings occurred in open
22 court.)

23 THE COURT: You may continue, Ms. Ring.

24 Q (By Ms. Ring) So Agent Grusing, this interview
25 with Michael Clark was set up at the Frisco Police

1 Department?

2 A Yes.

3 Q And again, it was you and Agent -- ATF Agent Amon
4 that conducted the interview?

5 A Right.

6 Q Agent Amon recorded the interview?

7 A He did.

8 Q Mr. Clark showed up for the interview?

9 A Yes.

10 Q At the time that you had requested he show up for
11 the interview?

12 A Right.

13 Q And the interview lasted over an hour?

14 A About an hour, yes.

15 Q In the planning of this interview prior to it
16 happening the decision was made that this interview would
17 transition from the focus on Dion Moore to the focus of
18 confronting Michael Clark as being a suspect in the
19 homicide?

20 A Yes.

21 Q And that was the plan going into that second
22 interview?

23 A That's right.

24 Q And that plan was executed?

25 A Yes.

1 Q Although the initial part of the interview which
2 is conducted by you and Agent Amon still starts out
3 relatively not confrontational, that changes towards the end
4 of the interview?

5 A Right.

6 Q And towards the end of the interview when it gets
7 more confrontational, that's when Detective Heidel comes in?

8 A That's correct.

9 Q And essentially straight up accuses Michael Clark
10 of murdering Marty Grisham?

11 A Yes.

12 THE COURT: Agent, what was the date of this
13 second interview at the Frisco Police Department?

14 THE WITNESS: I believe it was April 21st.

15 THE COURT: Thank you.

16 THE WITNESS: That's to the best of my
17 recollection.

18 MS. RING: If I may approach?

19 THE COURT: Yes.

20 Q (By Ms. Ring) Would looking at the front page of
21 the transcript refresh your memory about what day that
22 happened?

23 A Yes, it would.

24 Q Thank you.

25 You were close.

1 A Okay. Thank you.

2 Q What day did the interview occur?

3 A April 20, 2011.

4 Q Prior to Detective Heidel coming in at the end of
5 the interview and confronting Michael Clark of murdering
6 Marty Grisham, one of the other tactics that you and Agent
7 Amon used was to tell Michael Clark things that weren't
8 exactly true in order to see if he would admit that he was
9 involved in the murder?

10 A Yes, that's right.

11 Q And that involved telling him things about the
12 ability of forensics from since 1994 until now and that you
13 actually knew that the gun that he had in 1994 was the gun
14 that was involved in Marty Grisham's murder?

15 A That's right.

16 Q And that wasn't true?

17 A That's correct.

18 MS. RING: I have nothing further. Thank you.

19 THE COURT: Redirect examination, Mr. Kellner?

20 MR. KELLNER: Yes, please.

21 REDIRECT EXAMINATION

22 BY MR. KELLNER:

23 Q Agent Grusing, earlier when Ms. Ring asked you
24 about searching the field and I asked you about that earlier
25 as well in Aurora, we're talking about a field where both

1 Dion and the defendant say they shot guns some 17 years
2 earlier; is that right?

3 A That's right.

4 Q And Ms. Ring also asked you a question about how
5 you said something to the effect of, you know, you're not
6 going to get into trouble when you -- and you said, yeah,
7 with a qualifier today?

8 A Correct.

9 Q And in fact, isn't it true that you said on page 8
10 of that transcript nothing you say is going to get you in
11 trouble today, okay, I mean -- I mean, period, as long as
12 you tell us the truth?

13 A That's right.

14 Q So you asked for him to tell you the truth?

15 A Multiple times in the interview, yes.

16 Q When you talk about this GPS unit, this is
17 something that Detective Heidel was initiating; is that
18 right?

19 A Yes.

20 Q You're not familiar with the results of that GPS
21 unit?

22 A Not -- no, not really.

23 Q And the parts about building some rapport that she
24 asked you about, in this interview we heard about 22 minutes
25 worth of this interview. The parts about building rapport,

1 those are not included in the actual audio presented to the
2 jury?

3 A They were not.

4 Q Because you talked about things like getting ski
5 passes?

6 A Right.

7 Q And hobbies?

8 A Yes.

9 Q And that was as you said an effort to get the
10 defendant to talk to you?

11 A Yes.

12 Q And when he did talk to you and you asked for the
13 truth, did he tell you anything about a man named Luis?

14 A He did not.

15 MR. KELLNER: Thank you. I have no further
16 questions.

17 THE COURT: Recross, Ms. Ring?

18 MS. RING: No, thank you.

19 THE COURT: All right. Agent, you can step down.
20 Can this witness be excused, Mr. Kellner?

21 MR. KELLNER: Yes, Your Honor.

22 THE COURT: Ms. Ring?

23 MS. RING: Yes, he may. I'm sorry.

24 THE COURT: All right. Agent Grusing, you're
25 excused. Thank you, sir.

1 Would the People please call their next witness?

2 MR. KELLNER: Your Honor, the People call
3 Detective Chuck Heidel.

4 THE COURT: Sir, would you step forward.

5 DETECTIVE CHUCK HEIDEL,
6 called as a witness on behalf of the People, having been
7 first duly sworn, was examined and testified as follows:

8 THE COURT: Please have a seat.

9 Go ahead, Mr. Kellner.

10 MR. KELLNER: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. KELLNER:

13 Q Good morning, Detective.

14 A Good morning.

15 Q Everyone knows your name by now. Can you state it
16 and spell your name for the record please?

17 A Sure. It's Chuck Heidel. It's H-E-I-D-E-L.

18 Q What are you doing for a living?

19 A I'm a detective with the Boulder Police
20 Department.

21 Q How long have you been a detective with the
22 Boulder Police Department?

23 A Since January of 1997. I think it's been about 15
24 years.

25 Q What's your total experience in law enforcement?

1 A Well, I started back in 1983 actually with the
2 Boulder Police Department. After graduating from Michigan
3 State University with a degree in criminal justice I worked
4 for the Greeley Police Department for about two years. Then
5 I was hired by the Boulder Police Department in January of
6 1985 until current.

7 Q Well, specifically within the Boulder Police
8 Department what unit do you work in as a detective?

9 A Since 1999, since formation of the major crimes
10 unit that's where I've been assigned.

11 Q What is the major crimes unit?

12 A Major crimes unit consists of six detectives and
13 one sergeant. And it's -- the name kind of speaks for
14 itself. We investigate major crimes. Obviously all
15 homicides, any suspicious deaths, any complex crimes, any
16 serial types of offenses like serial rapes, that sort of
17 thing, and any serious assaults and a lot of sex assaults.

18 Q And you've been assigned to the major crimes unit
19 since its formation in 1999?

20 A Yes, excuse me, 1999.

21 Q What was the impetus? I mean, why was a major
22 crimes unit formed for begin with?

23 A I went to detectives in January of 1997. And I
24 always remember that date because that was about a month
25 after the JonBenet Ramsey case started. And one of the

1 things, I guess the silver lining out of that case was -- is
2 that the Boulder Police Department with the new chief Mark
3 Beckner decided that they needed a specialized unit that
4 investigated major crimes that was willing to invest at
5 least five years in that unit. And that was so that those
6 detectives could get -- could get advanced training and
7 could get experience investigating major crimes.

8 Q And you've well crossed over that five-year
9 threshold at this point?

10 A Yes. I think I'm the only original member of that
11 unit when it was formed in 1999.

12 Q As part of your duties in the major crimes unit
13 were you eventually assigned to investigate the murder of
14 Marty Grisham?

15 A Yes, I was.

16 Q When were you assigned to this case?

17 A Well, I was officially assigned to it in October
18 of 2009. But I had done some work with Detective Dave
19 Spraggs prior to that, but it was peripheral stuff.

20 Q This peripheral work that you did with Detective
21 Spraggs, when was that?

22 A I think that was in I want to say 2006. I think I
23 sat in on an interview that he may have had with Dion Moore,
24 at least a portion of it, and then did some other things
25 with it.

1 Q This then became your case though in October 2009?

2 A No. October 2009 is when I was officially
3 assigned the case.

4 Q Is this case what one might call a cold case?

5 A Oh, absolutely.

6 Q What's the meaning of a cold case?

7 A I don't know if there is a specific number of
8 years, but any homicide that's gone unsolved for over a
9 number of years becomes a cold case. Some are colder than
10 others. This one was pretty cold by the time that I got it.

11 Q When you say it's a cold case, does that mean it
12 hadn't been investigated at all since 1994, '95 time frame?

13 A No. What usually happens is the way these cases
14 sort of unfold is that there's an initial investigation. Of
15 course you have a number of detectives assigned to it at the
16 front end of it and there's a lot of work done. And then as
17 the leads sort of peter out, then one detective is assigned
18 to it.

19 And of course then other cases come in and that's
20 when it starts becoming I guess a cold case is that there
21 aren't any new leads coming in, there isn't any additional
22 work being done on it, and that's when it sits basically.

23 Q As part of a major crimes unit is one of the
24 reasons behind major crimes unit so that you can devote a
25 significant amount of time to a particular case?

1 A Yeah. I mean, prior to the major crimes unit
2 cases were -- I mean, if -- if the homicide case wasn't
3 solved or there wasn't any significant steps within the
4 first year, there were other homicides and other cases that
5 came in. And so those detectives were not only working
6 homicides, they might be working property crimes and that
7 sort of thing. So they had a fairly large case load.

8 The other idea behind the major crimes unit was
9 that our case load was smaller so that we could devote time
10 to it. And if we had a cold case that we were working or a
11 series of rapes that we were working, like a serial rapist,
12 that we were given time to actually devote solely to that
13 case.

14 And sometimes a homicide -- just like this case,
15 sometimes other homicides would pop up that -- there's
16 probably been a half dozen since I initiated this case that
17 I've been involved in or have been the lead on, which of
18 course I have to set it aside, and then I would go right
19 back to it.

20 But for the most part, yes, it was so that we
21 could focus on these cases and give a lot of time to them.

22 Q As part of the major crimes unit have you worked
23 on other cold cases in the past?

24 A Yes, I have.

25 Q So what's the first thing that you do when you're

1 looking at a cold case that you've just been assigned?

2 A Well, the first thing I do is get organized. I
3 kind of liken it to when you get a rental car. You sit in
4 it, you want to make sure where the lights are, you want to
5 know where the rear view mirror is adjusted, the seat
6 adjusted, you want to know where everything is.

7 Different detectives have different ways of
8 keeping organized. And so the first thing that I do is go
9 through the case file. And it's not just, you know, step
10 one I organize it, step two I start reading the file.

11 As I'm organizing the file obviously I'm reading
12 it, I'm looking for things in it that I might think need to
13 be done immediately. But I'm getting the case file
14 organized so that when I need to answer a question, when I
15 need to know where was this witness at and when did -- when
16 were they interviewed I can get to it quickly.

17 One of the ways I do that, for instance, is I'll
18 go through the entire case file and with today's technology
19 I scan it into what's called a pdf file, you might be
20 familiar with that, and I make it OCR compliant so that I
21 can do a work search on all of these files.

22 On some cases they are so old that some of the
23 reports were handwritten. So I might have one of our
24 secretaries type out those reports so again that they're
25 searchable. Because otherwise you can't search handwritten

1 notes.

2 Some of the other things I do is in this case in
3 particular these were interviews that happened a long time
4 ago, so they used cassette tapes. And so I had the cassette
5 tapes from then put into digital format so they would be
6 easier to use.

7 Sometimes that works better than other times, but
8 it just makes the whole case a lot easier and a lot more
9 searchable and, again, easier for me to find things when I
10 need them and easier for other people to find them when they
11 need them.

12 Q So once you get organized and kind of put things
13 where you want them in a case file, what's your next step?

14 A Well, the next step is to go through the case,
15 read all the reports, read the interviews, start looking at
16 some of the evidence.

17 And because technology has changed so much since
18 1994 you're looking for -- and I'm talking about forensics.
19 You're looking for things within that case that were
20 collected as far as evidence and you're trying to determine
21 whether there's things that can be submitted to either the
22 state or federal labs to -- that they can analyze that they
23 weren't able to analyze back in 1994.

24 Q We'll get back to some of the forensic stuff
25 later. But did you use the defendant's interview with

1 Detectives Trujillo, Weinheimer and Weiler as somewhat of a
2 starting point for launching your investigation?

3 A Oh, absolutely.

4 Q Why did you choose that interview?

5 A Well, it was very obvious in reading that
6 interview that he had -- Mr. Clark had misled detectives
7 back in 1994 and he had misled detectives regarding not only
8 where he got the gun, although that wasn't as important as
9 how long he had the gun and what he did with the gun.

10 And really the case began as started with that.

11 And so that was really one of my focuses was where the gun
12 was and if he was being misleading why was he being
13 misleading.

14 Q You're talking about when you're talking
15 defendant -- about the defendant's interview and the gun
16 itself. Is it safe to say that detectives prior to you
17 hadn't been able to really establish where that gun
18 definitively came from?

19 A Yes.

20 Q And did you as part of your investigation seek the
21 assistance of the Aurora Police Department in trying to
22 locate where this gun may have come from?

23 A Yes, because I knew if we could find out where the
24 gun came from we might be able to find out at least who
25 purchased the weapon and then speak with him and see what

1 kind of information he might have.

2 Q And when I mentioned the Aurora Police Department,
3 who did you contact and why did you contact the Aurora
4 Police Department?

5 A Well, I contacted a detective by the name of RJ
6 Wilson. And I just know RJ from -- I'm a member of the
7 Colorado Homicide Investigators Association, and I knew him
8 from meetings there and we just had a rapport.

9 And I told him what the situation was. I said
10 look, we have statements from a witness who says that he
11 bought two Bryco-Jennings guns on October 19th from a pawn
12 shop located at the northeast corner of Colfax and I think
13 it's Dayton is the actual street. And it was, you know, two
14 Bryco-Jennings guns that were purchased that day. Do you
15 guys have any kinds of record that might show that there was
16 actually that purchase on October 19th.

17 Q Well, why did you focus on October 19th?

18 A Well, because October 19th -- from the October 25,
19 1995 interview with Dion Moore, during that interview he
20 said that's when he purchased -- excuse me, he didn't say
21 exactly when he purchased the gun. He gave the location
22 where he purchased the gun.

23 And then Jamie Uhler during his interview in 1994
24 said that Michael Clark and Dion Moore had come to him and
25 said hey, we just bought two guns from a pawn shop. So Dion

1 Moore gave the approximate location, and then Jamie Uhlir
2 gave the date when it was purchased.

3 Q And you reviewed Jamie Uhlir's interview, the
4 audio cassette and the transcript, from I believe it was
5 November 7, 1994?

6 A That's correct.

7 Q And Jamie Uhlir gave the October 19th date because
8 it was a date of a soccer game that he was supposed to go to
9 with the defendant and the defendant didn't show up?

10 A That's correct. And there was some other things
11 too. One of the other things was is looking back at the
12 checks that were written there was a -- we had an
13 approximate cost of what the gun would have been -- how much
14 they would have paid for it. And it was either the day
15 before or the day of October 19th there was a check written
16 by Michael Clark to cash for like \$150, which matched the
17 amount or what the gun would have cost.

18 Q So you focused on October 19th. And you spoke to
19 this Detective RJ Wilson about pawn slips that he said he
20 had some kind of record --

21 A That's correct.

22 Q -- of gun sales?

23 A That's correct.

24 Q And earlier in this case we've actually admitted
25 as evidence two pawn slips that were held by the Aurora

1 Police Department and given to you for the sale of two
2 Bryco-Jennings?

3 A That's correct.

4 Q Both those Bryco-Jennings were 9mm guns?

5 A Yes. One was a model 59 and one was a model 58.

6 Q Did you look at other dates and surrounding dates
7 around October 19th to see if two 9mm Bryco-Jennings had
8 been sold to the same purchaser?

9 A Well, no. I mean, I asked for all the pawn slips
10 from I think October. But once we had narrowed it down to
11 the date matching the number of guns that was purchased and
12 I looked through those other pawn slips, I didn't see
13 anything else that was -- appeared to even be related to
14 this case. So the October 19th matched with the stories
15 that we were getting from Jamie Uhlir and then from Dion
16 Moore.

17 Q So you did look at the other pawn slips for
18 surrounding dates?

19 A Yes.

20 Q Once you found those two pawn slips that
21 corroborated Jamie Uhlir's story and things you heard from
22 Dion, what did you do based on the information you learned
23 from the pawn slips?

24 A Well, tried to find -- the name on the pawn slip
25 was a guy by the name of Michael Louis Berring -- or Louis

1 Berring, excuse me, I think was his middle name, so Michael
2 Louis Berring. So tried to find Michael Louis Berring.

3 Q Sorry, David Berring?

4 A Excuse, me David Louis Berring.

5 Q Once you got those pawn slips did you search any
6 sort of database for any records whether or not these guns
7 had popped up over time?

8 A Yes.

9 Q And what database did you search?

10 A Well, the FBI keeps -- I'll try to explain this.
11 The -- so anytime we have a stolen item, specifically guns,
12 any local agency if they have a stolen gun or a gun of
13 interest that they think was used in a crime, you can put
14 that into the local -- I mean statewide database.

15 And then you can also put it in the national
16 database so that if somebody, some other agency say finds
17 that weapon and they run that serial number, they'll get
18 what's called a hit. It will be flagged. It will say
19 contact Detective Chuck Heidel with the Boulder Police
20 Department.

21 So yes, I searched -- so the weapons were put in
22 there, and I searched that database.

23 Q Did you get any hits or any flags?

24 A I did. What I found out was -- is that Detective
25 Trujillo back in 1995 after talking with Dion Moore had kind

1 of already done some of this work. And so I got a hit
2 saying that I should contact Detective -- or excuse me,
3 Sgt. Tom Trujillo, my sergeant.

4 Q Have you ever since putting this flag into the
5 database gotten any sort of information indicating that
6 these guns had been found by some other local law
7 enforcement agency?

8 A No, I have not.

9 Q So once you searched for the guns in this -- these
10 databases did you try to actually locate David Berring?

11 A Yes, I did.

12 Q Where did you find Mr. Berring?

13 A Well, the way I found Mr. Berring was -- first of
14 all, was sort of like looking for the serial number on the
15 guns. I put out an attempt to locate on Mr. Berring so that
16 anytime any agency throughout the United States would run
17 his name it would again flag him and say hey, call -- for
18 the officer to call Detective Chuck Heidel, which is what
19 happened about a month I think or two after I put his name
20 in there.

21 I had seen from running his name that some
22 agencies down in Florida specifically around the Pompano
23 Beach area had been in contact with him, so I knew he was
24 probably in that area. But we finally got a call them from.

25 Q Did you actually fly out to Florida?

1 A Yes.

2 Q And you located Mr. Berring?

3 A Yes, I did.

4 Q And you actually conducted an interview with
5 Mr. Berring?

6 A That's correct.

7 Q Obviously Mr. Berring has already testified. I'm
8 just going to ask you a quick question about that.

9 A Sure.

10 Q Follow-up as part of the cross-examination from
11 the defense is that there's a question as to who brought up
12 the name Dion.

13 A Yes.

14 Q Did you bring up the name Dion?

15 A Yes, I brought up the name Dion.

16 Q You brought it up before him?

17 A Before him, yes.

18 Q Before you ever mention the name Dion did
19 Mr. Berring mention to you that the person who had solicited
20 him to buy those guns was a black male?

21 A Yes.

22 Q And before you ever mentioned the name Dion did
23 Mr. Berring independently mention that he thought this guy
24 was from Chicago or had connections to Chicago?

25 A Yes.

1 Q Once you had spoken to Mr. Berring and gotten his
2 story what did you do next in your investigation?

3 A Well, the next thing I did was look back through
4 the evidence, and I looked at the GRC information that had
5 come from Agent Ritter with CBI. He spoke yesterday. And
6 then I spoke with Agent Hammond with CBI. Also -- I'm
7 sorry, go ahead.

8 Q What was the purpose of speaking with Mr. Hammond?

9 A Well, it was obvious that when this GRC was run,
10 this check through that database was run back in 1994. One
11 of the things he put down at the bottom of that report
12 was -- is that this was -- this wasn't all-inclusive.

13 And I knew from speaking with Mr. Hammond that
14 that database grew. It might not just be that -- that there
15 wasn't a hit on this gun because it -- because it didn't
16 belong to that classification, but it might be because the
17 database just wasn't large enough. And the database grows
18 as he explained yesterday. So I wanted to get basically an
19 updated query of that database by Agent Hammond.

20 Q So you requested that, he did that for you?

21 A I did.

22 Q Now, as part of your review of the entire case
23 file did you look at things like Mr. Grisham's day planner?

24 A Yes.

25 Q Did you develop any sort of leads from that?

1 A No.

2 Q Did you look at any of his computer files?

3 A Yes.

4 Q Did you develop any leads from computer files?

5 A No. And Detective Testa had also looked at those
6 files from his report back in the day.

7 Q I want to talk to you about Mr. Stackhouse, who
8 testified yesterday. There's been this question about some
9 kind of stop and whether or not there was a warrant for him.
10 Can you tell the jury about what actually was going on
11 there?

12 A Sure. It was the same thing with Mr. Berring.
13 Basically Mr. Stackhouse was unfortunate enough to be in a
14 car at the time that didn't have -- wasn't registered I
15 think. And I think that the deputy -- I can't say what the
16 deputy -- if he was confused about it or not, but what
17 happened was -- is that he got stopped, he was given the
18 information about calling me, and then because there was no
19 insurance on the car or something like that it got
20 impounded.

21 And so Mr. Stackhouse was not happy about it when
22 he called me because his -- he had to pay to get his car out
23 of impound.

24 Q But he still spoke to you?

25 A Yeah, he did.

1 Q And when you say it was a similar situation to
2 Mr. Berring, are you talking about this attempt to locate
3 that you put into sort of a nationwide system?

4 A Um-hmm. Yes, excuse me.

5 Q And that attempt to locate tells a local agency if
6 they do come in contact with a particular individual to tell
7 them to call you?

8 A That's correct.

9 Q As part of your investigation were there newspaper
10 clippings inside the original case file related to -- from
11 November 2nd and onwards?

12 A Yes, there were.

13 Q What sort of newspaper clippings were in the file?

14 A Well, they were basic information about the
15 murder. Some of them, I think the first two were at least
16 on the front page. And they were -- most of them
17 regurgitated what was on the press releases that were signed
18 off by Sgt. Pelle at the time.

19 Q And did you read through all of those newspaper
20 articles?

21 A I did.

22 Q Did you also research and look for more newspaper
23 articles?

24 A Yes, I did.

25 Q And why did you look for more newspaper articles?

1 A Because I wanted to make sure that any of the
2 articles that were published at the time, I wanted to see
3 what was contained in those articles, what information was
4 out there.

5 Q Specifically relate to looking at Mr. Stackhouse's
6 interview from November 4, 1994?

7 A Yes, that's correct.

8 Q Did you look at newspaper articles from
9 November 3rd and November 4th?

10 A Yes, I did.

11 Q 1994?

12 A Yes, I did.

13 Q And as well from November 2, 1994?

14 A Yes, I did.

15 Q And articles from November 5, 1994?

16 A Yes, I did.

17 Q What newspapers did you look at?

18 A It was the Rocky Mountain News, Daily Camera and
19 then the Colorado Daily, which is a -- I think it's a
20 bi-daily or maybe every third day or maybe twice weekly
21 newspaper. I don't know if it's around anymore.

22 Q And I believe the Denver Post also ran an article
23 on November 2nd, the day after the murder?

24 A I believe so.

25 Q Did you look at that article?

1 A Yes, I did.

2 Q When you're looking through those articles did you
3 ever see anything in those articles indicating that the
4 defendant had shown his Marine recruiter a 9mm pistol?

5 A No.

6 Q Nothing in those articles about that?

7 A No.

8 Q Is there anything in those articles about the
9 defendant having spent time in southern Colorado,
10 specifically in Pueblo?

11 A No.

12 Q Was there anything in those articles -- prior to
13 the interview of Mr. Stackhouse on November 4th and 5th is
14 there anything in those articles about how the defendant had
15 been arrested on a stolen motorcycle?

16 A I don't believe so.

17 Q You don't believe so or do you know?

18 A They don't.

19 Q Is there anything in those articles stating that
20 the defendant drove a Ford model vehicle?

21 A No.

22 Q Eventually did you seek the assistance of the FBI
23 in this case?

24 A I did.

25 Q And specifically it was Special Agent Grusing?

1 A Yes, and Special Agent Amon with the ATF.

2 Q And you met with them and you planned how to
3 approach the defendant?

4 A That's correct.

5 Q Why didn't you just go approach him yourself?

6 A Well, again in reading the transcript -- and I've
7 read it many times, and then listening to the tape many
8 times it was obvious that Michael Clark was adamant in his
9 story when he misled detectives back then about how he got
10 the gun, how long he had the gun and what he had done with
11 the gun.

12 They'd asked him that several, several times. And
13 not only asked him several times, they also said -- they
14 told him look, this can eliminate you, you can be out of
15 this.

16 And it didn't make sense that having a Boulder
17 police detective go up to him 17 years later and ask the
18 same question, I didn't have any beliefs that there was
19 going to be any different result from that questioning that
20 was asked of him back in 1994.

21 Q As part of your investigation you said you would
22 look at the evidence and see if there was any sort of new
23 forensic testing that could be done?

24 A Yes.

25 Q And specifically did you see anything in this case

1 that you thought could be tested or re-tested?

2 A Yeah, the Carmex container that was underneath the
3 bottom stairwell or the bottom step in the entryway to the
4 apartments near 413 and 414.

5 Q Why did you focus on the Carmex container?

6 A Well, I mean, in looking at the photos from back
7 then and reading the crime reports it just -- it looked out
8 of place. It wasn't -- there wasn't other debris around
9 there except for the leaves. The only thing that was there
10 was the shell casings, and then you had this Carmex
11 container sitting on its side underneath the stair. It just
12 looked out of place. It didn't look like it belonged there.
13 And my thought was that it could be involved in the crime,
14 could be a piece of evidence.

15 Q Specifically what did you ask to have done with
16 that Carmex container?

17 A Well, I sent it to CBI and I asked DNA to look at
18 it, the DNA person. And I don't know who was going to look
19 at it until it gets down there. Usually it's Missy Woods,
20 and it was in this case. On the cover letter I asked her to
21 look at the -- or examine the Carmex container for DNA.

22 Q And she actually searched the exterior of the
23 Carmex container first?

24 A Right. And I had a conversation with her about
25 that. I assumed -- and I should never assume, but I assumed

1 that she was going to do the inside. Because I'm not a
2 scientist, I don't know about the issues that she thought
3 she might have as far as getting DNA off of the Carmex
4 material itself.

5 So we had a conversation one day about that. She
6 said well, I don't know. I guess, she said, I can try it.
7 So that's why she re-tested it later to get the inside.

8 Q Why did you think the presence of that Carmex
9 container on its side was significant in relation to the
10 defendant's interview?

11 A Well, the -- the defendant had said that the last
12 time he was at Mr. Grisham's apartment was -- let's see, so
13 the motorcycle happened on the 22nd. So basically the
14 weekend of the 23rd, 24th of September. So over a month
15 later, like 37, 38 days, something like that, that Carmex
16 container is still sitting there. That seemed -- that
17 didn't seem plausible to me that's when it would have had to
18 have been left.

19 Q When you say September 22nd, that's the motorcycle
20 arrest?

21 A Right.

22 Q And then September 24th, that's the article that
23 we saw the miracle in Michigan football game where Kristen
24 was out of town?

25 A That's correct.

1 Q And that's the weekend when the defendant was
2 basically watching Mr. Grisham's cat for Kristen?

3 A He was watching the cat John Lee that weekend,
4 yes.

5 Q So what's the process for going about getting a
6 comparison sample of DNA?

7 A Well, I don't know if Ms. Woods talked about that
8 or not, but what you need if you want to compare DNA to
9 somebody, you need obviously what's called a control sample
10 from that person.

11 And the way we do that, the way CBI recommends us
12 doing it is we get oral swabs. They're -- I mean, they're
13 sterile swabs, like you would swab your ear with Q tips kind
14 of, but you swab the inside of your mouth or have them swab
15 the insides of their mouth, and then submit it to CBI as the
16 control that they're going to compare the unknown that they
17 would have, in this case whatever they had gotten from the
18 inside of the Carmex container.

19 MS. RING: Judge -- sorry, you can finish your
20 sentence.

21 Can we approach?

22 THE COURT: Yes.

23 (The following proceedings occurred at the bench
24 out of the hearing of the jury.)

25 MS. RING: I'm sorry, I didn't mean to cut him

1 off. I just want to be careful about how you're going to
2 elicit getting this swab.

3 MR. KELLNER: My next question will be that a
4 judge signed a warrant to get the buccal swabs. I wasn't
5 going to say the name of a particular judge.

6 THE COURT: But that information isn't necessary
7 to establish the identity of the person that was swabbed. I
8 mean, why do you need the jury to know that there was a
9 court order? Can't you just say I swabbed him or I had him
10 swabbed?

11 MR. KELLNER: I could do that. My concern is the
12 last questioning from Ms. Ring of Special Agent Grusing and
13 really about the confrontational approach to him. And I
14 just want to establish that he did this with the law, that
15 he wasn't confronting him and getting a buccal swab from
16 some man that he wasn't supposed to.

17 THE COURT: Well, I think you're mixing apples and
18 oranges a little bit. Ask the foundation questions for
19 obtaining the swabs without referencing the court order or
20 court authority. If the issue comes up on
21 cross-examination, we'll certainly give you the opportunity
22 to redirect to clarify the process that was gone through.

23 But there's some -- there's some minor prejudice
24 that enters from saying a judge authorized me to go get a
25 DNA sample. And it's not necessary to explain the

1 production of the DNA sample.

2 MR. KELLNER: Your Honor, my concern at this point
3 is I'll ask a leading question, I'll say you got that swab
4 from the defendant you see sitting here and you took that
5 swab to CBI, and I'll leave it at that. But my concern is
6 that Mr. Heidel in the past has testified how he got this
7 swab with a court order. So I really would like to make
8 sure to tell him not to mention that, understanding your
9 ruling.

10 THE COURT: Well, I mean, if you would like I'm
11 happy to talk to him at side bar very quickly and explain to
12 him to make no reference to the court order to obtain a
13 buccal swab unless he's asked directly about it. That make
14 sense, Ms. Ring? All right. Thank you.

15 (The following proceedings occurred in open
16 court.)

17 THE COURT: Detective Heidel, could I see you at
18 side bar please?

19 (A discussion occurred at the bench off the
20 record.)

21 THE COURT: All right. You may continue,
22 Mr. Kellner.

23 Q (By Mr. Kellner) Detective Heidel, you were
24 telling us about buccal swabs. Did you get those buccal
25 swabs from the defendant?

1 A I did.

2 Q Do you see that person sitting here in court
3 today?

4 A Yes. He's at the defendant's table with the tie,
5 the only one wearing a tie.

6 Q Is the person that you got the buccal or the mouth
7 swabs from?

8 A Yes. And I obtained those on May -- I want to say
9 May 24th.

10 Q 2011?

11 A Excuse me, May 24, 2011.

12 Q And once you had those swabs what did you do with
13 them?

14 A I submitted that -- the buccal swabs to CBI along
15 with the Carmex container for re-analysis.

16 Q And when you take those swabs and then submit them
17 to CBI, what sort of process or procedure do you take to
18 safeguard the swabs?

19 A Well, they're sealed obviously after they dry.
20 And then I put evidence tape on them, I have to log those
21 into our evidence, property and evidence section. It's
22 logged in with a time, date stamp. I initial it. It's
23 given one of our item numbers.

24 And then in order to take it to CBI I have to
25 check it back out, both items back out and then they're

1 transported to CBI.

2 Q And then once you submit them to CBI, the swabs
3 and the Carmex container for analysis by Ms. Woods, she sent
4 you her results?

5 A Yes.

6 Q Consistent with what she said here today?

7 A That's correct.

8 Q Or I'm sorry, a few days ago?

9 A Yes.

10 MR. KELLNER: Can I have a moment please?

11 THE COURT: Yes.

12 (Pause.)

13 MR. KELLNER: Thank you, Detective. No further
14 questions.

15 THE COURT: Cross-examination, Ms. Ring.

16 MS. RING: I guess I need Detective Heidel's
17 assistance, because he had set aside some item for me.

18 THE COURT: Detective, would you step down and
19 help them locate whatever they're looking for?

20 MS. RING: Is it all right if I unstaple these?

21 THE COURT: Sure.

22 MR. KELLNER: Are those originals? Maybe make a
23 copy of that first.

24 MS. RING: I'm going to unstaple it.

25 (Pause.)

1 MS. RING: Mr. Kellner, do you want a copy made
2 while we're starting so that you have an exact copy of what
3 was stapled together?

4 MR. KELLNER: If you wouldn't mind that would be
5 good. Thank you.

6 THE COURT: Go ahead.

7 CROSS-EXAMINATION

8 BY MS. RING:

9 Q Detective Heidel, I think we've established that
10 starting in 2009 you become the lead investigator in this
11 homicide investigation?

12 A That's correct.

13 Q And what we know from prior testimony is that
14 initially right after the homicide occurs Detective Trujillo
15 is assigned as the lead detective?

16 A That's correct.

17 Q So the assignment that Detective Trujillo had back
18 in 1994, you had that same assignment now?

19 A Yes.

20 Q And that at some point in 1995 the lead detective
21 assignment is actually reassigned to Detective Hickman-Kampf
22 for some period of time?

23 A Yeah, I believe so.

24 Q And again, she would have had the same role that
25 you have now?

1 A That's correct.

2 Q And then there's a third individual who is
3 assigned lead detective at some point, and that's David
4 Spraggs?

5 A That's correct.

6 Q And that's in 2004, 2005?

7 A That sounds about right, 2004, 2005.

8 Q Now, I think what you were telling Mr. Kellner is
9 that back in 1994 and '95 you didn't have the same
10 specialized unit that was created after the -- I think you
11 told us after the JonBenet case?

12 A Well, it was in 1999, so it was a few years after
13 that.

14 Q Okay. And so it was after 1999 when detectives or
15 assignments were changed a bit so they had more time to
16 focus on major cases?

17 A That's correct.

18 Q But in looking and reviewing what Detective
19 Trujillo did and Detective Hickman-Kampf did, you certainly
20 wouldn't say that they neglected their duties in the
21 investigation of this case?

22 A Well, I think they thought they had gone as far as
23 they could with it at the time, but I'm speculating.

24 Q But when Detective Spraggs was assigned the lead
25 detective role in that 2004, 2005 time frame, that unit

1 we're talking about where you really could focus on the
2 bigger cases, that unit was established because it was
3 post-1999?

4 A That's correct.

5 Q You said you briefly had some involvement when
6 Detective Spraggs had the case open in 2004, 2005. But for
7 instance, you were at that Dion Moore interview?

8 A Yeah. And I think it was 2006 that he had the
9 interview with Dion Moore. I might be wrong.

10 Q I realize that we're talking about 5000 pages of
11 documents and lots of dates.

12 MS. RING: But if I can approach, Judge?

13 THE COURT: Yes.

14 Q (By Ms. Ring) Would showing you a face page of the
15 transcript refresh your memory about the date?

16 A Sure it would.

17 Q You need glasses too?

18 A Absolutely.

19 September 2004, yes.

20 Q So although you assisted Detective Spraggs
21 somewhat back then, it certainly wasn't your role to take
22 over the investigation at that point?

23 A No.

24 Q And that didn't happen until 2009?

25 A 2009, yes.

1 Q As the lead detective you basically get to make
2 the decisions about what's going to be investigated?

3 A Yes.

4 Q If something requires an extraordinary amount of
5 resources you might have to get some authorization from a
6 superior to access those resources, but ultimately it's your
7 decision about what gets done?

8 A Yes.

9 Q And certainly since 2009 you've been in charge of
10 the investigation?

11 A Yes.

12 Q You told us that one of the first things that you
13 did is get organized?

14 A Yes.

15 Q That's why we have nice, neat piles up here this
16 morning as opposed to yesterday afternoon?

17 A Probably more my OCD than anything else, but yes.

18 Q So it's fair that in 2009 you took everything that
19 had been documented, accumulated by the previous lead
20 investigators and you tried to organize that?

21 A That's correct.

22 Q So although we're talking about a lot of
23 information, you've had access to what all the other prior
24 lead investigators had done?

25 A Yes.

1 Q You had access to all of the reports that any
2 officer did involving this case?

3 A That's correct.

4 Q You had access to all the evidence that was
5 collected prior to you taking over?

6 A That's correct.

7 Q You told Mr. Kellner that once you reviewed
8 everything and organized everything one of your focuses
9 almost immediately became Michael Clark and that interview
10 from 1994?

11 A That's correct.

12 Q So it's fair that one of the things that you did
13 initially was figure out where Michael Clark was in 2009?

14 A That's correct.

15 Q And you were able to determine that Michael Clark
16 actually initially had stayed in the Boulder area following
17 the check fraud investigation and the homicide
18 investigation, he remained in the Boulder area?

19 A Yes.

20 Q And in fact, we heard that as part of the stealing
21 Marty Grisham's checks he actually ended up with a
22 conviction for that?

23 A That's correct.

24 Q And we heard that he was placed on probation in
25 that case?

1 A That's correct.

2 Q And so we know that he remained in the Boulder
3 area because he was on probation for a couple years in that
4 case?

5 A I don't know that for sure. But if that's what
6 happened, that's what happened.

7 Q Okay.

8 A I know sometimes probations can be played out in
9 other states if they move. But no reason for me not to
10 believe that.

11 Q Okay. Certainly if -- certainly you'd agree with
12 me that part of this large file includes information from
13 Michael Clark's probation file?

14 A I believe so, yes.

15 Q Okay. And again, I know I'm asking you to
16 remember a lot of information, but --

17 A That's okay.

18 Q -- it would make sense that his probation file
19 would be part of this case file?

20 A Yes.

21 Q You also learned that at some point Michael Clark
22 moved to Oregon?

23 A That's correct.

24 Q And that he lived in Oregon from 2001 to 2010?

25 A That sounds right.

1 Q And that he had actually been in the
2 Boulder-Denver area prior to moving to Oregon?

3 A That's correct.

4 Q And that sometime in 2010 he moves back to
5 Colorado?

6 A Correct.

7 Q And you knew that he was living in the
8 Silverthorne area?

9 A Correct.

10 Q And that he was living with his in-laws?

11 A I didn't know that until speaking with his
12 in-laws.

13 Q Okay. And that's what you knew about where
14 Michael Clark had been since 1994?

15 A That's correct.

16 Q And so maybe initially you didn't know he was
17 living with his in-laws. But for instance, when we heard
18 Agent Grusing earlier this morning talking about
19 interviewing Michael Clark up in Silverthorne, you were the
20 one who figured out where Michael Clark was working?

21 A That's correct.

22 Q At the Bighorn Ace Hardware in Silverthorne?

23 A Correct.

24 Q That he was living up in Silverthorne in that
25 area?

1 A Yes, that's correct.

2 Q Mr. Kellner just asked you about why you didn't go
3 and actually do the interview of Michael Clark in April 2011
4 yourself, and instead had Agent Grusing and Agent Amon do
5 the interview.

6 A That's correct.

7 Q But when we're talking about this ruse of just
8 showing up at Michael Clark's place of employment, as far as
9 you know as the lead investigator Michael Clark had not been
10 contacted regarding this homicide investigation since 1994?

11 A That's correct.

12 Q So the first time that you're aware that anybody
13 contacts Michael Clark about Marty Grisham's homicide since
14 1994 is this April 15, 2011 interview?

15 A Well, after -- shortly after his arrest on the
16 check fraud there was an attempt to have a conversation with
17 him, but -- but it didn't happen.

18 Q But that would have been close in time to 1994?

19 A Yes.

20 Q Okay. So let's say to be clear from 1995 to 2011
21 no one contacts Michael Clark about this investigation?

22 A That's correct.

23 Q Mr. Kellner asked you about these, the pawn slips;
24 right?

25 A Yes.

1 Q And I'm going to mark this as Defense Exhibit H.
2 To be clear, you told us about contacting an RJ Wilson?

3 A Yes.

4 Q And he worked for Aurora Police Department?

5 A That's correct.

6 Q And you contacted him because you knew he'd be
7 familiar with those pawn slip -- those pawn shops in that
8 area of Colfax?

9 A That's correct.

10 Q And you asked him to go find pawn slips that met
11 the criteria that you thought would be helpful in this
12 investigation?

13 A That's correct.

14 Q And so -- and most of the criteria you talked
15 about was what you had learned, what the information had
16 showed from Dion Moore and Jamie Uhlir and those types of
17 things that Mr. Kellner told you?

18 A That's correct.

19 Q And you're the first person, you're the first
20 investigator who asked to try to get these pawn slips?

21 A Well, I'm not clear on that. Do you want me to
22 expand or do you want to keep asking?

23 Q I'm used to asking at this point. Sorry.

24 A All right.

25 Q You're not -- one of the reasons is because of the

1 hit you got that said go contact Sgt. Trujillo?

2 A That's correct.

3 Q Okay. But the stack of pawn slips I'm holding in
4 my hand --

5 MS. RING: If I can approach?

6 THE COURT: Yes.

7 Q (By Ms. Ring) I'm going to have you open that.

8 A So what was contained in here originally were the
9 two pawn slips from October 19th that have already been
10 entered into evidence.

11 Q So that's People's Exhibit 74?

12 A Yeah. So that's why these two tag numbers -- so
13 that was one, and then this was the rest of the pawn ships,
14 the original pawn slips that were sent to us by the Aurora
15 Police Department.

16 Q But you would have received all of them together?

17 A Yes. But actually I believe Detective Wilson
18 pulled those aside so I didn't have to go searching through
19 them. But yes, and that's the stack, and they are in order.

20 Q Okay. And one of the criteria was clearly that it
21 was for -- well, why don't you tell me the criteria you
22 requested.

23 A Well, I requested that they search for sales of
24 two Bryco-Jennings that were sold on October 19th of 1994.
25 That's basically what the criteria was.

1 Q Okay. But you got several more?

2 A I've got some from not only from the ABC Pawn Shop
3 where I had asked them to search, but I think they just kind
4 of did the whole pile of those pawn slips where there was
5 sales of guns.

6 Q Okay.

7 A So you'll see other pawn shops in there also.

8 Q Okay. And you also I think when you're talking to
9 Mr. Kellner said that you may have said that looking in
10 October of 1994 was part of the parameters, although you
11 were trying to narrow it down to October 19th?

12 A Yes.

13 Q I'm going to ask you to put these back the way
14 they were. Thank you.

15 The Exhibit 74 that I just had up in front of you,
16 when David Berring testified he said that he actually saw
17 photocopies of those. That's what you brought to Florida?

18 A Yes.

19 Q Is that your memory?

20 A Yes.

21 Q Okay. So he didn't actually see those originals,
22 he would have seen the photocopy that you brought with you
23 to Florida?

24 A That's correct.

25 Q And when you told us that what you specifically

1 asked Detective Wilson what you wanted him to search for is
2 you specifically said you were looking for two
3 Bryco-Jennings 9mm handguns; right?

4 A Right.

5 Q That were purchased on October 19th of 1994?

6 A That's correct.

7 Q And you didn't ask for him to look for the
8 purchase of a third gun, a .380 Lorcin?

9 A Well, I think I probably told him that what
10 Mr. Moore had told us is that Mr. Moore wasn't sure, but
11 there may have been a .380 Lorcin too. Mr. Moore was
12 unclear on that, whether he had bought that then or some
13 other time. But what Mr. Moore was clear on was that there
14 were two Brycos purchased on that -- when they went to
15 purchase the gun -- those guns.

16 Q But you would agree with me that one of the things
17 Dion Moore said initially is he thought there were three
18 guns, and the additional gun was the .380 Lorcin, but it was
19 your understanding he was clear about the two 9mms?

20 A That's correct.

21 Q There isn't in all of those pawn slips that I just
22 showed you a purchase of a .380 of any kind by David Berring
23 on that same date?

24 A No.

25 MS. RING: Judge, I'm going to move to admit

1 Exhibit H.

2 THE COURT: Objection or voir dire?

3 MR. KELLNER: Yes, Your Honor. May I voir dire?

4 THE COURT: Yes.

5 MR. KELLNER: I'm going to have to pull these back
6 out. Sorry, Judge. May I stand here?

7 THE COURT: Yes, although you are blocking the
8 view of some of the jurors.

9 VOIR DIRE EXAMINATION

10 BY MR. KELLNER:

11 Q Detective Heidel, you became the lead investigator
12 in this case in 2009?

13 A Correct.

14 Q As the lead investigator your job is to look for
15 relevant evidence?

16 A Yes.

17 Q Follow up on relevant leads to this case?

18 A Yes.

19 Q The first pawn slip I'm pulling up here is from
20 October 8, 1994. It's a Winchester 12-gauge. Does this
21 have anything to do with this case?

22 A No.

23 Q Next pawn slip is from October 8, 1994. It's a
24 Winchester 12-gauge. Anything to do with this case?

25 A No.

1 Q Here is a Lorcin .380 from September 30, 1994. To
2 your knowledge anything to do with this case?

3 A No.

4 Q Here is a Ruger 9mm from October 6, 1994.
5 Anything to do with this case?

6 A No.

7 Q I've just pulled off the top four pawn slips.
8 Approximately how many different pawn slips are here?

9 A 200 maybe.

10 Q To your knowledge does any of this have anything
11 to do with this case whatsoever?

12 A Not that I could tell.

13 Q Did you ever speak to all several hundred people
14 who filled out these pawn slips?

15 A No.

16 Q Some of these pawn slips are for other pawn shops
17 other than ABC Pawn Shop; is that right?

18 A That's correct.

19 Q Do you know how many are from different pawn
20 shops?

21 A I don't know. There's a number of rifles in
22 there, also there's a number of shotguns.

23 Q I have a -- flipping to the middle here,
24 October 15, 1994 a lone .22 caliber. Anything to do with
25 this case?

1 A No.

2 MR. KELLNER: Judge, I'd object to the admission
3 of all these pawn slips. They're not relevant. There's not
4 been an appropriate foundation established. They contain
5 inadmissible hearsay.

6 THE COURT: Would counsel approach?

7 (The following proceedings occurred at the bench
8 out of the hearing of the jury.)

9 THE COURT: Ms. Ring, what's the relevance of this
10 evidence?

11 MS. RING: Judge, clearly that those pawn slips
12 were given to Detective Heidel by RJ Wilson based on his
13 request as part of this investigation to try to determine
14 how Michael Clark got the gun and if he got the gun from
15 Dion Moore.

16 Dion Moore testified that he got hundreds of guns
17 from these pawn shops. He testified that he used ABC. He
18 testified that he used Pasternack's. It was just part of
19 the investigation.

20 Part of our argument is how much the investigation
21 just solely focused on Michael Clark. And I think it goes
22 to that argument.

23 THE COURT: Your response, Mr. Kellner.

24 MR. KELLNER: Judge, simply because something was
25 looked at in the course of the investigation doesn't make it

1 relevant and admissible evidence.

2 We had Mr. Berring here who established an
3 appropriate foundation for the pawn slips that he actually
4 admitted. There is information related to hundreds of
5 people there from pawn shops that she's not established any
6 connection whatsoever to this case.

7 THE COURT: I'm not seeing the relevance of this
8 evidence. I'm going to sustain the objection.

9 (The following proceedings occurred in open
10 court.)

11 THE COURT: The objection is sustained.

12 CROSS-EXAMINATION (cont'd)

13 BY MS. RING:

14 Q We were just looking at the pawn slips that you
15 showed David Berring when you interviewed him in Florida?

16 A Yes.

17 Q And you heard David Berring testify. And you'd
18 agree that the first time that anyone ever spoke to David
19 Berring in this case was when you went down to Florida to
20 interview him?

21 A That's correct.

22 Q And you didn't have any prior communication with
23 David Berring about that you were going to come down there?

24 A No.

25 Q Or what you were going to talk to him about?

1 A No.

2 Q And your recollection of what happened is exactly
3 what David Berring said, that law enforcement went out and
4 contacted him on your behalf?

5 A That's correct.

6 Q Because you were down there to find him and meet
7 with him?

8 A That's correct.

9 Q And they brought him to the sheriff's department
10 for you to interview him?

11 A That's correct.

12 Q As part of that interview you showed -- you
13 brought line-ups with you?

14 A That's correct.

15 Q And you had prepared the line-ups prior to going
16 down there?

17 A That's correct.

18 Q You did two separate photo line-ups?

19 A Correct.

20 Q When David Berring talked about seeing 30 or 60
21 photos, that's not what you showed him?

22 A No.

23 Q You did the fairly standard police -- six-photo
24 array police procedure?

25 A Yes.

1 Q You did one photo array with Michael Clark's photo
2 in it?

3 A That's correct.

4 Q And actually the photo you used would be the same
5 photo we've seen throughout the course of the trial?

6 A That's correct.

7 MS. RING: So if I may approach with what I've
8 marked as Defense Exhibit I?

9 THE COURT: Yes.

10 MS. RING: And Defense Exhibit J.

11 Q (By Ms. Ring) Detective Heidel, I'm showing you
12 Defense Exhibit J. Is that the photo line-up that you
13 prepared and brought with you to Florida when you were
14 meeting with David Berring?

15 A Yes, it is.

16 Q And the individual in photograph number 2 is that
17 photograph of Michael Clark that we've seen multiple times?

18 A Yes, from back in 1994.

19 Q Right.

20 And then showing you what's been marked Defense
21 Exhibit I?

22 A Yes.

23 Q And that's a photo line-up admonition form that is
24 standard procedure for the Boulder Police Department?

25 A That's correct.

1 Q And it's just a standard advisement that you give
2 to someone prior to showing them a photo line-up?

3 A That's correct.

4 Q And it's filled out with David Berring's
5 information?

6 A Correct.

7 Q And the fact that you showed it to him on
8 February 18th during the course of that interview?

9 A 18th, 2010, yes.

10 Q And it indicates that he did not recognize or
11 identify anyone in the line-up?

12 A That's correct.

13 MS. RING: I move to admit Defense Exhibit I and
14 J.

15 THE COURT: Objection or voir dire, Mr. Kellner?

16 MR. KELLNER: No objection, Judge.

17 THE COURT: I and J will be admitted.

18 MS. RING: Judge, I'm going to ask if I can do
19 this the old fashioned way to publish this to the jury?

20 THE COURT: Sure. Ms. Batchelder, hand them to
21 Ms. Timms. If you'd review them, pass them to your left.
22 Mr. Lacopo, when it gets to you if you pass it behind you to
23 Mr. Krolick he can review them. Mr. Krolick, pass them to
24 your right. When they get back to Ms. O'Harah
25 Ms. Batchelder will retrieve them.

1 (Pause.)

2 THE COURT: While the jury is reviewing I and J
3 would counsel approach off the record?

4 (A discussion occurred at the bench off the
5 record.)

6 MR. KELLNER: Your Honor, may we approach again?

7 (The following proceedings occurred at the bench
8 out of the hearing of the jury.)

9 MR. KELLNER: I wanted to raise an issue outside
10 the presence of the jury.

11 My understanding or belief is that Ms. Ring is
12 going to approach Detective Heidel with the photo line-up
13 that he presented to David Berring containing Dion Moore's
14 photograph in it which he did not positively identify Dion
15 Moore as the person.

16 I do not believe that that is at all admissible
17 because she did not approach David Berring with that and ask
18 him to whether or not he identified anyone and give him a
19 chance to explain his selection or choosing of the person in
20 that line-up.

21 Now, I didn't object to the admission of
22 Mr. Clark's photograph on those grounds because
23 Mr. Berring's testimony was that he only dealt with an
24 African-American male. So frankly, I don't think it has any
25 bearing on Mr. Clark's photographic line-up.

1 But I think it's improper to present this
2 detective with a photo advisement without having actually
3 presented that information and question to David Berring
4 about it.

5 THE COURT: My recollection of the testimony is
6 that David Berring did testify to reviewing a photo line-up
7 and making a partial identification of an individual. I
8 don't have a specific recall as to whether or not he
9 referenced it as an African-American male or a white male.

10 But there is some testimony in the record that if
11 Ms. Ring were to choose to discuss the line-up procedure and
12 Mr. Berring's statements in response to that line-up
13 procedure I think would be relevant and admissible.

14 So with respect to the objection in limine I'm
15 going to overrule it at this time.

16 (The following proceedings occurred in open
17 court.)

18 THE COURT: Ms. Ring, you may continue.

19 MS. RING: Thank you.

20 Q (By Ms. Ring) Detective, you were present when
21 David Berring testified?

22 A Yes.

23 Q And actually you just agreed when Mr. Kellner
24 asked you if you're the one who actually asked David Berring
25 if he -- if the name Dion sounded familiar to him?

1 A That's correct.

2 Q And after you asked him if the name Dion sounded
3 family to him he said it did?

4 A Yes.

5 Q But then you heard him testify about having some
6 receipt with the name Dion Moore on the receipt. Do you
7 recall him testifying about that?

8 A No.

9 Q Okay. That's certainly not something he ever told
10 you when you were interviewing him on February 18th of 2010
11 that he had a receipt from a Dion Moore, that he had done
12 this purchase for him?

13 A No.

14 Q You also showed Mr. Berring a photo line-up as we
15 discussed with Dion Moore's picture in it?

16 A That's correct.

17 Q And again, you didn't show him 30 pictures or 60
18 pictures, you showed him another six-photo array?

19 A Six-pack.

20 MS. RING: If I may approach?

21 THE COURT: Yes.

22 Q (By Ms. Ring) And I'm showing you what's been
23 marked Defense Exhibit K and Defense Exhibit L.

24 A Yes.

25 Q Again, you prepared that line-up, Defense

1 Exhibit L, prior to going down to Florida?

2 A That's correct.

3 Q And Dion Moore's photo is in number 6?

4 A That's correct.

5 Q And again, you tried to use a photo of Dion Moore
6 that would have looked as best you could find of what Dion
7 Moore would have looked like in 1994?

8 A Yes.

9 Q And moving your attention to Defense Exhibit K,
10 that's an identical form to the one we looked at previously
11 that David Berring filled out regarding the photo line-up
12 involving Michael Clark in it?

13 A Correct.

14 Q And it's -- the advisement form has David
15 Berring's name on it?

16 A Yes.

17 Q It has your signature on it?

18 A Yes.

19 Q It has the February 18, 2010 date on it?

20 A Correct.

21 Q And on that form David Berring noted that he
22 actually identified the person in photo number 4 in that
23 line-up?

24 A That's correct.

25 Q And photo number 4 is not Dion Moore?

1 A Yes. It wouldn't have been possible to be that
2 person.

3 THE COURT: I'm sorry, what?

4 THE WITNESS: It wouldn't have been possible to be
5 that person.

6 Q (By Ms. Ring) Number 4 it wouldn't have been
7 possible to be the person that you were talking about?

8 A No, because that person would have been about 12
9 years old at the time. I had to use current photos, and
10 those were where those selections came from. I didn't have
11 photos from back then, so I had to get people that were
12 approximately that age looking wise.

13 Q Right. Okay. So we know that the individual in
14 number 4 couldn't have been the individual who David Berring
15 says he bought guns for?

16 A Correct.

17 Q But it's also not Dion Moore?

18 A That's correct?

19 MS. RING: I'd move to admit K and L.

20 MR. KELLNER: No objection.

21 MS. RING: And I move to publish.

22 THE COURT: K and L will be admitted. And we'll
23 do that the same way. Ms. Batchelder, provide those to the
24 jury.

25 (Pause.)

1 THE COURT: Ms. Ring, you may continue.

2 MS. RING: Thank you.

3 Q (By Ms. Ring) Detective Heidel, we already talked
4 about that you assisted Detective Spraggs in 2004 when
5 Detective Spraggs interviewed Dion Moore?

6 A That's correct.

7 Q But once you took over the investigation you also
8 wanted another interview with Dion Moore?

9 A Yes.

10 Q And so in March of 2010 you interviewed Dion Moore
11 again?

12 A That's correct.

13 Q You actually ended up seeing him at the Boulder
14 courthouse here?

15 A Yes.

16 Q And you asked if he'd come down to the police
17 department for another interview?

18 A Actually I think the interview took place here.

19 MS. RING: And I'm on page 924.

20 Q (By Ms. Ring) And again, Detective Heidel, I
21 understand that you've -- I don't want it to look like I'm
22 not getting my facts right. I'm showing you your supplement
23 report number 26. It has your name at the bottom.

24 A Okay.

25 Q And it says that on March 9, 2010 DA Ryan Brackley

1 and I interviewed Neil Dion Moore at the Boulder Police
2 Department?

3 A Yeah. That may have been -- actually the next
4 line says Moore was at the Boulder County courthouse. But I
5 do believe it occurred here. I may have -- I may have
6 mis-printed that or mis-typed that. But it was -- I'm
7 pretty sure the interview took place here. But if it says
8 police department, then --

9 Q Okay. So we know that you interviewed Dion Moore
10 on March 9th of 2010?

11 A Yes, that is correct.

12 Q You were present and Mr. Brackley was present?

13 A Yes.

14 Q You know that you initially contacted Mr. Moore
15 when he was here at the Boulder courthouse on an unrelated
16 matter?

17 A That's correct.

18 Q And although you'd agree with me it says the
19 interview happened at the Boulder Police Department, your
20 recollection is it may have happened somewhere in the
21 courthouse?

22 A Yes.

23 Q Okay. Mr. Moore certainly wasn't completely
24 consistent throughout his interviews with the police or
25 involving facts in this case?

1 A Well, no. There were some details that were
2 different probably each time we interviewed him.

3 Q But some things were consistent?

4 A That's correct.

5 Q But in 2010 he thought that he just gave Michael
6 Clark one of the guns that he already had?

7 A That's correct.

8 Q When you interview Michael Clark in March of 2010,
9 this is after you've met David Berring down in Florida?

10 A I'm sorry, did you say Michael Clark or Dion
11 Moore? I don't know.

12 Q I don't know what I said, but I meant to say --
13 let me start over. In March of 2010 when you're interviewed
14 Dion Moore you've already met with and interviewed David
15 Berring in Florida?

16 A That's correct.

17 Q Because that happened the month before?

18 A That's correct.

19 Q So when you're interviewing Dion Moore you have a
20 photo of David Berring?

21 A Yes, that's correct.

22 Q And I'm going to approach with Exhibit I believe
23 it's 75. So that's People's Exhibit 75, which is a -- I
24 believe it's a -- is it a DMV photo of David Berring?

25 A It's either a DMV or it's a Colorado

1 identification card.

2 Q And that would have been the photo that you would
3 have showed Dion Moore during your interview of March of
4 2010?

5 A Yes. And it is a driver's license.

6 Q Okay. And can we tell from that document when
7 that photo of David Berring was taken?

8 A I show it expires 3/16 of '98. So it would have
9 been prior to 3/16 of '98.

10 Q Also what I'm noting is it actually has that
11 Albbrook Drive address on it?

12 A That's correct.

13 Q Because you would have been trying to find a photo
14 of David Berring that would have looked the way he looked
15 close in time to 1994?

16 A That's correct.

17 Q Okay. So that's the photo that you showed Dion
18 Moore?

19 A That's correct.

20 Q And he wasn't familiar with the person in that
21 photo, or at least that's what he told you?

22 A Yeah. And I think his response was something like
23 there was a lot of people I used like that. I don't know,
24 you know. It was one of those sorts of responses.

25 Q In reference to using a lot of people to get guns

1 back in that time?

2 A That's correct.

3 THE COURT: Ms. Ring, do you still have a little
4 while to go?

5 MS. RING: I do.

6 THE COURT: Ladies and gentlemen of the jury, why
7 don't we go ahead and take the mid-morning recess. We've
8 been going for almost two hours.

9 Remember the admonition that I've given you
10 previously. It applies at this recess as well. Don't talk
11 about or communicate about the case with anyone by any
12 means. If someone does try to talk to you about the trial,
13 let me know about it immediately.

14 Don't read or listen to any news reports of the
15 trial. Don't consult any outside reference materials.
16 Don't do any independent investigation.

17 Remember it is especially important that you do
18 not form or express any opinion on the case until it is
19 finally submitted to you for your consideration.

20 Let's recess for 20 minutes. We'll be ready for
21 you at 11:50 -- I'm sorry, 10:50.

22 (The jury left the courtroom.)

23 THE COURT: Detective, if you would please be back
24 on the witness stand at 10:50.

25 Counsel, I show that Exhibit 75 has not been

1 admitted.

2 MR. BRACKLEY: That's what I was speaking with
3 Ms. Ring about. I didn't even offer it. I showed it to
4 Mr. Berring for the sake of address and stuff.

5 THE COURT: I just want to make sure everyone was
6 clear on that.

7 All right. Anything for the record before we
8 recess from the People?

9 MR. KELLNER: No, Judge.

10 THE COURT: From the defense?

11 MS. RING: No.

12 THE COURT: All right. Then we'll be in recess
13 until 10:50.

14 (A recess was taken.)

15 THE COURT: We're back on the record in People
16 versus Michael Clark. The defendant and his counsel are
17 present, the prosecution is present.

18 Anything for the record before we bring the jury
19 back from the People?

20 MR. KELLNER: No, thank you.

21 THE COURT: For the defendant?

22 MS. RING: No.

23 THE COURT: Would you bring the jury in please?

24 (The jury returned to the courtroom.)

25 THE COURT: Please be seated. Welcome back,

1 ladies and gentlemen of the jury.

2 Ms. Ring, you may continue with your
3 cross-examination of Detective Heidel.

4 MS. RING: Thank you.

5 Q (By Ms. Ring) Detective Heidel, Mr. Kellner asked
6 you about using a database where you could put a serial
7 number from a firearm into the database to see if it's come
8 up in any other crimes or anything like that?

9 A That's correct.

10 Q And you talked about the one hit you got was from
11 Sgt. Trujillo?

12 A Yes.

13 Q Okay. And my understanding is that the two of you
14 put two serial numbers into these databases that you're able
15 to use?

16 A That's correct.

17 Q And the two serial numbers was off of those two
18 pawn slips that we looked at earlier related to David
19 Berring?

20 A That's correct.

21 Q Mr. Kellner asked you about information in the
22 newspaper right after the homicide on November 2nd, 3rd, 4th
23 and 5th of 1994?

24 A Correct.

25 Q And although some of those newspaper articles were

1 gathered prior as part of the investigation, when you took
2 over one of things that you did as lead detective is
3 actually asked someone to do a search to get you all of the
4 articles that talked about Marty Grisham and the homicide?

5 A That's correct.

6 Q And you then made those articles part of the
7 discovery in this case?

8 A Correct.

9 Q You know because you're familiar with all aspects
10 of this case that the first interview of Walter Leon
11 Stackhouse happened at the Boulder County Jail on
12 November 4th of 1994?

13 A I believe that's correct.

14 Q You know that the first interview with
15 Mr. Stackhouse at the jail happened it was just Sgt. Meals
16 and Walter Stackhouse?

17 A That's correct.

18 MS. RING: May I approach?

19 THE COURT: Yes.

20 Q (By Ms. Ring) Is it fair that I'm showing you a
21 face page for a transcript of an interview between Sgt. Bob
22 Meals and Walter Stackhouse?

23 A That's correct.

24 Q And the date of that interview indicates that it
25 happened on November 4th of 1994?

1 A That's correct.

2 Q And it notes that the time of interview is 1824
3 hours?

4 A That's correct.

5 Q Which in lay person's terms?

6 A 6:24 in the afternoon.

7 Q And then we heard from Sgt. Pelle yesterday, and
8 he told us that he came back and did a second interview with
9 Mr. Stackhouse?

10 A Correct.

11 Q And that would have been the following day,
12 November 5th of 1994; right?

13 A Yes, that's correct.

14 Q And he indicated that that happened sometime in
15 the evening because he remembered it happened when
16 Sgt. Meals came on duty?

17 A That's correct.

18 Q And that would be consistent with what we just
19 looked at of the interview between Sgt. Meals and Walter
20 Stackhouse on November 4, 1994 not happening until
21 6:24 p.m.?

22 A Yes, that's correct.

23 Q Mr. Kellner asked you about information that was
24 not in the paper that Mr. Stackhouse relayed in his
25 interview?

1 A Correct.

2 Q I'm going to approach with what's been marked
3 Defense Exhibit M. It's pages 1432 and 1433 in discovery.
4 This one is going to be difficult for us to read, but it's
5 the copy that I got in discovery. Yeah, that does have a
6 Bates stamp on the bottom of 1432 and 1433.

7 A That's correct.

8 Q And you'd agree with me that that would be one of
9 the articles that would have been in discovery because it
10 had information about Marty Grisham's murder and about
11 Michael Clark?

12 A Yes. And it would have been in the original case
13 file. I can tell from the fringed edges of the newspaper.

14 Q Okay. And would you agree with me from looking at
15 that that page 1432 would be the first page of the article?

16 A That's correct.

17 Q And then 1433 would be the article continuing on?

18 A That's correct.

19 Q So you'd agree with me that the article -- the
20 title of article is Man Held In Theft of Victim's Checks?

21 A That's correct.

22 Q And right under it says Murder Probe Continues?

23 A That's correct.

24 Q And you can see a stamp on there that says
25 November 4th of 1994?

1 A Correct.

2 Q And then there's handwriting next to the article
3 on this sheet that says Daily Camera, November 4, 1994?

4 A Correct.

5 Q So that would all indicate that that article came
6 out in the Daily Camera on November 4th of 1994?

7 A Correct.

8 Q There is on that first page a photo of Michael
9 Clark?

10 A That's correct.

11 Q And it appears to be that same photo that we've
12 seen throughout this trial?

13 A Correct.

14 Q Certainly looks like those photos that Michael
15 Clark looked like in 1994?

16 A That's correct.

17 Q And again, I realize it's very difficult to read
18 some of that article but you would agree with me that in
19 that article it's clear that Michael Clark is being held
20 related to the theft of checks of Marty Grisham?

21 A Yes.

22 Q And it's clear that Marty Grisham is the victim of
23 this murder probe, that Marty Grisham has been murdered?

24 A I'm sorry, can you repeat that last --

25 Q That it's clear in the article that Marty Grisham,

1 the individual who it says that Michael Clark stole his
2 checks, is the individual that was murdered?

3 A Can I read from the paper here?

4 Q If you can read from that.

5 A I can.

6 Q Would you read it to yourself first?

7 A Sure.

8 Q Okay. So it says that Michael Clark was arrested
9 for stealing Marty Grisham's checks?

10 A Correct.

11 Q It makes it clear that Marty Grisham is the person
12 that was killed?

13 A Correct.

14 Q It makes it clear they're still looking for the
15 suspect who murdered Marty Grisham?

16 A Correct.

17 Q It makes it clear that Michael Clark is a person
18 of interest in that investigation?

19 A It doesn't use those words.

20 Q What words does it use?

21 A Well, can I read it?

22 Q Sure.

23 A Okay. There is no information at this time to
24 connect him with the murder, but obviously all leads are
25 being investigated. And that was from I think Leslie Aholm.

1 She was a public liaison person at the time.

2 Q Okay. And this is on the same page where Michael
3 Clark's picture is and they talk about Michael Clark having
4 stolen Marty Grisham's checks and forging them?

5 A Correct.

6 Q Can I see that for a minute so I can direct you to
7 the right page?

8 You would agree with me that on page 2 of the
9 article it indicates that he, being Marty, was shot four
10 times with a 9mm handgun?

11 A Right. It says at 9:34 Tuesday he was shot four
12 times with a 9mm handgun.

13 Q You'd agree with me that towards the end of the
14 article it talks about Clark, that he would be leaving to
15 join the US Marines in a couple of weeks?

16 A Yes, it does say that.

17 Q You'd agree with me that it talks about there
18 being a description of a car as a large green two-door older
19 model 1970s Chrysler with silver trim around the bottom?

20 A Yes.

21 Q And all of that information is in that article
22 from November 4th of 1994 in the Daily Camera?

23 A That's correct.

24 MS. RING: I'm going to staple these together
25 since Detective Heidel would agree with me that these two

1 pages go together, so the two pages would encompass Defense
2 Exhibit M. And I would move to admit Defense Exhibit M.

3 THE COURT: Objection or voir dire, Mr. Kellner?

4 MR. KELLNER: Judge, I have an objection as to the
5 hearsay contents of the newspaper. So long as there's given
6 a limiting instruction as to how the jury can use the
7 information inside the newspaper article, I don't have an
8 objection to its actual content. But I would suggest
9 substituting my copy for your copy. It seems to be much
10 clearer.

11 MS. RING: It's a much better copy.

12 THE COURT: So we could substitute the district
13 attorney's version for yours and still be marked as
14 Defendant's M.

15 Would counsel approach?

16 (The following proceedings occurred at the bench
17 out of the hearing of the jury.)

18 THE COURT: Can I see M?

19 MR. KELLNER: Yes, sir.

20 MS. RING: Do you want --

21 MR. KELLNER: This there.

22 THE COURT: It's a lot smaller.

23 MR. KELLNER: It's a blow-up too. So I got the
24 small one here, the next page, and blew it up so they can
25 see.

1 THE COURT: All right. And this would be four
2 pages now, and that's what you're seeking to admit?

3 MS. RING: That makes more sense to me.

4 THE COURT: All right. Let me look at it quickly.

5 (Pause.)

6 THE COURT: So I've had a chance to review the
7 four-page exhibit that is M. I will staple it altogether.

8 Ms. Ring, for what purpose are you seeking to
9 admit M? There's been an objection as to hearsay for the
10 statements contained in the article, actually the article
11 itself.

12 MR. KELLNER: I should rephrase. I would just ask
13 for a limiting instruction as to how it can be used by the
14 jury; in that, for example, Judge, I don't think it would be
15 appropriate for the defense on closing to say a man saw a
16 car driving away from the scene as a fact, but it can be
17 admitted as to how it impacts the credibility, voracity of
18 Mr. Stackhouse.

19 MS. RING: So I think it was clear from my line of
20 questioning that I was pointing out all the information and
21 I'm -- I started that chapter talking about Stackhouse. So
22 that's the purpose for which we're seeking to admit that.

23 THE COURT: So are you offering it for the truth
24 of what's stated in this article or for potential impact on
25 the reader, particularly Mr. Stackhouse?

1 MS. RING: Correct, the latter.

2 THE COURT: Not for the truth of the matter?

3 MS. RING: Correct.

4 THE COURT: So it's not hearsay on that basis.

5 Then on that basis I will admit M.

6 You're asking for a limiting instruction. And the
7 limiting instruction would be to the effect of?

8 MR. KELLNER: That members of the jury, you can
9 use the information contained in here to determine how it
10 impacts the credibility of Walter Stackhouse, but you cannot
11 take the statements asserted in these articles as truth and
12 fact. And really, Judge, I would defer to you on how to
13 exactly word that.

14 THE COURT: Okay. With that type of limiting
15 instruction, Ms. Ring, do you agree with that?

16 MS. RING: Yes.

17 What I was going to propose to do is just re-show
18 that to Detective Heidel just so I can be clear on the
19 record that it's the same information, the same article.
20 And I'm going to admit it.

21 THE COURT: Then I'll give the limiting
22 instruction. All right. That's fine.

23 MR. KELLNER: Thank you.

24 (The following proceedings occurred in open
25 court.)

1 Q (By Ms. Ring) Detective Heidel, I'm going to
2 approach again. And I just want you to verify for me that
3 what I'm showing you that's marked Defense Exhibit M which
4 is now four pages, that the first two pages would actually
5 be the print-out of the Daily Camera showing the actual
6 front page with the first part of the article clipping to
7 the second page showing the second part of the article as it
8 actually appeared in context in the paper?

9 A Yes.

10 Q And that pages 3 and 4 just take those two pages
11 of the article and magnify them significantly so that
12 someone might actually be able to read the information?

13 A That's correct.

14 MS. RING: Judge, I would base -- I would move to
15 admit this Exhibit 4 -- I mean Exhibit M.

16 THE COURT: M will be admitted.

17 Ladies and gentlemen of the jury, let me instruct
18 you that Exhibit M is being admitted not for the truth of
19 what is stated in the article. In other words, you may not
20 consider the information in the article as true or as proof
21 of any facts stated in the article.

22 However, you may consider it in your discretion
23 and as you see appropriate. You may consider how it may
24 have impacted the statements of Walter Stackhouse or another
25 witness.

1 You may continue, Ms. Ring.

2 Q (By Ms. Ring) Detective Heidel, we heard in
3 testimony about the interview of Mr. Clark in 1994 and in
4 hearing about the drive that Detective Denig and Detective
5 Weiler did about Mr. Clark indicating that he had arrived at
6 his home and watched part of a Beavis and Butthead episode?

7 A Yes.

8 MS. RING: Judge, may I approach?

9 THE COURT: Yes.

10 Q (By Ms. Ring) Going to show you what's been marked
11 Defense Exhibit N. And would you agree with me, Detective
12 Heidel, that this appears to be a piece of the newspaper
13 from the Rocky Mountain News?

14 A Yes.

15 Q From Tuesday, November 1, 1994?

16 A Correct.

17 Q And if you look down for me under the 9:00 p.m. to
18 9:30 time slot?

19 A Okay.

20 Q Under the MTV line?

21 A Right.

22 Q It shows that there was a Beavis and Butthead
23 episode from 9:00 to 9:30?

24 A Correct.

25 Q Followed by another Beavis and Butthead from 9:30

1 to 10:00 p.m.?

2 A That's correct.

3 MS. RING: Judge, I'd move to admit Defense
4 Exhibit N.

5 THE COURT: Objection or voir dire?

6 MR. KELLNER: No objection.

7 THE COURT: N will be admitted.

8 Q (By Ms. Ring) We -- when Agent Grusing was on the
9 stand the subject of a GPS being put on Michael Clark's
10 vehicle came up?

11 A Yes.

12 Q And Agent Grusing was kind of deferring to you and
13 the Boulder Police Department as that actually being a
14 decision that you made?

15 A Correct.

16 Q And in fact, you do know that there was a GPS
17 device put on Michael Clark's vehicle?

18 A Correct.

19 Q It was placed on his vehicle during the April 15,
20 2011 interview?

21 A It was sometime around then. It was before --
22 actually it was before that interview.

23 Q Before that interview?

24 A Yeah, shortly before it.

25 Q And it remained on his vehicle until May 24th of

1 2011?

2 A That's correct.

3 Q Also as part of that GPS tracking device it was
4 noted that after the April 15, 2011 interview that Mr. Clark
5 appeared to have made some stops after leaving that
6 interview?

7 A Correct.

8 Q And one of the stops that he made was at a -- some
9 City Market gas station?

10 A He made four stops, but that -- yeah, that was one
11 of the places.

12 Q And so one of the things you did was to try to
13 find if there were any public telephones at any of the
14 places where he stopped, those four places that he stopped
15 after the interview?

16 A Correct.

17 Q And so you went and got records from any of the
18 pay phones that were at any of the places where he stopped
19 to try to determine if he had made any phone calls?

20 A That's correct.

21 Q And based on your search there weren't any phone
22 calls made from any of those pay phones during that time
23 frame?

24 A Well, I think the only one -- there was only one
25 that I think of the four locations that I was able to get

1 any sort of records from, if that. So but no, there weren't
2 any phone calls that I could match up with that time frame.

3 Q And if there had been any other information from
4 having the GPS on Mr. Clark's car that was relevant to the
5 investigation you would have done a report about that and
6 that would have been part of your efforts?

7 A And I did.

8 Q You also as part of your investigation had a wire
9 tap placed on any known phones of Mr. Clark in this 2011
10 time frame?

11 A That's correct.

12 Q You became aware of an expert who had a new
13 technique to do fingerprints on shell casings or any kind of
14 bullet ammunition, a Dr. Bond?

15 A Yes, Dr. John Bond. But he was out of North
16 Hamptonshire, England. And that was actually done in 2008 I
17 think.

18 Q Okay. So that wasn't at your request or it was at
19 your --

20 A It was at my request. It was an article that I
21 had read in a forensic magazine about that technique that he
22 could attempt to raise -- he thought he could raise latent
23 prints off of shell casings even if they had been wiped down
24 based on acids on the skin. It was a new technique. But
25 yeah, we -- I gave that a shot.

1 Q So you had shell casings that you thought based on
2 your conversation with Dr. Bond it might be worth while for
3 him to examine?

4 A Sure.

5 Q And he did examine those for you?

6 A That's correct.

7 Q And he identified some possible ridge detail on
8 one of the items?

9 A Well, that was questionable. Our forensic -- our
10 fingerprint examiner Shelli Friesen looked at those, and she
11 said she didn't see any ridge detail. He thought he did.
12 The bottom line was that there wasn't enough ridge detail to
13 even use as a comparison, let alone put into a -- what's
14 called an AFIS database.

15 Q We what seems like quite a long time ago heard
16 from Kristen Grisham who testified?

17 A Correct.

18 Q And we heard when Kristen Grisham was testifying
19 that you had actually gone to New Jersey to interview her?

20 A That's correct.

21 Q And do you remember that actually in your report
22 it says you interviewed her in September of 2011?

23 A That's -- that's -- I don't think that's correct.
24 I think that was the -- actually --

25 Q It happened in 2010?

1 A 2010, yeah. It was in the fall of 2010. So I may
2 have just put the wrong year down there.

3 Q Because we know there was a second interview done
4 of Kristen Grisham here in Colorado, and that was a
5 subsequent interview?

6 A Right. And I think that was in the summer of
7 2011.

8 Q Right.

9 So again, you go to New Jersey to interview
10 Kristen Grisham?

11 A That's correct.

12 Q And as part of that interview you do tell
13 Ms. Grisham that you can talk to the DA's and there's been a
14 discussion about granting her immunity if she provides
15 information regarding Michael Clark and her father's murder?

16 A Right. I mean, I think what I told her was -- is
17 that look, if this ends up going to any sort of trial that
18 she is -- there's a good possibility she would be an
19 alternate suspect in this case. Based on the initial
20 investigation I didn't believe that, but that could be a
21 possibility.

22 Q And your recollection just like Ms. Grisham
23 testified earlier was that when you talked about the
24 immunity she wasn't interested in that and didn't follow up
25 on that in any way?

1 A Yes.

2 Q She has always maintained that she didn't have
3 anything to do with her father's murder?

4 A And I've spoke with her probably four times, yes.

5 Q Now, we talked about the fact that then you
6 interviewed Ms. Grisham again in person in August of 2011
7 when she flew out to Colorado to meet with you?

8 A That's correct.

9 Q And at that time you actually had a wire tap
10 placed on Kristen Grisham's cell phone?

11 A That's correct.

12 Q And again, the result of those wire taps was that
13 you didn't get any additional information that was helpful
14 in moving this investigation forward?

15 A Well, I wouldn't say it wasn't helpful. The
16 information that we gleaned from that was that she wasn't
17 concerned about the investigation, that she understood what
18 they had to do. And there certainly wasn't any concern on
19 her part that she was being looked at or that she could have
20 done this or been involved in this.

21 Q One of the things that you tried to do as the lead
22 investigator in this case is, you know, cross as many T's
23 and dot as many I's you could?

24 A Yes.

25 Q Talk to as many people who might have relevant

1 information to your investigation of Michael Clark as the
2 suspect of Marty Grisham's murder as you could?

3 A That's correct.

4 Q And any other possible leads?

5 A Correct.

6 Q So one of the things you made sure was that
7 anybody that you knew who would have seen Michael Clark
8 anytime right after November 1, 1994 when Michael Clark
9 was -- I'm sorry, when Marty Grisham was murdered, you tried
10 to make sure that as many people as possible who had been
11 around Michael Clark at that time were interviewed?

12 A Interviewed or re-interviewed, yes. Most of the
13 time it was re-interviewed.

14 Q So that includes, you know, Allyson Hackman who we
15 heard from yesterday?

16 A That's correct.

17 Q That includes Kristin Baulsir Buchanan who we
18 heard from yesterday?

19 A Yes.

20 Q Allyson Hackman's mother Wendy Ahrendt?

21 A Yes.

22 Q Bob Mann, the person that Michael Clark was living
23 with at the time?

24 A That's correct.

25 Q People that Michael Clark had been living with

1 just prior to living with Bob Mann?

2 A Yes.

3 Q Jamie Uhler?

4 A That's correct. Actually Jamie Uhler we
5 weren't -- I wasn't able to interview him. He did not want
6 to be interviewed. He -- I was contacted by his attorney,
7 Maximon I think the guy's name was, and said he's not
8 talking to you.

9 Q But he'd already been interviewed?

10 A He'd been interviewed back in 1994, yes.

11 Q And again, just to answer my question, anybody
12 that you could tell from the investigation who had been
13 around Michael Clark right after Marty Grisham's murder you
14 tried to contact and interview or make sure they'd been
15 interviewed previously?

16 A That's correct.

17 Q We also heard from Dion Moore about Vanessa and
18 Summer being in the car with him and Jamie Uhler and Michael
19 Clark on November 1, 1994?

20 A That's correct.

21 Q Prior to Michael Clark and Jamie Uhler going to
22 the soccer game?

23 A That's correct.

24 Q And about Vanessa saying something about seeing
25 the gun and being upset?

1 MR. KELLNER: Objection, Your Honor.

2 THE COURT: The objection is?

3 MR. KELLNER: Hearsay.

4 THE COURT: Your response?

5 MS. RING: I'm not offering it for the truth of
6 the matter asserted. I'm talking about what we heard from
7 Dion Moore and what action Detective Heidel took in response
8 to knowing that information.

9 MR. KELLNER: Your Honor, can we approach?

10 THE COURT: Overruled at this point.

11 Q (By Ms. Ring) So one of the things that you did is
12 you went and tried to find Summer and Vanessa?

13 A That's correct.

14 Q You were able to find them?

15 A Yes.

16 Q You were able to talk to them?

17 A Yes.

18 Q And they didn't recall anything that would be
19 helpful to you in terms of what Dion Moore told us?

20 A Well --

21 MS. RING: Judge, can we approach?

22 THE COURT: Sure.

23 (The following proceedings occurred at the bench
24 out of the hearing of the jury.)

25 MS. RING: I just want to be careful because I

1 purposely did not elicit any hearsay. Depending on how
2 Detective Heidel responds to my question I think it might
3 open the door to me to asking further questions. So I just
4 am trying to be on the safe side.

5 THE COURT: You don't get to open the door for
6 yourself.

7 MS. RING: I know.

8 THE COURT: Okay. It's cross-examination. If
9 you're worried about the question drawing some response
10 that's going to be unfavorable, unanticipated, I suggest
11 that you rephrase your question. If you want to stand by
12 the question, then you're going to have to live with the
13 answer.

14 MR. KELLNER: And I was objecting to the question
15 and the form it because it calls for a hearsay response.

16 THE COURT: Well, the question that's on the table
17 was and they didn't recall anything that would be helpful to
18 you in terms of what Dion Moore told us. The detective had
19 a one word answer it was well. And then Ms. Ring asked to
20 approach. So the question is not improper and a response of
21 answering another question not problematic. Am I missing
22 something?

23 MS. RING: I was trying to ask a question that
24 didn't elicit hearsay. My concern was what Detective Heidel
25 is going to say maybe brought out statements -- not

1 statements I'm concerned about, but that actually would
2 elicit the hearsay that I don't think I'm allowed to elicit.

3 THE COURT: Okay. Do you want to rephrase the
4 question? Do you want me to -- it's a yes or no answer.

5 MS. RING: Sure.

6 THE COURT: Up to you. You can run your
7 examination however you want. I mean, I agree that the
8 statements involving those women, out-of-court statements by
9 either of those women are likely inadmissible hearsay. And
10 I think you recognize that, and I think you're trying to --
11 I think that's your concern.

12 MR. KELLNER: It is, Judge, yes.

13 THE COURT: So --

14 MS. RING: I'm trying to come up with a yes or no
15 question. What's coming to my head I think that phrasing is
16 closer to calling for hearsay. And I'm trying to avoid
17 doing that. If anybody has expression of a better
18 question -- I mean suggestion.

19 THE COURT: Well, not -- I'm certainly not
20 mandating the question that you have to answer, but you
21 could say --

22 MS. RING: Can I ask they didn't recall the
23 details as Dion Moore recalled them?

24 THE COURT: You can.

25 MR. KELLNER: Judge, that's a way of essentially

1 eliciting a statement without putting quotes around the
2 statement. It still calls for inadmissible hearsay.

3 And she didn't confront Dion Moore about
4 statements of these people such that it would be admissible
5 under a different theory. I think it would be a more
6 appropriate question for her to say did you develop any
7 leads based on your conversation with them. That's a yes or
8 no question and it doesn't call for hearsay.

9 THE COURT: What you're asking about is whether or
10 not he received any information from either of those two
11 female witnesses that furthered his investigation or upon
12 which he conducted further investigative activity? Did they
13 give him anything in response? That's essentially what
14 you're trying to get to; right?

15 MS. RING: I -- I think I'll rephrase it and I'll
16 do it quicker.

17 THE COURT: Okay.

18 (The following proceedings occurred in open
19 court.)

20 THE COURT: You may continue, Ms. Ring.

21 MS. RING: Thank you.

22 Q (By Ms. Ring) I'm going to rephrase my question,
23 Detective Heidel.

24 You did tell us that you were able to talk to both
25 Summer and Vanessa that Dion Moore had been referring to?

1 A Yes.

2 Q And you were able to ask them questions that you
3 wanted to pursuant to your investigation?

4 A That's correct.

5 Q I asked you previously about interviewing or
6 following up on any individuals that would have been around
7 Michael Clark around November 1, 1994 and the days
8 following?

9 A Yes.

10 Q One of the other things that was done previous to
11 your taking over the investigation was to talk to other
12 individuals that were at the jail at the same time that
13 Michael Clark was in the jail?

14 A Are you saying I did that or somebody previously?

15 Q Somebody previously did that.

16 A I think somebody previously did that, yes.

17 Q And I believe it was yesterday, although I may be
18 getting my days mixed up, at some point a deputy from the
19 sheriff's department testified and an exhibit was entered
20 that showed all the individuals who were in the Boulder
21 County Jail at the same time as Michael Clark?

22 A Yes.

23 Q Do you remember that?

24 A Yes.

25 Q So the individuals -- the officers that were in

1 charge of investigating this case back in 1994 had that list
2 available to them of all the people that were in the jail at
3 the same time Michael Clark was in the jail?

4 A Yes. I think it was narrowed down to the areas
5 where he was at the time --

6 Q Okay.

7 A -- is my recollection.

8 Q And that would have been -- we heard about the
9 intake module and general population?

10 A That's correct.

11 Q And so those lists would have let the individuals
12 investigating back in 1994 and even you today know who was
13 in the jail at the same time as Michael Clark?

14 A That's correct.

15 Q We heard in Michael Clark's interview in 1994 that
16 one of the things that was done during that interview was
17 that a GSR kit was -- I'm not sure actually how you describe
18 it. When Michael Clark was in that interview there's this
19 discussion about gunshot residue and the sticky substance on
20 his hand to get the evidence for a kit that could be
21 examined?

22 A That's correct.

23 Q And a similar thing was done with Barbara Burger
24 now Barbara Swider?

25 A That's correct.

1 Q And also from Marty Grisham during the autopsy?

2 A That's correct.

3 Q And when you were reviewing everything in the case
4 file and all of the evidence when you took over the
5 investigation you were able to locate the GSR kit for
6 Barbara Burger?

7 A Correct.

8 Q You were able to locate the GSR kit for Marty
9 Grisham?

10 A That's correct.

11 Q But you were never able to locate the GSR kit for
12 Michael Clark?

13 A That's correct.

14 Q And nothing in the records you examined would
15 indicate that the GSR kit taken from Michael Clark in 1994
16 was ever sent to CBI or anywhere else for examination?

17 A That's correct.

18 Q And as you sit here today you can't tell us what
19 happened to that GSR kit?

20 A No, I cannot.

21 Q In addition to interviewing individuals who were
22 around Michael Clark right around the time frame of Marty
23 Grisham's murder November 1st and those following days, you
24 also tried to interview anybody else you could think of who
25 had any relation to Michael Clark, including his family

1 members, either you did or you had other people interview
2 his sister?

3 A Oh, yes. Yes.

4 Q You told us earlier that you actually spoke with
5 Michael Clark's in-laws?

6 A Yeah, I spoke with John Clark, Michael Clark's
7 dad, Coleene I believe it is is his mother, Bob Taylor and
8 Marilyn Taylor who are his -- the in-laws that he's living
9 with.

10 Q So in terms of resources -- and I asked you
11 earlier at the beginning of my cross-examination that as the
12 lead investigator it was your decision about what leads to
13 follow up on?

14 A Yes.

15 Q About what people to interview?

16 A That's correct.

17 Q About what resources to access as part of your
18 investigation?

19 A That's correct.

20 Q You told us you were actually able to send
21 evidence to a Dr. Bond in England?

22 A Yes.

23 Q So the things that you wanted to do as part of
24 your investigation you were able to do?

25 A Yes.

1 MS. RING: Thank you, Detective Heidel. No
2 further questions.

3 THE COURT: Hold on. Redirect, Mr. Kellner.

4 REDIRECT EXAMINATION

5 BY MR. KELLNER:

6 Q Detective Heidel, first I want to talk to you
7 about the wire tap you did on Kristen Grisham's phone?

8 A Yes.

9 Q You said something about how you were basically
10 following up on all possible leads?

11 A Yes.

12 Q So you -- recognizing that there had been this
13 investigation into Kristen back in 1994, why did you think
14 it was necessary to still follow up on a lead by getting a
15 wire tap on her phone?

16 A Well, to finally include or exclude her from this
17 investigation.

18 One of the things that -- the questions that came
19 back -- came up in 1994 was whether she knew about the theft
20 of the checks and if that somehow could have been tied into
21 the murder of Marty Grisham.

22 Q To be clear, you didn't suspect her of actually
23 shooting and killing her father?

24 A Oh, no.

25 Q But having been involved with the defendant and

1 stealing checks?

2 A Well, because, sure, she had given him the key
3 ostensibly to watch the cat.

4 Q So even though this had been thoroughly
5 investigated in 1994 you continued to track down all leads?

6 A Absolutely.

7 Q And she asked you some questions about immunity or
8 talking to Kristen about immunity. At any point did she
9 express any interest in wanting some kind of deal?

10 A None at all. She said I understand what you're
11 saying. I -- I don't -- she said I'll cooperate. She even
12 flew out to Colorado to speak with us. She met with me
13 freely. Anytime that I needed to meet with her or speak
14 with her on the phone she was completely cooperative.

15 Q I want to talk to you about the GPS unit on the
16 defendant's car.

17 A Yes.

18 Q All right. Ms. Ring had asked you how he had gone
19 to four different locations after -- immediately after the
20 interview with Special Agent Grusing and Agent Amon?

21 A That's correct.

22 Q Where did he go, what four places?

23 A Well, first of all, he left at 3:00 which was
24 based on watching his -- his regular schedule was out of the
25 ordinary. He didn't get off until I think 5:00, and he left

1 at 3:00, just minutes I think after that interview, drove
2 down the street, parked like behind where there was a -- GPS
3 isn't exact. We're just looking at the maps from it.

4 But it looked like where there was a Grease
5 Monkey, stopped there for 15 or 20 minutes, drove up the
6 street where there was another gas station which would have
7 been towards -- if you know Silverthorne at all it would
8 have been south, so towards I-70. Stopped at another gas
9 station there for a short period of time, stopped at another
10 gas station, then right across the street for a short period
11 of time and then drove up to the gas station located at the
12 City Market just up the street from that.

13 So it was out of the ordinary in the sense it was
14 the first time we had seen -- I had seen that sort of
15 movement from him. It was definitely different.

16 Q What was the purpose of you putting that GPS unit
17 on his car to begin with?

18 A Well, the purpose was -- and again, beginning and
19 end of this is trying to find that gun. And so the thought
20 was is that hey, if these ATF and FBI agent come and talk
21 with the suspect about -- Mr. Clark about the gun, if he did
22 stash it someplace, if he hid it someplace where nobody
23 could find it, then maybe he'd be concerned about somebody
24 finding that gun and that he would go and either remove it,
25 take it someplace else, run it through a meat grinder, metal

1 grinder, something like that, do something to make sure that
2 that gun was actually hidden.

3 And so what we did with the GPS unit was we could
4 not watch him -- because of manpower we couldn't watch him
5 24 hours obviously. So we -- based on the vehicle that we
6 knew he mostly used we put the GPS unit on that vehicle.

7 And then what we did was we put up what's called a
8 geo fence. And the geo fence will alarm us, it would page
9 me if he went past a certain area. And this was all just
10 guesswork really, but it was just a lead that we wanted to
11 follow up on.

12 And the geo fence started at the Eisenhower tunnel
13 because based on the initial interview and initial
14 investigation we thought well, if he hid this gun it would
15 be on the front -- it was on the front range someplace, so
16 on this side of the mountains. So if he passed that geo
17 fence at some time it would have alerted us, then we would
18 have got people out there to follow up. And that lead
19 didn't follow out.

20 Q Let me ask you about the wire tap on the
21 defendant's phone.

22 A Yes.

23 Q Did you have, you know, a sense of whether or not
24 you felt like this would have been a successful lead or not?

25 A Well, originally I thought possibly.

1 Q Why is that?

2 A Well, because sometimes when you approach suspects
3 about crimes that they've committed, the first thing they
4 want to do is get on the phone and start talking to people
5 about it.

6 You might -- I don't think it would have been the
7 case in this case, but sometimes you'll find co-conspirators
8 that they call and say hey, they're talking about this crime
9 that happened way back when or they'll talk to family
10 members and say hey, I was just approached by the FBI about
11 this deal that happened way back when, you know, I need to
12 talk to you about it, we need to be prepared. And so that
13 was why we tried the wire tap.

14 Q Now -- and you said initially your thought was
15 that that might happen, there might be some phone
16 conversations.

17 Did there come a time when you became concerned
18 that there would be no leads developed from this wire tap?

19 A Yeah. Well, part of to sort of initiate maybe
20 conversation was we went and started contacting family
21 members to say that we were investigating this case against
22 Michael Clark and thought that might begin some
23 conversation, because I had assumed that Michael Clark had
24 already told them.

25 Well, the first call that I made -- first stop

1 that I made after the wire was up and running was to
2 Mr. John Clark's residence in Loveland, so Michael's dad.
3 And myself and Agent Amon had a conversation with him on the
4 front porch of his residence.

5 During that conversation what I found out was,
6 first of all, is that Mr. Clark, John Clark --

7 MS. RING: Judge, I'm going to object to hearsay.

8 MR. KELLNER: Going to statements of the defendant
9 or statements not made by the defendant.

10 THE COURT: Approach, would you.

11 (The following proceedings occurred at the bench
12 out of the hearing of the jury.)

13 THE COURT: Statements of John Clark to this
14 investigator would be hearsay. What's the purpose for
15 offering it?

16 MR. KELLNER: Well, she was talking about his
17 investigative actions all throughout the direct and
18 cross-examination.

19 The purpose of asking this question is to elicit
20 whether or not the defendant had approached his family and
21 told them that he was being contacted by the ATF and the
22 FBI.

23 I'm not seeking to offer further statements of
24 people for the truth of the matter asserted. Essentially
25 what I believe the testimony will come out being, Judge, is

1 that they were -- there were conversations on the wire tap
2 indicating that they knew they were being tapped.

3 THE COURT: Well, isn't -- aren't you offering
4 that for the truth of the matter?

5 MR. KELLNER: With respect to conversation
6 Detective Heidel had with the in-laws of the defendant where
7 they asked him if they were being tapped. And Detective
8 Heidel gave them an answer which prompted the in-law to say
9 okay, so essentially I understand that our phones are being
10 tapped, trying to establish essentially where that lead went
11 or why it didn't happen.

12 THE COURT: The question was did you have reason
13 to believe it would not be --

14 MR. BRACKLEY: And he said no. And I think if the
15 proper follow-up is why and that he heard them this is on at
16 least three occasions saying the phones were tapped -- and I
17 think, you know, why did you -- you know, another question
18 why did you stop, why did you take the wire tap down,
19 because they were talking about the fact that they were
20 being wire tapped.

21 I mean, it goes -- it goes to state of mind on
22 what the people to -- but his state of mind, his
23 investigator actions. It explains why he did what he did.

24 THE COURT: I mean, how does that go to prove any
25 material fact that's at issue in this case?

1 MR. BRACKLEY: What -- what the inference is
2 asking about it that you wire tapped his phone and you got
3 nothing. The fact is they got a lot. They got a lot
4 because they weren't talking about it because they said the
5 phones were being wire tapped, don't talk about it. That's
6 a lot in the context of a case like this.

7 But the question was asked to infer if you wire
8 tapped phones you got nothing. Now to ask him why didn't
9 you get anything, why did you stop the wire tap, that's the
10 inference that was -- that's made on opening statement.
11 That's the inference that we've made in closing. We're
12 entitled to ask why you stopped the wire tap.

13 MS. RING: That's what they're talking about.
14 First of all, what he was just questioning about was John
15 Clark, who is my client's father. Now you're talking about
16 the in-laws, which is a different witness. It's the in-laws
17 that say is our phone is being tapped. That's clearly
18 hearsay.

19 They don't have any statements of my client saying
20 is my phone being tapped. It's the phone -- he lives with
21 his in-laws where his in-laws are saying -- and so -- and
22 that's after Detective Heidel goes and interviews them about
23 this case. So the timing is -- it's calling for hearsay.
24 It's not my client's statements.

25 MR. BRACKLEY: Judge, it's the in-laws' phone.

1 It's that person's phone that was tapped who was asking him
2 if it's been wire tapped and was telling the rest of the
3 family the phone is wire tapped, the in-laws' phone. So
4 it's not a separate phone. That's the subject phone.

5 THE COURT: Well, at best that goes to prove why
6 the in-laws wouldn't be talking about it. It does not go to
7 whether or not the defendant made any statements or refused
8 to talk about any of the statements.

9 MR. BRACKLEY: Certainly it does go as to whether
10 or not there was any. It certainly does go as to why they
11 would discontinue the wire tap when they did.

12 Because don't forget, his testimony was I talked
13 to the family to see if -- whether there would be
14 conversation among the family, i.e. I spoke to Michael, this
15 is what he said to me. Instead they said the phones were
16 being wire tapped, don't say anything.

17 THE COURT: Why is it material when he terminated
18 the wire tap? Why?

19 MR. BRACKLEY: Why did they ask why is the wire
20 tap material to show that they didn't get anything. And
21 that's not true. And we should be we're entitled to show
22 why they didn't get anything, because they knew their phones
23 were being tapped.

24 THE COURT: I disagree.

25 MR. BRACKLEY: I would ask to strike the record as

1 to anything about a wire tap. We should be able to rebut
2 questions asked on cross-examination as to --

3 THE COURT: Well, first of all, it's got to be
4 admissible evidence. That means it's got to be relevant.
5 Second of all, it's got to be with non-hearsay. So I
6 respectfully disagree with your analysis.

7 MR. BRACKLEY: It's coming in as to why they took
8 the wire tap down.

9 THE COURT: And that fact is not -- it doesn't go
10 to any material issue in this case.

11 MR. BRACKLEY: The fact that he had -- he had
12 reason to believe the people know they were being listened
13 to is not material?

14 THE COURT: It's not the defendant. Who cares if
15 it's his father or his in-laws?

16 MR. BRACKLEY: It's the defendant's phone. And
17 it's based on information -- it's based on information that
18 they had put -- it's the defendant's phone. And it's based
19 on information from conversations that they expected to have
20 from the defendant.

21 THE COURT: I disagree. I'm going to sustain the
22 objection.

23 MR. KELLNER: Judge, I think we completed two
24 issues or --

25 THE COURT: Well, or three.

1 MR. KELLNER: The first one was with respect to my
2 question to why he approached the defendant's father and why
3 he didn't expect anything to happen on the wire tap.

4 I think it is appropriate non-hearsay for him to
5 elicit well, the defendant had not told him anything about
6 this case, and so that's another reason why he didn't expect
7 there to be the chatter back and forth. Now that's with
8 respect to what the defendant did or did not say.

9 THE COURT: You're talking about the defendant has
10 a talk with his family members or his father or his in-laws
11 about the case to include the detective has no information
12 about that so he wouldn't have followed up with the wire tap
13 or continued with the wire tap?

14 MR. KELLNER: Essentially, yes, sir.

15 MR. BRACKLEY: Also knew they were being wire
16 tapped.

17 THE COURT: Well, I'm sorry, I'm not seeing -- if
18 there's some relevant purpose here I'm not seeing it. And
19 even if there is some relevant purpose here, on a 403 basis
20 this is going to confuse or completely inflate the issue
21 beyond any legitimate purpose for any --

22 MR. BRACKLEY: Whether they kept the wire tap up
23 for three days or three years is not material, why he
24 stopped the wire tap isn't material?

25 MR. KELLNER: With respect to specific statements

1 that the defendant made in those wire taps he has listened
2 to, I can't ask about statements --

3 THE COURT: Okay. Then --

4 MR. KELLNER: -- where he doesn't want to talk
5 about the investigation with his family members?

6 THE COURT: Okay. That's a different issue.
7 That's the defendant's own statement relative to the
8 investigation and his knowledge of the investigation. Those
9 are admissible statements of a party opponent. They have
10 more relevance, although not a great deal of relevance, than
11 statements of the family and relatives. Those -- those
12 questions would be proper on redirect. But in terms of what
13 father or in-laws or anybody else other than the defendant
14 say, they're not admissible.

15 MR. BRACKLEY: Judge, we presented this case -- we
16 didn't present anything to do with the wire tap. But there
17 was -- it was raised on cross-examination in an effort to
18 show that the police got nothing out of this wire tap, but
19 that's not true. So it has become relevant. It has become
20 material.

21 And it's not being offered for the truth. It's
22 being offered as to why the police didn't get a confession
23 or a statement or find the gun, because they knew they were
24 being wire tapped. I think that's wholly material and
25 relevant based on the cross-examination.

1 THE COURT: That's why the defendant's statements
2 made on the wire tap would be relevant and admissible. But
3 that doesn't mean that the other statements made by the
4 father or other relatives are admissible.

5 So you can ask about the father's statements --
6 I'm sorry, you can ask about the defendant's statements on
7 the wire tap to the extent that they're --

8 MR. BRACKLEY: But certainly if the father-in-law
9 got on the phone and said, you know, I talked to Mike, I
10 said I was going to throw him out unless he told me where
11 the gun was and he told me he dumped the gun in the Boulder
12 Reservoir, that would be material. And it's the -- the fact
13 the father-in-law -- well, it would explain why they went
14 and looked in the Boulder Reservoir.

15 THE COURT: It might.

16 MR. BRACKLEY: It would explain why they took
17 another step.

18 But the fact that the father-in-law said three
19 times about the wire tap, we're being wire tapped explains
20 why they then went and did what they did, just like going to
21 look in the Boulder Reservoir. But I think that limiting
22 question is proper as to why they then did he what they did.

23 THE COURT: I disagree.

24 (The following proceedings occurred in open
25 court.)

1 THE COURT: The objection is sustained.

2 Q (By Mr. Kellner) Subject to our conversation I'm
3 going to ask a more pointed question. Based on your review
4 of the wire tap did you learn that the defendant didn't want
5 to talk about contact by the FBI and contact by ATF and the
6 Boulder Police Department investigation, did not want to
7 talk about those things with his family members?

8 A Yes.

9 Q And is that why you discontinued your wire tap?

10 A Yes.

11 Q She talked to you a little bit about the GSR kit
12 from 1994?

13 A Yes.

14 Q Which you had previously said -- we've heard
15 testimony that was used as a ruse?

16 A Yes.

17 Q And back in 1994 you were an officer with the
18 Boulder Police Department?

19 A Yes, I was.

20 Q What was your training back in 1994 with respect
21 to the effectiveness of a GSR kit some two days after
22 someone allegedly shot a gun?

23 A It would have been worthless.

24 Q And is that why this GSR kit was used as a ruse in
25 this case?

1 A I believe so.

2 Q Earlier Ms. Ring showed you a newspaper article,
3 and I actually substituted our copy and it's been admitted
4 as a defense exhibit?

5 A Yes.

6 Q And she also showed you a TV guide print-out?

7 A Yes.

8 Q You actually pulled those things, researched
9 those, the TV guide and those articles, and provided them in
10 discovery; is that right?

11 A Yes, those are in discovery.

12 Q With respect to that article she asked you some
13 questions about what was contained, what was not?

14 A Yes.

15 Q And to be clear, is there anything in those
16 articles that you reviewed, specifically the one that's been
17 admitted as evidence, about the defendant showing a 9mm
18 pistol to his Marine recruiter?

19 A No.

20 Q There's nothing in there about the defendant
21 having --

22 MS. RING: Judge, I think this was asked and
23 answered.

24 THE COURT: Overruled. It's -- it was asked and
25 answered but in a different context not specific to this

1 particular exhibit which is M.

2 Q (By Mr. Kellner) There was nothing in that exhibit
3 or in that article about the defendant having a Ford car?

4 A No.

5 Q Or the defendant having been to Pueblo?

6 A No.

7 Q There was nothing in there at all in that exhibit
8 about the defendant having been arrested on a stolen
9 motorcycle?

10 A No.

11 Q And that's the same for all of the newspaper
12 articles that you've reviewed?

13 A Correct.

14 Q You sent those shell casings to a Dr. John Bond in
15 England; right?

16 A Yes.

17 Q Why would you do that? I mean, it had already
18 been evaluated for ridge detail, latent prints by Ted Ritter
19 back in 1994.

20 A Because this was a different technique, and it was
21 different than the type of technique used by CBI. And it
22 was experimental, but it was a shot.

23 Q And it's just another lead that you were trying to
24 follow up in this case?

25 A Absolutely.

1 Q Ms. Ring asked you some questions about David
2 Berring and having shown photo line-ups?

3 A That's correct.

4 Q Now, she asked you whether or not Mr. Berring had
5 been able to identify the defendant in the photo line-up?

6 A That's correct.

7 Q And Mr. Moore, Dion Moore -- I'm sorry, David
8 Berring previously told you that the only person that he had
9 contact with was a black African-American male who solicited
10 him to buy the guns?

11 A Yes. That was the only person that he remembered.

12 Q And when you were showing him a photo line-up that
13 had Dion Moore's picture in it, what's the purpose of a
14 photo line-up? I mean, are you trying to find people that
15 look similar to Dion Moore?

16 A Yes.

17 Q And isn't it true that Mr. Berring said actually
18 he identified that person number 4 between 70 and
19 80 percent?

20 A Yes.

21 Q He wasn't entirely sure about that?

22 A That's correct.

23 Q But when you talked to David Berring he was able
24 to -- when you showed him the photocopy of the pawn slips he
25 was able to identify his signature?

1 A Yeah, right away.

2 Q And his address back in 1994?

3 A Yes.

4 Q And he remembered purchasing two 9mm guns for an
5 African-American male?

6 A He did.

7 Q He remembered purchasing those two 9mm guns for an
8 African-American male who had ties to Chicago?

9 A That's correct.

10 Q He was able to remember where he was picked up by
11 Dion Moore with respect to where he was living?

12 A Yes, off of Albrook.

13 Q I'm sorry, an African-American male I should say?

14 A Correct.

15 Q And that is actually consistent with what Dion
16 Moore had said as to where he picked up the person on that
17 day --

18 A That is --

19 Q -- to purchase those guns?

20 A That is correct.

21 Q David Berring remembered that it was the ABC Pawn
22 Shop?

23 A Yes, he did.

24 Q And that is the same place that Dion Moore had
25 previously said the guns were purchased?

1 A That's correct.

2 Q And Ms. Ring had asked you some questions about
3 various statements that Dion Moore had made over time being
4 inconsistent and consistent. You're familiar with the
5 October 29, 1995 interview with Dion Moore?

6 A Yes.

7 Q Based on your review of this entire case file?

8 A Yes.

9 Q And Dion Moore said that the guns that he
10 purchased, specifically the gun he purchased for the
11 defendant, Michael Clark, was before Halloween?

12 A That's correct.

13 Q He said that he gave Michael Clark one of the
14 Bryco 9mm's?

15 A That's correct.

16 Q That the 9mm gun he had given to Michael Clark was
17 a full size Bryco 9mm?

18 A That's correct.

19 Q And Dion also said that the gun that he kept was
20 the Bryco 9mm compact?

21 A Yes, that he, Dion Moore, kept was the compact.

22 Q And the model 58 is the compact version of the
23 Bryco-Jennings --

24 A That's correct.

25 Q -- 9mm?

1 A That's correct.

2 Q The full size version is the model 59?

3 A That's correct.

4 Q And you said that you ran these serial numbers in
5 a database to see whether or not the guns had ever been
6 found?

7 A That's correct.

8 Q And the serial numbers you ran in the database,
9 one was associated with a Bryco 59?

10 A That's correct.

11 Q And the other serial number the ran in the
12 database was associated with a Bryco model 58?

13 A That's correct.

14 MR. KELLNER: Thank you, Detective. No further
15 questions.

16 THE COURT: Recross, Ms. Ring?

17 RE CROSS-EXAMINATION

18 BY MS. RING:

19 Q Detective, other than the Sgt. Trujillo hit on the
20 serial numbers, neither serial number ever came up in the
21 search in the database?

22 A That's correct.

23 MS. RING: Nothing further.

24 THE COURT: All right. Detective, you can step
25 down.

1 Would the People call their next witness?

2 MR. BRACKLEY: People rest, Your Honor.

3 THE COURT: All right. Ladies and gentlemen of
4 the jury, the People have completed the presentation of
5 their case in chief and they have rested.

6 At this time I'm going to excuse you. I need to
7 take up some matters with the attorneys outside of your
8 presence. I anticipate this is going to take 15 or 20
9 minutes. I will give you further instructions as to the
10 length of the recess after I've been able to talk with
11 counsel.

12 Remember the admonition that I've given you
13 previously. I'm aware that it's a couple minutes before
14 noon. But remember the admonition that I've given you
15 previously.

16 Don't talk to anybody about this case by any
17 means, including the other jurors. You've heard that the
18 People have rested now, but that doesn't mean that you've
19 heard all the evidence. And it may be tempting that you
20 start talking about or formulating an opinion on the case.
21 Don't do that please.

22 Don't talk to anyone about the case. Don't do any
23 outside research. Don't do any independent investigation.
24 And then I'll call you back in here and give you further
25 instructions as soon as I can.

1 (The jury left the courtroom.)

2 THE COURT: Record should reflect that the jury
3 has left the courtroom.

4 People have rested. On behalf of the defendant
5 are there any motions?

6 MS. MILFELD: Judge, at this time we would make a
7 motion for judgment of acquittal based on the record.

8 THE COURT: The standard is from *People v.*
9 *Bennett*, 515 P.2d 446, Colorado Supreme Court case from
10 1973. That standard is whether the relevant evidence, both
11 direct and circumstantial, when viewed as a whole and in the
12 light most favorable to the prosecution is substantial and
13 sufficient to support a conclusion by a reasonable mind that
14 the defendant is guilty of the charge beyond a reasonable
15 doubt.

16 The Court would find based on the evidence
17 presented in the People's case in chief that the evidence is
18 substantial and sufficient to support a conclusion by a
19 reasonable mind that the defendant is guilty of the charge
20 beyond a reasonable doubt when the evidence is viewed as a
21 whole and in the light most favorable to the prosecution.
22 The defendant's motion for judgment of acquittal will
23 respectfully be denied.

24 Mr. Clark, I need to talk to you about your right
25 to testify and your right to remain silent.

1 You have an absolute right to testify on your own
2 behalf in this trial. If you want to testify, no one can
3 prevent you from doing so, not your attorneys, not the
4 district attorney, not law enforcement, not me. It is your
5 right. If you want to testify, you will be given that
6 opportunity.

7 If you do testify, the prosecution will be allowed
8 to cross-examine you. If you have been convicted of a
9 felony, the prosecutor will be able to ask you about it and
10 then the jury would find out about it.

11 If a felony conviction is disclosed to the jury,
12 the jury would be instructed to consider that only as it
13 bears upon your credibility.

14 In deciding whether or not to testify you should
15 listen to the advice of your attorneys and other people that
16 you trust. But ultimately the decision is yours. Do you
17 understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: At the same time you also have the
20 right to remain silent and not to testify. And if you
21 choose to exercise your right to remain silent, no one can
22 compel you to testify, not your attorneys, not the district
23 attorney, not law enforcement, not me. If you choose to
24 remain silent, I will respect that choice and you cannot be
25 required to testify.

1 If you choose to not testify, the jury can be
2 instructed that they may not hold that decision against you
3 or consider it for any purpose.

4 Again, regarding your decision to remain silent
5 you should consider the advice of your attorneys and any
6 other people that you trust. Ultimately it is your
7 decision, and I will respect your decision. If you choose
8 to remain silent no one will compel you to testify.

9 Do you understand that you have the absolute right
10 to testify and the absolute right to remain silent?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you have any questions for me
13 concerning those rights?

14 THE DEFENDANT: Negative.

15 THE COURT: Did you say negative?

16 THE DEFENDANT: No, I do not.

17 THE COURT: Do you wish to testify in this case?

18 THE DEFENDANT: I'd like to speak with my
19 attorneys.

20 THE COURT: All right. How much time do you think
21 you need?

22 THE DEFENDANT: Couple minutes.

23 THE COURT: Okay. That's fine. Why don't we
24 break for about five minutes. You think that's enough time?

25 THE DEFENDANT: May I have a couple more to use

1 the restroom?

2 THE COURT: Sure. Why don't we come back at ten
3 minutes after 12:00. Do you think that's enough time for
4 you?

5 THE DEFENDANT: Plenty.

6 THE COURT: Go ahead and use the restroom, talk
7 with your attorneys, think about the rights that I've just
8 explained to you. And we'll be back at 12:10.

9 (A recess was taken.)

10 THE COURT: We're back on the record in 12CR222.
11 Mr. Clark and his counsel are present, the district
12 attorneys are present, the jury is not.

13 Mr. Clark, have you had enough time to talk to
14 your attorneys and think about the two different options,
15 the right to testify and the right to remain silent?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: What would you like to do, sir?

18 THE DEFENDANT: I will not testify.

19 THE COURT: Okay. Are you under the influence of
20 any alcohol, drugs or medication right now?

21 THE DEFENDANT: No, sir.

22 THE COURT: Is there anything going on that you
23 think prevents you from understanding what's happening right
24 now?

25 THE DEFENDANT: No, sir.

1 THE COURT: Is anyone pressuring or coercing you,
2 twisting your arm in any way to make you choose not to
3 testify?

4 THE DEFENDANT: No, sir.

5 THE COURT: Is this your own decision?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have you been able to make it freely
8 and voluntarily?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You understand the consequences of
11 choosing not to testify? In other words, you wouldn't be
12 called as a witness in this case.

13 THE DEFENDANT: Yes.

14 THE COURT: And I would instruct the jury that
15 they could not use your silence against you, they could not
16 consider it for any purpose. Do you understand that as
17 well?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And is it still your decision that you
20 do not want to testify?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. I'll find that the
23 defendant is freely, voluntarily and knowingly waiving his
24 right to testify.

25 Ms. Ring, does the defense anticipate putting on

1 any evidence?

2 MS. RING: We do, Judge. And we've actually had
3 one witness here who ended up staying all morning who would
4 be a very short witness. And I know it's late, but if
5 there's any way we could accommodate her. I think it was
6 actually Mr. Brackley's suggestion because of a witness that
7 was here on their subpoena yesterday. My guess is she will
8 be ten minutes total.

9 THE COURT: Okay. Let me -- how many witnesses do
10 you anticipate calling?

11 MS. RING: In addition to this witness five. And
12 none of them are very lengthy. But this is the only person
13 who has been waiting all morning at this point.

14 THE COURT: All right. That's fine.

15 Would you bring the jury back in?

16 (The jury returned to the courtroom.)

17 THE COURT: Please be seated. Welcome back,
18 ladies and gentlemen of the jury.

19 The People have rested their case. At this time
20 does the defendant wish to present any evidence?

21 MS. MILFELD: Yes, Judge. The defense calls Wendy
22 Ahrendt.

23 THE COURT: Would you please step forward, ma'am?
24 Come on all the way up here to the witness chair all the way
25 up by that seat there. Before you sit down would you please

1 face me and raise your right hand?

2 WENDY AHRENDT,

3 called as a witness on behalf of the Defendant, having been
4 first duly sworn, was examined and testified as follows:

5 THE COURT: Please have a seat.

6 DIRECT EXAMINATION

7 BY MS. MILFELD:

8 Q Can you please state your name and spell your last
9 name for the record?

10 A Wendy Ahrendt, A-H-R-E-N-D-T.

11 Q What do you do for a living?

12 A I'm retired.

13 Q Where do you live?

14 A I live in Boulder. Address, 2058 Balsam Drive.

15 Q Where did you live back in November of 1994?

16 A Same location.

17 Q Do you have any children?

18 A I have one.

19 Q Is your daughter Allyson Hackman?

20 A Yes, she is.

21 Q In 1994 what was she doing at that time?

22 A She was a student at Boulder High School.

23 Q What were you doing at that time?

24 A I was teaching elementary school.

25 Q Do you remember the night of November 1st?

1 A No.

2 Q Why don't you remember that?

3 A Because it's a long time ago.

4 Q Do you remember receiving a phone call on the
5 night of November 1st?

6 A I do not, but I know that I said that I did
7 receive one.

8 Q If you told police something at the time, would
9 that have been the truth?

10 A Yes.

11 MS. MILFELD: Judge, may I approach?

12 THE COURT: Yes.

13 Q (By Ms. Milfeld) I'm showing you a police report.
14 It shows at the top that it was made by Detective Linda
15 Arndt. It shows that there was no page number on this page,
16 but it shows the next is number 2.

17 A Okay.

18 Q I'm showing you page 11. And it states earlier
19 that I contacted Detective Weiler, passed on information to
20 him. At approximately 6:45 p.m. on November 3rd I phoned
21 Kristin Baulsir.

22 The second paragraph it says at approximately
23 7:00 p.m. I received a phone call from Wendy Ahrendt,
24 Hackman's mother. Hackman told me that when Clark had
25 called on Tuesday night --

1 MR. BRACKLEY: Your Honor, I'm going to object to
2 Ms. Milfeld reading it. I think it's -- to reading it to
3 Ms. Ahrendt. I think it's more appropriate to have
4 Ms. Ahrendt read it to yourself, see if it refreshes her
5 recollection.

6 I'm also going to tell the Court to my knowledge
7 Detective Arndt is not going to be testifying here. So to
8 put it in this way I think is improper.

9 THE COURT: Well, that is the correct procedure as
10 you stated, except that's not the procedure that's been
11 followed in a number of prior instances. But it's a valid
12 objection, so I'm going to sustain the objection.

13 You need to go through refreshing this witness'
14 recollection because there's been an objection.

15 MS. MILFELD: Judge, I would just like to state
16 for the record that under prior inconsistent statements if a
17 witness does not remember, C.R.S. says that you can either
18 refresh the witness' memory or you can impeach the witness.
19 And so I'm choosing to do the second method. But I will ask
20 her if this refreshes her memory.

21 THE COURT: Okay.

22 Q (By Ms. Milfeld) If you could please review that,
23 this paragraph here, and then let me know when you're done.

24 A Okay. Just that paragraph?

25 Q Yes. Does that refresh your memory about what you

1 told officers at that time?

2 A Not a lot, a little bit I mean.

3 Q And you said earlier that you don't really
4 remember that time before; right? You don't remember the
5 night of November 1st?

6 A No.

7 Q But what you actually stated to the officer at the
8 time is that you remembered getting a phone call at 9:45?

9 A I think I said approximately 9:45.

10 Q You told officers at the time that you had only
11 known Mr. Clark for about a week prior to the phone call?

12 A Yeah, I don't remember that.

13 Q You told officers that you remember it was
14 approximately 9:45 because you were getting ready your
15 family for bed?

16 A Sometime later in the night when we would get
17 ready for bed, yes.

18 Q Would 9:45 have been a time when you had been
19 getting ready for bed back in 1994?

20 A Could have been, um-hmm.

21 Q Can you think of any reason why you would not have
22 told the police the truth at that time?

23 A No.

24 Q If you told the police something at the time would
25 that have been what actually happened?

1 A Yes.

2 Q Would that have been the truth?

3 A Yes.

4 Q Do you remember that your daughter Allyson Hackman
5 dated Mr. Clark sometime around 1994 to 1995?

6 A Yes.

7 MS. MILFELD: No further questions.

8 THE COURT: Any cross-examination, Mr. Brackley?

9 MR. BRACKLEY: Very, very limited.

10 CROSS-EXAMINATION

11 BY MR. BRACKLEY:

12 Q Good afternoon Ms. Ahrendt. Am I saying that
13 correctly, Ahrendt?

14 A Yes.

15 Q You and I met a number of occasions; right?

16 A Um-hmm.

17 Q And it's fair to say, like your daughter Allyson,
18 you've had a lot of phone contact with investigators from
19 different offices?

20 A Yes.

21 Q And lawyers from different offices and police
22 officers. And you just as you sit here today and as you've
23 sat there through all of these efforts to refresh your
24 recollection from what happened on November 1st, 1994, it
25 just can't be done?

1 A No, I don't remember.

2 Q And as you sit here today you don't remember
3 whether a call was made at exactly 9:45 or 9:50 or 10:00;
4 correct?

5 A That's correct, I do not.

6 Q Do you recall being shown another page of that
7 same report that Ms. Milfeld just showed you where it states
8 that -- well, let me just read -- I'm sorry, let me ask you
9 to read it, and then I'll ask you a question about it.

10 A Okay.

11 Q And it's fair to say that Detective Arndt had
12 taken notes that you said that Michael Clark called your
13 house at 9:45 or 10:00 p.m.?

14 A Yeah.

15 Q And we can probably agree it's sometime in the
16 middle there on either end or somewhere between 9:40 and
17 10:00; right?

18 A That would have been close to bedtime for -- yeah,
19 so I would say that is true.

20 Q And you also told police investigators in more
21 modern times that it would have been unusual for Michael
22 Clark to call your house after 9:00?

23 A Or anybody to call my house, yes, uh-huh. That's
24 true.

25 MR. BRACKLEY: Okay. Thank you, ma'am. No

1 further questions.

2 THE COURT: Any redirect?

3 MS. MILFELD: No further questions. Thank you.

4 THE COURT: All right. Ms. Ahrendt, you can step
5 down.

6 Can this witness be excused, Ms. Milfeld?

7 MS. MILFELD: Yes, Judge.

8 THE COURT: Mr. Brackley?

9 MR. BRACKLEY: Yes, Judge. Thank you.

10 THE COURT: Mr. Ahrendt, you're excused. Thank
11 you, ma'am.

12 All right. Ladies and gentlemen of the jury,
13 let's go ahead and take the noon recess.

14 Remember the admonition that I've given you
15 previously. It applies at this recess as well.

16 Don't communicate about or discuss the case with
17 anyone by any means. Don't read or listen to any news
18 reports of the trial. Don't conduct any outside
19 investigation or research.

20 Remember, it's especially important that you do
21 not form or express any opinion on the case until it is
22 finally submitted to you.

23 Why don't we go ahead and recess until 1:45, give
24 you almost an hour and a half for lunch. And when you
25 return at 1:45 we'll continue with the presentation of

1 evidence. Have a good lunch.

2 (The jury left the courtroom.)

3 THE COURT: Anything to place on the record before
4 we recess for lunch on behalf of the defense?

5 MS. RING: Oh, no, Judge. You always ask them
6 first.

7 THE COURT: We're in your case now, so I thought I
8 would -- anything from the People?

9 MR. BRACKLEY: No, Your Honor.

10 THE COURT: All right. Then we'll be in recess
11 until 1:45.

12 (A recess was taken, whereupon this reporter's
13 portion of the trial concluded for the day.)

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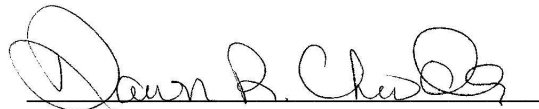
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CERTIFICATE

The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, District Court, County of Boulder, State of Colorado.

Dated this the 3rd day of April, 2013.


DAWN R. CHIODA, CSR, RPR
Official Court Reporter

1 -----
 2 **DISTRICT COURT**
 3 **BOULDER COUNTY**
 4 **COLORADO**

5 1777 6th Street
 6 Boulder, CO 80302
 7 -----

8 **Plaintiff:**

9 People of the State of Colorado

10 **Defendant:**

11 Michael Clark

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 ! ***FOR COURT USE ONLY***
 !
 ! Case No. 12CR222
 ! Division 6

12 The matter came on for jury trial on October 17th,
 13 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
 14 Boulder District Court, and a jury of 12 persons, and the
 15 following proceedings were had.
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PROCEEDINGS

The matter came on for jury trial on October 17th, 2013, before the Honorable Thomas Mulvahill, Judge of the Boulder District Court, and a jury of 12 persons, and the following proceedings were had.

* * * *

THE COURT: All right. We are back on the record in 12 CR 222. The Defendant and counsel are present; the jury is not. Anything to take up on the record before we bring the jury back in, for the defense?

MS. RING: Judge, I think that Mr. Kellner raised an issue about testimony they anticipate us eliciting from Officer Denig later on this afternoon, so I don't know if he wanted to --

MR. KELLNER: I do, Judge.

THE COURT: Go ahead.

MR. KELLNER: Your Honor, I believe that the defense is going to intend to elicit some testimony from Detective Rich Denig that he met with a man named Arman Vandeboss (a heard) and that Mr. Vandeboss gave a description of a car, a Chrysler Regal, that was seen at or around -- between essentially 9:00 and 9:30 leaving the scene of the apartment complex. And I think that that testimony, if she were to elicit that, would clearly be calling for inadmissible hearsay. Mr. Vandeboss is not here, he's not endorsed by

1 either side, and getting into that testimony would be
2 inadmissible hearsay. And there's been no notice of seeking
3 to admit under 807 or any other hearsay exception.

4 THE COURT: Defendant's response, Ms. Ring?

5 MS. RING: Just so that the Court has a full
6 picture, we don't plan on asking specifically what this
7 Mr. Vandeboss said.

8 THE COURT: Okay.

9 MS. RING: We actually did attempt to find this
10 individual to determine if we did want to call him as a
11 witness, et cetera, but it turns out that Mr. Vandeboss is
12 deceased.

13 THE COURT: Okay.

14 MS. RING: But we certainly didn't file any motions
15 under 807.

16 We do anticipate eliciting from Detective Denig that
17 he had information as part of his investigation about a car,
18 and the description of the car, without eliciting where the
19 information came from or the details of the information.
20 Because there's been discussion throughout the trial,
21 including the information in the newspaper and
22 Mr. Stackhouse's testimony, about different cars and different
23 descriptions that is not a car associated with our client in
24 any way. And just to elicit from Officer Denig that he had
25 information about a vehicle, that description, and that they

1 followed up on that description of the vehicle and that
2 that -- a car of that description was never tied in any way to
3 our client. So I don't think that it's being offered for the
4 truth of the matter asserted. It's being offered for what the
5 officers did, why they did it and why that description has
6 been out there and, further, to show that it didn't tie to our
7 client.

8 THE COURT: Was there some connection between the
9 vehicle and the crime?

10 MS. RING: Well, as you heard from Mr. Kellner,
11 Mr. Kellner anticipated that we would bring this up.

12 THE COURT: Right.

13 MS. RING: So...

14 THE COURT: Well, it sounds to me like he
15 anticipated correctly.

16 MS. RING: It's certainly not something that they
17 are surprised about. And in terms of the police
18 investigation, they -- the problem is I can't call
19 Mr. Vandeboss, he's dead.

20 THE COURT: Right.

21 MS. RING: I mean I guess that we could argue that
22 it was -- well, that still doesn't get us there. But in terms
23 of their investigation, this person worked at a gas station,
24 reported that between 9:00 and 9:30 that he heard the
25 gunshots, that he saw a vehicle driving away quickly and that

1 the gas station he worked at was right at the corner, of --
2 the gas station's at the corner of 55th and Arapahoe. He gave
3 a detailed description of the vehicle to the officers and
4 officers, based on that information, did research and went out
5 looking for a vehicle that matched that description. And
6 that's how in the paper -- that's consistent with information
7 in the paper about the Chrysler and a green car.

8 And there's been lots of testimony about green cars
9 and whether or not my client's car was green or whether it was
10 primer, and so that's where the green car information comes
11 from, and that's different than my car -- client's Ford
12 Mustang primer, but that's the green car.

13 THE COURT: Well, how do you get to the follow-up
14 investigation conducted by Detective Denig unless the
15 information is admitted for the truth of the matter asserted,
16 because if it's not admitted for the truth of the the matter,
17 who cares what Detective Denig did.

18 Do you understand my quandary?

19 MS. RING: Well, Judge, we're certainly not arguing
20 that -- or not going to argue that there was a green vehicle
21 that was involved in the murder. My concern at this point is
22 the number of times people were asked if my client's car was
23 green, and these comments about green paint versus primer on
24 my client's Ford Mustang.

25 And our argument is that this whole green vehicle

1 description comes from the gas station attendant who describes
2 the vehicle that's not a Ford Mustang that's not primer, and
3 that the police were actually looking for that green vehicle,
4 which isn't associated with my client. And that's why
5 those -- there's been all these questions in the trial about a
6 green vehicle.

7 THE COURT: So what's the probative value there
8 related to the issues in this case -- look, if you have a cell
9 phone, you need to turn it off -- I mean what does it go to
10 show that's at issue here?

11 MS. RING: That there was a description of a green
12 vehicle, which is why everybody -- the prosecution
13 consistently asked about my client's car and if it was green.
14 And that the -- where that green vehicle information comes
15 from is not because there's a green vehicle related to my
16 client, it's because the police had information about a green
17 vehicle, which they investigated based on information they got
18 the night of the homicide and it doesn't relate to my client.

19 I wouldn't have the concern if there weren't so many
20 questions brought up throughout the trial about the color of
21 my client's car and whether it was green on it, and then the
22 description of the green Chrysler and the newspaper, and then
23 that tying into what Mr. Stackhouse said.

24 THE COURT: Well, what -- I'm not seeing the
25 relevance of what Detective Denig did in response to a report

1 about a green vehicle, I'm just -- I'm not.

2 MS. RING: All right.

3 THE COURT: And so I don't see how it's admissible.
4 I mean am I missing something? If you can't -- I mean, look,
5 it's Mr. Vandeboss' testimony -- I'm sorry -- his statement
6 to Detective Denig or to police officers during the
7 investigation --

8 MS. RING: Right.

9 THE COURT: -- about seeing this green car, it's
10 hearsay, if you want it admitted for the truth of the matter.

11 MS. RING: Right.

12 THE COURT: If it's not admitted for the truth of
13 the matter --

14 MS. RING: So, Judge, the way I think about it is if
15 Mr. Vandeboss had given the police information and they
16 didn't follow up on any of it, but I wanted to elicit the
17 details of what Mr. Vandeboss told the police, because they
18 didn't follow up on any of it, I would just be eliciting his
19 hearsay statements. I'm concerned about where this
20 description of a green vehicle comes from that's come up
21 throughout the course of the trial, that the jury doesn't know
22 where that comes from where I think that the impression is
23 that it's related to my client's Ford Mustang, which is a
24 primer -- which has some green on it somewhere. And I think
25 that's misleading to the jury because the green vehicle

1 description comes from Mr. Vandenboss and the police acted on
2 that. If the police hadn't acted on that -- and I'm not going
3 to talk about Mr. Vandenboss giving that information, but I
4 want to be able to elicit that the police were investigating a
5 green vehicle and the description of the vehicle, which
6 doesn't match my client's. And if the green vehicle thing
7 hadn't come up, I wouldn't have had to do that.

8 THE COURT: Well, look, I'll be honest with you, I
9 don't think that it's going to confuse the jury the way the
10 evidence is at this point in time. I mean I had some
11 questions about this case. I had no -- I had no knowledge of
12 any statement made by Mr. Vandenboss to Detective Denig or
13 anyone else until you just brought it up right now. It was
14 not confusing or concerning to me at any point in the trial,
15 the discussion about the color of the vehicle. It appears
16 that from the evidence, the Defendant's Mustang was primarily
17 primer grey. There were two smaller portions on the front --
18 on the front end and on the back end that were small sections
19 of green, not only do I not think that the -- that particular
20 testimony regarding Mr. Vandenboss' statement and the
21 follow-up investigation on the green vehicle, not only do I
22 think that it's not relevant, I don't think it's necessary to
23 clear anything up. And, frankly, I think that it probably
24 injects an issue that is just going to be confusing for the
25 jury, because I'm sitting here -- I don't see how it's

1 relevant. So with respect to that portion of the examination
2 of Detective Denig, I'll grant the motion in limine.

3 MS. RING: Okay.

4 THE COURT: All right. Anything further before we
5 bring the jury in?

6 MS. RING: Not from our end.

7 THE COURT: All right. Would you bring the jury in.
8 (The jury entered the courtroom.)

9 THE COURT: All right. Please be seated.

10 Welcome back, ladies and gentlemen of the jury.

11 Ms. Ring, on behalf of the Defendant any further
12 evidence to present?

13 MS. RING: Yes, we call Tanya Augustine.

14 THE COURT: Would you step forward, ma'am. Come all
15 the way up here. Before you sit down, would you face me and
16 raise your right hand.

17 **TANYA AUGUSTINE,**
18 a witness herein, having been first duly sworn, was examined
19 and testified on her oath as follows:

20 THE COURT: Go ahead, Ms. Ring. Have a seat.

21 Go ahead, Ms. Ring.

22 **DIRECT EXAMINATION**

23 **BY MS. RING:**

24 Q. Ms. Augustine, could you tell the jury your full
25 name and spell your last name for the record, please.

1 A. Tanya Georgianne Augustine, A-u-g-u-s-t-i-n-e.

2 Q. Ms. Augustine, where do you live now?

3 A. The Lodges.

4 Q. No just --

5 A. Summerville, Massachusetts.

6 Q. What do you do for a living?

7 A. I'm a high school teacher.

8 Q. What subject do you teach?

9 A. Biology and anatomy and physiology.

10 Q. Did you live in Boulder, Colorado, at some point?

11 A. Yes, I did.

12 Q. When did you live in Boulder, Colorado?

13 A. I lived in Boulder from 1990 to 1995.

14 Q. And when you were living in Boulder, Colorado,
15 during that time frame, was your last name Jerome?

16 A. Yes, it was.

17 Q. So if you were interviewed by police or named in
18 police reports from back in 1994, it would have indicated
19 Tanya Jerome?

20 A. That's right.

21 Q. When you were living in Colorado, in Boulder,
22 Colorado, in that time frame at some point did you live in an
23 apartment complex near 55th and Arapahoe?

24 A. Yes, I did.

25 MS. RING: And may I approach?

1 THE COURT: Yes.

2 Q. (By Ms. Ring) I'm showing you what's been marked
3 defense Exhibit O. And I believe you have seen a smaller
4 version of this picture before?

5 A. That's right.

6 Q. Does it look familiar to you now?

7 A. Yes.

8 Q. Roughly?

9 A. Roughly. I didn't see it from that angle, but, yes.

10 Q. Okay. Does that roughly show where the apartment --
11 the apartment complex that you were living in in November of
12 1994?

13 A. Yes, it looks the same.

14 MS. RING: Okay. I would move to admit this exhibit
15 and publish it to the jury.

16 THE COURT: Any objection or voir dire?

17 MR. BRACKLEY: Your Honor, I have seen it and I
18 don't object, but I've also offered to put a bigger one up on
19 the screen if that would be more helpful to counsel and to the
20 jury.

21 THE COURT: O will be admitted.

22 (Defendant's Exhibit O was admitted into evidence by
23 agreement of the parties.)

24 Ms. Ring, you can present it in either format. What
25 is your preference?

1 MS. RING: Okay.

2 Q. (By Ms. Ring) I'm going to try to do this so that
3 the jury can see it and that you can see it, Ms. Augustine.

4 A. Okay.

5 THE COURT: Can you see that?

6 THE JURY: Yes.

7 MS. RING: I can try to -- well, it's tight.

8 UNIDENTIFIED JUROR: No, you're good. Thank you.

9 MS. RING: Okay.

10 Q. (By Ms. Ring) I think that we have a pointer up
11 here --

12 THE COURT: I have got one, if you don't.

13 Q. (By Ms. Ring) -- which I'm afraid to use. If I
14 knew how to use it, that would help.

15 THE COURT: She is a high school teacher, I bet that
16 she --

17 Q. (By Ms. Ring) I bet she does. I think if you push
18 that and --

19 A. Okay. There you go.

20 Q. Did that work?

21 A. Mm-hmm.

22 Q. Okay. So the apartment complex we're looking at at
23 55th and Arapahoe has several buildings, right, marked that
24 are part of the apartment complex?

25 A. Right. Right.

1 Q. And would you show the jury which building you were
2 living at?

3 A. That one.

4 Q. Okay.

5 A. Pretty much right there.

6 (The witness indicated.)

7 Q. So you're indicating that you lived at 5630 Arapahoe
8 Avenue?

9 A. Yes, I did.

10 Q. Okay. And then when you were specifically pointing
11 in the pointer, what you were pointing at was the backside of
12 that building?

13 A. That's right.

14 Q. Okay. And do you recall from your apartment where
15 you lived then, what you looked out on?

16 A. Yes. We looked out on the golf course on the third
17 floor, so right about there.

18 (The witness indicated.)

19 Q. Okay. And on that diagram, do you see where the
20 parking lot would have been, where you would have parked when
21 you were living there?

22 A. I parked over here.

23 (The witness indicated.)

24 Q. Okay. And did that apartment complex have a laundry
25 facility when you were living there?

1 A. Yes, it did.

2 Q. And where do you believe -- which building was the
3 laundry facility?

4 A. The laundry facility -- sorry -- the laundry
5 facility was right here.

6 (The witness indicated.)

7 Q. Okay. And do you recall where the entrance was to
8 the laundry facility?

9 A. It was right about there.

10 (The witness indicated.)

11 Q. Okay. And you were going from your apartment where
12 you showed us out on that side facing the golf course. How
13 would you have gotten from your apartment to the laundry area?

14 A. I walked down the stairs internally in here and then
15 came through this way like that, and then walked to the
16 courtyard here and then around this.

17 (The witness indicated.)

18 Q. Okay. So you wouldn't actually have to go outside
19 and around your building, you could go internally through
20 5630 Arapahoe Avenue and then across the courtyard to the
21 laundry facility?

22 A. That's right, so the most direct route is this one.

23 (The witness indicated.)

24 Q. Okay. I'm going to now take your attention back
25 directly to the evening of November 1st, 1994. Do you

1 remember anything happening that evening?

2 A. Well, I remember -- I didn't know the date or the
3 year at the time until this was -- I was contacted about it,
4 but I do remember all these things happening, so I didn't
5 remember the date specifically.

6 Q. Okay. So you were contacted within the last couple
7 of months from people from my office, the people representing
8 Michael Clark, right?

9 A. That's correct.

10 Q. And you were asked if you remembered events that
11 happened in November of 1994?

12 A. That's right.

13 Q. And initially you didn't remember all of the events
14 independently?

15 A. I did remember them, I just didn't remember the
16 dates. So I remembered everything that happened, I just
17 didn't remember the dates, but I remembered the things that
18 happened.

19 Q. Okay. So as you sit here today, you now remember
20 the events that happened back in November of 1994?

21 A. I do remember them.

22 Q. And what -- you needed to refresh your memory about
23 the exact date?

24 A. That's right.

25 Q. Okay. Do you recall if you did laundry on

1 November 1st, 1994?

2 A. Yes, I did.

3 Q. Okay. And do you recall what time you did laundry?

4 A. It was approximately 9:15 to 9:30, something like
5 that.

6 Q. And why would you be doing laundry that late at
7 night in the fall of 1994, or do you remember why?

8 A. Yes. I remember because I was teaching fitness
9 classes at Rally Sport in the evenings, and I had a later
10 class because I worked full time during the day. So my
11 classes were the later classes, like a 6:30 or 7:30 class.

12 Q. And when you said that you did laundry the evening
13 of November 1st, 1994, did you take the same route that you
14 just showed us on the diagram just a few minutes ago?

15 A. Yes, I did.

16 Q. And did anything happen that was unusual on your way
17 to do laundry on November 1st, 1994?

18 A. Yes, I saw -- I walked by a man that scared me,
19 which was unusual for me because I'm not really scared of
20 anybody. So that was the only time that I really remember
21 being scared of someone in Boulder walking around.

22 Q. And so is it fair that that's why it kind of sticks
23 out in your mind?

24 A. Yes.

25 Q. Okay. If you can use the pointer again to show us

1 roughly on the diagram where you remember coming into contact
2 with this male that scared you that evening.

3 A. So I was walking -- I walked through here and I'm
4 heading towards the laundry room, and it must have been right
5 about here.

6 (The witness indicated.)

7 Q. Okay.

8 A. And it's hard to say because this is farther away,
9 so I can't tell distance, but that area.

10 Q. Okay. And when you remember this male who scared
11 you, was there anyone else out in that courtyard area at that
12 time?

13 A. There was a man and that was it.

14 Q. Okay. And how do you remember today that there
15 wasn't anybody else out in that courtyard area other than that
16 male?

17 A. Because I remember -- I think I remember being
18 scared, so I remember the details of that -- that 30 seconds
19 of time that I -- I remember that moment and feeling scared
20 and feeling alone, so I remembered it.

21 Q. Okay. Do you think as you sit here today if there
22 had been anybody else out and around at that time frame it
23 would have impacted how you felt and running into this male?

24 A. I probably would have felt less scared.

25 Q. And is it fair that as you sit here today you can

1 tell us that you didn't notice any other commotion going on in
2 that courtyard area when this male passed you on your way to
3 do laundry that evening?

4 A. It was completely silent, there was no commotion.

5 Q. I think you just told us that you recall that --
6 this encounter. How long do you think the encounter or the
7 passing by of this male lasted?

8 A. I'm trying to give you approximate, 20 seconds.

9 Q. Were you able to get a look at this individual?

10 A. Yes, I was.

11 Q. Did the person say anything to you?

12 A. No, they didn't.

13 Q. Do you remember any details of what that person
14 looked like?

15 A. Yes, I do.

16 Q. What do you remember?

17 A. I remember it being a young white male significantly
18 larger than me with fair hair, but not extremely fair.

19 Q. So you said -- I forget exact your exact words, but
20 definitely larger than you?

21 A. Yes.

22 Q. Okay. How tall are you?

23 A. I'm 5 foot 3 inches.

24 Q. Okay. Are you roughly the same size now that you
25 were then?

1 A. Approximately.

2 Q. Okay. So can you give us a better estimate about
3 how much taller you believe that person was than you are?

4 A. I'm doing math, probably at least 8 inches.

5 Q. Okay. Would looking at the report of the
6 information you gave to the Boulder police at the time refresh
7 your memory about approximately how tall you thought that
8 person was and what other descriptors you may have been able
9 to give at that time?

10 A. Can you repeat the question? I didn't understand.

11 Q. So I thought that I heard you say you were having
12 trouble recalling exactly how much taller and bigger that
13 person was?

14 A. Yeah, I just think in general I'm not -- it's hard
15 to estimate a person's height, but, you know -- so definitely
16 well over 6 inches, but not 6 foot 6. So not extremely tall,
17 but significantly taller than me, 5 foot 11, 6 feet when you
18 are 5 foot 3.

19 Q. Do you recall as you sit here today whether or not
20 you noted anything about the clothing the individual was
21 wearing?

22 A. The thing I do remember is they were dressed, but
23 not completely bundled up. So they had on clothes to cover up
24 their body, but not like a parka or hat or scarf that I could
25 see them, so I felt more threatened by them.

1 Q. Do you recall whether you were passing this
2 individual when you were on your way to the laundry room or on
3 your way back to the apartment?

4 A. I was definitely passing to the laundry room.

5 Q. Okay. And when you came out of the laundry room,
6 did you see this person?

7 A. No, I did not.

8 Q. Okay. Did you notice any commotion or anything when
9 you came back out of the laundry room?

10 A. No, I did not.

11 Q. After you came out of the laundry room, did you go
12 back to your apartment?

13 A. Yes.

14 Q. Okay. At any point that evening did you know that
15 there was any kind of crime or murder that was committed at
16 that apartment complex?

17 A. I had no idea that anything had happened.

18 Q. When did you first hear that there had been some
19 kind of crime or homicide that was committed at your apartment
20 complex?

21 A. I don't recall exactly, it was the next day. I
22 don't remember the format, it might have been the radio, it
23 might have been a newspaper, probably one of those two that I
24 either heard it on the radio or saw it in the newspaper the
25 next day.

1 Q. And what did you do when you heard that information?

2 A. I was surprised because I lived there and I didn't
3 know anything about it and then I -- I made the connection
4 that I had seen someone the night before, so I -- I called the
5 police and left a message. I think that I left like a voice
6 mail saying, I don't know if this is relevant, but I saw
7 someone last night when I was out doing the laundry.

8 Q. Okay. And based on that phone call and leaving a
9 message, did you end up meeting with an officer from the
10 Boulder Police Department?

11 A. I did.

12 Q. And do you recall that you would have met with him
13 on November 2nd?

14 A. I do now, yes, I remember meeting him.

15 Q. Okay. Do you remember if it was very close in time
16 to when you made the call?

17 A. They called me right back, like within hours. So I
18 was surprised that they called me back so soon because I
19 thought that they would probably not call me back.

20 Q. Okay. And when they called you back, they wanted
21 information about your interaction with this individual the
22 night before?

23 A. That's right.

24 Q. And you gave them as many details as you could?

25 A. Right.

1 Q. And even though you have an independent memory today
2 of those events, you would agree with me that your memory then
3 was clearer about specific details?

4 A. Yes, of course, because it was right after the
5 event.

6 Q. Okay. And you tried to be as accurate as possible
7 when you gave those details?

8 A. Right.

9 Q. Do you recall that after you gave the details about
10 the person that you had seen the night before who scared you,
11 that you were then asked to come down to the police
12 department?

13 A. Right, I was -- I was asked to come almost right
14 away.

15 Q. And do you recall going back to the police
16 department?

17 A. Yes, I do.

18 Q. And do you recall when you were at the police
19 department you were asked to help an artist do a composite
20 drawing of the person that you had seen the night before?

21 A. Yes.

22 Q. Do you recall also that when you were in the police
23 department you were asked to look at a photo lineup?

24 A. Yes, I remember looking at the photographs.

25 MS. RING: Okay. May I approach?

1 THE COURT: Yes.

2 Q. (By Ms. Ring) I'm approaching with what has been
3 marked defense Exhibit P and Q. Would you agree with me that
4 what I'm showing you in Q is a photo lineup?

5 A. Yes.

6 Q. And that at the top it says Boulder Police
7 Department?

8 A. Right.

9 Q. And that there are six individual photos in the
10 lineup?

11 A. Right.

12 Q. And there are six white males in that lineup?

13 A. Right.

14 Q. And then in defense Exhibit P that I'm showing you,
15 at the top it says Boulder Police Department lineup
16 advisement?

17 A. Correct.

18 Q. And then there's a space for someone to fill out
19 their name who's part of the lineup procedure, and that's your
20 name there?

21 A. Yes.

22 Q. And the date on there is November 3rd, 1994?

23 A. Yes.

24 Q. At 11:45 in the morning?

25 A. Yes.

1 Q. And you checked the box that you did not identify
2 any of those persons?

3 A. That's right, I did not.

4 Q. Okay. And at the bottom it's got your name and
5 signature, right?

6 A. That's my signature, yes.

7 Q. Okay. And that's the address, 5630 Arapahoe, 334,
8 where you were living at the time?

9 A. Right.

10 Q. And then the police officer's signature is next to
11 it under witnesses who are the individuals that showed you the
12 photo lineup?

13 A. That's right.

14 Q. Okay. Do you recall as you sit here today that's
15 the photo lineup you looked at?

16 A. I mean the -- I don't remember the faces.

17 Q. Okay. But you do recall looking at --

18 A. I remember looking at a bunch of pictures and I
19 remember going, No, No, No, No, No, No, so I remember not --
20 not recognizing them.

21 Q. Okay. Do you recall seeing a photograph in the
22 newspaper of someone who had been arrested in connection
23 with -- potentially in connection with the homicide
24 investigation?

25 A. Yes, I remember the front page of the newspaper.

1 Q. Okay. And what do you remember about when you saw
2 that individual on the front page of the newspaper?

3 A. I remember being surprised because the picture on
4 the newspaper was the one person that I picked out of the
5 lineup and I said, That's definitely -- I picked one person
6 and I said, Definitely not him. And it was the one person I
7 was, Definitely not him, I would have remembered his ears, and
8 that was the one in the newspaper.

9 Q. Okay. So you remember -- so it sounds like when you
10 saw the picture in the newspaper, it was after you had seen
11 the photo lineup?

12 A. That's right.

13 Q. So you recognized having seen that person's photo in
14 the photo lineup; is that --

15 A. That's right, I definitely saw that photo in the
16 lineup.

17 Q. And that in looking at that photo lineup, that you
18 noticed specifically that clearly wasn't the person you had
19 seen on November 1st, 1994?

20 A. That's right.

21 Q. And what I heard you just tell us is what you
22 noticed specifically in the photo were ears sticking out?

23 A. Yeah, I remember specifically making a comment about
24 the -- to the detective, like, I would have remembered that
25 one, and it was the only one I picked out and that was the one

1 that ended up in the paper. So it was, like, a strong memory,
2 like, it was interesting to me that it was the one person that
3 I said it wasn't that was the one on the paper.

4 Q. When I was asking you previously about if you
5 remembered what the individual was wearing and you talked
6 about kind of having open clothes and not a big puffy jacket
7 on. Do you recall anything else in particular about what
8 clothing details you were able to give the police about the
9 individual you saw in the courtyard on November 1st, 1994?

10 A. I don't remember the clothing details anymore.

11 MS. RING: Okay. If I approach.

12 Q. (By Ms. Ring) I'm going to show you from one of the
13 officer's reports, it's page 269, to see if that refreshes
14 your memory at all about any of the other details you would
15 have given when you met with police officers right after you
16 saw the individual in the courtyard. So I'm just going to ask
17 you to read this paragraph right here to yourself, okay.

18 A. Okay. Mm-hmm.

19 Q. Does looking at that refresh your memory at all
20 about details you were able to give the police back in 1994?

21 A. Some of them, yes.

22 Q. What do you now remember after reading that?

23 A. Well, I definitely -- I mean I remember the
24 experience and the person, a large white male, and that area
25 at that time, I definitely remember that. It's just -- and

1 clean shaven, no facial hair.

2 Q. Okay. But as you sit here today you don't remember
3 any of the other details about clothing or more specific
4 height that you were able to give back then?

5 A. No, I don't remember anymore.

6 Q. Okay. But you had no reason to give the officer
7 anything other than whatever details you could remember when
8 you met with him that day?

9 A. Right, I assume I was more accurate 18 years ago.

10 MS. RING: Judge, I'm going to approach one more
11 time, if I may?

12 THE COURT: Yes.

13 Q. (By Ms. Ring) So specifically as you sit here today
14 you don't remember that you specifically -- you do remember
15 saying that it was a very large white male, correct?

16 A. Right.

17 Q. But you don't remember saying that the person was
18 approximately 6 foot 2 inches. I think that you already
19 described short dirty-blond hair. You don't remember saying
20 glasses?

21 A. No.

22 Q. I believe you told us you do remember no facial
23 hair?

24 A. Mm-hmm.

25 Q. And you don't remember as you sit here today saying

1 that he was wearing jeans and a jeans jacket?

2 A. I don't remember. And I think maybe now much larger
3 man 6 foot 2 inches is much larger then and now that doesn't
4 seem so large. So after those many years I wouldn't call 6
5 foot 2 inches very large, but maybe I would have back then
6 based on the other men that I knew. I was just thinking of
7 that now. I've had friends who were like 6 foot 7 inches,
8 that's very large, 6 foot 2 inches is not very large.

9 Q. So just so I'm clear, in your life now when you
10 think of describing a very large male, that's where this
11 6 foot 6 inches and the 6 foot 7 inches comes from?

12 A. Yeah. My boyfriend at the time was like 5 foot 9
13 inches, so he was significantly larger than 5 foot 9 inches.

14 Q. Back in 1994?

15 A. Correct.

16 MS. RING: Okay. Judge, may I approach?

17 THE COURT: Yes.

18 Q. (By Ms. Ring) I'm showing you what's been marked
19 People's -- Defendant's Exhibit R. Did you want me to
20 introduce your own exhibits now, defense Exhibit R. Does that
21 look familiar?

22 A. Vaguely familiar.

23 Q. Okay. You told us earlier that you remember going
24 down to the police department, and one of the things that they
25 wanted you to do is -- was do a composite or meet with the

1 artist?

2 A. Right. Mm-hmm.

3 Q. And you remember doing that?

4 A. I do.

5 Q. Okay.

6 A. Yes.

7 Q. And that looks vaguely familiar to you today as a
8 composite?

9 A. Very, yeah. Mm-hmm.

10 Q. How much longer after this happens in November 1st
11 of 1994 do you continue to live at that apartment complex?

12 A. I believe that I moved out -- I know I moved out in
13 June of 1995.

14 Q. Okay. So not quite a year later, but --

15 A. Seven, eight months -- eight months, yeah.

16 Q. Okay. While you were living in that apartment
17 complex until June of 1995, did you ever see the person that
18 scared you on November 1st, 1994 again?

19 A. No, I did not.

20 MS. RING: No further questions.

21 THE COURT: Okay. Cross-examination, Mr. Brackley.

22 MR. BRACKLEY: Your Honor, I'm going to put up the
23 other photo so I can stand back here. It's People's 1 in
24 evidence.

25 THE COURT: Okay.

CROSS-EXAMINATION

BY MR. BRACKLEY:

Q. Good afternoon.

A. Hello.

Q. Ms. Augustine, do you still have that pointer up there?

A. I do.

Q. Great. So looking at what is People's 1 in evidence, that's more of a -- kind of a historically accurate photo of the way the Fairway Apartments looked back in 1994, correct?

A. I was over there.

(The witness indicated.)

Q. Okay.

A. No, over here. Here we go. That's the golf course. Is that part of the golf course?

(The witness indicated.)

Q. Actually, let me show you this one.

A. I'm getting disoriented here because the parking lot --

Q. Right. So you see the parking lot here?

(Counsel indicated.)

A. Oh I'm here. There I am. I get it. Yeah, I'm, like, what's going on here.

Q. In that particular photo the parking lot would be

1 that horseshoe area, kind of up in the center middle?

2 A. Okay. Yes. Right.

3 Q. And you had described the laundry room being right
4 over here?

5 (Counsel indicated.)

6 A. Mm-hmm.

7 Q. And your apartment being on the third floor over
8 here?

9 (Counsel indicated.)

10 A. That's right.

11 Q. And you were able to navigate from your apartment
12 into the courtyard into the parking lot of the laundry room by
13 going through and internal hallway area?

14 A. That's right.

15 Q. Okay. So as you sit here today, you don't remember
16 whether this was -- this could have been any time between 9:15
17 and 10:00, correct?

18 A. It's hard to say at this time. 10:00 sounds late
19 for me to be out because I had to get up and go work, and I
20 remember -- I do remember at the time when I knew it was going
21 on that I thought that it was closer to the -- the -- like
22 9:15. So I -- it's sort of like I'm having a memory of
23 knowing that it was the time closer to 9:15.

24 Q. But it's fair to say when you came out of your
25 apartment and you came across the courtyard and into the

1 laundry room, it was quiet?

2 A. Yes, it was quiet.

3 Q. The only other person out there was this person that
4 you saw?

5 A. That's right.

6 Q. And can you tell us more about this person, what it
7 was that scared you, other than the fact that you were alone
8 with an unknown person in your courtyard at night?

9 A. I don't recall at this time. I mean I -- I walk --
10 I still walk alone at night a lot and I live in a -- a very
11 densely populated city and I'm generally not afraid of really
12 anybody. So something maybe about -- the way he was walking
13 or that he walked -- probably combination that he came too
14 close to me and that set off my radar, that it was getting too
15 close and that he was maybe walking a little faster than
16 usual. That's -- that's how I keep myself safe is I pick up
17 on those things fast, so something about that it setoff sort
18 of my, like -- my guard up.

19 Q. So do you recall telling the police on November 2nd,
20 1994, when you spoke to them that one of the things about this
21 person was he walked within 2 feet of you and that was one of
22 the things that scared you?

23 A. I don't remember the 2 feet. I remember it being,
24 you know, uncomfortably close to me once again.

25 Q. Do you remember telling the police officer who

1 interviewed you that kind of a more typical or appropriate
2 distance would be 5 feet?

3 A. Yeah. I mean, once again, I don't know the numbers,
4 but there's a certain distance and that he came within that
5 distance, so I don't know. I don't remember saying 5 feet or
6 2 feet, but I remember feeling that it was an unsafe distance.

7 Q. Let me show you page 269.

8 A. Or uncomfortable distance I guess I should say.

9 Q. This is something that Ms. Ring showed you. And if
10 you could take a look at that and read that paragraph that's
11 bracketed, please.

12 A. Yeah, this is the same -- this looks like the same
13 paragraph that I just read, yes.

14 Q. Okay.

15 A. Mm-hmm.

16 Q. And does that paragraph refresh your recollection as
17 to whether you told the officer that the thing that scared you
18 about this male was that he walked within 2 feet of you when
19 it's more typical that someone would walk 5 feet from someone?

20 A. Like I said, the -- those precise numbers I don't
21 remember, but the general assumption that there's a certain
22 safe distance that strangers keep and that he had gotten
23 closer than the safe distance.

24 Q. No doubt and I understood that, but my question was
25 does that refresh your recollection --

1 A. No, it doesn't.

2 Q. -- as to telling the officer that --

3 A. No, it doesn't.

4 Q. -- as 2 feet as opposed to 5 feet?

5 A. No.

6 Q. Is there anything else in there that you would have
7 told the officer as to what it was about this man that scared
8 you other than that 2 feet versus 5 feet distance?

9 A. I don't know. Just a sense of -- just a sense that
10 something wasn't right, but nothing specific.

11 Q. Okay. And again the question was, does reading that
12 refresh your recollection as to whether you told the officer
13 anything?

14 A. No, it doesn't.

15 Q. Do you remember telling the officer that the man was
16 a large white male? You have said that, and that the --

17 MR. BRACKLEY: May I approach?

18 THE COURT: Yes.

19 Q. (By Mr. Brackley) And that he was approximately
20 6 feet 2 inches. Do you recall telling the officer that?

21 A. No, I don't.

22 Q. Do you recall telling the officer that the man had
23 short, dirty-blond hair?

24 A. I remember that experience. I don't remember
25 telling the officer, but I remember him having short,

1 dirty-blond hair.

2 Q. Do you remember telling the officer that the man had
3 glasses?

4 A. No, I don't.

5 Q. Exhibit B, which -- I'm sorry -- defense Exhibit R,
6 you stated this -- this composite sketch looks vaguely
7 familiar to you, correct?

8 A. Correct.

9 Q. And it's fair to say that that composite sketch has
10 glasses --

11 A. Correct.

12 Q. -- correct? So the man in the composite sketch has
13 glasses, and that would be consistent with your description of
14 someone with glasses?

15 A. Glasses, right.

16 Q. And you said you had -- you said that you did
17 specifically recall no facial hair?

18 A. Right.

19 Q. Or clean shaven, correct?

20 A. Right.

21 Q. Now when you went down to the police station, is it
22 fair to say that you were describing for them the man that you
23 saw in your courtyard at about 9:15, right?

24 A. Correct.

25 Q. As opposed to the man who committed a murder?

1 A. Correct.

2 Q. Okay. You have no reason to believe today that the
3 man that you saw committed the murder that night, correct?

4 A. That's right.

5 Q. And you had no reason to believe back in 1994 that
6 that man committed a murder, correct?

7 A. That's right.

8 Q. You were doing your duties as a citizen, trying to
9 be helpful?

10 A. That's right.

11 Q. Is it fair to say that when you came out of your
12 apartment on the way towards the laundry room, you were
13 walking west, correct?

14 A. West? That way, yes, west.

15 Q. Towards --

16 A. I haven't lived here in a while.

17 Q. And you were walking towards what would be that
18 horseshoe shaped parking lot?

19 A. Yeah, I was heading that way. Well, wait, no.

20 Q. Right --

21 A. Mm-hmm --

22 Q. -- towards that?

23 A. -- towards that.

24 Q. Sort of the building that's on the very top of the
25 exhibit --

1 A. Right there.

2 Q. -- in the center? And at that time you stated it
3 was quiet?

4 A. That's right.

5 Q. You didn't see any police lights or ambulance
6 lights?

7 A. No, I saw nothing.

8 Q. You saw no police officers in the courtyard?

9 A. No.

10 Q. Just you and this man that scared you?

11 A. Yes.

12 Q. You proceeded into the laundry room?

13 A. Right.

14 Q. And do you recall where you were in the laundry
15 stage at this point, in the cycle?

16 A. No.

17 Q. Were you just loading up or switching out?

18 A. I might have been -- I wasn't picking up. I might
19 have been loading up or putting in the drier.

20 Q. Okay. When you came out of the laundry room, can
21 you estimate how long you were in the laundry room for from
22 the time you went in to the time you came out?

23 A. Two or three minutes.

24 Q. So two or three minutes after you came out of the
25 laundry room still quiet?

1 A. Correct.

2 Q. This man who had passed you is gone?

3 A. Correct.

4 Q. Nowhere to be seen?

5 A. Right.

6 Q. Do you at this point hear people yelling?

7 A. No.

8 Q. Do you at this point see police lights?

9 A. No.

10 Q. Do you hear police sirens?

11 A. No.

12 Q. Still quiet?

13 A. Quiet.

14 Q. At this point it's fair to say that it's just you
15 walking back towards the east into your apartment?

16 A. Right.

17 Q. When you got back to your apartment, you just went
18 about your night, correct?

19 A. Right.

20 Q. Didn't think about this man that you had seen?

21 A. I must have thought about him a little, because I
22 remembered it the next day, but not much. Okay. Not
23 significantly.

24 Q. For instance, you didn't call the building manager?

25 A. No.

1 Q. Did you notify any of your neighbors?

2 A. No.

3 Q. Did you call the police?

4 A. No.

5 Q. Got up the next morning and at some point found out
6 that there had been a murder in your building?

7 A. Right.

8 Q. And that's something that as you walked across the
9 courtyard from east to west, you had no idea that anything
10 like that had transpired, correct?

11 A. That's right.

12 Q. Was transpiring or was about to transpire?

13 A. That's right.

14 Q. All right. The courtyard is empty at this point?

15 A. Right.

16 Q. When you were shown the photos of the six
17 individuals by the Boulder police officer, you're looking for
18 the person who you saw walking through the courtyard that
19 night, correct?

20 A. That's right.

21 Q. You are not looking for the person that committed
22 the murder necessarily?

23 A. No.

24 Q. You don't have any information that that person
25 committed the murder in those six photos?

1 A. No.

2 Q. The men in the six photos didn't have glasses on?

3 A. I don't remember -- oh just now, those men didn't
4 have glasses on.

5 Q. Right.

6 A. No.

7 Q. No glasses on the photos?

8 A. Right.

9 Q. And you identified that as the photo that you looked
10 at vaguely?

11 A. Yeah, I don't remember the faces, I just remember
12 looking at pictures.

13 Q. Okay. So when you talked to the composite artist,
14 you did your best to provide a description of the person that
15 you saw walking across the courtyard, right?

16 A. Correct.

17 Q. When you went down to the police station and you
18 drew that composite, that was your goal, right?

19 A. Correct.

20 Q. And I would imagine that at the completion of that,
21 the composite artist showed you his or her work and you said,
22 it's about right to the best of my ability?

23 A. Yeah, it wasn't great, it was so-so, but that's
24 all -- yeah, that I kind of gave up.

25 Q. But it's fair to say that the people in those six

1 photos in that photo lineup or photo array, they don't look
2 anything like that guy who you did the composite sketch with?

3 A. It wasn't the same guy, no.

4 Q. You were only describing and trying to help the
5 police identify or create a picture a -- of the person who you
6 saw walking west -- east towards your courtyard?

7 A. Right.

8 Q. Can you tell -- do you know in general or
9 specifically where this man went after passing you?

10 A. I don't know where me went.

11 Q. Is it fair to say that you were heading straight
12 east to west from your apartment towards the laundry room?

13 A. Right.

14 Q. And where was the man heading?

15 A. That way.

16 (The witness indicated.)

17 Q. Okay. So he was heading towards your building?

18 A. I don't know. I'm not sure, I don't remember. It
19 could have been here, it could have been here, because I can't
20 remember exactly where I was. It could have been one of
21 these, it wasn't that one and it wasn't that -- this area.

22 (The witness indicated.)

23 Q. Okay. But it's fair to say you walked -- is it fair
24 to say you took the most direct route --

25 A. Yeah, I probably stuck to this --

1 THE COURT: Hold on. You need to let him finish the
2 question.

3 THE WITNESS: Okay. I'm sorry.

4 Q. (By Mr. Brackley) Is it fair to say that you took
5 the most direct route from your building to the laundry room?

6 A. Yes.

7 Q. And the man would have been within 2 feet of your
8 most direct route?

9 A. He would have been close.

10 Q. Okay. So close that it made you uncomfortable?

11 A. Correct.

12 Q. Okay. And he was heading the opposite direction
13 that you were?

14 A. He was heading the opposite direction.

15 Q. And you didn't see whether he went to this building
16 or your building or any other direction?

17 A. No, I didn't.

18 MR. BRACKLEY: Thank you, Ms. Augustine.

19 THE COURT: Redirect.

20 **REDIRECT EXAMINATION**

21 **BY MS. RING:**

22 Q. Ms. Augustine, I heard Mr. Brackley asking you
23 something about the composite and what you thought about the
24 composite when it was finished --

25 A. Right.

1 Q. -- and I couldn't hear your answer.

2 A. I wasn't happy with the composite. I didn't feel
3 like it looked like the person I saw, but I -- I felt like it
4 was too difficult to describe a face of a person to another
5 person and it was just a hard task to do. So I remember
6 looking at it and thinking, Well, it doesn't look just like
7 him. I knew it didn't look just like him, but it was close.
8 It was in the ballpark, but it wasn't accurate.

9 MS. RING: No further questions.

10 THE COURT: Recross?

11 **RECROSS-EXAMINATION**

12 **BY MR. BRACKLEY:**

13 Q. Probably difficult also because you saw this person
14 for about 20 seconds, right?

15 A. That's right.

16 MR. BRACKLEY: Thank you.

17 THE COURT: All right. Ms. Augustine, you can step
18 down.

19 THE WITNESS: Okay.

20 THE COURT: May this witness be excused, Ms. Ring?

21 MS. RING: Yes.

22 THE COURT: Mr. Brackley?

23 MR. BRACKLEY: Yes, Your Honor.

24 THE COURT: Ms. Augustine, you are excused. Thank
25 you.

1 THE WITNESS: Thank you.

2 THE COURT: Any further evidence on behalf of the
3 Defendant?

4 MS. RING: Yes, we call Mr. Terry Kruger.

5 THE COURT: Sir, would you step forward. Come all
6 the way up here. All the way up by that chair, if you would,
7 please. And before you sit down, would you face me and raise
8 your right hand.

9 **TERRY KRUGER,**

10 a witness herein, having been first duly sworn, was examined
11 and testified on his oath as follows:

12 THE COURT: Please have a seat.

13 Go ahead, Ms. Ring.

14 **DIRECT EXAMINATION**

15 **BY MS. RING:**

16 Q. Good afternoon, Mr. Krueger. Would you --

17 A. Good afternoon.

18 Q. -- state your name and spell your last name for the
19 court reporter.

20 A. Terry Kruger, K-r-u-g-e-r.

21 Q. Mr. Kruger, where do you live now?

22 A. Carlsbad, California.

23 Q. And what do you do?

24 A. As little as possible, I'm retired.

25 Q. Do you do anything artistic?

1 A. I'm a painter.

2 Q. Did you used to work with the Boulder Police
3 Department in drawing composites?

4 A. I did.

5 Q. Were you doing that in 1994?

6 A. I was.

7 Q. Did that mean you were an employee of the Boulder
8 Police Department -- or can you describe how that relationship
9 worked?

10 A. I was a 20-year employee of the Boulder Police
11 Department and City of Boulder.

12 Q. Do you recall being asked to draw a -- help meet
13 with a witness and draw a composite in the investigation
14 regarding Marty Grisham's murder in 1994?

15 A. Only in retrospect.

16 Q. Okay. And when you say "only in retrospect," is
17 that because you have been contacted recently to ask you about
18 if you remember doing that?

19 A. That's correct.

20 Q. Okay. But that's something that you would have done
21 in 1994, in the normal course of your employment as part of
22 the Boulder Police Department?

23 A. Yes.

24 MS. RING: Okay. If I may approach?

25 THE COURT: Yes.

1 Q. (By Ms. Ring) I'm showing you what's been marked
2 defense Exhibit R. Does that look familiar to you?

3 A. It does.

4 Q. Is your name or signature anywhere on that?

5 A. This is my signature.

6 Q. Okay. What does that mean, that your signature is
7 there?

8 A. That means that I -- this is my drawing and this is
9 actually a computer -- both a physical drawing by hand and
10 probably completed in the computer.

11 Q. Okay. So is it fair that you don't have a specific
12 recollection of doing this specific composite?

13 A. Is it fair?

14 Q. Yeah. Is it true?

15 A. Is it fair to say?

16 Q. It's fair to say?

17 A. Well, yes and no. I know that this is my work and I
18 know that I did it, and I'm somewhat familiar with the fact
19 that -- how it was done.

20 Q. Okay. Do you have an independent recollection as
21 you sit here today of actually meeting with the witness who
22 you spoke with in order to do that composite?

23 A. I do not.

24 Q. Okay. Does the document you're looking at tell you
25 who actually was assigned to the case and would have actually

1 asked you to do this composite?

2 A. Yeah. Detective Tom Trujillo -- you know, in a case
3 like this I wasn't always sure that the detective -- if there
4 even was a detective that had been assigned to the case yet.
5 Somebody might just say they need you for a composite and --
6 but in this case the case must have been assigned to him at
7 that time.

8 Q. Okay. And then there's other information on here
9 that indicates what would be the date and time and location
10 of -- that would be the crime, correct?

11 A. Yes.

12 Q. Okay. And it says that the date and time was
13 November 1st of 1994 at 9:30 or 21:30 hours, right?

14 A. Mm-hmm.

15 Q. And the location is 5640 Arapahoe?

16 A. Mm-hmm.

17 Q. It also says what date -- the date completed,
18 meaning what date the composite was done?

19 A. Mm-hmm.

20 Q. I think you have to say yes or no because Ms. Ritter
21 is trying to take that down.

22 A. Yes, I agree.

23 Q. And what date does it say?

24 A. November 3rd, 1994.

25 Q. Okay. There's also some other information here over

1 on the right that's descriptive information. In terms of how
2 you would do composites, that information comes from the
3 witness that you're talking to who's describing the person?

4 A. That's correct.

5 Q. So that information there would be given to you by
6 that person?

7 A. That's correct.

8 Q. Okay. There's also some numbers in here from 1 to
9 10 and the 7 is circled. Can you tell us what that indicates?

10 A. The 1 to 10 is an evaluation that I ask them to
11 complete to give me a number of how much they thought the
12 likeness was like the person they were describing to me.

13 Q. And you do that after you're done with the drawing?

14 A. Yes.

15 MS. RING: Okay. I would move to admit defense
16 Exhibit R.

17 THE COURT: Objection or voir dire.

18 MR. BRACKLEY: Quick voir dire, Your Honor.

19 THE COURT: Go ahead.

20 **EXAMINATION**

21 **BY MR. BRACKLEY:**

22 Q. So, Mr. Kruger, how are you?

23 A. Fine, thanks.

24 Q. You mentioned that there is some kind of -- some
25 detail -- biographical information on the right side which

1 would include race, gender, height, weight, age, et cetera.
2 Without telling us any details, do you recall where that
3 information -- do you recall actually getting that information
4 from the person who you sat with and -- and, um -- and did the
5 sketch with?

6 A. That's the only place I would have gotten it.

7 Q. Okay. And there's other stuff in there about the --
8 the, um -- about the relevance of this particular sketch in
9 relation to whatever crime is being investigated, right?

10 A. I'm not sure I understand your question.

11 Q. For instance, this is the suspect of a homicide, or
12 this is someone who's seen in the area, or this is a person of
13 interest. You would record some of that information on here?

14 A. Yes, if I felt that it was pertinent.

15 Q. And you might record some details about the type or
16 nature of eyeglasses or something like that, correct?

17 A. If I had that information.

18 MR. BRACKLEY: Your Honor, I'm going to object and
19 I'm going to ask to approach.

20 THE COURT: Okay. Please approach.

21 (Whereupon, counsel for the parties and the reporter
22 approached the bench and the following proceedings were had
23 out of the hearing of the jury.)

24 MR. BRACKLEY: Ms. Jerome didn't testify to any of
25 this information as to any of this information as to any of

1 this information, this information, this information. Um, she
2 doesn't remember any of this information. And, frankly,
3 Judge, this is where I'm going to say that none of this is
4 relevant because it does not have a nexus to the homicide.
5 Ms. Jerome saw someone out there during a timeframe which was
6 completely irrelevant to any homicide.

7 THE COURT: Your response.

8 MS. RING: Well, I think that when we hear from
9 Officer Wyton and she doesn't remember that information he'll
10 be able to testify to that information, if you want to redact
11 that piece. I didn't ask him the details of that information,
12 just that the characteristics are there.

13 THE COURT: What about the argument that this
14 ultimate suspect evidence, such as it is, is irrelevant?

15 MS. RING: Well, they brought it up in their direct
16 that there was a person that was seen in roughly 9:30 at
17 night, that they had a composite done. They asked the person
18 to look at a lineup. That was all brought up in their direct
19 testimony. So it certainly comes on me to say that the person
20 they were talking about didn't identify my client.

21 THE COURT: Wasn't there also testimony that the
22 person identified in the sketch turned out to be a resident of
23 the apartment complex?

24 MS. RING: That's who we are putting on next, but
25 it's our burden that there is a timeframe issue, and about

1 what the police investigation did or didn't do.

2 MR. BRACKLEY: I mean I would have liked to have
3 litigated this before trial outside of the presence of the
4 jury because the guy is going to come in and say that is me.

5 THE COURT: And he apparently lived at the complex
6 at the time. This witness was going to say that sketch is me,
7 I was a resident of the apartment complex at the time.

8 MR. BRACKLEY: Right.

9 THE COURT: Do you have any other evidence that
10 somehow this individual that Ms. Augustine has described, or
11 there's sufficient evidence to conclude that she was the
12 source of the sketch just because of the timing, but any other
13 evidence to connect this person to the crime?

14 MS. RING: I'm not arguing that's an alternate
15 suspect. I'm arguing that the police didn't follow through on
16 leads and they didn't do a satisfactory investigation. The
17 person who the police say is this guy who lived at the
18 apartment at the time is going to testify that he got home
19 after the shooting. If he got home after the shooting, he
20 wasn't the guy she saw, but the police didn't follow up any
21 further on that because they said it was the neighbor.

22 THE COURT: I'll go back to what I asked a few
23 minutes ago. Do you have any evidence that connects the guy
24 she saw to the crime?

25 MS. RING: The timing of between 9:15 and 9:30

1 before the shooting is the time directly before it. I'm not
2 going to argue he's the guy. I'm going to argue that the
3 police investigate this, they said they closed it up, but they
4 hadn't because the neighbor wasn't the guy.

5 THE COURT: I'm going to excuse the jury for
6 20 minutes. I need to talk to you about this further.

7 (Whereupon, the following proceedings were had in
8 the presence and the hearing of the jury.)

9 THE COURT: Ladies and gentlemen, I'm going to
10 excuse you for 20 minutes. It's a little early for the mid
11 afternoon recess, but I need to talk to counsel about the
12 issue.

13 Remember the admonition that I have given you
14 previously applies at this recess as well. And we should be
15 ready for you at about 10 minutes after 3:00.

16 (The jury exited the courtroom.)

17 THE COURT: The record should reflect the jury has
18 left the courtroom.

19 Mr. Kruger, you can step down. If you would,
20 please, be back on the witness stand at 10 after 3:00. You
21 can walk directly up and take a seat at 3:10.

22 Thank you.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: Mr. Brackley, you were about to respond
25 to Ms. Ring's argument that this is -- isn't alternate suspect

1 evidence, it's more along the lines of incomplete police
2 investigation of the crime. And I wanted to be able to talk
3 with counsel in open court without having to whisper at the
4 bench, so go ahead.

5 MR. BRACKLEY: Judge, I think that the -- one of the
6 last points Ms. Ring made was that it's not the guy. The
7 person who Mr. Loren (sic) is going to come in and say I'm not
8 that guy, he's right. I mean Mr. Zondlo is going to come in
9 and say I am that guy, he's wrong because there is this timing
10 issue. Mr. Zondlo got there after the shooting. When
11 Mr. Zondlo pulled into the parking lot, there was mass chaos
12 in that courtyard. But the issue is when Ms. Augustine was
13 there in that courtyard it was quiet both to the -- to the
14 laundry room and after the laundry room. She sees a man who,
15 according to her, scared her because he walked within 2 feet
16 of her as opposed to 5 feet, which is more appropriate.

17 THE COURT: No, she just said he walked close to
18 her.

19 MR. BRACKLEY: That's all she says, that he walked
20 close to her, that's it. He wasn't menacing her, he didn't
21 have a gun, he didn't have a knife, he didn't say anything to
22 her, he didn't threaten her. She simply got spooked by a man
23 who walked too close to her at a time when there was
24 absolutely nothing going on in that courtyard. There was no
25 nexus to the crime.

1 The jury will be asked to speculate as to who this
2 man was, where he was going, to which apartment. He wasn't
3 even walking towards Marty Grisham's apartment, he was walking
4 east, the opposite direction she was walking in. She said
5 that she was walking towards the laundry room from her
6 apartment, this man passed, in her words, very close to her,
7 but back then she said within 2 feet of her going the opposite
8 direction, which is east towards the golf course. There is no
9 nexus, there is no relation to this sighting, this man in the
10 sketch and the murder.

11 And she testified, Judge, that she didn't go there
12 to draw a picture or a sketch or help the police identify the
13 person who she has reason to believe committed a murder. She
14 was assisting the police to identify the man who she saw
15 passing by in the courtyard when nothing was going on and
16 there is no reasonable or likely nexus to the crime.

17 THE COURT: Okay. Ms. Ring, do you want to respond?

18 MS. RING: So, Judge, first of all, our argument is
19 not going to be that that's the alternate suspect. Although I
20 would disagree with Mr. Brackley that the timing of when this
21 happened -- and I know that the Court heard from Ms. Jerome --
22 Ms. Augustine that she doesn't remember all the details, but
23 she told the police and called them then and told them that it
24 happened around 9:30. And it happened very --

25 THE COURT: She said 9:15, didn't she?

1 MS. RING: She said between 9:15 and 9:30, and what
2 she told the -- you know, because we were refreshing
3 recollection, Officer Wyton's records will say that she said
4 9:30.

5 THE COURT: Okay.

6 MS. RING: And the fact that there was somebody in
7 the courtyard between 9:15 and 9:30 right near Marty Grisham's
8 apartment, when they are saying that he was murdered, right
9 before 9:34, is relevant. What we're going to argue and what
10 we have been arguing this entire trial is that the police very
11 early on focused on Michael Clark. And we're arguing they
12 focused on Michael Clark to the point where they didn't follow
13 up on other investigation that they should have.

14 Now I know from everything else that I had read in
15 discovery that there isn't even a report that indicates that
16 they wanted to talk to Mark Zondlo to clear up whether he was
17 the individual in the composite. Mark Zondlo is the neighbor
18 who the police would say this is the person in the composite,
19 but there's no report that documents that anywhere. We just
20 read it in discovery that they ruled Mark Zondlo out as a
21 suspect, there's nothing in discovery that told us why. So we
22 went and interviewed Mark Zondlo and he says that he got home,
23 and when he got home Kirk Magill was already outside, there
24 was already commotion and, clearly, Marty Grisham had been
25 shot. So it follows, based on what Tanya Jerome said in her

1 timing and what Mark Zondlo says in his timing, that the
2 person she saw wasn't Mark Zondlo. And we get to put in
3 evidence that says the police said they cleared that issue up
4 with Tanya Jerome by saying that it was Mark Zondlo, but they
5 didn't clear it up because they didn't pay attention to the
6 timing. And so who knows when that -- that -- I get to
7 comment on their investigation and what they didn't do.

8 THE COURT: But this is ultimate suspect evidence
9 and you are just calling it something else because what you
10 want to be able to put in is evidence that the person in that
11 sketch who Ms. Jerome, now Augustine, saw between 9:15 and
12 9:30 may have been responsible for the murder. That's really
13 what you are getting to here, that's alternate suspect
14 evidence.

15 MS. RING: But I'm not arguing that, and I get to
16 argue that they decided that the person in the composite was
17 Mark Zondlo, that's what -- the police made that assumption.

18 THE COURT: I thought that one of you told me -- and
19 I apologize, but I thought that one of you told me that Mark
20 Zondlo is going to say that is me in that sketch.

21 MR. BRACKLEY: Your Honor, may I interrupt. Even if
22 Mark Zondlo said there's no way that's me, you still have to
23 look at Tanya Jerome in a vacuum. And there is no nexus --
24 there's no nexus to what she saw or who she saw or when she
25 saw it to this homicide.

1 MS. RING: Judge, they brought it up. They had her
2 come down to the police department, they talked about it
3 earlier. They brought up that there was a witness who had
4 seen somebody at 9:30 p.m. They -- the whole interview with
5 Michael Clark they tell him that we have got somebody doing a
6 composite who has seen a lineup, and I get to talk about why
7 they immediately said it was Michael Clark and it wasn't.

8 THE COURT: Okay. Purely as alternate suspect
9 evidence I would exclude it on 402 and 403 grounds. There's
10 no nexus. There's no connection other than the sighting of
11 some person, Mr. Zondlo, or otherwise, who was there within
12 between 4 and 19 minutes. But it is true that the prosecution
13 in their case-in-chief referenced the sketch, referenced the
14 conclusion that the sketch was of a resident at the apartment
15 complex, and so for those reasons I'll allow the defense to
16 continue on this line of questioning in evidence.

17 We started off with an objection to the admission of
18 Exhibit R on alternate suspect grounds. I would sustain that
19 objection, however, because the People brought it up in their
20 case-in-chief, I'm not going to exclude it on alternate
21 suspect grounds. I will at this time conditionally allow the
22 admission of R with the redaction of all of the written
23 information that was provided to the sketch artist and is
24 contained on the bottom margin of R. If it is subsequently
25 established that that information was provided by

1 Ms. Augustine, then the redaction is no longer necessary, but
2 for right now R is admitted, but the information in the bottom
3 of the sketch is redacted. The analysis is akin to the People
4 opening the door and I'm going to give the Defendant a fair
5 opportunity to respond to it.

6 MR. BRACKLEY: Your Honor, the People were -- the
7 fact that it came out in the People's direct case, it came out
8 during cross-examination. And it started out in -- in defense
9 opening statement about this sketch, that's where all this
10 started. When I asked Sheriff Pelle about it, it was on
11 redirect and it was limited, I said, I'm limiting you to your
12 conversation with Mr. Stackhouse. Mr. Stackhouse talked about
13 this sketch, what he was talking about, that was the
14 limiting -- that was -- those were very limited questions. I
15 also mentioned that it isn't a report. Sergeant Pelle wrote
16 this information in one of his reports, so to say there's no
17 report about that, that's not true, but --

18 THE COURT: Okay.

19 MR. BRACKLEY: -- but I -- my questions were very
20 limited to what was Stackhouse talking about when he's talking
21 about I don't have -- I have longer hair than that.

22 MS. RING: It came out in the interview of Michael
23 Clark in November of 1994 --

24 THE COURT: That's right.

25 MS. RING: -- which the prosecution put on in their

1 case-in-chief.

2 THE COURT: That's right. Look, I agree, it's not
3 proper alternate suspect evidence, but I'm going to allow it
4 because I think that it's a fair response to evidence that was
5 presented by the People. So are you intending to publish
6 Exhibit R at this time, Ms. Ring?

7 MS. RING: No.

8 THE COURT: Okay.

9 MR. BRACKLEY: So, Your Honor, I guess that my
10 question to the Court at this point would be, is does the
11 Defendant get to argue that there is a killer out there
12 somewhere, where is he?

13 THE COURT: In closing argument?

14 MR. BRACKLEY: Right.

15 THE COURT: No.

16 MR. BRACKLEY: Okay.

17 THE COURT: But they would be entitled to argue
18 along the lines of what Ms. Ring just stated, and that is that
19 police had information, came to a conclusion perhaps with --
20 came to a conclusion that may or may not have been
21 fundamentally sound, and once they reached that conclusion
22 didn't go any further with it, that I think is proper argument
23 and comment. But to say that the person in that sketch is, in
24 fact, the person that committed the homicide is not
25 permissible.

1 All right. We'll be in recess until 3:10.

2 (The afternoon recess was taken.)

3 MS. RING: Judge, Mr. Brackley is telling me now he
4 doesn't have an objection to --

5 THE COURT: Let's go back on the record, 12 CR 222.
6 The Defendant and counsel are present, the jury is not.

7 I had previously ruled that R was admitted subject
8 to redaction. Now my understanding is that the People have no
9 objection to R without being redacted; is that true,
10 Mr. Brackley?

11 MR. BRACKLEY: Right, Your Honor.

12 THE COURT: Okay.

13 MR. BRACKLEY: It's mostly a practical point in that
14 I know as the evidence will play out that information will
15 come out, that Ms. Jerome provided that information, but --
16 it's fine. The People withdraw that objection.

17 THE COURT: So R will be admitted in its entirety.
18 And if you want to publish it now, you can.

19 MS. RING: That's the last thing I'm going to do
20 with Mr. Kruger is admit R. I'm not going to publish it now.
21 And then it's Mr. Brackley's witness.

22 THE COURT: All right. Would you bring the jury in.

23 (Whereupon, the jury entered the courtroom, and the
24 following proceedings were had in the presence and the hearing
25 of the jury.)

1 THE COURT: Please be seated. Ms. Ring, just prior
2 to the recess you had moved for the admission of Exhibit R. R
3 will be admitted.

4 (Defendant's Exhibit R was admitted into evidence by
5 agreement of the parties.)

6 MS. RING: Thank you. I have no further questions
7 for Mr. Krueger.

8 THE COURT: All right. Cross-examination,
9 Mr. Brackley.

10 MR. BRACKLEY: No cross-examination for Mr. Kruger.
11 Thank you, sir.

12 THE COURT: All right. Mr. Kruger, you can step
13 down.

14 Can this witness be excused, Ms. Ring?

15 MS. RING: Yes.

16 THE COURT: Mr. Brackley.

17 MR. BRACKLEY: Yes.

18 THE COURT: Mr. Kruger, you are excused.

19 Any further evidence on behalf of the Defendant?

20 MS. RING: We call Matt Zondlo.

21 I'll go check, I know Mr. Zondlo is on this floor.

22 THE COURT: Okay. Why don't you check.

23 Sir, would you step forward, please. Come all the
24 way up here by this witness chair. Before you sit down, would
25 you face me and raise your right hand.

1 **MARK ANDREW ZONDLO,**
2 a witness herein, having been first duly sworn, was examined
3 and testified on his oath as follows:

4 THE COURT: Please have a seat.

5 Go ahead, Ms. Ring.

6 **DIRECT EXAMINATION**

7 **BY MS. RING:**

8 Q. Mr. Zondlo, would you tell us your full name and
9 spell your last name for the record, please.

10 A. My name is Mark Andrew Zondlo, last name
11 Z-o-n-d-l-o.

12 Q. Mr. Zondlo, where do you live presently?

13 A. Princeton, New Jersey.

14 Q. And what do you do?

15 A. I'm an assistant professor of civil and
16 environmental engineering at Princeton University.

17 Q. Did you live in Boulder, Colorado, at one point?

18 A. Yes, I did.

19 Q. And when you lived in Colorado, did you go to the
20 University of Colorado?

21 A. Yes, I was a graduate student there.

22 Q. Okay. Did you get a degree from there?

23 A. Yes, I got a Ph.D in chemistry.

24 Q. Were you living in Boulder, Colorado, in November of
25 1994?

1 A. Yes, I was.

2 Q. Do you recall where you were living?

3 A. At the Fairways apartments.

4 MS. RING: If I may approach? I lost my easel.

5 Q. (By Ms. Ring) I'm going to show you what's been
6 marked and admitted as defense Exhibit O. Does that diagram
7 look familiar at all to you in terms of the apartments where
8 you lived?

9 A. Yes, it does.

10 Q. In 1994?

11 A. Yes, it does.

12 MS. RING: And if the District Attorney wouldn't
13 mind, since I lost my easel, if they wouldn't mind flashing up
14 the apartments since I don't have anywhere to put that.

15 THE COURT: I mean the easel is back here. We can
16 set it up, if you want.

17 MS. RING: Thank you.

18 Q. (By Ms. Ring) And this should be a pointer up here
19 and -- wow, that's what happens when you get a Ph.D, you pick
20 it up and you can use it right away.

21 Can you tell from looking at the diagram that
22 that's --

23 A. I'm trying to get oriented --

24 Q. Okay.

25 A. -- right now. I assume this is the parking lot; is

1 that correct?

2 (The witness indicated.)

3 Q. Maybe.

4 A. I don't think that's the same graph you just showed
5 me or at least it's a different --

6 Q. Let's see if you look at both of these at the same
7 time if that helps. So that --

8 A. Okay. Okay. I see. Okay. I lived in an apartment
9 on the first floor right here.

10 (The witness indicated.)

11 Q. Okay. And do you recall if you lived there on
12 November 1st of 1994?

13 A. Yes, I did.

14 Q. Can you show us where you lived on the first floor
15 of the building? Do you recall if Marty Grisham was one of
16 your neighbors?

17 A. Yes, he was.

18 Q. And did you know Marty Grisham?

19 A. No, I didn't, other than, you know, passing, saying
20 hello.

21 Q. Did you have a roommate when you were living in that
22 apartment?

23 A. Yes, I did.

24 Q. And who was your roommate at the time?

25 A. Edwin Holcome, he was also a fellow first year grad

1 student.

2 Q. Do you remember learning that Marty Grisham had been
3 murdered?

4 A. What do you mean by "learning"?

5 Q. Do you remember having that information?

6 A. I guess I found out the next day in the Daily Camera
7 that there was an actual murder. I came home shortly after
8 apparently the shooting happened.

9 Q. And do you recall on November 1st, 1994, what you
10 did that day prior to coming home that evening?

11 A. Yes, I was a graduate student, I had classes and I
12 had two TA courses in the evening, or help sessions or
13 something like that. And then -- do you want the full
14 description or is that good enough?

15 Q. Well, you told us that you got home and --

16 A. Okay.

17 Q. So do you remember where you were coming from right
18 before you came home?

19 A. Yes, I was coming from campus. I stopped at the
20 King Soopers at 30th and Arapahoe, I got some groceries and
21 then I came home, drove into the parking lot.

22 Q. And did anything out of the ordinary happen when you
23 drove into the parking lot that night?

24 A. Yes. As I was driving in, the apartment manager
25 came running out and flagged me down and I thought that was a

1 little bit weird. I rolled down my window and he said, Mark,
2 Mark, did you see anyone run out here. Several people heard
3 gunshots, and said someone came out here, to which I
4 responded, No.

5 Q. Okay. And you told us you left much earlier that
6 day and went to campus and did what you would normally do?

7 A. Correct.

8 Q. And that was the first time you had come back to
9 your apartment was that evening when you came into the parking
10 lot?

11 A. Yes.

12 Q. Do you have any recollection of what you were
13 wearing that night when you got out of the car and were --

14 A. Yes, I was wearing jeans, I had some sort of
15 purplish sweater on, I had my jacket on, it was a red jacket,
16 kind of like a light ski jacket. I was wearing my glasses
17 since I had just been driving and that's all I remember.

18 Q. Do you remember seeing a composite in the newspaper
19 at some point related to Marty Grisham's murder?

20 A. Yes, I did.

21 Q. And what drew your attention about the composite?

22 A. I read in the Daily Camera, you know, sandy blonde
23 hair, it was like 6 foot, 6 foot 2 inches, 200 pounds. And I
24 just kind of thought -- and it kind of looked like the hair
25 was parted in the center and I said, Oh that could be me, and

1 thought nothing of it.

2 Q. You certainly didn't have anything to do with Marty
3 Grisham's murder?

4 A. No.

5 Q. And you clearly got home after it happened?

6 A. Yes.

7 MS. RING: Nothing further.

8 THE COURT: Cross-examination, Mr. Brackley.

9 **CROSS-EXAMINATION**

10 **BY MR. BRACKLEY:**

11 Q. At some point you contacted the police about this
12 sketch that you saw in the newspaper, right?

13 A. No, I did not contact the police on my own. Several
14 people in my classes said, Mac, I saw you on the news last
15 night, I saw you in the paper. They said I saw this picture
16 and I said, That's Mark, but I did not contact the police. A
17 couple of days later I got a phone call around breakfast time
18 and it was a Detective Tom Trujillo.

19 Q. Okay. Did you at some point meet with Detective Tom
20 Trujillo?

21 A. Yes, a couple weeks later.

22 Q. Okay. And you went into the Boulder police or did
23 he come to where you were at the time?

24 A. On the initial phone conversation he said that they
25 could send someone out there to interview me or I could go to

1 the station, because of logistics and phone tag I ended up
2 going to the police station.

3 Q. Okay. So there was some logistical and phone tag
4 issues for a little bit, which delayed you actually getting
5 into the Boulder Police Department to meet with Detective
6 Trujillo?

7 A. That's correct.

8 MR. BRACKLEY: Okay. Your Honor, if I can approach
9 with People's 84 --

10 THE COURT: Yes.

11 MR. BRACKLEY: -- for identification.

12 Q. (By Mr. Brackley) Mr. Zondlo, do you recognize that
13 guy?

14 A. Yes, that is me.

15 Q. And is that you back in the fall of 1994?

16 A. Yes, that is correct.

17 Q. Is that a photograph that Detective Trujillo would
18 have taken of you back in -- back when you met with him when
19 you responded to his request to meet with you?

20 A. Yes, it was.

21 Q. Okay. And is that a fair and accurate depiction of
22 how you looked at or about that time?

23 A. Yes.

24 MR. BRACKLEY: Your Honor, I would move to admit
25 that into evidence as People's 84.

1 THE COURT: Objection or voir dire?

2 MS. RING: No.

3 THE COURT: 84 will be admitted.

4 (People's Exhibit 84 was admitted into evidence by
5 agreement of the parties.)

6 Q. (By Mr. Brackley) Okay. If I can publish? First I
7 would like to publish defense R.

8 THE COURT: Do you have it electronically or do you
9 need to do it the old fashioned way?

10 MR. BRACKLEY: We have it electronically.

11 THE COURT: Okay.

12 MR. BRACKLEY: Okay.

13 Q. (By Mr. Brackley) Do you recognize this here?

14 A. Yes.

15 Q. Is that the sketch that you saw in the newspaper?

16 A. Yes.

17 Q. That you thought looked like you and others said
18 that's you?

19 A. Yes.

20 Q. Okay. If I can show People's 84. And is that you
21 back there in the fall of 1994?

22 A. Yes.

23 MR. BRACKLEY: And, Your Honor, I'm going to show
24 those two side-by-side.

25 THE COURT: Go ahead.

1 Q. (By Mr. Brackley) Is this pretty much why you
2 suspected that you were, in fact, the person in the sketch?

3 A. Well, I hadn't seen the large 8-and-a-half-by-11,
4 but, yes, I just saw the small one in the Daily Camera, but
5 after several people told me this, my initial reading when I
6 saw it that morning before anyone had told me, I said, That
7 could be me, and then when people started saying that, it --
8 and then when I saw the 8-and-a-half-by-11 that Detective
9 Trujillo gave to me, I said, That's me.

10 Q. Okay. As you sit here today, do you recall your --
11 what your sort of height and weight information would have
12 been back in 1994 in the fall?

13 A. My height is probably the same as now, 6 foot
14 2 inches, my weight was probably somewhere in the 200 to 215
15 range. I don't know the exact value.

16 Q. Okay. And I see that you are wearing a jacket there
17 with some blue trim. Is that -- that more of a red jacket
18 that has kind of a blue liner or trim around it?

19 A. Yes.

20 Q. And a button-up shirt?

21 A. Yeah. That's a button up shirt, that was the jacket
22 I was wearing the night that this happened.

23 MR. BRACKLEY: Great. Thank you, sir.

24 No further questions.

25 THE COURT: Any redirect, Ms. Ring?

1 MS. RING: Yes, please.

2 May I approach with defense Exhibit S?

3 THE COURT: Yes.

4 **REDIRECT EXAMINATION**

5 **BY MS. RING:**

6 Q. Mr. Zondlo, is that what I'm showing you, defense
7 Exhibit S, appear to be the same photo just bigger, where it
8 actually shows your jacket?

9 A. It looks like it, yes.

10 Q. So defense exhibit --

11 A. I mean, yes. Yeah.

12 Q. Defense Exhibit S is a picture of you?

13 A. Yes.

14 Q. Okay. And it's an accurate picture of how you
15 looked in 1994?

16 A. Yes.

17 Q. And it actually shows you wearing a red jacket?

18 A. Yes.

19 Q. And is it the same jacket that Mr. Brackley was just
20 asking you about that you can only see the top blue color of
21 it?

22 A. Yes.

23 Q. And is that red jacket reflected in defense
24 Exhibit S the jacket you would have been wearing that you told
25 us about earlier on November 1st of 1994 when you got home

1 from grocery shopping?

2 A. Yes.

3 MS. RING: I move to admit defense Exhibit S.

4 THE COURT: Any objection?

5 MR. BRACKLEY: No objection.

6 THE COURT: S will be admitted.

7 (Defendant's Exhibit S was admitted into evidence by
8 agreement of the parties.)

9 MS. RING: No further questions.

10 THE COURT: All right. Any recross, Mr. Brackley?

11 MR. BRACKLEY: No, Your Honor. Thank you, sir.

12 THE COURT: Mr. Zondlo, you may step down. Can this
13 witness be excused, Ms. Ring?

14 MS. RING: Yes.

15 THE COURT: Mr. Brackley?

16 MR. BRACKLEY: Yes.

17 THE COURT: Mr. Zondlo, you are excused. Thank you
18 very much.

19 THE WITNESS: Thank you.

20 THE COURT: Any further evidence on behalf of the
21 Defendant?

22 MS. MILFELD: Yes, Judge. We call Detective Denig.

23 THE COURT: Would you step forward please,
24 Detective. And, sir, you've previously been sworn in this
25 matter, so I'll simply remind you, you are still under oath.

1 THE WITNESS: Okay.

2 THE COURT: Please have a seat.

3 Go ahead, Ms. Milfeld.

4 MS. MILFELD: Thank you, Judge.

5 **DIRECT EXAMINATION**

6 **BY MS. MILFELD:**

7 Q. Detective Denig, do you remember meeting with Tanya
8 Jerome?

9 A. Yes.

10 Q. What was the purpose of meeting with her?

11 A. She had given Detective Wyton some information about
12 a party she had seen at the apartment complex on the night of
13 the homicide.

14 Q. Where did you meet with her?

15 A. At the police department, the Boulder Police
16 Department.

17 Q. Was there anything that you did before the meeting
18 to prepare? Did you prepare anything for the meeting?

19 A. Yes, prior to her arrival Detective Wyton and I put
20 together a photo lineup.

21 MS. MILFELD: Judge, may I approach?

22 THE COURT: Yes.

23 Q. (By Ms. Milfeld) I'm showing you what's marked as
24 defense Exhibit P, one has pictures on it, the other is a face
25 sheet. I would like you to review that for a minute.

1 THE COURT: Isn't one P and one Q?

2 MS. MILFELD: That's right, Judge. I just saw the P
3 on the top sheet.

4 THE COURT: Okay.

5 MS. MILFELD: Q, for the record, is the pictures and
6 P is the face sheet.

7 Q. (By Ms. Milfeld) Okay. I want to start with
8 defense Exhibit P. Do you recognize this?

9 A. Yes, I do. This is my handwriting showing the date
10 and time of the advisement, my signature and my employee
11 number.

12 THE COURT: And, Detective, I need you to keep your
13 voice up, if you would, please. I know Ms. Milfeld is
14 standing right next to you. Make sure the jury can hear.

15 A. Yes. My handwriting appears on this lineup
16 advisement form. I have completed the date and time of the
17 advisement, the location, and I signed it as a having
18 completed the form with my employee number.

19 Q. (By Ms. Milfeld) You mentioned this earlier. This
20 is a lineup advisement, but what does that mean?

21 A. It's a form that we would hand to a witness and let
22 them read this so that you could be consistent in what --
23 instead of me telling them what you are about to hand them,
24 you would let them read this and so you could be consistent
25 with your -- with each witness.

1 Q. Is --

2 A. What they were about ready to look at.

3 Q. Is this a fair and accurate depiction of the
4 advisement that you did with Ms. Jerome?

5 A. Yes.

6 Q. I want to move your attention to defense Exhibit Q.
7 What does this exhibit depict?

8 A. It's a photographic lineup that Detective Weiler and
9 I constructed as six photographs contained in it to be.

10 Q. Is this the photographic lineup that you prepared
11 before meeting with Ms. Jerome?

12 A. Yes.

13 Q. Is this the photographic lineup that you showed her
14 that day?

15 A. It is.

16 Q. I want to draw your attention --

17 MS. MILFELD: Well, at this time the defense moves
18 to admit defense Exhibit P and Q.

19 THE COURT: Objection or voir dire, Mr. Kellner?

20 MR. KELLNER: No, Judge.

21 THE COURT: P and Q are admitted.

22 (Defendant's Exhibits P and Q were admitted into
23 evidence by agreement of the parties.)

24 Q. (By Ms. Milfeld) I'm going to stand here with you.
25 And who's depicted in position 3?

1 A. I believe that would have been a booking photo of
2 Mr. Michael Clark.

3 Q. Why did you include him in the lineup?

4 A. Because at the time in the information that we had
5 gleaned, it was believed that he may have some involvement.

6 Q. Was Ms. Jerome able to pick out anyone in the
7 lineup?

8 A. No, she was not.

9 Q. Did she pick out Mr. Clark in position 3?

10 A. No, she did not.

11 MS. MILFELD: Judge, at this time I would like to
12 publish the exhibits to the jury.

13 THE COURT: Permission granted. You have it
14 electronically or do you need to do it the old fashioned way?

15 MS. MILFELD: Old fashioned way.

16 THE COURT: All right. P and Q will be published to
17 the jury.

18 Ms. Batchelder, if you would start with Ms. Timms.
19 And, ladies and gentlemen, if you would pass it around like
20 you did previously today.

21 Ms. Milfeld, you may continue your direct
22 examination.

23 MS. MILFELD: Judge, I don't have any other
24 questions. Thank you.

25 THE COURT: Cross-examination, Mr. Kellner.

CROSS-EXAMINATION

BY MR. KELLNER:

Q. Good afternoon, Detective Denig.

A. Good afternoon.

Q. Detective Denig, you knew that Tanya Jerome had drew a composite with Terry Kruger who included a person who had glasses; is that right?

A. I had seen that composite, yes.

Q. And that she only described seeing one person, just one person, at the time when she walked past this person she described and then drew in the composite?

A. I don't recall any direct information that I got from Tanya regarding her -- the context of her -- other than she had seen somebody the night of the homicide in the complex, I don't remember any other.

Q. Do you recall that the person that she put in the composite was 6 foot 2 inches?

A. No, I don't recall that --

Q. Do you recall --

A. -- description.

Q. -- the person she put in the composite was 210 pounds?

A. No, I don't.

Q. Do you recall that the person she had in the composite had sandy blonde hair with hair parted in the

1 middle?

2 A. I do not.

3 Q. Even though she had drawn this composite of someone
4 that had glasses and sandy blonde hair parted in the middle
5 6 foot 2 inches, 210 pounds, you still showed her a six-pack
6 lineup that included the Defendant?

7 A. That's correct.

8 Q. And you did that basically just to cover all your
9 bases as far as your investigation goes; is that right?

10 A. Yes.

11 MR. KELLNER: Thank you.

12 THE COURT: Any redirect?

13 MS. MILFELD: No, Judge.

14 THE COURT: All right. Detective, you may step down
15 again.

16 Any further evidence on behalf of the Defendant?

17 MS. MILFELD: Yes, the defense calls Detective Tom
18 Trujillo.

19 THE COURT: Detective, would you step forward,
20 please. Sir, you've previously been sworn in the matter.
21 I'll just remind you, you are still under oath. Please have a
22 seat.

23 THE WITNESS: Thank you.

24 THE COURT: Go ahead, Ms. Milfeld.

25 **DIRECT EXAMINATION**

1 **BY MS. MILFELD:**

2 Q. One of the things that you did during your interview
3 with Michael Clark was a gunshot residue field kit?

4 A. Yes.

5 Q. Whose idea was it to use the kit?

6 A. I don't know. I got to tell you, it was a
7 combination. I mean it was an idea that we floated out there
8 and just we did it.

9 Q. What was the reasoning behind using the kit?

10 A. Basically as a ruse to get him thinking that we had
11 some evidence and see if he would tell us more.

12 Q. You wanted Mr. Clark to give you information as a
13 result of using that gunshot residue field kit?

14 A. Yes.

15 Q. What is the gunshot residue field kit normally used
16 as?

17 A. Basically it collects gunshot residue, that's what
18 we use it for.

19 Q. Would it be fair to say that it's normally used as
20 an evidence-gathering tool?

21 A. Yes.

22 Q. If someone has gunshot residue or you get a positive
23 gunshot residue result, what does that mean?

24 A. It means that they have been in and around somebody
25 that's shot a gun.

1 Q. Does it mean that a person could have shot a gun?

2 A. Yes.

3 Q. Does it mean that a person could have come into
4 contact with someone who shot a gun?

5 A. Absolutely.

6 Q. Can it also mean that someone was in the vicinity
7 where a gun was shot?

8 A. Yes.

9 Q. How do you think that the GSR kit can be important
10 evidence in a case where it is alleged that a person used a
11 gun in a murder?

12 A. Right after the shooting, if you had the suspect or
13 somebody that's been around the suspect, you want to try to
14 collect that residue right away.

15 Q. How can that be important evidence for the
16 prosecutor? I mean if there's a positive gunshot residue
17 result, what could that show?

18 A. Basically it shows one of two things. He's either
19 the shooter or somebody that's been around the shooter, or
20 an -- actually, if you expand it even further, it's somebody
21 that may have touched the shooter or walked by the shooter.
22 It's -- the evidence is really transient, by "transient," it's
23 very fragile. So if I have it on my hands and I touch you, by
24 example, I'm going to transfer it to you.

25 Q. So you talked about that there are possibilities,

1 there's a gunshot residue result and it's positive, and in a
2 case in which someone is alleged to have used a gun in a
3 murder, that could show that they, in fact, did commit the
4 murder?

5 A. I think that we're taking a step. Um, it would
6 help -- it would help -- it would be a piece of evidence that
7 we could look at. Just because somebody has gunshot residue
8 on their hands right after a homicide, doesn't actually mean
9 that they are the shooter because there's other things that
10 come into place.

11 Q. There's other possibilities we talked about?

12 A. Absolutely.

13 Q. But that's one of the things that it could show?

14 A. Yes.

15 Q. That he actually used a gun?

16 A. Yes.

17 Q. Let's say the converse occurs and the gunshot
18 residue result, there's not a positive test.

19 A. Okay.

20 Q. How do you think that would be important to, say, a
21 defense attorney?

22 A. A defense attorney would allege that the person
23 wasn't around the shooting.

24 Q. So I think that we can agree that a gunshot residue
25 test does have evidentiary value?

1 A. Yes.

2 Q. That it can have value for both defense attorneys
3 and prosecutors?

4 A. Absolutely.

5 Q. In this particular case, were gunshot residue field
6 kits used on any other people?

7 A. Yes, there were.

8 Q. Who were they used on?

9 A. At autopsy -- let me back up. When Mr. Grisham was
10 in the hospital, the bags on his hands to protect his hands,
11 um -- at the autopsy the gunshot residue kit was used on him
12 to see if he had gunshot residue on his hands. It would --
13 actually, I'm not even sure if we tested it because it was
14 kind of obvious that he was around a gunshot because he had
15 bullet holes in him -- he had bullets in him.

16 The second person was Barbara Burger Swider, she
17 goes by both names, the witness that was in the residence at
18 the time of the shooting. Again, she was around the shooting,
19 so we did do a gunshot residue test on her, too.

20 Q. Did you keep those kits?

21 A. Yes.

22 Q. Were those --

23 A. Those two.

24 Q. -- logged into property and evidence?

25 A. They absolutely were.

1 Q. Are they still with us today?

2 A. I believe so, yes.

3 Q. You talked a little bit about the collection of the
4 gunshot residue. What is the normal procedure that you follow
5 after you collect this?

6 A. Normally I take the kit, put it into evidence.

7 Q. Would you document that in any way?

8 A. It would be -- there would be an evidence report,
9 yes.

10 Q. After you would log it into property and evidence,
11 would you send it anywhere?

12 A. I got to say maybe, it's really case dependent.

13 Q. Let me back up.

14 A. Okay.

15 Q. If you wanted testing to be done on the kits, where
16 would you send it?

17 A. If the kit needed to be tested, it would go down to
18 the Colorado Bureau of Investigation.

19 Q. And at some point they would send back the kits with
20 some sort of results?

21 A. Yes.

22 Q. In this particular case with the gunshot residue
23 field kit you did with Mr. Clark, do you know what happened
24 after you performed that test to the kit?

25 A. Yeah, it -- tossed it. We don't have that kit.

1 Q. So your testimony today is that you threw it away?

2 A. Yes.

3 Q. Now we've had multiple hearings in this case,

4 Detective Trujillo; is that correct?

5 A. Yes.

6 Q. You were present at a previous motions hearing?

7 A. Yes.

8 Q. The prosecutor's were present?

9 A. Yes.

10 Q. I was present, Ms. Ring was present?

11 A. Absolutely.

12 Q. Mr. Clark, the and judge were present?

13 A. Correct.

14 Q. At the time we asked you about what happened to the
15 kit after you did it?

16 A. Yes.

17 MS. MILFELD: I'm on 16 of the motions hearing.

18 Q. (By Ms. Milfeld) So I'm showing you a transcript

19 from the motions hearing and I'm showing you the front page.

20 It says, District Court, Boulder County, that we were here on

21 August 9th, 2012. It shows on the first page a bunch of

22 people that were present.

23 A. Correct.

24 Q. I'm drawing your attention to page 16, and this was

25 a question that I asked you, but after that, meaning the test,

1 You didn't keep track of what happened to it. Answer, I did
2 not, um, I know the test. I don't believe the test was
3 entered, the kit. And then you say, It's not a test, It's
4 actually a collection kit.

5 A. Correct.

6 Q. So when we were at the motions hearing, you would
7 agree with me that you never told us anything about you
8 throwing away the test?

9 A. No.

10 Q. When you were at the motions hearing you told us, I
11 don't know what happened to the test?

12 A. Yes.

13 Q. You told us that you didn't know whether the other
14 two detectives had anything to do with the kit?

15 A. Yes.

16 Q. So you're testifying for the first time today that
17 you threw away the gunshot residue kit?

18 A. Yes.

19 Q. You talked about earlier how it was your idea to use
20 the kit as a psychological tool, or someone's idea?

21 A. Correct.

22 Q. Is using the kit as a psychological tool in any sort
23 of Colorado Bureau of Investigation manual?

24 A. No.

25 Q. Certainly the Colorado Bureau of Investigation has

1 never told you to use the kit as a psychological tool?

2 A. No, they have not.

3 Q. Would it be fair to say -- and I think that you
4 already said this before -- that you were hoping by using the
5 kit that you would be able to get more information from
6 Mr. Clark?

7 A. Yes.

8 Q. Were you hoping that he might tell you that he was
9 involved in some way in the murder?

10 A. Absolutely.

11 Q. When you were doing the kit with him, how did you
12 play up the effectiveness of the kit?

13 A. Talked to him about the importance of the kit, what
14 the kit is going to show, that kind of stuff.

15 Q. And was any of that true?

16 A. At the time, no, it wasn't.

17 Q. And I want to talk more in detail about what
18 specifically you told him. Was one of the things that you
19 told him that you would be able to detect the specific type of
20 gunpowder used?

21 A. That -- the individual elements, yes.

22 Q. That's not true?

23 A. Not at that time, no.

24 Q. One of the things you told him was that you would be
25 able to tell what manufacturer the gun came from?

1 A. Yeah, if that's in the transcript, yes.

2 Q. But that wouldn't be true as well?

3 A. No.

4 Q. Did the kit work as you hoped it would?

5 A. It did not.

6 Q. Did Michael Clark give you any information as a
7 result of you using the kit?

8 A. No, he did not.

9 Q. Did Michael Clark confess in any way as a result of
10 you using the kit?

11 A. He did not.

12 Q. I want to turn your attention to an interview that
13 you had with Kristin Grisham.

14 A. Okay.

15 Q. Do you remember meeting with her?

16 A. Yes.

17 Q. Do you remember when you met with her?

18 A. One of the interviews I did with her -- and,
19 actually, it started out as a polygraph, um, down at -- in the
20 Lakewood area, that's a time that I met with her.

21 Q. Did you meet with her after the polygraph was done?

22 A. Yes.

23 Q. Who was present at this interview?

24 A. I believe it was Jeff Janks, um, was the other
25 person in the room with us.

1 MR. KELLNER: Your Honor, I'm going to object at
2 this time. May we approach?

3 THE COURT: Yes.

4 (Whereupon, counsel for the parties and the reporter
5 approached the bench and the following proceedings were had
6 out of the hearing of the jury.)

7 THE COURT: What's the objection?

8 MR. KELLNER: Judge, it's that the witness is
9 getting into territory covered by polygraph examinations,
10 which is not admissible in this case. I don't know why he
11 entered that. I understand that she was asking him a
12 non-leading question and he did, but I think that the witness
13 needs to be warned that's not admissible evidence and it can't
14 happen in the presence of the jury.

15 THE COURT: Well, I'd say that this is one area of
16 the law in which I'm quite confident in which I know what the
17 answer is.

18 MS. MILFELD: I think --

19 THE COURT: I think that we all can agree that we
20 know what the answer is. The question -- the answer to the
21 question referenced the location and purpose for meeting with
22 the witness. It is not inquired about the test, the questions
23 asked during the test or the results of test, so the question
24 and answer are not improper for those purposes. But,
25 obviously, I would caution counsel to make sure that the

1 questions are phrased properly so that there is no reference
2 to -- to the offering of the test, the administration of the
3 test, questions during the test, answers during the test or
4 results of the test. And I would authorize you to lead the
5 witness to avoid that problem area.

6 MS. MILFELD: Judge, the specific questions that I'm
7 inquiring of Detective Trujillo is about the questioning
8 revolving the sexual physical abuse. Earlier we heard -- way
9 earlier we heard Kristen Grisham talk about that, she doesn't
10 remember these questions, and so I'm following up with him on
11 that. I'm not asking anything about the polygraph.

12 MR. KELLNER: Judge, I would strongly object to any
13 questioning about sexual physical abuse. I remember this very
14 vividly when Ms. Ring asked Kristin on the stand. Certainly
15 there was no sexual or physical abuse which is the same
16 consistent answer that she gave.

17 THE COURT: Hold on. Hold on.

18 MS. MILFELD: It's not --

19 THE COURT: Ladies and gentlemen of the jury, I'm
20 going to ask you to step into the jury room for just about
21 5 minutes.

22 (The jury exited the courtroom.)

23 THE COURT: Let me ask you guys to backup a little
24 bit so that -- the record should reflect the jury has left the
25 courtroom -- the ruling on the polygraph issues should be

1 clear.

2 Ms. Milfeld, you followed up with saying that what
3 you intended to ask about was --

4 MS. RING: Judge, if I can clarify.

5 THE COURT: Go ahead.

6 MS. RING: During the examination of Kristen
7 Grisham, she was asked about an interview -- or the interview
8 we're talking about with Detective Trujillo that happened
9 after the polygraphs, so not involving the polygraph or any of
10 its results, about whether she was asked about whether she had
11 told Michael Clark that she was sexually assaulted or
12 physically abused by her father, because that -- would that
13 have been any reason for Michael Clark to have wanted to
14 commit the murder of Marty Grisham.

15 THE COURT: I recall that.

16 MS. RING: Kristen Grisham said that she did not
17 remember that line of questioning, so we're just doing proper
18 impeachment with -- using Detective Trujillo to say that he
19 did ask those questions during that interview.

20 MR. KELLNER: Your Honor --

21 THE COURT: Go ahead.

22 MR. KELLNER: Judge, Ms. Ring asked the witness
23 directly whether or not she had ever been the victim of any of
24 those types of abuse and she clearly answered no. Whether or
25 not she was asked that question 18 years ago is simply not

1 relevant, it's not proper impeachment either.

2 THE COURT: I would agree.

3 MS. RING: Judge, the issue isn't whether or not the
4 sexual assault or abuse happened. The issue is the police
5 were so focused on whether or not Michael Clark had a motive
6 to commit this crime, that they asked Ms. Grisham those
7 specific questions.

8 THE COURT: Right.

9 MS. RING: Looking for a motive, and Ms. Grisham did
10 not remember being asked those questions. So we're allowed to
11 show the jury that we didn't make that up, that indeed those
12 questions were asked.

13 THE COURT: To the extent that it's relevant for
14 that purpose, it is extremely prejudicial, it is misleading,
15 it's going to be confusing for this jury. The fact of the
16 matter is that the witness, Kristen Grisham, testified that
17 there was no physical or sexual abuse, so there's no basis to
18 believe that any of that information would have been -- ever
19 been communicated to Mr. Clark.

20 To the extent that she was asked -- Kristen Grisham
21 was asked about whether or not she was asked those questions
22 and you want to clarify that she was asked those questions,
23 the relevance, the probative value, that is *de minimus* and on
24 403 grounds I'm going to sustain the objection. We're not
25 going to go there.

1 MS. RING: So then are we allowed to ask Detective
2 Trujillo if during the interview of Kristen Grisham he asked
3 her whether or not she had told Michael Clark anything that
4 would give him a reason to murder Marty Grisham because of
5 what she had told him? That's -- that's the issue.

6 THE COURT: That's the question that you want to
7 ask?

8 MS. RING: Because you won't let me ask the other
9 questions, I'm proposing an alternate question that leaves out
10 the specific language that Your Honor seems to be concerned
11 about.

12 THE COURT: Not just seems, is.

13 MS. RING: Okay. Sorry.

14 THE COURT: Mr. Kellner, your response.

15 MR. KELLNER: Judge, that leads directly down the
16 same path and it was a question that was asked of the witness.

17 THE COURT: Right, but the distinction is she said
18 it didn't occur. The question is did she ever tell him
19 anything that would provide a motive for him. I'm going to
20 allow that question, but only in that generic manner.

21 Would you bring the jury back in.

22 MR. KELLNER: Wouldn't that be a proper question for
23 Kristen Grisham, not for this witness, as to whether or not
24 Detective Trujillo had asked Kristin if she had told him a
25 motive. That would be something that you would have to ask

1 Kristen Grisham and then --

2 THE COURT: It already was.

3 MR. KELLNER: And so if that question came out
4 through Kristen Grisham --

5 THE COURT: She said she didn't remember.

6 MR. KELLNER: She said she didn't remember telling
7 him something about --

8 THE COURT: No, she did -- she didn't remember the
9 questions. I'm going to allow the question on cross -- well,
10 on direct.

11 MR. KELLNER: Judge, I understand your ruling. I
12 have another area of concern, based on my understanding of the
13 defense's pretrial discussions with this witness, it concerns
14 some opinion or writings that he made concerning the
15 credibility of a witness, particularly Mr. Stackhouse.
16 Whether or not his notes, he had written something down to the
17 effect that perhaps a polygraph would be appropriate for this
18 person. And, obviously, I -- I would make a motion in limine
19 at this point -- and I don't know if that's something that the
20 defense is going to go into, Judge. I only raise it because I
21 know their investigator questioned him about it, but that
22 would be completely improper character evidence for this
23 witness to opine as to the credibility of some other witness.

24 THE COURT: General terms, I agree with you.

25 MS. MILFELD: Judge, the issue always with any

1 witness is whether or not that witness is credible, whether
2 that person has any motive or bias. And part of that
3 necessarily isn't, I would say, character evidence, but shows
4 whether or not he thinks the person is telling the truth.

5 Detective Trujillo put in his notes that he
6 wanted -- was thinking about polygraphing Stackhouse because
7 he thought that he might be a psychopath. If Detective
8 Trujillo has questions about Mr. Stackhouse's credibility and
9 he is a lead investigator at the time, we're allowed to follow
10 up on that and say, Did you ever do that and why did you write
11 that.

12 THE COURT: Your response.

13 MR. KELLNER: Credibility is a question for the
14 jury. They saw Mr. Stackhouse testify and be cross-examined.
15 Some other person's testimony or thought process about the
16 credibility of a witness is essentially like a human lie
17 detector, it's categorically improper, not to mention
18 questioning about polygraphs and wanting to conduct
19 polygraphs. Polygraphs are off limits and would and should
20 not be brought up in this Court at all.

21 THE COURT: The *People v. Wittrein*, 221 P.3d 1076,
22 *People v. Liggett*, 135 P.3d 725, *People v. Cook*, 197 P.3d 269,
23 all stand for the proposition that a witness may never testify
24 that a person was truthful on a particular occasion. I'll
25 sustain the motion in limine -- or grant the motion in limine.

1 MR. KELLNER: In this case, Judge, I have one other
2 issue to raise. Again, Your Honor, it's based on --

3 THE COURT: Go ahead.

4 MR. KELLNER: -- the defense investigator's
5 questioning of Detective Sergeant Trujillo, and that is
6 searches he conducted for vehicles, makes and models, related
7 to the issue we discussed earlier related to Detective Denig.
8 And my understanding is that that line of questioning and then
9 what officers may have done as far as searching for vehicles
10 related to Mr. Vandeboss' statement is not admissible.

11 MS. MILFELD: Judge, we understood the Court's prior
12 ruling. I don't intend to elicit anything from Detective
13 Trujillo about searching for those cars. What I do intend to
14 elicit is that Detective Trujillo wanted to know what kind of
15 car Mr. Clark was driving, and the only cars that he was able
16 to find was a Dodge Neon and a primer blue Ford Mustang.

17 THE COURT: That line of questioning is certainly
18 permissible.

19 MS. MILFELD: I'm not going to ask him -- I
20 understood the Court's prior ruling that the conversation that
21 our investigator had with Detective Trujillo was before any of
22 this had come up.

23 THE COURT: Okay. I understand. Would you bring
24 the jury back in.

25 (The jury entered the courtroom.)

1 THE COURT: All right. Please be seated. All the
2 members of the jury are back. Thanks for your patience.

3 Ms. Milfeld, you may continue with your
4 cross-examination.

5 Q. (By Ms. Milfeld) Before we left off we were talking
6 about the interview that you had with Kristen Grisham.

7 A. Yes.

8 Q. At any time during the interview did she ever tell
9 you that she had told Michael Clark information that would
10 have provided a motive for him to kill Mr. Grisham?

11 A. She did not.

12 Q. I want to turn your attention back to 1995. What
13 did you do on this case in 1995? Did you review the case
14 file?

15 A. I did towards the end of '95, because I had the
16 interview with Dion Moore in October of '95. We went back
17 over and looked through a bunch of people that we probably
18 need to recontact during that time.

19 Q. Specifically, did you take any investigative actions
20 with respect to researching cars that Michael Clark drove?

21 A. I know I did two cars that he drove or found
22 listings on the two cars he drove, and that's all we did.

23 Q. What were the cars that you found that he drove?

24 A. Again, the one that sticks out in my mind is the
25 same one that he was driving back in November of '94, it was a

1 two-tone Ford Mustang, it's the same car that his dad told me
2 that he was driving. It's the same car that we knew about
3 because he was contacted in that car.

4 Q. Did you ever go looking for that car in 1995?

5 A. Not that I remember.

6 Q. Would it refresh your memory if I showed you a
7 police report that you wrote at that time?

8 A. Sure. Yes.

9 Q. So I'm showing you your police report. Does this
10 look like the supplemental report you did?

11 A. Yes, that's fine.

12 Q. And if you could review this to yourself, this
13 paragraph.

14 A. This one?

15 Q. Yes.

16 A. Yes.

17 Q. Does that refresh your memory --

18 A. It does.

19 Q. -- about what you did with respect to the car?

20 A. Yes.

21 Q. Where did you find the Ford Mustang?

22 A. It was actually parked in front of Wendy -- it was
23 Arndt -- no, that was her mom's name -- up on Balsam.

24 Q. Were there any other cars that you were able to
25 connect to Mr. Clark besides you had spoke about the Dodge

1 Neon and the For Mustang?

2 A. Those are the only two cars.

3 Q. You weren't able to connect him to any other cars?

4 A. No.

5 Q. In 1995 did you ever consult with a forensic
6 psychiatrist?

7 A. We did.

8 Q. Who did you consult with?

9 A. Dr. McDonald, who -- basically a guy I worked with
10 him through the Denver Police Department.

11 Q. Why did you consult with him?

12 A. I wanted him to look at some of the interviews that
13 we had done in the case.

14 Q. How common is it to consult with a forensic
15 psychiatrist?

16 A. I have actually used forensic psychiatrists on
17 several cases that I have worked.

18 Q. You certainly don't do that in every single case?

19 A. Absolutely not, no.

20 Q. Besides Dr. McDonald, did you also contact a
21 Dr. Henry Stevens?

22 A. Yes.

23 Q. Who is Dr. Henry Stevens?

24 A. Dr. Stevens is with IPTM out of Florida.

25 Q. What's IPTM?

1 A. I was afraid you were going to ask that.

2 Institution of Police Traffic Management.

3 Q. What was his job there?

4 A. I had actually gone to a homicide school down there,
5 and one of the things we talked about is this type of -- or
6 this type of interview, and he asked that I send him the
7 interviews and he would give an opinion for us.

8 Q. So you consulted with both Dr. McDonald and
9 Dr. Henry Stevens?

10 A. Yes.

11 Q. In 1996, were you still working on this case?

12 A. By '96, I don't believe so.

13 Q. Do you remember conducting an offline search?

14 A. I don't.

15 MS. MILFELD: Judge, may I approach?

16 THE COURT: Yes.

17 MS. MILFELD: Page 589.

18 Q. (By Ms. Milfeld) I'm showing you a city of Boulder
19 letter. I'm going to ask you to review this --

20 A. Okay.

21 Q. -- to yourself.

22 A. Yes. Yes.

23 Q. Does that refresh your memory about doing an offline
24 search in 1996?

25 A. It does.

1 Q. What did you do?

2 A. Basically contacted I believe the FBI. What I was
3 looking for specifically is if anybody had come across two
4 weapons that we had found, that he had previously found in the
5 case, or information about the two weapons that we had
6 previously found in the case.

7 Q. What sort of information about those guns did you
8 provide to the FBI?

9 A. The make, model, serial number, that's it I believe.

10 Q. So back in 1996, you had the serial numbers of those
11 guns?

12 A. I had the serial numbers of the two weapons that I
13 believe were associated, yes.

14 Q. What happened as a result of that search?

15 A. As far as I know I don't think we got any results
16 out of it.

17 Q. So as far as you recall they weren't able to locate
18 the guns from the search?

19 A. Correct.

20 Q. When the FBI conducts an offline search, do you have
21 a sense of how big that database is?

22 A. I truly do not. I would imagine huge, but I don't
23 really have any idea.

24 Q. It would be fair to say that it's probably
25 extensive?

1 A. Yes.

2 MR. KELLNER: Objection, Your Honor, outside his
3 scope and knowledge.

4 THE COURT: Sustained.

5 Q. (By Ms. Milfeld) I want to talk to you about the
6 information that you learned from speaking with Dion Moore.

7 A. Okay.

8 Q. You said earlier that you recall meeting with him?

9 A. Yes.

10 Q. You said earlier that you, in fact, recall doing
11 that as part of your investigative actions back in 1995?

12 A. Yes.

13 Q. During that interview you had a conversation with
14 him about the guns that he had bought?

15 A. Yes.

16 Q. In that conversation he told you that he said I
17 think we bought two 9mm's and a .380?

18 A. I believe -- I vaguely remember going -- I went over
19 the transcript and I listened to it and I remember that
20 conversation, yes.

21 Q. Okay. Would it refresh your memory if you were
22 able to look at the transcript?

23 A. Yes.

24 MS. MILFELD: I'm at 2177.

25 Q. (By Ms. Milfeld) I'm showing you a transcript that

1 shows that this happened back on October 25th, 1995. I'm
2 showing that Jeff Fig was present, Dion Moore was present, you
3 were present, Linda Sue Smollen?

4 A. Yes.

5 Q. Yes. And I'm drawing your attention to 2177, and I
6 would like you to review that first. And I'm referring you to
7 the first few lines.

8 A. Yes.

9 Q. Does that refresh your memory about what he told
10 you?

11 A. Yes.

12 Q. So he told you that I think we got two 9s and a
13 .380?

14 A. Yes.

15 Q. That's what he told you back then?

16 A. He did. He talked about a compact full-size and
17 then .380.

18 Q. He didn't tell you I'm positive I got the two 9s,
19 but I'm only sure about the .380, that's not what he said?

20 A. No.

21 Q. He told you that he got three guns total?

22 A. Yes.

23 Q. When you spoke with him in 1995, was that the first
24 time that you had spoken to him?

25 A. I know that's the first interview I had with him. I

1 don't think I spoke to him before that.

2 Q. Your recollection is that the -- that's the first
3 interview he ever had with any police?

4 A. With me for sure.

5 Q. Back in 1995, I want to talk about the information
6 that you knew as the lead detective. I know you testified
7 earlier that that was your role back in 1995?

8 A. Yes.

9 Q. As the lead detective back in 1995, you would have
10 been the person that was familiar with or most familiar with
11 the case file?

12 A. Back in '95, yes.

13 Q. Did you know in 1995 that Mr. Clark had forged and
14 cashed checks for Marty Grisham?

15 A. Yes.

16 Q. Did you know in 1995 that Michael Clark wanted to
17 join the Marines?

18 A. Yes, I did.

19 Q. We talked a little bit about the gun, but you knew
20 in 1995 that Mike had possibly bought two 9mm guns from Dion
21 Moore?

22 A. No. I knew that Dion Moore purchased two guns and
23 Dion says he gave one to Mike so...

24 Q. So -- but that's what you knew back in 1995?

25 A. Right. Right.

1 Q. You knew that Dion Moore told you that he got the
2 guns at a pawnshop?

3 A. Yes.

4 Q. You know in 1995 that the bullets came from a 9mm
5 gun?

6 A. Yes.

7 MR. KELLNER: Your Honor, objection, I'd ask that
8 she not lead the witness.

9 THE COURT: Overruled.

10 Q. (By Ms. Milfeld) You can answer the question.

11 A. Yes.

12 Q. You knew about Walter Stackhouse at the jail?

13 A. I did.

14 Q. You knew that a Carmex container was found at the
15 scene?

16 A. Yes, I think I knew that.

17 Q. And all of this information that we're talking
18 about, this is information that you knew as a lead
19 investigator back in 1995?

20 A. Yes, it was.

21 MS. MILFELD: Nothing further. Thank you.

22 THE COURT: Cross-examination, Mr. Kellner.

23 **CROSS-EXAMINATION**

24 **BY MR. KELLNER:**

25 Q. Detective Trujillo, in that interview on

1 October 25th of 1995 with yourself, Detective Hickman and Dion
2 Moore, do you recall Dion Moore saying that in the day that
3 you and Michael went in, you guys bought a total of three
4 guns; is that right? That's a question by you. And he says,
5 I'm pretty sure, yes, and he says, At least -- at least two,
6 at least the two. I think that we -- I think that we got a
7 .380 I think, I think that I got a .380 also?

8 A. Again, I know you are reading right out of the
9 transcript, so if that's what the transcript said, that's
10 exactly what was said.

11 MR. KELLNER: Well, let me approach, if I may,
12 Judge.

13 THE COURT: Yes.

14 MR. KELLNER: Thank you.

15 Q. (By Mr. Kelner) I'm referring to page 19 of the
16 transcript. Would you go ahead and read this to yourself.

17 A. Okay. That's exactly what he said.

18 Q. Is it fair to say that Dion Moore was certain that
19 he had bought two Bryco Jennings 9mm pistols?

20 A. It is from that, yes.

21 Q. And he was not entirely sure if he also bought a
22 .380?

23 A. Yes.

24 Q. Let me talk to you about this GSR kit. You
25 mentioned earlier that you said it was used as a ruse?

1 A. Absolutely.

2 Q. And it was used as a ruse because back in 1994 those
3 gunshot residue kit tests, you kept on saying that they had to
4 be used right away?

5 A. Right, right after the shooting.

6 Q. Right away after the shooting?

7 A. Yes.

8 Q. You said the particles just can fall off the hands?

9 A. They can.

10 Q. And is it true that when you put your hands in your
11 pocket, the particles can come off as well?

12 A. Yes.

13 Q. If you wash your hands, the particles go away?

14 A. Yes.

15 Q. And if you shake someone's hand, the particles can
16 come off your hand and go on the other person's hands?

17 A. Absolutely.

18 Q. And say you take a shower, particles most certainly
19 would be coming off at that point?

20 A. Yes.

21 Q. Is that why you say it's important only if you get
22 it right away after a shooting?

23 A. It is. That's why we put bags on the victim's hands
24 right after the stay in the hospital, as soon as he was
25 pronounced.

1 Q. But as you said, it was fairly obvious that he had
2 been in and around a gunshot at this point?

3 A. Yes.

4 Q. So when you say right after, in this case the
5 Defendant was found and interviewed two days after the
6 shooting?

7 A. Correct, November 3rd.

8 Q. Right. And so when you say used as gunshot residue
9 kit as ruse, it's because you had no thoughts or expectations
10 that there would be any kind of evidentiary value to it?

11 A. I did not.

12 Q. And isn't it true that when you actually use that
13 little sticker and you started pulling up gunshot -- or
14 started putting it on his hands, he started asking you a lot
15 of questions about how the gunshot residue kit worked?

16 A. Yes.

17 Q. In fact, it was one of the first times he started
18 asking you questions about what was going on?

19 A. Correct.

20 Q. And I think earlier, if I remember correctly,
21 Ms. Milfeld asked you if he -- after you did this if he had
22 confessed and you said no?

23 A. Correct.

24 Q. Now throughout the course of the interview, did you
25 and Detective Weiler and Weinheimer repeatedly ask him to tell

1 you the truth?

2 A. Yes, we did.

3 Q. And I know she said he didn't confess, but you asked
4 him repeatedly to tell you the truth?

5 A. Yes.

6 Q. Did he tell you the truth about where he got the
7 gun?

8 A. He did not.

9 Q. Did he tell you the truth about what he did with the
10 gun?

11 A. I don't believe so.

12 Q. I'm going to turn back to that October 25th, 1995
13 interview with Dion Moore. Now Dion Moore said that he had
14 gotten two 9mm chrome Bryco Jennings --

15 A. Correct.

16 Q. -- is that right? And when she asked you about this
17 offline search you did, these were the guns you were searching
18 for?

19 A. Yes.

20 Q. One was a compact?

21 A. Yes.

22 Q. And one was a full size?

23 A. Yes.

24 Q. And one was a model 59, that's the full size?

25 A. Yes.

1 Q. And the other model 58 is the compact?

2 A. Yes, it is.

3 Q. And Dion Moore said he kept the compact and gave the
4 model 59, the full size, to the Defendant?

5 A. Yes.

6 Q. She asked you a bunch of questions about what you
7 knew back in 1995. Is it fair to say that back in 1995 you
8 didn't know that the bullets that killed Marty Grisham could
9 have been fired from a full size Bryco Jennings 9mm model 59?

10 A. Sorry, the first part of question again?

11 Q. Is it fair to say that you don't know back in 1995
12 that the bullets that killed Marty Grisham could have been
13 fired from a Bryco Jennings model 59?

14 A. I did not know that, no.

15 Q. And, in fact, that's something that came up much
16 later when Detective Heidel took over the case?

17 A. Yes.

18 Q. And is it fair to say that back in 1995 you didn't
19 know that the Defendant's DNA was found on the inside of a
20 Carmex container found just outside Marty Grisham's door where
21 he was shot and killed?

22 A. Correct, I did not know that.

23 MR. KELLNER: I have no further questions.

24 THE COURT: Any redirect?

25 MS. MILFELD: No questions, Judge. Thank you.

1 THE COURT: All right. Detective, you may step
2 down. Thank you, sir.

3 Any further evidence on behalf of the Defendant?

4 MS. RING: The defense rests.

5 THE COURT: All right. Would counsel please
6 approach.

7 (Whereupon, counsel for the parties and the reporter
8 approached the bench and the following proceedings were had
9 out of the hearing of the jury.)

10 THE COURT: No more evidence?

11 MS. RING: No.

12 THE COURT: I'm going to explain to the jury that
13 they have received all the evidence. I'm going to excuse them
14 until 9:00 tomorrow morning and tell them when they return at
15 9:00 I'll give them instructions and give them closing
16 arguments. Okay.

17 MS. RING: Okay.

18 THE COURT: All right. Thank you. I'll ask if
19 there is any rebuttal evidence --

20 MR. BRACKLEY: Okay.

21 THE COURT: -- in front of the jury.

22 THE COURT: All right.

23 (Whereupon, the following proceedings were had in
24 the presence and the hearing of the jury.)

25 THE COURT: Mr. Brackley, on behalf of the People,

1 is there any rebuttal evidence?

2 MR. BRACKLEY: No, Your Honor. Thank you.

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, you have now heard all of evidence that you may consider
5 in this case. We are going to recess for the evening. I need
6 to work with the attorneys on the instructions of law. I'm
7 going to ask you to return tomorrow morning at 9:00. When you
8 return at 9:00, I'll be able to give you those instructions of
9 law and you will hear closing arguments from counsel. After
10 that point in time then the case will be given to you for
11 deliberations.

12 What's important is that you remember the admonition
13 that I have given you throughout. You have not yet heard the
14 law that applies, you have also not heard the closing
15 arguments of counsel, so it would not be fair or appropriate
16 for you to begin forming or expressing any opinion on the
17 case. You may not discuss it amongst yourself or with anyone
18 else.

19 Remember what I have told you previously in terms of
20 the admonition. Don't communicate about or discuss the case
21 with anyone, this includes member of your family, people
22 involved in the trial, other jurors or anyone else. If
23 someone approaches you and tries to discuss the trial with
24 you, let me know about it immediately. Don't read or listen
25 to any news reports of the trial. Don't consult any outside

1 reference materials.

2 As I said earlier, it is especially important you do
3 not form or express any opinion on the case until it is
4 finally submitted to you for your deliberation. Please have a
5 good evening. We should be ready for you right at 9:00
6 tomorrow morning. Thank you.

7 (The jury exited the courtroom.)

8 THE COURT: The record should reflect that the jury
9 has left the courtroom. Folks, do you need a couple minutes?
10 Counsel, do you need a few minutes before we start talking
11 about jurisdictions?

12 MS. RING: Judge, first, I think that we need to
13 renew the motion for judgment of acquittal and stand on the
14 record.

15 THE COURT: All right. Upon consideration of the
16 evidence as a whole and applying the appropriate standard I'll
17 respectfully deny the motion for judgment of acquittal at the
18 close of the evidence. The evidence is certainly sufficient
19 at this point.

20 I want to clarify one other thing that I asked you I
21 think that it was off the record. The jury instruction
22 conference is probably going to go past 5:00. If it does, are
23 counsel in agreement that the record can be made by using the
24 FTR as opposed to a court reporter?

25 MR. BRACKLEY: Yes, Your Honor.

1 MS. RING: That's fine.

2 THE COURT: All right.

3 MR. BRACKLEY: Do we want to have -- do we begin
4 with our court reporter and/or do we just get rid of the
5 reporter now and start rolling with the tape?

6 THE COURT: We can excuse the reporter if
7 comfortable doing that.

8 MR. BRACKLEY: That's fine.

9 THE COURT: All right. Then when we reconvene, then
10 the record will be made by FTR.

11 MS. RING: Judge, I've talked to Mr. Clark about
12 what the jury instruction conference is and what it entails,
13 probably more information than the Court really needs, but he
14 has his children, he hasn't seen them while he has been down
15 here, so he is trying to get out there to have dinner with
16 them tonight. So I have talked about it. Based on our
17 conversation, I'm comfortable waiving his appearance for the
18 jury instruction conference, but I want to make sure it's okay
19 with Your Honor.

20 THE COURT: It's fine with me. Mr. Clark, you
21 understand that I'm talking to the lawyers about the
22 instructions that I'm going to give to the jury?

23 THE DEFENDANT: Yes.

24 THE COURT: It's not anything that you would
25 directly participate in. I wouldn't be asking you questions

1 or for your opinion, but it's something that you maybe be
2 interested, you maybe want to consult with your attorneys
3 about it, they may want to consult with you, but it is your
4 choice at this point. If you would like to excuse yourself,
5 that's fine with me. Is that what you want to do?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. Then you are excused. I'm going
8 to ask you to return tomorrow at 9:00.

9 THE DEFENDANT: Certainly.

10 THE COURT: And that will be for further trial
11 proceedings. So you are excused at this time and whenever you
12 want to step out. Do you want a few minutes until we start
13 talking about jury instructions?

14 MS. RING: I just don't know whether it would be
15 productive. I don't actually know if Ms. Milfeld, and who's
16 doing jury instructions for the District Attorney, if it makes
17 sense for them to discuss about which instructions are at
18 issue prior to us discussing that with you. Because often
19 that's more efficient if we can decide what the issues are
20 first.

21 THE COURT: I would agree. I mean I have looked at
22 both proposed sets. They are identical in instructions and
23 between the two parties. I mean do you want sometime to talk,
24 counsel?

25 MR. BRACKLEY: You know , yeah, Judge, maybe if we

1 could use one of the jury rooms where our jury is not, so we
2 can have everything spread out. Ms. Milfeld and I can go
3 through it real quick and see what we -- where we vary and we
4 can limit it to that.

5 THE COURT: Sure. Then let's do this. Do you want
6 to come back at 5:00? Well, let me put it this way. I'll be
7 in chambers. You just let me know when you are done having
8 your conference, when you are ready to come back in and go on
9 the record. I think that we can probably use Judge Bailin's
10 jury room. So if you want to follow me back that way, I think
11 that's probably available.

12 (Whereupon further proceedings were had on FTR.)

13 (Court adjourned for the evening.)

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 2nd day of April, 2013.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
22
23
24
25

1 -----
2 **DISTRICT COURT**
3 **BOULDER COUNTY**
4 **COLORADO**
5 1777 6th Street
6 Boulder, CO 80302
7 -----

8 **Plaintiff:**

9 People of the State of Colorado

10 **Defendant:**

11 Michael Martin Clark

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! ***FOR COURT USE ONLY***
!
! Case No. 12CR222
! Division 6

12 The matter came on for jury trial on October 18th,
13 2012, before the **HONORABLE THOMAS MULVAHILL**, Judge of the
14 Boulder District Court, and a jury of 12 persons, and the
15 following proceedings were had.
16 -----

1 **P R O C E E D I N G S**

2 The matter came on for jury trial on October 18th,
3 2012, before the Honorable Thomas Mulvahill, Judge of the
4 Boulder District Court, and a jury of 12 persons, and the
5 following proceedings were had.

6 * * * *

7 THE COURT: 12 CR 222, People versus Michael Clark.
8 Mr. Clark is present with his defense counsel, the District
9 Attorney's office representatives are present, the jury is
10 not.

11 The jury instructions that were discussed and
12 approved last night have been distributed to each of the
13 jurors. I understand that counsel is requesting that the
14 court reporter report the reading of the instructions; is that
15 correct, Ms. Ring?

16 MS. MILFELD: Yes, Judge.

17 THE COURT: Okay. And is there anything further for
18 the record before we bring the jury in on behalf of the
19 People.

20 MR. BRACKLEY: No, Your Honor.

21 THE COURT: On behalf of the Defendant?

22 MS. RING: No, Judge.

23 THE COURT: Would you bring the jury in.

24 (Whereupon, the jury entered the courtroom, and the
25 following proceeding were had in the presence and the hearing

1 of the jury.)

2 THE COURT: Please be seated. Welcome back, ladies
3 and gentlemen of the jury. You will each find on your chair a
4 copy of the jury instructions. This is your copy to read
5 along with, as I read them to you. You also will be allowed
6 to take this back into the jury room when you are
7 deliberating. Everybody got one?

8 All right. Let me read those instructions to you at
9 this time.

10 MR. BRACKLEY: Your Honor, we don't have a copy
11 either.

12 THE COURT: I asked you last night if you wanted one
13 and you said you didn't.

14 MR. BRACKLEY: I didn't last night, but I assumed
15 that we would be getting them with the rest of the copies this
16 morning.

17 THE COURT: Do you have a copy?

18 MS. MILFELD: I do.

19 THE COURT: Okay. Everybody have a copy of the jury
20 instructions? All right.

21 Jury instruction 1: Members of the jury, the
22 evidence in this case has been completed. I will now instruct
23 you on the law which you must apply in order to reach your
24 verdict. It is my responsibility to decide what rules of law
25 apply to this case. While the lawyers may have commented

1 during the trial on some of these rules, you are to be guided
2 by what I say about them. You must follow all of the rights
3 as I explain them to you. Even if you disagree or do not
4 understand the reasons for some of the rules, you must follow
5 them.

6 No single rule describes all of the law which must
7 be applied, therefore, the rules must be considered together
8 as a whole. If you decide the prosecution has proved beyond a
9 reasonable doubt that the Defendant has committed the crime as
10 charged, it will be my responsibility to decide what the
11 punishment will be. You should not try to guess what the
12 punishment might be. It should not enter your consideration
13 at any time.

14 During the course of the trial you received all of
15 the evidence that you may properly consider to decide the
16 case. Your decision must be made by applying the rules of
17 law, which I give you, to the evidence presented at trial.
18 Neither sympathy nor prejudice should influence your decision.

19 At times during the trial lawyers made objections to
20 questions asked by other lawyers and to answers by witnesses.
21 Do not draw any conclusions from such objections or from my
22 rulings on the objections. These only related to the legal
23 questions that I had to determine and should not influence
24 your thinking.

25 When I told you not to consider a particular

1 statement, you were told to put that statement out of your
2 mind, and you may not consider any statement in your
3 deliberations which you were instructed to disregard.

4 Finally, you should consider all the evidence in the
5 light of your observations and experience in life.

6 Jury instruction 2: The Defendant is charged with
7 committing the crime of murder in the first-degree in Boulder
8 County, Colorado, on or about November 1st, 1994. The
9 Defendant has pleaded not guilty.

10 Jury instruction 3: The complaint is a mere
11 accusation against the Defendant and it is not in itself any
12 evidence of the guilt of the Defendant, and no juror should
13 permit himself or herself to be influenced to any extent,
14 however light, against the Defendant because of or on account
15 of the filing of such a complaint.

16 Jury instruction 4: The Defendant does not have to
17 testify. The decision not to testify is not evidence, does
18 not prove anything, and should not be considered for any
19 purpose.

20 Jury instruction 5: Every person charged with a
21 crime is presumed innocent. This presumption of innocence
22 remains with the Defendant throughout the trial and should be
23 given effect by you unless, after considering all of the
24 evidence, you are then convinced that the Defendant is guilty
25 beyond a reasonable doubt.

1 The burden of proof is upon the prosecution to prove
2 to the satisfaction of the jury beyond a reasonable doubt the
3 existence of all of the elements necessary to constitute the
4 crime charged.

5 Reasonable doubt means a doubt based upon reason and
6 common sense which arises from a fair and rational
7 consideration of all of the evidence, or the lack of evidence,
8 in the case. It is a doubt which is not a vague, speculative
9 or imaginary doubt, but such a doubt as would cause reasonable
10 people to hesitate to act in matters of importance to
11 themselves.

12 If you find from the evidence that each and every
13 element has been proven beyond a reasonable doubt, you will
14 find the Defendant guilty. If you find from the evidence that
15 the prosecution has failed to prove any one or more of the
16 elements beyond a reasonable doubt, you will find the
17 Defendant not guilty.

18 Jury instruction 6: The mere number of witnesses
19 appearing for or against a certain proposition does not in and
20 of itself prove or disprove said proposition.

21 Jury instruction 7: You may have to decide what
22 testimony to believe. You should carefully consider all of
23 the testimony given and the circumstances under which each
24 witness has testified.

25 Consider each witness' knowledge, motive, state of

1 mind, demeanor, and manner while on the stand. Consider the
2 witness' means of knowledge, ability to observe and strength
3 of memory. Consider also any relationship each witness may
4 have to either side of the case; the manner in which each
5 witness might be affected by the verdict; and the extent to
6 which, if at all, each witness is either supported or
7 contradicted by other evidence in the case. You should
8 consider all facts and circumstances shown by the evidence
9 which affects the credibility of the witness' testimony.

10 You may believe all of the testimony of a witness,
11 or part of it, or none of it.

12 Jury instruction 8: The credibility of a witness
13 may be discredited by showing that the witness has been
14 convicted of a felony. A previous conviction is one factor
15 which you may consider in determining the credibility of the
16 witness. You must determine the weight to be given to any
17 prior conviction when considering the witness' credibility.

18 Jury instruction 9: You have heard witnesses who
19 have testified as experts. You are not bound by the testimony
20 of experts; their testimony is to be weighed as that of any
21 other witness. It is entirely your decision to determine what
22 weight shall be given their testimony.

23 Jury instruction 10: There are two types of
24 evidence from which you may properly find the truth as to the
25 facts of a case. One is direct evidence. The other is

1 circumstantial evidence, that is, the proof of facts from
2 which other facts may reasonably be inferred. The law makes
3 no distinction between direct and circumstantial evidence.

4 Jury instruction 11: The Court admitted certain
5 evidence for a limited purpose. At that time you were
6 instructed not to consider it for any purpose other than the
7 limited purpose for which it was admitted. You are again
8 instructed that you cannot consider evidence admitted for a
9 limited purpose except for the limited purpose for which it
10 was admitted.

11 Jury instruction 12: A witness may not remember
12 making a prior statement or may deny that he or she ever made
13 the statement. This is especially true in a case in which the
14 prior statement was made a long time ago. In order to elicit
15 the proper statement, an attorney may refresh the witness'
16 memory or impeach the witness. This may be done by using a
17 prior written statement, a police report, a transcript, a
18 recording, calling the witness to whom the statement was made,
19 or anything else that might help the witness remember.

20 Where a witness has made a previous statement
21 inconsistent with his testimony at the trial or cannot
22 remember ever making the statement, the previous statement may
23 be shown by any otherwise competent evidence, such as a prior
24 written statement, police report, transcript, recording, or
25 testimony by a witness to whom the statement was made. This

1 evidence is admissible not only for the purpose of impeaching
2 the testimony of the witness, but also for the purpose of
3 establishing a fact to which his testimony and the
4 inconsistent statement relate.

5 Jury instruction 13: A crime is committed when the
6 Defendant has committed a voluntary act prohibited by law
7 accompanied by a culpable mental state. Voluntary act means
8 an act performed consciously as a result of effort or
9 determination. Culpable mental state means "after
10 deliberation" and "with intent" as explained in this
11 instruction. Proof of the commission of the act alone is not
12 sufficient to prove that Mr. Clark had the required culpable
13 mental state. The culpable mental state is as much an element
14 of the crime as the act itself and must be proven beyond a
15 reasonable doubt, either by direct or circumstantial evidence.

16 A person acts "intentionally" or "with intent" when
17 his conscious objective is to cause the specific result
18 prescribed by the statute defining the offense. It is
19 immaterial whether or not the result actually occurred.

20 "After deliberation" is part of the specific intent
21 of murder in the first-degree. After deliberation means not
22 only intentionally, but, also, that the decision to commit the
23 act has been made after the exercise of reflection and
24 judgment concerning the act. An act committed after
25 deliberation is never one which has been committed in a hasty

1 or impulsive manner.

2 Jury instruction 14: The elements of the crime of
3 Murder in the First Degree are:

4 1. That the Defendant;

5 2. in the State of Colorado, at or about the date
6 and place charged;

7 3. with intent;

8 4. to cause the death of a person other than
9 himself; and,

10 5. after deliberation;

11 6. caused the death of that person or another
12 person.

13 After considering all the evidence, if you decide
14 the prosecution has proven each of the elements beyond a
15 reasonable doubt, you should find the Defendant guilty of
16 Murder in the First Degree.

17 After considering all the evidence, if you decide
18 the prosecution has failed to prove any one or more of the
19 elements beyond a reasonable doubt, you should find the
20 Defendant not guilty of Murder in the First Degree.

21 Jury instruction 15: Once you begin your
22 deliberations, if you have a question about the evidence in
23 this case or about the instructions or verdict forms that you
24 have been given, your Foreperson should write the question on
25 a piece of paper, sign it, and give it to the bailiff who will

1 bring it to me.

2 I will then confer with the attorneys as to the
3 appropriate way to answer your question. However, there may
4 be some questions that under the law I am not permitted to
5 answer. If it is improper for me to answer the question, I
6 will tell you that. Please do not speculate about what the
7 answer to your question might be or why I am not able to
8 answer a particular question.

9 There is one further instruction and then a form of
10 verdict. I will discuss those with you at the completion of
11 closing arguments.

12 At this time I will call upon the parties to make
13 their closing arguments. On behalf of the People,
14 Mr. Kellner.

15 MR. KELLNER: Thank you, Your Honor.

16 On November 1st, 1994, the Defendant knocked on
17 Marty Grisham's door. When he opened that door he shot him
18 down cold blood. He murdered Marty Grisham by shooting him
19 twice in the chest, twice more in the head at close range.
20 You have heard testimony over the last two weeks, you have
21 heard a variety of evidence presented and all of that evidence
22 leads back to the Defendant and points to his guilt. He had
23 an undeniable motive to kill Marty Grisham. He undeniably had
24 the means with a Bryco Jennings 9mm model 59 pistol,
25 semiautomatic, to kill Marty Grisham and he had the absolute

1 opportunity to do so when he left Jamie Uhlir's apartment in
2 Denver, drove back towards Boulder the evening of
3 November 1st.

4 Now we have covered a lot of ground over the course
5 of the last two weeks. You have heard testimony and evidence
6 from people in an investigation spanning nearly 18 years. And
7 there's a timeline of events that is critical to understand
8 the evidence in this case coming to you, a true verdict, a
9 verdict of guilty as charged. So what I'm going to do now is
10 I'm going to go over that evidence and that timeline and
11 explain to you step-by-step how we know that the Defendant is
12 guilty.

13 This whole case undeniably began on September 22nd,
14 it is a Thursday. This is a day that the Defendant is
15 arrested on a stolen motorcycle with Kristen Grisham riding on
16 the backseat. This is the day that Kristen Grisham gives him
17 the key to Marty Grisham's apartment, to her father's
18 apartment, so that the Defendant can take care of his cat
19 while she is out of town.

20 The next day, September 23rd, she leaves and heads
21 towards Michigan. You heard testimony about -- you saw the
22 newspaper articles, September 24th is the day the miracle
23 Michigan, that football game where Kristen Grisham was out of
24 town and the Defendant, by his own statements when he is
25 interviewed by the police, admits that he was in the apartment

1 that weekend taking care of the cat. There's no coincidence
2 that just days after he's in that apartment the checks begin
3 to be forged and Marty Grisham's name and those checks are
4 cashed and paid to no other person other than the Defendant.
5 This happens over a period of days.

6 You have the evidence here presented, each and every
7 single one of the checks which is made out to the Defendant.
8 He cashes three checks, October 6th, 7th and 10th. He digs
9 himself a deeper and deeper hole for the next several days,
10 more and more checks. Specifically, October 17th, \$150 check,
11 October 18th, Tuesday, this is the day that the Defendant in
12 his own statement to the police says, This is when he met the
13 man in Montebello named Louis, he's going to buy some stereo
14 equipment. The story that is just completely fabricated, but
15 that's the day when he says he met Louis and Louis leaves this
16 9mm pistol in his car.

17 October 19th, this is the day that Jamie Uhlir
18 testified that the Defendant was supposed to meet with him at
19 his apartment in Denver and go to a soccer game. He is
20 certain of that date, he checked his schedule, it was
21 October 19th that the Defendant was supposed to meet with him
22 and he did not. When asked why the Defendant didn't meet with
23 him on October 19th, the Defendant said because he and Dion
24 Moore went and bought some guns. Now Jamie Uhlir asked him,
25 you know, how much does it cost? Jamie Uhlir remembers

1 between \$120 and \$150. Look back on the checks and the time
2 of the checks, look for a check on October 19th and see what
3 it says.

4 The Defendant tells Jamie Uhlir on October 19th that
5 he and Dion used an unknown third-party, a man who was over
6 the age of 21, to help them by those guns. And you saw the
7 pawn slips dated October 19th. The only time when two Bryco
8 Jennings 9mm pistols were sold to the same person on the same
9 day. Detective Heidel looked through that entire stack,
10 hundreds of pawn slips from the Aurora Police Department, it's
11 the only time he found two Bryco Jennings 9mms sold to the
12 same person on the same day. Completely corroborating Jamie
13 Uhlir's statement.

14 October 20th is a Thursday, the Defendant cashes
15 more checks.

16 October 22nd, Saturday, this is the day when,
17 according to the Defendant's unbelievable story that he tells
18 police, this is the day when he brings this gun back to Denver
19 and he supposedly gives it to just some unknown black male in
20 Montebello. This is the same gun he tells the detectives he's
21 concerned about leaving fingerprints on.

22 You also heard from Sergeant Weyer about that
23 unusual behavior when he looked at the pistol, handled the
24 magazine, pulled out a bullet, and the Defendant became
25 nervous, grabbed that magazine, pistol, and the bullet back

1 and wiped the fingerprints off of that 9mm cartridge.
2 Probably no coincidence that no fingerprints were found on the
3 9mm cartridges when Ted Ritter examined them.

4 October 24th, October 25th, he's digging himself a
5 deeper hole, forging, cashing, stealing from Marty Grisham.

6 October 26th, this is another critical date, this is
7 a date when Jamie Uhlir says he is positive he saw that 9mm
8 pistol, a pistol he described as silver, outside of his
9 apartment inside the Defendant's car and that pistol came from
10 underneath the seat. What's also important about October 26th
11 is at this time Jamie Uhlir described seeing hollow point
12 ammunition, this is critical because the following week, you
13 know, when Sergeant Weyer saw him.

14 October 26th, he sees the pistol, more checks are
15 forged. It's during this time frame, October 24th through
16 28th, this is the week when Sergeant Weyer undeniably says
17 that he had seen the gun in the recruiting office, that the
18 Defendant had brought it in and showed it to him, and it's
19 critical to think about exactly what the Defendant said.

20 When you go back and deliberate, folks, I hope you
21 take the time to listen to that audio CD again and review the
22 transcript of the Defendant's statements. One of the things
23 that you'll see is that in that interview he says to the
24 detectives, it was two weeks ago, it wasn't the last week that
25 he showed the gun to Sergeant Weyer. In fact, he goes on to

1 say, it was the week before that. It could have even been the
2 week before that, meaning two weeks earlier. What's the
3 Defendant trying to do with this statement, he's trying to
4 separate himself from the time of the murder and the time that
5 he had that gun. He is trying to mislead the detectives and
6 point them in any other direction but himself.

7 Sergeant Weyer. Sergeant Weyer testified that he
8 was interviewed on November 3rd, 1994, when his memory was
9 fresh as to exactly when he saw that pistol. And Sergeant
10 Weyer has no reason to make up a story, he has no reason not
11 to cooperate with the police and tell them exactly what he
12 saw.

13 That next week, October 27th, that's a Thursday, the
14 Defendant has court for the stolen motorcycle. There's
15 another forged check.

16 October 28th, Friday, another forged check, digging
17 deeper and deeper.

18 October 30th and 31st, you heard testimony from
19 Jason Breslin, Stacey Howell, people that were with Loren
20 Grisham in Glenwood Springs, Colorado, establishing without a
21 doubt that Loren Grisham was nowhere near Boulder the night
22 his father was killed. And then, again, another check for a
23 \$1,000.

24 As the Defendant says in his interview with the
25 detectives, he thought that he would start tapering off with

1 the amount of money that he was stealing from Marty Grisham.
2 That check was to pay for his own court costs, fees and fines
3 that he had to pay for stealing the motorcycle.

4 November 1st, approximately 11:30, this is when Jeff
5 Gore receives a phone call from an unknown man who we later
6 learn is none other than the Defendant calling and asking
7 about the balance on Marty Grisham's account. When challenged
8 by Jeff Gore on the security question, the Defendant fails.
9 He cannot answer that security question and he actually hangs
10 had up on Jeff Gore. Why would he do that, because he knows,
11 he knows this is almost up for him. He's got to know at this
12 point after calling the bank and failing the challenge from
13 the security question, the jig is up. He's got to know at
14 this point that that is going to eventually lead back to Marty
15 Grisham, eventually those checks will lead back to him.

16 So now November 1st, the pressure is on the
17 Defendant. Later that day Marty Grisham goes to the credit
18 union and speaks to Patty Harris. Patty Harris and Marty
19 Grisham confirm that he didn't cash those checks, he didn't
20 write those checks. What the Defendant doesn't know -- and as
21 Ms. Milfeld actually said in her opening statement, what the
22 Defendant doesn't know at this point is that Marty Grisham is
23 aware of the stolen checks. He doesn't know that Marty
24 Grisham has now gone to Barb Lennon at the police station and
25 filed a report.

1 2:30, November 1st, Kristin returns home and she
2 goes to her mother's place in Louisville and spends that night
3 with her mother. She calls her father leaving a message, she
4 is not going to meet up for dinner that day. At the same time
5 the Defendant goes to Jamie Uhlir's apartment in Denver, they
6 are going to go to the Boulder High School versus Columbine
7 soccer game at Lakewood Memorial Stadium.

8 November 1st, Tuesday, later in the afternoon, Jamie
9 Uhlir says he arrives home. The Defendant is already there a
10 long with Dion Moore, Summer and Vanessa and his roommate.
11 This is critical because this testimony comes from Jamie
12 Uhlir, a friend of the Defendant since junior high school, a
13 person he played soccer with all throughout high school, a
14 person he describes as a friend and he has no reason not to
15 cooperate with the police.

16 Later that afternoon Jamie Uhlir says that they go
17 in Clark's 1967 Ford Mustang, they drive Dion, Summer and
18 Vanessa to the bus station so that they can go back to
19 Boulder. Jamie Uhlir and the Defendant then leave in that
20 Ford Mustang and drive to the soccer game. What's critical
21 about this is that this is a day where Dion says he saw the
22 gun, Vanessa freaked out. The gun was under the seat. Every
23 person that talks about where the gun was, including the
24 Defendant in his own interview, says he kept that gun under
25 the seat of the car. These are critical corroborating details

1 Dion and Jamie Uhlir. He sees that gun under the seat of the
2 car the day of the murder just hours before.

3 Kristin and Pam later that night they begin to watch
4 a movie, spending time together at their home in Louisville.
5 The Defendant and Jamie Uhlir go to the soccer game, it starts
6 around 7:00 and goes to about 8:45. And the Defendant's own
7 words establishing the timeline he says he got done about
8 8:40, 20 to 9:00, says the game ended about a quarter to 9:00
9 maybe.

10 Next the Defendant drops Jamie Uhlir off at his
11 apartment and leaves for Boulder. Jamie Uhlir says that it's
12 between 8:50 and 9:00 at night. The Defendant says he arrives
13 back in Boulder at the apartment on Gunbarrel Avenue. Bob
14 Mann who normally lives there is gone. He's out of town that
15 night. There is no one else around to say that the Defendant
16 was there.

17 The Defendant says he watches the last part of
18 Beevis and Butthead. Think back on what Jamie Uhlir said.
19 Jamie Uhlir said that they were going to go into his house and
20 watch that TV show, but then right before they went in, the
21 Defendant said he had something to do and left and went back
22 to Boulder, ostensibly to call Allison Hackman. Jamie Uhlir
23 has a phone in his apartment, Jamie Uhlir says the Defendant
24 could use his phone, that the Defendant stays the night at
25 Jamie Uhlir's apartment. There's no rush to head back to

1 Gunbarrel Avenue apartment to make a phone call and there's no
2 need to leave to go watch this TV program when he says that he
3 was going watch it with Jamie Uhlir earlier.

4 And the Defendant's own words, the Defendant's own
5 words he says it takes him 30 to 35 minutes to get from Jamie
6 Uhlir's apartment to the apartment in Gunbarrel, which is even
7 farther away than Marty Grisham's apartment, 30 to 35 minutes.
8 He says he gets back and watches the show that runs from 9:00
9 to 9:30. He catches the last part of it. And the Defendant's
10 own words, in his own statements he has the time to get back
11 to Marty Grisham's apartment from Jamie Uhlir's apartment and
12 commit the murder.

13 9:34 from the computer aided dispatch, the CAD
14 report undeniably Barbara Swider makes a phone call to 911 at
15 9:34. When you go back and deliberate, listen to that 911
16 call and look at the details on the CAD report as they come
17 out. Within the first minute of that phone call she says,
18 Marty Grisham's a 48-year-old man who has been shot, he's
19 conscious and he's breathing. Within the first minute of the
20 CAD report those details appear. And then in her rush to help
21 him, as he's bleeding to death, she pulls that phone cord out
22 of the wall, she gets reconnected once the lady from upstairs
23 comes downstairs, Nancy Cornwell, with the portable phone and
24 gets her back on 911. You can actually hear that happen. And
25 compare the times on the CAD report as you listen to the 911

1 call, firmly establishing that it was 9:34 when Marty Grisham
2 was shot and killed.

3 According to the Defendant, and also from
4 Ms. Hackman, she gets a call sometime around 9:45 to 10:00.
5 It's a conversation that lasts approximately 45 minutes to an
6 hour. What's critical about this is the timeline where
7 Detectives Weiler and Denig -- Detective Weiler leaves in an
8 attempt to recreate the path that the Defendant would have
9 taken from Jamie Uhlir's apartment to Marty Grisham's
10 apartment. He leaves at 8:50, consistent with Jamie Uhlir's
11 testimony. He leaves at 8:50 and arrives in the parking lot
12 at 9:21. That parking lot is a matter of feet, yards away
13 from the front door of Marty Grisham's apartment. It would
14 take literally no time to get out of the car and go to the
15 front door of Marty Grisham's apartment. He gets there at
16 9:21. Detective Denig leaves at 9:00, he arrives in the
17 parking lot of Marty Grisham's apartment complex at 9:32.
18 Even giving the Defendant every single benefit of the doubt as
19 these two officers drove in unmarked police cars, no lights,
20 no sirens, with the flow of traffic, they arrived in Marty
21 Grisham's apartment from Jamie Uhlir's apartment with plenty
22 of time for the Defendant to get out, knock on Marty Grisham's
23 front door and shoot him down in cold blood.

24 Next those two detectives waited until 9:35 and they
25 drove the two separate routes. In fact, one of the routes

1 explicitly described by the Defendant up 55th, across on
2 Valmont, up again on 63rd and then left onto Gunbarrel. He
3 drives that exact same route and they both arrive 9:43 at the
4 Gunbarrel apartment. Why is it that there's just the right
5 amount of time for the Defendant to leave Marty Grisham's
6 apartment and then get back at 9:45 to 10:00 to make that
7 phone call. It is a feeble and weak attempt to try to
8 establish some kind of alibi, and he's using two 17-year-old
9 girls to try to do it.

10 Later on that night he makes another phone call to
11 Kristin Baulsir around 10:30. Now Kristin Baulsir doesn't
12 remember this conversation, but what she tells you
13 unequivocally, the exact same thing is told to you by Allison
14 Hackman, is that that is an unusual time for him to call, it
15 is late. People are asleep in their house and don't have cell
16 phones. They are not connecting by text message. This is on
17 land line, the main line of the house, and it is an unusual
18 and late time for the Defendant to call.

19 November 2nd, between 2:30 and 3:00, again, think
20 about this. Just the next day, November 3rd is when Sergeant
21 Weyer is interviewed by Commander Weinheimer. Sergeant Weyer
22 says the Defendant shows up asking how soon can I get out of
23 here? That is a quote from the Defendant, How soon can I get
24 out of here? Sergeant Weyer describes him as being over eager
25 to enlist. What's the rush, why does he want to leave right a

1 way, the answer is obvious.

2 November 3rd, the Defendant is finally arrested,
3 he's brought in for questioning. And, in fact, he is
4 questioned by three detectives inside the Boulder Police
5 Department.

6 November 4th, news reports come out, in fact, you
7 have one of those newspaper articles. You have heard
8 testimony from Detective Heidel that within those newspaper
9 articles there are details about the murder, but what is not
10 inside those articles is what's absolutely critical in this
11 case.

12 Speaking of those articles, think about Walter
13 Stackhouse. Who's Walter Stackhouse? Walter Leon Stackhouse
14 is a guy who, obviously, has gotten in a lot of trouble with
15 the law over his life. Walter Leon Stackhouse is what he is.
16 When he was asked about his criminal history, he wasn't
17 fighting it, didn't deny it. He is who he is. But Walter
18 Leon Stackhouse is exactly the kind of man who would be in the
19 Boulder County jail, exactly the kind of man that the
20 Defendant would speak to, because they are actually charged
21 with the same crime, forgery, check fraud. And there is,
22 without a doubt, they were in the same location within the
23 Boulder County jail and, in fact, even shared a room.

24 So think about Walter Leon Stackhouse. Ms. Milfeld
25 asked him a lot of questions about his criminal history and he

1 owned that. That doesn't mean that -- we talked about this
2 during voir dire, that doesn't mean that Walter Leon
3 Stackhouse isn't capable of telling the truth. What Walter
4 Leon Stackhouse describes is a conversation with the Defendant
5 where the Defendant tells him details. And Ms. Milfeld told
6 you on opening statement that all those details are somewhere
7 in the newspaper articles, and that's just not the evidence in
8 this case. It is just not the evidence in this case. There
9 are things that never appeared in the newspaper that could
10 have only come from one place, and that one place is from the
11 Defendant's mouth.

12 Walter Leon Stackhouse knew that the Defendant had
13 been in Pueblo, that is nowhere in the newspaper articles. He
14 knew that the Defendant had been arrested on a stolen
15 motorcycle, that is nowhere in the newspaper articles. He
16 knew, and as Sheriff Pelle actually told you, this information
17 was closely held, something they did not want anyone else to
18 know about, but Walter Leon Stackhouse knew that the Defendant
19 had shown that 9mm pistol to his recruiting officer, to
20 Sergeant Weyer, and that the Defendant was concerned about
21 that.

22 Walter Leon Stackhouse also testified about how the
23 Defendant said there's this picture in the newspaper, somebody
24 with glasses, somebody with long hair. And you saw Mark
25 Zondlo come in here, he is the spitting image of that person.

1 He had an exact reason to be in the apartment complex, in
2 fact, he lived there, but what was the Defendant's reaction to
3 that composite in the paper, I don't have long hair, I don't
4 wear glasses, I got that beat. Walter Leon Stackhouse said
5 that the Defendant said I don't drive a Chrysler. They are
6 saying something in the paper about a Chrysler, I drive a
7 Ford. Nowhere in the paper, nowhere does it say that the
8 Defendant drives a Ford.

9 So think about Walter Leon Stackhouse's motivation
10 for coming in here and testifying. The defense tried to make
11 you believe that he would come in and testify because
12 someone -- he wanted work release some 18 years ago, but you
13 heard testimony from Sheriff Pelle, that that work release was
14 already done. He had been sentenced, he was going into work
15 release no matter what. What does it have anything to do with
16 testifying now 18 years later? He gains no benefit from
17 coming here from California to Colorado to testify in this
18 case. And, in fact, not does he just not gain a benefit,
19 Walter Leon Stackhouse actually gets a negative, a deficit,
20 Walter Leon Stackhouse is now a person, as he described,
21 someone who may have a death sentence because if they knew
22 that he had come here -- people knew in prison that he had
23 come here to testify, that could literally end his life. He
24 has no reason to come here. When offered the chance of not
25 coming, having a hearing, saying, I don't want to come out

1 there and testify, he didn't even have that hearing, didn't
2 ask for it. He came here willingly, and he has got no reason
3 now to tell you the truth. And what he told you was
4 consistent with what he told Sergeant Meals on November 4th,
5 1994, and Sheriff Pelle on November 5th, 1994.

6 There's one other thing that he told you, he
7 mentioned that the Defendant said I'm going to go back in that
8 apartment, I was going to go back and get a 13-inch color TV
9 and a VCR and look back at the pictures that have been
10 admitted as evidence in this case. Look back at the pictures
11 of Marty Grisham's apartment and see what you see there.
12 13-inch color TV, a VCR plain view, where does that come from?
13 It comes from no other place, but the Defendant.

14 Think about what Walter Leon Stackhouse said about
15 he questioned when he pressed the Defendant, Did you do this,
16 Did you kill this guy, and he nods his head. No doubt in his
17 mind that he meant yes. The Defendant just says, He's dead.
18 They can't charge me because they will never find the gun.

19 The fact that Walter Leon Stackhouse doesn't come in
20 here and say, you know what, the Defendant told me, Hey, Leon,
21 I killed that guy, Yeah, I just killed him. Because if he was
22 going to make up a story about what the Defendant said, don't
23 you think that he would just embellish that detail and go all
24 the way? No, the fact that Walter Leon Stackhouse comes in
25 and says, He just nodded his head, actually supports the truth

1 of what he's saying.

2 Now, ladies and gentlemen, you are going to have
3 this as evidence to review in this case. You are going to
4 have the transcript to look at, if you request that from the
5 judge, and you are going to be able to listen to the audio, if
6 you request that as well, and you should look at it in the
7 context of all the evidence presented, all 80 plus exhibits
8 from the People and the exhibits from the defense.

9 I want to talk to you about some of the things the
10 Defendant said in that interview. I want to talk to you about
11 sort of the context of what's going on in his life this time,
12 November 1st, 1994. Take a moment and read that to
13 yourselves. He's talking about how he wants to impress
14 Sergeant Weyer, about how he feels that he let Sergeant Weyer
15 down.

16 Now you heard testimony from Jamie Uhlir, you heard
17 testimony from Alan Hammond, you heard testimony from Pam
18 Grisham, and other witnesses that joining the Marine Corps is
19 the Defendant's dream, something that he wanted to do since
20 early in high school. You heard from Sergeant Weyer, he was a
21 motivated recruit, he had gone through the initial processing
22 stage, his application had been approved and, in fact, he
23 tells Walter Stackhouse that he's supposed to ship out the
24 next week, and that's consistent with what Sergeant Weyer
25 says.

1 Sergeant Weyer is a person that the Defendant
2 desperately wants to seek approval from and it's a person that
3 he doesn't want to let down, because Sergeant Weyer went to
4 bat for him when he got that motorcycle case. Sergeant Weyer
5 went to the District Attorney's Office and tried to work out a
6 deal so he could still enlist, probably also because Sergeant
7 Weyer wants to make his quota and do well on his own job.
8 There is no doubt that the Defendant's recruitment is
9 literally hanging by a thread at this point, anymore trouble
10 and he is without a doubt out of the program and cannot join
11 the Marines.

12 Joining the Marines isn't the entire motive. You
13 have to think about what's going on in the Defendant's life at
14 this time, he's lost his scholarship to the University of
15 Southern Colorado in Pueblo and he is back in Boulder and he
16 has no place to stay. He can't stay with his parents, he is
17 having trouble with his parents. He's here literally moving
18 from apartment to apartment, couch to couch, staying at Bob
19 Mann's house, a person he barely knows, just some booster for
20 some girl's volleyball and basketball teams at the high school
21 waiting for his chance to get out of Boulder.

22 He tells these detectives in this interview he is
23 desperate for money, desperate for money, that's what's going
24 on in the Defendant's mind at this time. When he makes that
25 phone call and Jeff Gore picks up and he realizes that that

1 check fraud case is going to come to a close, he's got to do
2 something about that before Marty Grisham learns about the
3 checks and reports it to the police and it leads directly back
4 to him. That's what's going on in the Defendant's mind at
5 this time.

6 Think back on what he said to Special Agent Grusing
7 and Agent Amon from the FBI when they asked him about this
8 time in his life, and listen to that CD as well. He says, I
9 tried to block that part of my life out of my mind, that was a
10 bad part of my life. That is the situation that the Defendant
11 finds himself in when he makes that phone call to Jeff Gore.

12 The Defendant tells a lot of people a lot of things
13 about guns, his ability to get guns. He tells Sergeant Weyer
14 things like, Me and my friends are stealing guns from
15 pawnshops in Denver, further corroborating Dion and David
16 Berring, but he tells him things about how he has got an AK 47
17 in his car. He tells him things that he is going to a shoot
18 out in Pueblo. He says things like, I was in a drive-by and I
19 got in a fight, told him stories about shootings. Why would
20 the Defendant tell Sergeant Weyer, a person whose approval he
21 is desperately seeking, a person whose respect he is trying to
22 earn, about all these stories of shootings and things like
23 that, it's because in the Defendant's mind, this is the person
24 that he wants other people to believe he is. He wants people
25 like Sergeant Weyer to believe that he is this tough guy who

1 gets in gunfights, that is the person he portrays himself to
2 other people to be, that is the person he wants himself to be.
3 That is the kind of person who goes to Dion Moore and asks for
4 a gun, and asks for a gun not just any kind of gun, but a gun
5 purchased through a man that cannot be traced back to Michael
6 Clark. That is the kind of person he wants to be and the kind
7 of person who he is capable of knocking on the door of Marty
8 Grisham's apartment and shooting him down, removing an
9 obstacle to further his own ambitions.

10 In that interview the detectives approach him and
11 say things like, Look, tell us where the gun is, help us find
12 the gun. We can go out there right now, tonight, we can go
13 look for these people and find out where this gun is. The
14 Defendant at this point knows that he is literally the prime
15 suspect, he knows that all he needs to do to clear his name is
16 tell them where the gun is. What does he say, well, if you
17 show up there, these people are just going to run, it's not
18 worth it.

19 They give him another opportunity later in this
20 conversation. Let's just go out there right now. This guy
21 makes a phone call, I can probably make that happen. He says,
22 No, No, No, we need to make sure it's the same gun. We need
23 to go right now and we are going to find that gun. You want
24 to show us where it is, Who this person is that you gave it
25 to, No, no chance of that. That's what the Defendant's

1 response is.

2 Why doesn't he take that opportunity? Why does he
3 continue to mislead the detectives during this interview? Now
4 think about it, motive, means and opportunity. And then when
5 confronted, confronted with these facts, he does nothing other
6 than mislead the detectives, literally send them on a chase
7 that would derail this investigation for years and enable him
8 to escape justice for nearly 18 years. Why would he make up
9 this story?

10 The defense said earlier in opening that he's a
11 afraid of Dion Moore, you have seen not a shred of evidence,
12 not one statement by one person in this case that the
13 Defendant was scared of Dion Moore in the least. When asked
14 by Jamie Uhlir, Is Dion Moore a scary guy, he literally
15 laughed. Dion Moore was not a scary person to the Defendant.
16 Dion Moore was exactly the kind of guy that the Defendant knew
17 he could use to get what he wanted. He is not a person that
18 he is scared of, in fact, he is a person that he trusted
19 enough to use to buy a weapon that couldn't be traced back to
20 him, that wasn't traced back to him until ultimately Detective
21 Heidel got on this case and tracked down David Berring and
22 corroborated Dion Moore's story.

23 Again, in this interview the Defendant says he
24 realizes during the course of this -- I mean you guys,
25 obviously, don't know much about what happened. He's becoming

1 more confident. The only time that confidence begins to
2 shatter and waiver is when they start sticking with that stub
3 for the GSR kit and he begins to ask questions and questions,
4 listen to it, read the transcript.

5 And he says the defense in their opening said he
6 cooperated, that he cooperated with these detectives. He
7 tells him, Look, I have told you everything I know, after
8 giving the story about Louis leaving a gun in his car in
9 Montebello. He says, You can call me a liar, You can call me
10 that outright, but I'm not going to change my story. I'm
11 telling you straight up, knowing that these detectives are
12 literally trying to either exclude or include him in this case
13 and possibly exclude him if they could just get that gun, he
14 says, I am telling you the truth, I'm being straight up with
15 what happened to that gun. It is the furthest thing from the
16 truth. Ask yourselves why.

17 The ballistics evidence in this case. Ted Ritter
18 examined those bullets in 1994, took measurements for the
19 bullets. He described the rifling in this case as being
20 sloppy. He described the Bryco Jennings the same way that
21 Allen Hammond did, as being a cheap gun. The kind of gun that
22 will leave sloppy lands and grooves impressions. What he
23 found there was enough to measure on that bullet that killed
24 Marty Grisham. Those measurements when Allen Hammond searched
25 for them in 2011, take out the variance of the plus or minus

1 .05 or .03, take it out, look at the evidence that's been
2 admitted and you will see that the Bryco arms model 59 fits
3 perfectly within those numbers that Ted Ritter found, meaning
4 that the gun that killed Marty Grisham could have been the
5 Bryco Jennings model 59. Model 59 is critical in this case
6 because there are two pistols bought by Dion Moore that day on
7 October 19th. One was a model 58 and one is a model 59.

8 You heard testimony from Dion Moore. Dion kept the
9 compact, the Defendant got the full size. He said that in
10 1995. The full size is the model 59, that picture right there
11 is the model 58, that is the compact. The Defendant kept the
12 larger gun. And it's no coincidence that in that list, the
13 printout of all the different model guns that could have shot
14 that bullet, the model 58 is not on there; the gun that the
15 Defendant had is.

16 When you look back at this list, think back on the
17 testimony of Ted Ritter and Allen Hammond, think back on all
18 the designations of the various different types of guns that
19 are included in there. You can literally take out hundreds
20 upon hundreds of those guns from that list, like Glock and
21 Heckler, because we know there's no rifling on the barrels,
22 they are cut barrel. Those can all be removed. There's no
23 breach face markings, those guns can be removed. All the
24 single shotguns, the shotguns, the submachine guns, the
25 rifles. You know that when Marty Grisham answered the door he

1 looked through that peephole as described by -- as described
2 by his girlfriend. He looked through that peephole as not
3 opening up the door with someone with a submachine gun or a
4 rifle. So when you take that list back and look at it and see
5 the various models that could have fired that bullet, it's not
6 that long, and what's included in it is the Bryco arms model
7 59.

8 The Carmex container right there, the night of the
9 murder. The Carmex container sits underneath that step and it
10 is plain as day in daylight. What does that matter, because
11 the only thing in that breezeway that's out of place is that
12 Carmex container. You heard testimony from Kirk Magill that
13 he walked those grounds on a daily basis picking up any sort
14 of debris and trash. He took pride in his job. You heard
15 that from him. This is a guy that walked the grounds on a
16 daily basis and if something that obvious was sitting there,
17 don't you think that Kirk Magill would have picked it up. And
18 as it laid there -- it's -- what's critically important is
19 that it laid on its side. Why is that important, because
20 according to the Defendant when asked, When was the last time
21 you were there at Marty Grisham's apartment, he says it was
22 the weekend that he stole the checks way back in September,
23 September 23rd, 24th, 25th, literally 37 days. He's asked
24 that question a second time, he repeats that answer, I have
25 not been back there since I watched that cat, 37 days. That

1 Carmex container is not going to sit on its edge for 37 days.
2 That Carmex container is not going to sit there as a piece of
3 trash or debris with Kirk Magill walking the grounds. That
4 Carmex container was left there on the night of the murder.
5 It was left there on the night of the murder and inside that
6 Carmex container the DNA profile matches the Defendant, that
7 can literally exclude, think about this, 99.4 percent of the
8 world's male population excluded. The Defendant is not in
9 that 99.4 percent.

10 Throughout this case we had to prove to you the
11 Defendant committed this act after deliberation. There's no
12 doubt that the Defendant probably began thinking about this
13 when he told Dion he needed a gun because some scary guy was
14 stalking him in October. There's no doubt that the Defendant
15 knew, as he said in his own statement to the police, that he
16 knew a confrontation was going to come eventually. And as he
17 wrote those checks, he didn't know this would ultimately come
18 crashing down on him. And when he showed up at Marty
19 Grisham's door, knocked on it and without hesitation four
20 shots immediately ringing out, that shows a person who's doing
21 an act intentionally and after deliberation. And his feeble
22 attempts to establish an alibi by calling Allison Hackman and
23 Kristin Baulsir late at night to show that this was a plan, a
24 plan that he executed, a plan that in some ways he was lucky
25 enough to get away with for 18 years, or maybe he is just the

1 most unlucky man in the world. Maybe it's just an incredible
2 series of coincidences.

3 We talked about this during voir dire. Mr. Brackley
4 asked you a question about coincidences and some folks said,
5 Yeah, one point say coincidence is nothing. Two, it starts to
6 look dark; three, four, five, six, turns from coincidence to
7 overwhelming evidence of guilt. It is no coincidence that the
8 defendant had a Bryco Jennings 9mm pistol. It is no
9 coincidence that that 9mm pistol was a model 59. It is no
10 coincidence that the Defendant the week prior when he showed
11 that gun to Sergeant Weyer had ball ammunition, no longer
12 hollow points that Jamie Uhlir saw in the week prior, now it's
13 ball ammunition, the kind of ammunition that killed Marty
14 Grisham. It is no coincidence that when Sergeant Weyer looks
15 at that ammunition, he's that professional Marine, a Marine
16 that carried an M9 Baretta as a sidearm in combat in Desert
17 Storm. He knows exactly, exactly what ball ammunition looks
18 like. It's no coincidence that the day after the murder he
19 shows up saying, When can I get out of here. It's no
20 coincidence his DNA is found inside of that Carmex container,
21 it would have been sitting on it's edge for 37 days. No.
22 Gone well past any sort of potential for just mere
23 coincidences, that is evidence of overwhelming guilt,
24 overwhelming guilt.

25 The Defendant said back in 1994 they can't charge me

1 because they will never find the gun, he's right, we never
2 found the gun. It's not for lack of trying. When this
3 detective or other detectives from the Boulder Police
4 Department couldn't find the gun because of the Defendant's
5 actions, but he was wrong, he was charged, he sits here today
6 charged with this crime and all the evidence points back to
7 him.

8 Now the decision is yours. It doesn't matter what
9 anyone else did over the course of the last 18 years, the
10 decision is now yours and you can feel confident in returning
11 a verdict of guilt in this case. You can feel confident that
12 returning a verdict of guilty is the right thing to do that is
13 consistent with the evidence and the law, without bias,
14 prejudice or sympathy. You can feel confident that returning
15 a verdict of guilty in this case will support the truth and
16 will finally after 18 years do justice to Marty Grisham.

17 THE COURT: Thank you, Mr. Kellner.

18 Ladies and gentlemen of the jury, we are going to
19 recess. I need to give the court reporter a rest. We are
20 going to recess until 10:40, little bit over 15 minutes.

21 Remember the admonition that I have given you
22 previously, it applies at this recess as well. Don't talk
23 about the case with anyone else. Don't communicate about the
24 case with anyone else by any means. Don't read or listen to
25 any news reports, don't consult any outside reference

1 materials, don't do any independent investigation. It's
2 especially important that you do not form or express any
3 opinion on the case until it is finally given to you for your
4 deliberations.

5 We should be ready promptly at 10:40. We'll see you
6 then. We'll be in recess until 10:40.

7 (Whereupon, the morning recess was taken.)

8 THE COURT: Back in open court on 12 CR 222. The
9 Defendant and all counsel are present. Would you bring the
10 jury in, please.

11 (Whereupon, the jury entered the courtroom, and the
12 following proceedings were had in the presence and the hearing
13 of the jury.))

14 THE COURT: Please be seated.

15 On behalf of the Defendant, closing argument,
16 Ms. Ring.

17 MS. RING: Michael Clark did not kill Marty Grisham
18 and we know that because the Boulder Police Department pulled
19 out all the stops. They did a thorough, creative, resourceful
20 investigation of Michael Clark as the suspect who murdered
21 Marty Grisham, and what we know as the result of that
22 investigation is that Michael Clark didn't do it.

23 In 1994, Michael Clark was a young, immature
24 19-year-old and that 19-year-old Michael Clark, he was capable
25 of screwing up a scholarship to college, and he was capable of

1 being busted on a stolen motorcycle, and he was capable of
2 taking advantage of a crime of opportunity and taking Marty
3 Grisham's checks and forging them and writing them out each
4 and every one of them in his own name, but that 19-year-old,
5 young, immature, Michael Clark was not capable of cold
6 blooded, intentional murder. And 18 years later after a
7 thorough investigation, Michael Clark is a 37-year-old married
8 man, a father who lives in Silverthorn with his in-laws and
9 works at Big Horn Ace Hardware, and he didn't kill Marty
10 Grisham.

11 So then why are we here, why is Michael Clark
12 sitting at that table with me? Well, of course, in 1994 it
13 would have been remiss of the Boulder Police Department to not
14 have at least investigated Michael Clark, that wouldn't have
15 made any sense. What would happen is their entire focus in
16 that '94 and '95 investigation, when David Spraggs re-looked
17 at the case, when Detective Heidel took it over in 2009, it
18 all focused solely on Michael Clark. And sometimes defense
19 lawyers get up and they talk about what a shy investigation
20 the police did, and all the things they missed and they didn't
21 do, but in this case in investigating Michael Clark as the
22 suspect, they did it all, they pulled out all the stops. But
23 what we know now, if you look at all of that, everything they
24 did, it's that Michael Clark didn't do it.

25 When you're trying to sort out how to organize all

1 of the evidence, the information, the testimony that you have
2 heard over the two weeks, I'm going to talk to you about it in
3 terms of motive, opportunity and capability. And in talking
4 about capability, I'm going to talk to you about the gun.

5 Mr. Kellner made it sound like they have proven to
6 you that Michael Clark had a 9mm model 59 Bryco Jennings
7 handgun. What we know, what we all know, what was proven is
8 that Michael Clark had a 9mm gun that he showed to Sergeant
9 Weyer that Jamie Uhler saw, we know that. And I know that
10 when Mr. Brackley gets up, because he gets to go last, that he
11 is going to go back over some of these things. But I know
12 they have talked about and they are going to talk about and
13 they have showed some of that statement about the whole Louis
14 story. Why tell the police the story about Louis.

15 Dion Moore, and they said you didn't hear from
16 anybody that Dion Moore is a scary guy or anybody said that he
17 was scary. Dion Moore started running guns to Chicago when he
18 was 14 years old. You saw Dion Moore in a sweater and a
19 collared shirt, you saw the Boulder Dion Moore who's not a
20 scary guy, who hung out with Jamie and could be empowered and
21 play sports and do all those positive things, but Dion Moore
22 told you all of those guys knew about his other side. They
23 didn't like that other side of him, but they knew the Dion
24 Moore who lived in Montebello and Aurora and had gang ties to
25 Chicago and ran hundreds of thousands of guns.

1 So do you admit you are scared with Dion Moore
2 walked around, scared of him, but, yeah you are scared of Dion
3 Moore, and you don't snitch on him and he is also your buddy.
4 So when the police are asking about where you got the gun, you
5 don't say I got it from Dion.

6 They want to talk to you about where the gun goes.
7 Why didn't Michael Clark just give up that gun. And, of
8 course, the police told him we need to know it was the same
9 gun. So what gun was Michael Clark supposed to give him that
10 was supposed to be the same gun, because, you know, if it was
11 excluded, it was a different gun, you just made that up and
12 just went and got that gun.

13 19-year-old, immature, Michael Clark had a gun,
14 shouldn't have had a gun, definitely didn't have a gun to kill
15 Marty Grisham because if he did, why do you show it to the
16 Marine recruiter? Are you kidding me. It's like walking in
17 the police department and saying, Oh, look, I have a 9mm gun,
18 I'm going to use it and kill somebody in a week, but don't
19 worry. That's ridiculous.

20 That timeline, that timeline that Mr. Kellner wants
21 to fudge for you about when Michael Clark had the gun.
22 Sergeant Weyer said the previous week on November 3rd, he said
23 the previous week and Commander Weinheimer and the timeline
24 you saw today, that Monday would have been the -- I believe
25 that it's the 25th, and he sees him with ball point bullets,

1 then the full metal jacket. October 26th Jamie Uhlir says he
2 saw the gun and he clearly saw hollow points, and then nobody
3 else saw Michael Clark with the gun.

4 And they are going to get back and Mr. Brackley is
5 going to talk about -- and Mr. Kellner already talked about
6 Oh, no, no, on November 1st that gun was in Michael Clark's
7 car and Vanessa and Summer saw it. Only person who says that,
8 Dion Moore in October of 1995 when he is going to get his
9 cases dismissed if he can tie Michael to the gun on
10 November 1st.

11 You heard Detective Heidel spoke to Vanessa, spoke
12 to Summer, and you know if they were seeing Michael Clark with
13 the gun, you would have heard that. And according to Dion
14 Moore -- I mean Vanessa was so freaked out by that gun that's
15 why he remembers that, so wouldn't Vanessa have remembered
16 that.

17 MR. BRACKLEY: Objection, Your Honor. There's been
18 absolutely no testimony or evidence about what Vanessa said or
19 did not say.

20 THE COURT: Ladies and gentlemen of the jury, let me
21 remind you that the statements of counsel are not evidence.
22 You should rely on your own memory of the testimony and
23 evidence during the trial when you are determining the facts.

24 You may continue, Ms. Ring.

25 MS. RING: Thank you.

1 You are allowed to consider the lack of evidence,
2 like the fact you didn't hear from Vanessa and you didn't hear
3 from summer.

4 Dion Moore told you that Michael Clark told him,
5 Don't worry, I got rid of the gun before Marty Grisham was
6 murdered. And then Dion didn't say, Oh, but I said to Michael
7 Clark, Wait, Wait, Wait, I saw the gun on November 1st, No,
8 you didn't. That's not what -- that wasn't Dion's response to
9 Michael Clark telling him I got rid of the gun before Marty
10 Grisham was murdered, because Dion's story about the gun in
11 the car on November 1st, 1994 is a lie.

12 The other reason you know that didn't happen is
13 because who's in the car. Michael Clark's driving his Ford
14 Mustang. Jamie Uhlir is in the car because they are going to
15 the soccer game, and Vanessa, Summer and Dion are in the car.
16 Just telling you he sees the gun on October 26th with the
17 hollow points. Just didn't tell you about in the car Vanessa
18 going, Oh my god, there's a gun, there's a gun, because it
19 didn't happen because only Dion Moore tells you that because
20 Dion Moore wants a deal. So the last time anybody sees
21 Michael Clark with the gun is October 26th with the hollow
22 points.

23 What are you supposed to do with David Berring and
24 Dion Moore because their stories, they don't match. What you
25 are supposed to do with David Berring and Dion Moore is

1 realize how badly the Boulder Police Department wants it to be
2 Michael Clark so that they're trying to shove this story that
3 doesn't make any sense to make it this 9mm Bryco model 59,
4 which doesn't prove anything.

5 David Berring, I never forget a face, I'm really
6 good with faces. He picks up number 4, that's the person that
7 looks the least like Dion Moore in this entire photograph,
8 there's nothing similar. But what's also concerning about
9 that lineup is that Detective Heidel put a person in the
10 lineup who David Berring picks out who couldn't have even been
11 there, he would have been too young. What kind of lineup is
12 that, what does that suggest about what the Boulder Police
13 Department is looking for?

14 They find David Berring 16 years later under a tree
15 on a beach in Florida. He gets brought by the police to this
16 interview and, guess what, they get what they want from David
17 Berring, but the problem is, it's got to match Dion Moore,
18 right? I mean that's the only way it makes any sense. So you
19 heard from Dion Moore about how many guns he ran and how many
20 pawnshops he used and how many straw purchases he used. And
21 this is when Dion wants his deal, but even then Dion doesn't
22 pick out David Berring's photo. He has never seen David
23 Berring. We show him the photo later. The guy that Dion
24 Moore used, he used clearly more than once, although David
25 Berring says he only did it once. He got at least eight guns

1 over a 3- to 4-month period from the guy, that's what Dion
2 Moore says. Dion Moore thinks they got two 9mms and a .380.
3 Dion Moore says that he definitely got ammunition, David
4 Berring says no ammunition, but the bottom line is, we all
5 know Michael Clark had a 9mm. We all know Michael Clark got
6 that gun from Dion Moore. But shoving all of this into that
7 David Berring/Dion Moore thing, that doesn't make any sense,
8 just shows you how much the Boulder police were just focused
9 on trying to pin this on Michael Clark.

10 So now we need that gun, general rifling
11 characteristics, that GRC thing to match because we have to
12 make that Bryco Jennings, we have decided it's got to be the
13 Bryco Jennings. We are going to make it the Bryco Jennings so
14 it has to fit.

15 Agent Ritter, their expert, he's been doing it
16 longer than Agent Hammond. He did the measurements, he looked
17 through the microscope. He had to use these discrepancies in
18 here because they were difficult to measure. And what Agent
19 Ritter thought the right thing to do in his expert opinion was
20 to use a mean, not to take the high and the low and make the
21 search as big as possible, you take the mean, but that doesn't
22 fit so we have to change it.

23 Agent Hammond doesn't take to Agent Ritter about why
24 he used the mean. He doesn't talk to Agent Ritter about why
25 he came up with those larger discrepancies with some of the

1 lands and grooves, he doesn't talk to Agent Ritter about
2 anything. He doesn't re-do his measurements. What he does is
3 help them make their case by making it larger so that that
4 Bryco Jennings model 59 fits. And, again, all that does is
5 tell you that if Michael Clark had a 9mm Bryco Jennings, it
6 might have been a gun that might fit with those bullets,
7 that's all it does. All that work to make all of this fit and
8 that's all it gets you. And why are they using this, why do
9 they keep giving you all this, because that's all they've got,
10 and it's all they have got because Michael Clark didn't do it.

11 Motive, they know this doesn't make any sense. This
12 is a 19-year-old immature, poor decision-making, every check
13 made out to yourself with such a bad signature that Patty
14 Harris can just look at the signature immediately and know
15 it's not Marty Grisham's, not cold blooded, calculated killer
16 who gave himself a 3-minute window to do this. So they know
17 that motive doesn't fit so they keep looking for other
18 motives. The Marine thing, except Sergeant Weyer says on
19 November 3rd he already wasn't going, he already blew it with
20 the stolen motorcycle, so now that doesn't make any sense. So
21 then we are going to make Kristen Grisham involved because
22 that makes more sense because if Kristen wants Michael to help
23 her kill her father because of some horrible thing that
24 happened, but none of that happened. But they interview
25 Kristen over and over and over again and they wiretap her

1 phone because they need a motive that makes sense. And it
2 finally -- they finally have to give up because Kristen
3 nothing to do with it, because Michael had nothing to do with
4 it, there's no motive.

5 Opportunity, I want to talk to you about opportunity
6 in three different segments. I want to talk to you about Barb
7 Berger or Barbara Swider. Now I want to talk to you about
8 Jamie Uhler, and I want to talk to you about Detective Weiler
9 and Detective Denig. So let's start with Barbara Burger.
10 Marty Grisham wasn't murdered at 9:34. This is the CAD
11 report. It says -- but it says is the operator at dispatch
12 who got the phone call from 911 started typing at 9:34, that's
13 what that tells you. The person who killed Marty Grisham had
14 to be at the door well before 9:34 because Barbara Burger told
15 you in great detail the events starting with the knock. And
16 Barbara Burger understandably remembers all the details of
17 that evening. But they are sitting at the dining room table,
18 Marty's feet are up on the table and they hear a knock. And
19 Marty doesn't rush up to the door to open it, he pauses,
20 sounds like a Loren knock, gets up, walks to the door. Walks
21 to the door and pauses and looks through the peephole, pauses
22 again, looks back at Barbara Burger and then he opens the door
23 and then he's shot four times. And you heard Barbara Burger
24 say, initially she didn't really know what happened, she
25 thought maybe it was fireworks, she wasn't sure. And it took

1 her sometime, 30 seconds, a minute to go, Oh wait, he's been
2 shot, and she still hasn't called 911 yet because she gets up
3 and she runs to Marty first and then realizes I better get
4 backup and make that phone call. So 9:34 is not when that
5 person who killed Marty Grisham was at that door, it was
6 before that. It had to be before that.

7 Jamie Uhlir. Jamie Uhlir and Allison Hackman are
8 really important because Jamie Uhlir knows Michael Clark
9 really, really, really well, and that night and that next day
10 he's the same old Mike. Allison Hackman on the phone, nothing
11 odd, nothing weird, so much so that she visits him in the jail
12 and ends up dating him for at least a couple of years.
13 Because she told us he went to see her in Michigan when she
14 was in college. The good-headed kid didn't go on dating a
15 murderer.

16 They used Michael Clark's own words about what time
17 that soccer game got over around 8:40, right, and they talked
18 about what a feeble attempt at an alibi that was. You know
19 why it was a feeble attempt at an alibi, because it wasn't an
20 alibi, it's because it's what happened. When you listen to
21 what Jamie Uhlir said and the times that the cops want it to
22 be, because if you go to a playoff soccer game that's
23 scheduled to start at 7:00, you are lucky if it starts at
24 7:00, if anything, it starts later. We heard one person say
25 their 45-minute halves, somebody else said they are 40-minute

1 halves, but the way soccer works is that if there's extra time
2 or injury time, it gets added on to the halves, so those half
3 times individually had to be longer. And then there's this
4 thing because there's two halves called a halftime. So if you
5 add that all up you keep pushing that time frame not where
6 they want it to be. And anybody who's ever been to a sporting
7 event that's of any kind of nature where it's crowded, where
8 it would -- it was held at Lakewood Memorial Stadium, you
9 don't get to run right out. And when your buddy is on
10 crutches because he just had ACL surgery, you are not
11 sprinting down the steps to get to your car and you don't get
12 to get in your car and peel out of the parking lot because,
13 guess what, you are not all alone.

14 And Jamie Uhlir never said Michael Clark said I have
15 to get out of here, we have to get down the steps, hurry up,
16 pushing him on his crutches, because that didn't happen
17 because Michael Clark wasn't in a rush to go anywhere. So
18 then you have got to get to your car in the parking lot and
19 deal with the traffic after the game because we know they
20 didn't leave early. And you have got to drive from 6th and
21 Kipling at the stadium back to Jamie Uhlir's house. And then
22 you park your car, because you don't kick Jamie out as you are
23 driving off from the curb, and you go in the house and you got
24 a page from Allison Hackman and you decide what, you know
25 what, I like this girl, if you remember when they were 19 you

1 don't want to talk to the girl that you are trying to make be
2 your next girlfriend at your buddy's house with your buddy's
3 around, that's not how it works.

4 Michael Clark couldn't have done it, he didn't have
5 the opportunity. There's no way when you think about the
6 soccer game, when it ended, all of those details, that he had
7 time to get there. And I would suggest to you that Detective
8 Weiler and Detective Denig's timing actually helps confirm
9 that Michael Clark didn't have the opportunity. And they
10 didn't do that drive trying to exclude Michael Clark, because
11 if you did, you know where you start, you actually start at
12 the stadium and you see how long it takes to get from that
13 stadium to Jamie Uhlir's house. And you have had other people
14 who actually were at that game to confirm what time it ended.
15 And you get to Jamie Uhlir's house and you don't start parked
16 in the car outside, you start from his door where Michael
17 Clark would have had to have left to get into his car.

18 33-mile drive, flow of traffic in under 33 minutes.
19 Doesn't happen. And they want to say that Jamie or Michael
20 Clark said they could get home in 30 to 35 minutes and we all
21 say that about approximating distances and how long it takes
22 us to get certain places. But I-25 is not 65 the whole way
23 there, 36 is not 65 the whole way there. And you know what,
24 once you get off on Foothills, it's 45 and there are things
25 called traffic lights and there are at least three or four of

1 them on Foothills and there are at least four or five of them
2 on Arapahoe. So you have got to get incredibly lucky. I
3 cannot hit a single one of those lights to get to that parking
4 lot when they say they did.

5 And if you are going to kill Marty Grisham, you have
6 to park, you probably want to park somewhere where no one is
7 going to see your car. You have to get your gun, you
8 presumably you need to load your gun. You want to look around
9 and make sure nobody is around that might possibly see you.
10 And you have to get out of that car and up to Marty Grisham's
11 door. And if you think about all the details and all the
12 things that need to happen, it didn't because it couldn't.

13 Yesterday Detective Sergeant Trujillo was asked
14 about everything they had in 1995 and what's new since then.
15 And then Mr. Kellner got up and said, Well, let's talk about
16 what's new since 1995. The GRC that we have now brought broad
17 reason, not Agent Ritter who did the original measurement,
18 Agent Hammond has broad end or GRC, so it fits so that, you
19 know, take out all of those guns that Mr. Kellner wants you to
20 ignore because what they are 90, 92 manufacturers on that
21 list, cut it in half 50 manufacturers. How many different
22 makes and models, nobody told us that, how many different
23 guns.

24 And Carmex, that's what's new. You know what, Missy
25 Woods tested the outside only, because whoever is using

1 Carmex, whoever's Carmex it was, your DNA is on the outside,
2 because you got to unscrew the top and you stick your finger
3 in and you rub it all over your lips, just like Missy Woods
4 showed you. And then you put the top back on with your DNA
5 all over your fingers that put it all over your lips and you
6 screw it back on and there's where your DNA is. There's DNA
7 on the outside of the Carmex, there's YSTR and there's
8 autosomal and we don't know whose that is because there was
9 only one sample sent down and it was Michael Clark's sample.
10 And out of a database of 4,100 people, there's a partial YSTR
11 paternal lineage, nothing on the outside. It's not Michael
12 Clark's DNA, I'm sorry, it's not Michael Clark's Carmex.

13 What if it's Marty's DNA on the outside, what if --
14 because we know Michael Clark was there, he used it when he
15 was there, and that actually is his DNA there, that Y partial
16 does match, but it rolled out the door when the police were
17 coming in and out because it's Marty's DNA, because whoever's
18 Carmex this is, their DNA is on the outside and it's not
19 Michael Clark.

20 And Detective Heidel, they want to say it was
21 obvious it was there. It was so obvious it was there, they
22 showed you that photo, there are lights everywhere, there are
23 police everywhere, there's crime scene tape everywhere,
24 flashlights. They don't see it. They don't see it because it
25 wasn't obvious because who knows how obvious it had been

1 there. And we don't know what it looked like, whether it
2 looked like it had been out there for weeks or months or what
3 have you, because when Detective Denig picked it up, the
4 photograph didn't come out and -- yeah, he put it into
5 evidence in the secured bag, but it's been to CBI twice to be
6 tested. So we don't know what it looked like when they picked
7 it up and it wasn't obvious because it was -- I'm sorry -- how
8 many officers did we hear were on scene before Detective Denig
9 comes the next day when the crime scene tape is gone.

10 All of these things that they want to make such a
11 big deal about, the Carmex, the pawnshop, the GRC, could have
12 been a Bryco Jennings, none of it, none of it is even close to
13 getting you to Michael Clark being the killer and it's not
14 even close after everything they did because he's not.

15 Walter Stackhouse, you know, in voir dire what they
16 talked to you about was he heard somebody had a felony
17 conviction, would that be a reason not to believe them. And
18 people talked about, you know, everybody can make one mistake
19 in their life and recover, or I think somebody said if you
20 stole food to feed your family. Dion Moore, David Berring,
21 Walter Stackhouse, that's not what we're talking about.

22 How convenient. This is the jail list, all the
23 people that were in the jail with Michael Clark. Only person,
24 only person he admits anything to is Walter Stackhouse. All
25 those deputies that worked in the jail, you hear anybody come

1 in and say Michael Clark was doing this really weird thing
2 where he was cutting out all the articles in the newspaper
3 that related to him and the newspaper came back in shreds,
4 only Walter Stackhouse. And the DA wants to say you ought to
5 believe Walter Stackhouse because he told you how much he had
6 to lose by coming out here to testify under a subpoena
7 escorted by somebody from the DA's office, but he's a changed
8 man, except he's still in prison right now. And you know
9 what, people who are in prison and people who have felony
10 convictions, they can tell the truth, but Walter Stackhouse
11 didn't tell the truth.

12 Walter Stackhouse, I am sure, made friends with
13 Michael Clark. I am sure he talked to Michael Clark and he
14 got Michael Clark to tell him all the things that Michael
15 Clark told a lot of other people. Michael Clark talked about
16 the stolen motorcycle, Michael Clark talked about Pueblo and
17 losing that scholarship. Michael Clark talked about his Ford
18 Mustang. But the only information that Stackhouse had about
19 Marty Grisham's murder came from the newspaper because
20 Stackhouse in 1994 was desperate to get back on work release.

21 You heard about the stores that he owned that he
22 would lose if he was back in the jail, you heard he had just
23 seen a judge in August in the same case in the same probation
24 violation. He needed to get back out to work release.
25 Stackhouse, who's got a cocaine problem at the time, reads

1 this article, says, I know that guy because I'm in the jail
2 with him. And I know in reading this article that Michael
3 Clark's somebody they are looking at, but they don't have
4 definitive evidence. They don't have what they need, but I
5 know from this article about the Marines, I know in this
6 article about the checks. He gleans everything he needs to
7 know from the article, buddies up with Michael Clark, is seen
8 with Michael Clark, conveniently at some point gets put in the
9 same room with Michael Clark, and then can give these
10 statements that Michael Clark told him he did it. Talk about
11 convenience, talk about coincidence.

12 Sergeant Pelle said, No, the judge makes those
13 decisions about going back into work release. Stackhouse told
14 you I never saw the judge, I never saw the judge because the
15 jail took care of it for Stackhouse. He got what he wanted.
16 Stackhouse, convicted felon, not in Michael Clark's age group,
17 nothing else in common, he's the only person Michael Clark
18 makes any kind of admission to, seriously. How many hours
19 with those detectives in 1994, trained detectives who have a
20 ruse, who are lying about GSR, who are talking to him over and
21 over and over again, no admissions there, no friends, family,
22 anybody, not an ATF agent, not an FBI agent, no one, just
23 Stackhouse.

24 In 2009, Detective Heidel takes over the case and
25 what Mr. Kellner had Detective Heidel confirm for you is that

1 when he took over in 2009 he didn't start with a blank slate,
2 he didn't say let's just start fresh. He started with that
3 1994 interview, the focus of this investigation never changed.
4 And Mr. Brackley is going to get up and he is going to say the
5 focus never changed because there were no other leads. The
6 focus never changed because starting immediately after Marty
7 Grisham was killed, the focus went to Michael Clark and it
8 stayed there.

9 We know that the person who killed Marty Grisham
10 knew how to handle a firearm. Anybody who knows anything
11 about firearms actually knows it's not easy to pick up a
12 weapon, a 9mm weapon and shoot it in that narrow timeframe,
13 hit your target and be successful, it's not easy. Michael
14 Clark's not that guy.

15 We know that Marty Grisham was a Dr. Jeckel and a
16 Mr. Hyde. We know from his daughter that Marty Grisham was
17 the kind of guy who could piss somebody off so much that her
18 thought was, He finally did it, he finally pissed somebody off
19 that much, that guy wasn't Michael Clark.

20 And we know when Kristen Grisham is telling us that
21 about her father and somebody is trying to say you mean he was
22 a tough love kind of guy, you mean he was an authoritative,
23 it's Kristen Grisham who says he's like Dr. Jeckel and
24 Mr. Hyde. It's Barbara Berger that told you that he described
25 himself as an asshole at times. Kristen Grisham told you she

1 stopped talking to her dad because he was the kind of guy who
2 could make her feel horrible, horrible.

3 Now doesn't matter what kind of guy Marty Grisham
4 was, he didn't deserve to be murdered, but that's who murdered
5 him and that's not Michael Clark. And we know that Marty
6 Grisham knew who was on the other side of that door, and you
7 know that from Barbara Swider, that he looks threw the
8 peephole and he doesn't say who is there, he doesn't look at
9 Barbara quizzically like I have no idea who this is, he looks
10 threw the peephole and looks at Barbara Burger like here we go
11 because he knows who it is, and that's not Michael Clark.

12 And they can get up on rebuttal and tell you, Oh,
13 yeah, we heard Marty Grisham met Michael Clark. You heard
14 from Kristin she was avoiding her father. That Michael Clark
15 had been in Pueblo and she had only recently started seeing
16 him again within the last couple of months, so that when Marty
17 Grisham met Michael Clark, it would have been back in high
18 school at least a year-and-a-half to two years ago, not
19 someone who at 9:30 at night would be you look through the
20 peephole and look at Barbara Burger and say, Here we go, and
21 all of that doesn't fit. All of that doesn't make it Michael
22 Clark, because it wasn't Michael Clark.

23 Creative, resourceful, thorough investigation of
24 Michael Clark. Wiretaps, GPS, send ballistics to Dr. Bond in
25 England, you name it, send the ATF and the FBI out there

1 unannounced at his work, tell him things that aren't true.
2 All of that focused on Michael Clark, and what do you have,
3 you have that. He's not the one, and you have that he's not
4 the one because he didn't do it. And you know they were so
5 focused and always focused on Michael Clark from very, very
6 early on because they ruled out and resolved who Tanya Jerome
7 saw that night by saying that it was Matt Zondlo the neighbor
8 and that couldn't be. There's no way Tanya Jerome is out
9 there and doesn't notice all the mayhem that happens
10 immediately after the shooting. It's not possible. And it's
11 not possible that Matt Zondlo doesn't remember that he came
12 back and the shooting had already occurred. That they are so
13 focused on Michael Clark that they don't get that right, and
14 they don't get it right because all they want is to make it
15 him.

16 And when they get up here and tell you there weren't
17 any other leads and there weren't any other leads and all of
18 these are coincidences and it has to be Michael Clark, that's
19 not how our criminal justice system works, that's not good
20 enough.

21 Michael Clark didn't have the capability, Michael
22 Clark didn't have the motive and Michael Clark didn't have the
23 opportunity to kill Marty Grisham on November 1st of 1994,
24 prior to 9:34 p.m. In 1994 Michael Clark was a young,
25 immature guy who made some mistakes. He wasn't capable of

1 cold blooded, intentional, first-degree murder and he didn't
2 do it.

3 THE COURT: Thank you, Ms. Ring.

4 People's rebuttal close, Mr. Brackley.

5 MR. BRACKLEY: Thank you, Your Honor.

6 Same old Mike, same old Mike. Michael Clark,
7 19-year-old Michael Clark, Michael Clark today in 2011, it's
8 the same old Mike, it was the same old Mike that murdered
9 Marty Grisham. The man in court, the man who is sitting in
10 this courtroom murdered Marty Grisham. A lot has changed
11 since 1994. We are going to talk a little bit about what has
12 changed, but the most significant change from 1994 to 2012 is
13 going to happen today, October 18th, 2012, and that's when 12
14 citizens from Boulder County are finally going to get to make
15 the decision in this case by looking at all the evidence as
16 the evidence actually is. The evidence as it was actually
17 admitted before you into evidence, not what Ms. Ring would
18 like to believe based on how things probably happened or how
19 things should have happened or how things might have happened.
20 I don't know that there are any injury time outs at this
21 soccer game. I don't know if on any other occasion Mike Clark
22 knew how to handle a gun, but I knew from -- but I know from 1
23 to 2 feet away he was able to hit Marty Grisham four times.
24 That's what I know and that's what this evidence shows. And
25 that's not me speculating, that's not me saying what might

1 have been.

2 The timeline in this case, that important timeline
3 of what happened after say 8:40 p.m. on November 1st, I have
4 to put that in context of all of the evidence and not just
5 speculative evidence, what Ms. Ring wants to believe or what
6 she thinks could have happened at a soccer game, whether there
7 was traffic or no traffic or traffic lights. The evidence
8 comes from Jamie Uhler on this witness stand. The evidence
9 comes from Mike Clark, his words, his voice on that tape as to
10 when he started heading back to Boulder from Denver. And it
11 was between 8:50 and 9:00 by the two people who were there.
12 The Defendant had every opportunity to get from Denver to
13 Boulder.

14 And back in 1994 when the detectives drove those
15 routes, it matched exactly what the Defendant said. It
16 matched exactly what Jamie Uhler said back then as to how long
17 it takes him to get from his apartment to his parents house in
18 Boulder, because that's the evidence, that's what the evidence
19 is. You can't speculate about it and you don't have to. You
20 can rely on actual evidence.

21 Now, ladies and gentlemen, you will be coming into
22 this building, some of us come into this building every day,
23 and you have been coming in here for the last two weeks and
24 when you walk past these majestic mountains, so close, you can
25 just reach out and touch them, beautiful, you come into this

1 courtroom where all of the lines are clean and they make sense
2 and they all come together, that's not the way real life is.
3 I wish, ladies and gentlemen, in this building where things
4 are so serious and so grave, so ugly, that something could be
5 easy, but a murder trial is not easy. A murder investigation
6 is not easy. I wish things could be clean and pristine and as
7 orderly as things are in this courtroom. I wish that life
8 could always have a man like Judge Mulvahill.

9 MS. MILFELD: Objection, Judge.

10 THE COURT: Sustained.

11 MR. BRACKLEY: But it's not. This case is not like
12 that, the evidence is not like that, because the evidence is
13 born in the real world and it comes to us from the real world.

14 I don't know if I would agree that the Boulder
15 police always did the creative, thorough investigation in this
16 case. No when those shots rang out and that 911 call is made,
17 let's make no mistake, it did not take Barbara Burger
18 30 seconds to a minute to get up from that table, her
19 boyfriend was blasted back into the apartment. She described
20 to you her thought process as she gets up and goes across and
21 sees him shot and immediately goes back to that phone.

22 Ms. Ring's estimation is based on what Ms. Ring
23 wants the evidence to be. This crime took seconds, the murder
24 of Marty Grisham took seconds, seconds. And as she pointed
25 out yesterday when she was questioning Detective Heidel, there

1 are 5,000 pages of investigation over the last 18 years in
2 this case and there has never been -- there has never been any
3 other person who had the motive, the opportunity or the means
4 to murder Marty Grisham than the man in court, the Defendant.

5 When those shots had rang out and that 911 call was
6 made and those police got to the scene, Barbara, who had met
7 with Marty Grisham earlier that day and who took a police
8 report from him earlier that day for checks that were being
9 stolen, put it out, Look at the daughter, Look at the son,
10 Look at the boyfriend. That's exactly what they did over the
11 next couple of days. They are talking to the daughter and
12 they talked to her over and over and over again. They talked
13 to her a couple of years ago and they are still looking at her
14 because it makes sense.

15 They immediately find out that Loren, who was in
16 Glenwood Springs, four hours away that night, woken up out of
17 bed by a deputy sheriff from Glenwood Springs at a timeframe
18 where he could not have been there had he been in Boulder, but
19 they still -- they still continue to look at him because it
20 makes sense, because it makes sense. They talked to Pam
21 Grisham because it makes sense.

22 Kristen Grisham comes into the courtroom in October
23 of 2012, after having been a suspect for a long time and she
24 tells you about her dad. How painful it must that have been
25 to tell a room full of strangers about the relationship that

1 she had with her dad, a man who was murdered at a time in his
2 life when, asshole that he must have been, was trying to do
3 better. A man who was looking forward to a future where he
4 was trying to do better.

5 Michael Clark, ladies and gentlemen, got the benefit
6 of the doubt for 18 years. He got the benefit of the doubt.
7 If the evidence hasn't changed all that much and the Boulder
8 Police Department really wanted to pin this on him -- and when
9 we talk about motive and opportunity and means, think about
10 the motive for this detective and for these officers from the
11 Boulder Police Department. What's their motive to frame a man
12 for a murder that he didn't commit, what's their opportunity
13 to do that? And 5,000 pages of investigation and 18 years of
14 investigation, do you think that they can get away with
15 pinning a man for a murder he didn't commit if there was
16 any -- any inference that was reasonable or believable or
17 credible that someone else committed this murder, because it
18 always comes back to Mike Clark and not because that's what
19 they want, not because that's what they want, the people at
20 this table, because that's what the evidence says. The
21 evidence, ladies and gentlemen, that is believable, that makes
22 sense, that's reasonable, says that the Defendant committed
23 this crime. You put it all into context.

24 You know, you talk about Dion Moore and let's put
25 him into context. Dion Moore was the Defendant's friend. No

1 doubt that he was running guns and that's a terrible business,
2 it's a horrible business, but Jamie Uhlir new Dion Moore
3 better than anyone in Boulder since he was a kid, pseudo
4 family, pseudo brothers. And they said that because they
5 weren't actually brothers, because they had lived together on
6 and off. Dion, his father was best friends of Jamie Uhlir's
7 father. If anyone knew Dion Moore, it was Jamie Uhlir, but
8 Jamie Uhlir had no problem giving up Mike Clark -- giving up
9 Dion Moore as the guy who gave the Defendant the gun because
10 that's what he knew because that was the truth.

11 What's the difference between Dion Moore -- I'm
12 sorry -- between Jamie Uhlir and Michael Clark, Jamie Uhlir
13 had no reason not to give up Michael Clark as the person who
14 gave that gun to the Defendant. Jamie Uhlir had no reason to
15 hide that, but the Defendant had every reason to hide that,
16 every reason to hide the fact that he got that gun from Dion
17 Moore because he used that gun to murder Marty Grisham.

18 The same old Mike, same old Mike finds himself in
19 the Boulder Police Department being interviewed by three
20 detectives, and despite over and over and over again insisting
21 that he was telling the truth. At one point even becoming
22 insulted that they didn't believe him, at one point even
23 becoming insulted and critical of the criminal justice system,
24 that's what they say about the criminal justice system,
25 despite the fact that everything he said was untrue.

1 Everything he said was misleading, everything was said was
2 designed to steer the police away from his gun, the gun that
3 he purchased. And they told him, We want to clear you or we
4 want to exclude you and we want to give you an opportunity to
5 explain it.

6 He could have cleared himself if he didn't murder
7 Marty Grisham by giving him that, by giving them that gun. He
8 could have cleared himself and he didn't do it because that
9 gun connects him to the murder of Marty Grisham, that gun had
10 been in his possession when he murdered Marty Grisham,
11 according to his story, he had three weeks before and we know
12 that's not true.

13 We know from Sergeant Weyer, he saw that gun within
14 the last week with the same kind of ammunition that was used
15 to murder Marty Grisham. The Defendant wasn't telling the
16 truth about when he had it, where he got it and what he did
17 with it, his story was ridiculous, but that's the same old
18 Mike. The same old Mike who's able to pull this 16-year-old
19 girl into his story that night, into his alibi, and then a
20 17-year-old girl after that and say, I couldn't have done it,
21 I was talking to these young girls. But we know that he had
22 the opportunity to call them, based on his words, not
23 Ms. Ring's assessment of how a soccer game works because
24 that's not the evidence. His words, Jamie Uhlir's words, the
25 words of investigators who drove that route, that's the

1 evidence and the Defendant had every opportunity to commit
2 this murder. But same old Mike is able to convince Allison
3 Hackman that he is not nervous, nothing is up, but put it into
4 context, put Allison Hackman's context and -- and don't
5 forget, she doesn't remember this. She doesn't even remember
6 being a 16-year-old Boulder High School girl being interviewed
7 by the police in a murder investigation. Her boyfriend is
8 being investigated for murder, she doesn't even remember
9 talking to the police. That's crazy. I don't know if that
10 even makes sense, but that's her testimony, put it into
11 context.

12 The Defendant earlier that day called Jeff Gore
13 pretending to be Marty Grisham because he had been stealing
14 from him, and he calls Jeff Gore to find out how much money is
15 left in this account. At the time the Defendant was a man
16 with a dream and that dream was really more of a reality, it
17 was really more of a reality of the only way out for the
18 Defendant, he was going to get out, he didn't have a place to
19 stay, he was sleeping on couches, he wasn't welcome in his
20 parents house, he was out of college, he has got nowhere to go
21 and he wants to join the Marines. He has the T-shirt and the
22 stickers and he tells all of his friends that's his dream.
23 And Jeff Gore confronts him, when Jeff Gore confronts him with
24 that question about, Where do you live, and then the second
25 question, what do you think goes through Mike Clark's head,

1 what do you think goes through his heart and what do you think
2 goes through his soul. He is busted. So it's not just about
3 a couple hundred dollars worth of checks here and there, it's
4 about his dream, his life-long dream is probably over.

5 When Marty Grisham leaves the Boulder Police
6 Department later that day, Barb Lennon tells you there are no
7 formal interviews by detectives, there are no arrest warrants.
8 The case hasn't been investigated, just a couple hours later
9 the victim is dead. He's dead because Marty Grisham is
10 executed by the man in court and because he was an obstacle to
11 his dream.

12 You know, he wrote his name on those checks, it
13 would have been pretty easy to detect that he was the one
14 stealing those checks, which would have ended his dream of
15 being in the Marines. There was really no option. There was
16 really no option then to kill the only person who could be
17 victim against him, and that was Marty Grisham.

18 Maybe you think that it's just senseless and doesn't
19 make sense, but you know what, I don't know what murder ever
20 does, but put it in context, put that Carmex container in
21 context. The question, is there any evidence, does it make
22 sense at all that while the police are there with their
23 evidence plaque cards all over that patio way, outside of Marty
24 Grisham's door.

25 Some Carmex container, it's almost like a cartoon,

1 you know, you could picture one of the animated cartoons where
2 the Carmex container rolls off the table and rolls out the
3 door and, you know, it goes over the threshold of the door and
4 it turns right and it -- it rolls down the thing. And all
5 these cops there and all plaque cards and all this activity
6 and it rolls and it settles right there in the one place you
7 can look at the photos, it settles right there in the one
8 place where it would be hard to find that night. The one
9 place where it would be hard to find, that's where it settles,
10 on its side. That's why the police go back the next day to
11 continue collecting evidence and they find it. And you want
12 to know what condition the Carmex condition was in, take a
13 look at it. It's been in this bag, this very bag, not the
14 plastic one, but the bag inside with all the tape on it, it's
15 been in that bag for 18 years. And it's been taken out for
16 the time that they need to run a swab over it or to check it
17 for fingerprints, and that's the condition.

18 Now there is DNA on the outside, there is DNA on the
19 inside, and that's his DNA on the inside. And Ms. Ring talked
20 about the database excluding 99.4 percent of the world's
21 population, that's a lot of people that's still left, right.
22 How many of those people not excluded live in the United
23 States, how many of those people not excluded live in
24 Colorado, how many of those people not excluded live in
25 Boulder, how many of those people not excluded have a 9mm

1 Bryco Jennings model 59 handgun with ball ammunition, how many
2 of those people know Marty Grisham, how many of those people
3 were stealing from Marty Grisham, how many of those people
4 called the bank that very day pretending to be Marty Grisham
5 and got caught, how many of those people went to the Marine
6 recruiter the very next day and said how soon can I get out of
7 here, how many of those people misled the Boulder police
8 detectives when they needed that murder weapon? One. One,
9 and it's him, it's the Defendant, one person. The person
10 inside that Carmex container outside of the crime scene within
11 feet of where Marty Grisham was gunned down.

12 Cooperation agreement by Dion Moore. Ms. Ring said
13 Sheriff Pelle talked about how a judge needs to approve the
14 work release and all that. We didn't hear anything about a
15 judge. Well, take a look at the cooperation agreement by Dion
16 Moore, there's a line in there, Judge Richtel agreed. Judge
17 Richtel agreed, Judge Richtel had to give his approval to this
18 agreement, a judge had to sign off on it. And maybe it was
19 worth dismissing some of Dion Moore's cases in 1995 to advance
20 a murder investigation, I don't know, but when Dion Moore 18
21 years later sat in this courtroom, he was getting nothing.
22 He's waking up today in a jail because he has a marijuana case
23 in Reno, Nevada. He was sent back to jail with nothing. Is
24 Dion Moore the kind of guy who feels obligated to help the
25 police for the prosecution in anything, especially against the

1 guy who was once his friend or is he telling the truth.

2 You can go through this agreement, everything Dion
3 Moore was supposed to provide, everything single bit of
4 information he was supposed to provide is corroborated, of
5 course, he knows Michael Clark. He obtained the handgun from
6 Michael Clark in the conversations. Corroborated by Jamie
7 Uhlir, who on the very day they got that gun Jamie Uhlir said
8 Michael Clark told him that he got the gun from a pawnshop in
9 Denver. Corroborated by the pawn slips, hundreds and hundreds
10 of gun sales in Aurora area, only two of them were to the same
11 guy.

12 David Berring is more like a physical exhibit, he's
13 as much a physical exhibit as these slips. He was a tool that
14 they used to make this purchase. And he remembers the black
15 kid with ties to Chicago buying two guns, and the slips are
16 the compact and the full size, exactly as Dion Moore remembers
17 them to be. But it's the Defendant ultimately who misleads
18 the police about where these came from. Dion Moore never
19 misled the police. David Berring never misled the police
20 about his involvement. The Defendant did because that full
21 size gun was the gun that was used to murder Marty Grisham by
22 shooting him four times.

23 It's ironic that the Defendant uses Dion Moore for
24 his own purposes to get him that gun, even though they were
25 friends, but who else do you go to when you are a 19-year-old

1 living in Boulder, who else do you go to to get a gun that
2 cannot be tied to you, but a guy who's dealing with guns,
3 especially a guy who you actually know who's your friend. But
4 then he comes into court 12 years later and he says why would
5 you ever believe anything that Dion Moore says, that's the
6 irony there. You might cause someone to say that's what they
7 say about the criminal justice system in some critical sense,
8 because he's using that for his own interests, like he used
9 Allison Hackman, and Ms. Buchanan for his misleading story to
10 the police. He's using it for his own interests.

11 Stackhouse, he never got anything for his
12 cooperation in this case. It was probably one of the most
13 poignant moments of this trial when this guy, life-long
14 criminal, that guy gets felonies like I get suits, probably
15 slightly more over the last 18 years, but you know what, he
16 never got anything. He never got anything. The most poignant
17 moment was after about an hour of being questioned about his
18 criminal history, and you know we said this over and over and
19 over again in this trial, over and over again that the
20 Defendant doesn't have to do anything, they don't have to ask
21 a single question, make a single argument, admit a single
22 piece of evidence. They have no burden of proof at all.

23 And let me just say, these ain't crappy lawyers,
24 they are excellent lawyers, but when they questioned
25 Stackhouse, they don't ask him a single question about what

1 the Defendant said to him about the Defendant's contact and
2 conversation with Stackhouse in that jail because it makes
3 sense. Mr. Kellner said it already, why wouldn't Stackhouse
4 read the newspaper, why wouldn't he say, Yeah, Mike told me he
5 shot him four times in a doorway, because that's not what the
6 Defendant said to him because that's not the truth.

7 Back to that poignant moment. The most poignant
8 moment is Stackhouse saying despite what this means to him and
9 despite the lack of benefit, despite the harm coming here to
10 testify is going to do to him, if someone did this to my
11 family --

12 MS. MILFELD: Objection, Judge, completely improper.

13 THE COURT: Overruled.

14 MR. BRACKLEY: If someone did this to my family,
15 this is his -- these are his words not mine, If someone did
16 this to my family, I would want someone to step forward. When
17 you are in jail with a felony arrest and you are accused of a
18 murder, you are being looked at for a murder, you are being
19 investigated for a murder, Stackhouse is the guy you talk to.
20 Stackhouse stepped forward in this case and he stepped forward
21 18 years almost to the week as the first time he stepped
22 forward and his story never, ever changed. You want someone
23 to step forward and Stackhouse, the felon and drug addict that
24 he is, he's that guy in this case.

25 We talked about -- we talked about same old Mike --

1 and I'm almost finished, ladies and gentlemen -- he didn't
2 talk to his friends about this, he talked to Stackhouse. He
3 misled the police. Same old Mike. You heard from Detective
4 Heidel yesterday, in fact, 18 years later. He does have a
5 family and he has got in-laws and he has a job, but he's not
6 talking to his family either. The one thing they learned on
7 the wiretaps is he is not talking to his family either, same
8 old Mike.

9 Every time someone comes in this building no matter
10 what they are charged with, it's a tragedy. This case is a
11 tragedy because a man was murdered. This case is a tragedy
12 because lives are turned upside down everywhere. And I wish
13 it was easy, I wish that there was a way to just put it all in
14 a hopper and press a button and get an answer, but it's never
15 easy, it's never pretty, it's never beautiful, it's never
16 majestic, it is hard work. It is hard work.

17 Boulder Police Department didn't always do the hard
18 work, but when they did and when these excellent lawyers did
19 their work, there was still no suspect, there was still no
20 murderer at large. There is the Defendant, the only one with
21 a motive, the opportunity and the means to commit this murder.
22 He's the only one, ladies and gentlemen, the only one.

23 Be proud of the work you are going to do in this
24 case, as hard as it is, as heartbreaking as it may be to hear
25 this evidence and to do what you have to do, be proud, do

1 justice and make sure that the right thing happens. Thank
2 you.

3 THE COURT: Thank you, Mr. Brackley.

4 Ladies and gentlemen of the jury, let me read to you
5 jury instruction 16. The bailiff will now escort you to the
6 jury room. Upon reaching the jury room you are to select one
7 of your members to be the foreperson of the jury. Your
8 foreperson will preside over your deliberations and shall sign
9 whatever verdict you reach.

10 The verdict must represent the considered judgment
11 of each juror. In order to return a verdict, it is necessary
12 that each juror agree to it. Your verdict must be unanimous.

13 Only one portion of each of the verdict forms shall
14 be returned signed and the verdict form and these instructions
15 shall remain in the possession of your foreperson until such
16 time as they are called for in open court. Upon reaching a
17 verdict, you will inform the bailiff of this court and you
18 will remain in your jury room until called into the courtroom.

19 You will be provided with one verdict form. When
20 you have unanimously agreed upon your verdict, you will select
21 the portion of each form which reflects your verdict and the
22 foreperson will sign it as the Court has stated.

23 The verdict form you will receive reads as follows.
24 You have a copy attached to your packet. There is a single
25 form of verdict, it is entitled Jury Verdict Count 1, Murder

1 in the First Degree.

2 I. We, the jury, find the Defendant, Michael Martin
3 Clark, not guilty of Count 1, Murder in the First Degree. And
4 there's a signature line for your foreperson.

5 II. We, the jury, find the Defendant, Michael
6 Martin Clark, guilty of Count 1, Murder in the First Degree.
7 And there's a signature line for your foreperson.

8 The Foreperson should sign only one of the above,
9 paragraph I or paragraph II. If the verdict is not guilty,
10 then I above should be signed. If the verdict is guilty, then
11 II above should be signed.

12 You are further instructed that no inferences are to
13 be drawn from the order in which the Court reads the verdicts.

14 Ladies and gentlemen, there is one original set of
15 instructions. I have marked in the upper right-hand corner in
16 blue ink on the face sheet of the original instructions. I
17 have also done the same harking on the original form of
18 verdict. This is the verdict form that your foreperson will
19 sign and retain that original verdict form with the original
20 instructions until you are called into court to deliver them
21 to me.

22 At this time I will swear in the bailiffs.

23 MR. BRACKLEY: Judge, can we approach.

24 (Whereupon, counsel for the parties and the reporter
25 approached the bench and the following proceedings were had

1 out of the hearing of the jury.)

2 MS. RING: It's been my experience that all the
3 jurors shouldn't have a copy of the verdict form because you
4 only want one verdict form signed from the jury.

5 THE COURT: That's why I marked it as original.

6 MS. RING: Okay. I guess that I wasn't here for
7 that part yesterday. I just wanted to make sure that we had a
8 way of --

9 THE COURT: So there's one marked original, but
10 everybody has the form.

11 MR. BRACKLEY: Yes. Correct.

12 MS. RING: Okay.

13 THE COURT: So the copies that each juror has are
14 not marked originals.

15 MS. RING: I guess that I still think that we should
16 take the copies because you could write original on it. I
17 have never had multiple verdict forms go back.

18 THE COURT: Frankly, I have done it that way.

19 MS. RING: All right.

20 THE COURT: If you want me to, I'll reiterate they
21 can only sign the original form of verdict.

22 MS. RING: Okay.

23 (Whereupon, the following proceedings were had in
24 the presence and the hearing of the jury.)

25 THE COURT: Ladies and gentlemen of the jury, let me

1 reiterate. There is only one verdict form that has original
2 written in the upper right-hand corner, that's this verdict
3 form that I have in my hand. The original instructions and
4 this original verdict form will be given to you back in the
5 jury room as you begin your deliberations. It is this
6 original verdict form and only this original verdict form that
7 your foreperson shall complete and return to me when you are
8 called back in open court.

9 At this time let me swear in the bailiffs.

10 (Whereupon, the oath was administered to the
11 bailiff.)

12 THE COURT: Ladies and gentlemen of the jury, by law
13 12 of you will deliberate on this case, 14 of you were
14 selected to listen to the evidence and the arguments; 2 of you
15 were designated in a random manner to be alternates. Those
16 alternates are Mr. Pip and Mr. Conley. And, gentlemen, I
17 suspect right now you are probably feeling a little
18 frustration, maybe a little disappointment, probably even a
19 little bit of relief. What I need to make very clear for you
20 is you still remain members of this jury until the jury itself
21 returns a verdict. The admonition that I gave you at all the
22 previous recesses applies now while you are excused from the
23 deliberations with the rest of the panel. So please don't
24 talk to anybody or communicate with anyone by any means about
25 the case. Don't express your opinions about the case. Don't

1 discuss with anyone your view of the case and please refrain
2 from forming an opinion on any information or based on any
3 information that might come to your attention after you're
4 released today. Don't read or listen to any news reports,
5 don't do any outside investigation, don't consult any outside
6 reference materials.

7 In the event that one or more of the 12 jurors are
8 unable to continue with their deliberations, you may be called
9 upon to come back and join the remaining members of the jury
10 and deliberations would begin anew. We'll get direct contact
11 information for you. I will let you know as soon as a verdict
12 is reached or as soon as we need you to return.

13 I understand that you have committed two weeks to
14 this process, I truly appreciate that, what is important for
15 you to realize right now is that your duties as jurors have
16 not yet been discharged.

17 For the 12 of you who will be deliberating, you are
18 now a deliberating jury so the admonition that I gave you
19 previously only applies in part. You may deliberate when all
20 12 of you are together in the jury room and only when all 12
21 of you are together in your jury room. Your foreperson can
22 determine when you will take breaks, mid morning, mid
23 afternoon or for lunch and what time you would like to be
24 released in the evening, but you may not deliberate unless all
25 12 of you are present. It's all right for you to separate at

1 breaks and certainly in the evening you will be allowed to go
2 home, but remember the rest of this admonition. Don't
3 communicate about or discuss the case with anyone by any means
4 except for your fellow jurors when you are all together in the
5 jury room. Don't read or listen to any news reports of the
6 trial. Don't consult any outside reference materials, don't
7 do any independent investigation.

8 At this time you are released to report to the jury
9 room to begin your deliberations. I'll deliver the original
10 instructions, the original form of verdict and the exhibits to
11 you in short time. Thank you.

12 (Whereupon, jury deliberations commenced.)

13 THE COURT: The record should reflect the jury has
14 left the courtroom. Counsel, you may leave the building and
15 return to your office as you see fit. Before you do that, if
16 you would please give a direct contact number to
17 Ms. Batchelder and/or Ms. Ritter so we can contact you in the
18 event that there are any issues be the jury or when they
19 return a verdict.

20 Anything else for purposes of the record at this
21 time from the People?

22 MR. BRACKLEY: No, Your Honor.

23 THE COURT: On behalf of the Defendant?

24 MS. RING: No.

25 THE COURT: Then we'll stand in recess.

1 (Whereupon, a recess was taken.)

2 THE COURT: This is Judge Mulvahill over in the
3 Boulder District Court. I'm trying to find Megan Ring and
4 Nelissa Milfeld.

5 All right. So we're on the record in 12 CR 222.
6 Counsel for Mr. Clark are appearing by speakerphone. They
7 have waived the appearance of their client for this purpose
8 for this issue. District Attorney Brackley and Kellner are
9 present.

10 The jury submitted a question about 15 minutes ago.
11 It reads, quote, Questions -- is Michael Clark right or
12 left-handed? I need to provide an answer to that question. I
13 would suggest in the correspondence to counsel that the answer
14 should be, I cannot answer that question for you. You have
15 received all of the evidence which you may consider during
16 your deliberations.

17 Mr. Brackley, what's the People's position on that
18 or a different response?

19 MR. BRACKLEY: Judge, I think that's the only
20 appropriate response.

21 THE COURT: Ms. Ring, what's the Defendant's
22 position?

23 MS. RING: I couldn't hear Mr. Brackley.

24 MR. BRACKLEY: My response was that is the only
25 appropriate response to that jury question.

1 MS. RING: I agree that it's an appropriate response
2 and I have no objection to that response.

3 THE COURT: All right. I will put that response in
4 writing and return it to the jury. Thank you very much.

5 MS. RING: Thank you.

6 (Whereupon, recess was taken.)

7 THE COURT: Hello, Ms. Ring and Ms. Milfeld. We are
8 on the record in 12 CR 222. You are appearing by telephone at
9 your request. Mr. Clark is not present. The prosecution is
10 present.

11 I have received another question from the jury. It
12 reads, quote, Can we have a printed transcript of Michael
13 Clark's interview with police, 11-3-94?

14 THE COURT: What's the People's position with
15 respect to response to that question?

16 MR. BRACKLEY: Judge, the People's position is the
17 same as earlier stated with respect to either the transcript
18 or the video or the transcript, and that's that the jury be
19 allowed to have the transcript with an instruction from the
20 Court, pursuant to the *Debella* case, that the jury should give
21 no undue influence to any particular part of the transcript. I
22 know that the Court has made a preliminary ruling on that
23 prior to this question being asked, but the People's position
24 is the same.

25 THE COURT: All right. Ms. Ring on behalf of

1 Mr. Clark.

2 MS. RING: We are objecting to the transcript going
3 back without -- with any instruction or no instruction. And
4 we are asking -- we were in support of the Court's earlier
5 ruling that if the request was made, that the option would be
6 that the jury could hear the entire recording with the
7 transcript from start to finish together and then it would be
8 removed from the jury room.

9 THE COURT: Yeah. The difficulty is they didn't ask
10 to watch the video or listen to the audio, they only asked to
11 review the transcript. I think that there's a couple
12 different options available. One would be to say no, and I
13 don't think that's the proper response because the transcript
14 was, in fact, admitted as an exhibit.

15 The second option would be to provide the transcript
16 as requested to the jury, but if I did that, I would include
17 a -- in the written answer a specific admonition that they
18 could not give undue weight or emphasis to this exhibit or any
19 portion of the exhibit, and they should consider all of the
20 evidence that was presented during the trial.

21 The third option would be to ask the jury if they
22 wanted to listen to the recorded interview while reviewing the
23 written transcript. I think that under the circumstances,
24 where the jury is asking to only have the printed transcript,
25 I will go with the second option and that would be to answer,

1 yes.

2 MS. RING: But just to renew our objection, I mean
3 it's the -- we're arguing that it's testimonial in nature.
4 It's the only exhibit that's admitted that they are going to
5 have free access to that's of a testimonial nature, and that
6 it is -- even with the Court's instruction the -- the concern
7 is that the one piece of testimonial evidence that they will
8 have to look at over and over and over again.

9 THE COURT: Right. But it will be with -- I mean
10 you could say that about any other piece of evidence that went
11 back. They can review it to the extent that they want to as
12 often as they want to. Your concern about this being
13 testimonial, I understand that it is different than say a
14 photograph that was admitted, but at the same time,
15 particularly with respect to this transcript, there were not
16 any incriminating statements -- or at least directly
17 incriminating statements made by the Defendant in the
18 transcript.

19 MS. RING: Well, that certainly wasn't the
20 prosecution's bid in the closing argument about their use of
21 the transcript.

22 THE COURT: Well, I think that this jury if they're
23 instructed to not give undue weight or emphasis to the exhibit
24 itself or any portion within the exhibit, I think that they
25 will be able to understand that, especially with a further

1 caution, they need to consider all of the evidence that was
2 presented during the trial I think fairly instructs them that
3 they can look at it, they just can't rely on it exclusively or
4 unfairly. I think that they are smart enough to figure that
5 out and follow that instruction. So I understand this is over
6 the defense's objection, but with respect to the language in
7 the written response, give me just a minute.

8 Counsel let me ask you what you think about this
9 response. The Court cautions the jury to not give undue
10 weight or emphasis to the transcript or any particular portion
11 of the transcript. The jury must consider all of the evidence
12 presented during the trial.

13 Mr. Brackley, your thoughts on that verbiage?

14 MR. BRACKLEY: That's appropriate, Judge.

15 THE COURT: Ms. Ring, understanding that you object
16 to this going back to the --

17 MS. RING: Right.

18 THE COURT: -- the jurors at all.

19 MS. RING: Judge, I -- I don't object to the
20 language you are using, understanding my objection and
21 thinking about this again, I just want to -- my recollection
22 of when the District Attorney asked for -- to provide copies
23 of the transcript to the jurors and admit the copy of the
24 transcript was because they wanted to play the audio recording
25 of Mr. Clark's interview. And that the purpose of the

1 transcript was so that the jurors could follow along with the
2 audio of the interview. And that there was never any
3 discussion about whether that transcript, which I don't think
4 that it would have been admitted -- we certainly would have
5 objected without the audio being admitted. So I think if the
6 audio came first and the transcript ends up getting admitted
7 to assist the jury during the playing of that interview and
8 then -- and that's, I think, supported by the District
9 Attorney not submitting a transcript and giving it to the jury
10 in the other interview that was submitted because it wasn't as
11 lengthy and it wasn't the same concern about the jury being
12 able to pay attention and follow along.

13 And I know that I didn't make that initial objection
14 when -- because I, frankly, thought, based on the Court's
15 prior ruling, this wasn't going to be an issue. But I think
16 if we go back to why the transcript got admitted in the first
17 place, it really is not what should have happened and that
18 transcript wouldn't be in there. I understand that the jury
19 wouldn't necessarily know that, but that's how that -- the
20 transcript was submitted to the jury was because the audio was
21 coming in.

22 THE COURT: Well, I -- I mean in terms of the
23 sequence of events and at least part of the purpose for having
24 the transcript admitted as an exhibit, I agree with you --
25 your recounting. There certainly wasn't ever any discussion

1 or even consideration about whether the transcript would only
2 be conditionally admitted or only be admitted for use in
3 conjunction with the recording.

4 MS. RING: Well, I think that I raised that concern
5 and -- about the issue of the transcripts and audio at the
6 time and the Court's response to me when I raised that concern
7 was that if there was a request made, and I understand now you
8 didn't anticipate a request for just the transcript, but I did
9 raise that concern when those exhibits were being admitted,
10 and the Court's response at that time was the procedure I
11 followed in the past, which I would plan on. And so, you
12 know, based on that there wasn't any reason for me to think
13 about objecting to the transcript alone.

14 But, you know, I think that the interview, the
15 transcript came in with the audio and certainly voice
16 inflection and when questions are answered and how how they
17 are answered is different than when you are just looking at a
18 transcript versus listening to the audio. And I know that if
19 the DA had tried to just submit the transcript, which I don't
20 know how they would have done that, I would have objected to
21 just the transcript. We certainly wouldn't have an officer up
22 there reading the entire transcript of the interview. The
23 only way the -- the transcript gets in is if the audio is in.

24 THE COURT: Not -- not necessarily. Although I
25 think that I understand the point you're making. I don't

1 know. Mr. Brackley.

2 MR. BRACKLEY: Judge, I think that Mr. Kellner
3 actually was involved in this particular exchange with
4 Ms. Ring and the Court, so I'm going to turn it over to him so
5 that he is not whispering in my ear.

6 THE COURT: Mr. Kellner.

7 MR. BRACKLEY: And I --

8 THE COURT: Well, all right. Let me -- let me ask
9 this. What's the People's position if I in response to the
10 question offer to allow the jury to listen to the audio from
11 start to finish and have the transcript for review while the
12 audio is being played?

13 MR. BRACKLEY: In addition, so --

14 THE COURT: No.

15 MR. BRACKLEY: -- you are talking --

16 THE COURT: No, instead of.

17 MR. BRACKLEY: You know, Judge, I recall -- I recall
18 the conversation. I don't recall the specifics of whether or
19 not we parsed through video and transcript versus just --
20 versus just transcript. But I think that, you know, for the
21 sake of making this -- I think that -- that the Court's first
22 response is most appropriate based on the actual question that
23 this jury has asked.

24 MS. RING: I guess I'm really curious about how the
25 District Attorney would assert that there's some way that they

1 would have gotten that transcript in without the audio.

2 THE COURT: Well, but the fact of the matter is it's
3 already been admitted as a separate exhibit.

4 MR. BRACKLEY: Well, we could have tried to admit it
5 without the audio. You could have admitted the audio, but how
6 we choose to admit a Defendant's statement is up to us. How
7 you choose to respond to it is up to you. But I think that we
8 could have -- we could have admitted it simply as a paper
9 transcript and we could have had someone sit here and read it,
10 but, of course, that's not the route we took or chose.

11 MS. RING: Ms. Milfeld is reminding me that I had a
12 specific conversation with Mr. Kellner where he asked if he
13 had an objection to admitting the transcript and giving a jury
14 a copy of the transcript so they could follow along while they
15 were listening to the audio, and based on that conversation
16 with Mr. Kellner I didn't object.

17 THE COURT: Well, but I think -- again, I understand
18 your point, but that's -- I don't think that that conversation
19 or the conversation that I had with counsel on the record
20 contemplated a request from the jury for just the transcript.
21 Now that was probably shortsighted of me.

22 MS. RING: Well, I guess what -- what is the
23 downside, based on the prior conversation which we all had
24 which may have been shortsighted on all of our parts of taking
25 the Court -- third suggestion, which is offering the video --

1 I mean the audio with the transcript to follow along, and if
2 we then get a question that that isn't what they want, then we
3 deal with that issue. But since that would be fair, because
4 it's what -- what's contemplated when we had the discussion
5 with -- when it was entered, and if the jury responds to that
6 that they are okay with that procedure, then we don't risk
7 creating some issue.

8 MR. BRACKLEY: The People's response to that would
9 be that it's very clear what the jury wants at this point.
10 There seems to be no other way to interpret it.

11 THE COURT: Well, I think if push comes to shove,
12 I'll go with the second option. But I'm going to ask this
13 jury if it's acceptable for them to listen to the entire
14 recorded interview while simultaneously reviewing the
15 transcript, and we can set that up for them tomorrow morning
16 at 9:00. I'll try to get that question to them right now and
17 I -- hopefully, I'll have a response within the next five
18 minutes.

19 MR. BRACKLEY: Judge, when the Court was
20 contemplating three options, were you contemplating just one
21 of those options or was there a thought that there could be a
22 choice to the jury as to what they wanted?

23 THE COURT: No, I was contemplating one of the three
24 options, but if they clearly indicate that listening to the
25 entire recording while reviewing the transcript simultaneously

1 is not going to suit their purposes, then I'm going to provide
2 the transcript to them with the admonition that I discussed
3 earlier.

4 Counsel, in response to jury question 2, I'm going
5 to send the jury question back is it acceptable if I play the
6 entire recorded interview from 11-3-94 and you may
7 simultaneously review the transcript. I'll have the bailiff
8 deliver that to the jury and see if there's a response in the
9 next few minutes.

10 MS. RING: Okay.

11 THE COURT: So rather than -- not that I don't want
12 to have you on the telephone, Ms. Ring, but how about if I
13 hang up and call you back as soon as I have a response.

14 MS. RING: Fine, thank you.

15 (Whereupon, a brief recess was taken.)

16 (Whereupon, the following proceedings were had in
17 the presence and the hearing of the jury.)

18 MS. RING: This is Megan.

19 THE COURT: Hi, Ms. Ring. This is Judge Mulvahill
20 again. We are on the record in 12 CR 222. Mr. Clark is not
21 present, Mr. Brackley and Mr. Kellner are present. You are on
22 the speakerphone. I had submitted a question to the jury, as
23 I stated earlier, if it was acceptable to play the entire
24 recorded interview and then they could simultaneously review
25 the transcript. I will tell you they initially wrote in a

1 response, We thought that you said that we could look at this
2 transcript again and wrote page numbers in our notes, and then
3 that's X'd out, that entire response is X'd out. There's a
4 note that says, Sorry. And then in bigger letters with an
5 exclamation point it say, Yes. So that's the procedure I'll
6 apply here.

7 I'll have the bailiff explain to the jury that when
8 they return at 9:00 tomorrow morning we'll have that
9 transcript available for them and they will review it
10 simultaneously with the playing of Exhibit 59, which is the CD
11 of the interview of the Defendant on November 3rd, 1994, and
12 the bailiff will sit in the jury room with the jury at this
13 time to make sure that it is played through once from start to
14 finish. So that's what we'll do tomorrow morning.

15 MS. RING: Thank you.

16 THE COURT: All right. Thank you.

17 MR. BRACKLEY: Megan.

18 THE COURT: Ms. Ring, Mr. Brackley might have
19 something.

20 MR. BRACKLEY: So it sounds like the jury will be
21 released right now, or you are going to wait and let them keep
22 going on other issues until 5:00.

23 THE COURT: I'll let them go until 5:00. It's 24
24 minutes to 5:00, so I'll let them go at 5:00. I'll excuse
25 them directly from the jury room at 5:00 and instruct them to

1 return at 9:00.

2 MR. BRACKLEY: And the presumption, then, that we'll
3 not be needed until 11:30 or 12:30 when they are finished
4 tomorrow because I guess once you start that tape you are not
5 stopping it.

6 THE COURT: That's correct.

7 MR. BRACKLEY: Okay.

8 THE COURT: I suppose at 9:00 they could say, Never
9 mind, we changed our mind. So if that happens then you need
10 to be available sooner.

11 MR. BRACKLEY: Can we ask for notice when the tape
12 is rolling, so we can --

13 THE COURT: I'll have bailiff e-mail counsel when
14 the --

15 MR. BRACKLEY: Tell me and I'll e-mail counsel when
16 the tape is started.

17 MR. KELNER: They might be surprised when they learn
18 they can't listen to only parts of it based on their response
19 about having page numbers.

20 THE COURT: No. No, because I said is it acceptable
21 if I play the entire recorded interview and you may
22 simultaneously review the transcript. So I think that it's
23 pretty clear what they will be allowed to do.

24 All right. Anything else from the People?

25 MR. BRACKLEY: Doesn't the Court have better

1 notepaper for jury notes? That's a no I think.

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1 THE COURT: Let's not talk about budgets.

2 MR. BRACKLEY: Okay.

3 THE COURT: So anything else pertinent to the case
4 for the record?

5 MR. BRACKLEY: No, Your Honor.

6 THE COURT: Ms. Ring.

7 MS. RING: No, thank you, Judge.

8 THE COURT: Thank you counsel. Off the record.

9 (Court adjourned for the evening.)

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
) ss
3 COUNTY OF BOULDER)

4 I, Kimberly A. Ritter, do hereby certify that I
5 am a Certified Shorthand Reporter within and for the State of
6 Colorado, Official Reporter of the District Court of Boulder;
7 that as such Reporter, I was present upon the occasion of the
8 hearing in the above-entitled matter at the aforesaid time and
9 place; that I stenographically recorded all proceedings had,
10 evidence adduced, and testimony taken in the above-entitled
11 matter.

12 I do hereby certify that I caused my said
13 shorthand notes to be reduced to typewritten form, and that
14 the foregoing pages constitute a full, true and correct
15 transcript of my said shorthand notes so taken aforesaid.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this 9th day of May, 2013.

18
19
20 Kimberly A. Ritter, RPR
21 Certified Court Reporter
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