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TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	}	IN THE DISTRICT COURT
VS.		WOOD COUNTY, TEXAS
JASON THAD PAYNE		402ND JUDICIAL DISTRICT

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65	Affidavit of Angie Cooper, Custodian of Records for Quitman ISD and August 27, 2007 through December 11, 2007, Attendance records for General Jackson Payne	126	126	5
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11	72	East Texas Medical Center EMS medical records of Austin Taylor Wages	11	11	6
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13	74	December 11, 2007, transcription of the interview of Jason Payne			
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17	100	Photograph	49	50	7
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9 116	Test-fire exemplar			
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21		Head			
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33		at 6 inches			
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21	29	Soot test-fire exemplar at 2 inches (RETAINED BY			
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3 (TRIAL ON THE MERITS EXHIBITS)

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13	34	Test-fire exemplar at 11 inches (RETAINED BY			
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15	35	Test-fire exemplar at 8 inches (RETAINED BY			
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REPORTER'S RECORD
VOLUME 2 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE	)	402ND JUDICIAL DISTRICT

PRETRIAL HEARINGS

On the 19th day of June, 2009, and on the 12th day of November, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable G. Timothy Boswell, Judge presiding, held in Quitman, Wood County, Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

FOR THE STATE OF TEXAS:

3

SBOT NO. 24026483

MR. JAMES PATRICK "JIM" WHEELER

4

CRIMINAL DISTRICT ATTORNEY

- AND -

5

SBOT NO. 21376000

MR. HENRY WHITLEY

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25

1 CHRONOLOGICAL INDEX
2 VOLUME 2 OF 12
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16 BY INVESTIGATOR JIM BROWN 10 2

17 Evidence accepted and taken into custody
18 BY DEPUTY JERRY BLALOCK 10 2

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20 Reporter's Certificate 11 2

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24

25

1 PROCEEDINGS

2 JUNE 19, 2009

3 THE COURT: And then 20,529, State vs.
4 Jason Thad Payne on pretrial.

5 MR. WHEELER: My understanding is there a
6 few pieces of evidence that need to be ordered and
7 produced before disclosure for the Defense. We'll talk
8 about that.

9 THE COURT: Y'all are just going to visit
10 about that and --

11 MR. PARKS: Yeah. Mr. Brown is here and
12 we'll visit about that and if there's any dispute or
13 whatever or whatever we come to, we'd like to get into
14 the record.

15 THE COURT: And you did get that letter
16 from the State regarding the --

17 MR. PARKS: I did.

18 THE COURT: All right. Very well. At any
19 rate, y'all keep me informed as to what you want done on
20 that.

21 MR. WHEELER: Thank you, Your Honor.

22 (Recess.)

23 THE COURT: All right. Let me go ahead and
24 call 20,529-2008, State vs. Jason Thad Payne.

25 And you wanted to get something on the

1 record. Are you ready to proceed?

2 MR. PARKS: Defense is ready.

3 MR. WHEELER: State's ready, Your Honor.

4 THE COURT: All right. And Mr. Payne is
5 present as well as counsel for the State and counsel for
6 the Defense.

7 So, I don't know what you wish to announce
8 but --

9 MR. PARKS: Judge, it's my understanding
10 from talking with Mr. Brown that we have an agreement.
11 There are about three items, I think, with discovery
12 that were outstanding. That would be some DVDs, back
13 page of the expert's report that somehow or another has
14 been misplaced and --

15 MR. WHEELER: And photos.

16 MR. PARKS: -- and photos. I believe
17 Mr. Wheeler has indicated that he can have those to us
18 in 10 days.

19 MR. WHEELER: A week to 10 days. I've got
20 to get my investigator back by the time we get to trial,
21 and we'll be on top of that.

22 THE COURT: We'll give you the more
23 generous time of 10 days available, so if there's any
24 difficulty, just report it back to the Court and we'll
25 deal it.

1 MR. WHEELER: May I have 10 days from
2 Monday so I can have Jerry back?

3 THE COURT: That be fine.

4 MR. WHEELER: Thank you.

5 THE COURT: 10 days from Monday.

6 MR. WHEELER: Thank you, Your Honor.

7 THE COURT: All right.

8 (End of proceedings.)

9 * * * * *

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

11 NOVEMBER 12, 2009

12 THE COURT: Cause No. 20,529-2009, State
13 versus Jason Thad Payne.

14 You wanted to --

15 MR. WHEELER: This is Cause No.
16 20,529-2008. And I have asked Mr. Blalock just now to
17 bring the firearm to the courtroom that's the subject of
18 this hearing.

19 THE COURT: And my concern is -- I've
20 entered an order to examine the firearm. My concern is
21 the chain of custody.

22 DEPUTY BLALOCK: Yes, sir.

23 THE COURT: It was suggested that the way
24 to deal with that is we get it on the record and let it
25 be handed over to Defense counsel. If there's a problem

1 while it's in the Defendant's hands, well, I don't think
2 they will be able to use that. So if you can arrange to
3 bring it to the courtroom and get it exchanged in the
4 courtroom, we'll make sure it's clear that way and we'll
5 have on the record.

6 DEPUTY BLALOCK: Yes, sir. Be right back.

7 THE COURT: Yes, sir.

8 (Recess.)

9 THE COURT: Let me go back on the record to
10 20,529-2008, State vs. Payne. Counsel for the State and
11 counsel for the Defendant are present, and Jerry Blalock
12 of the Wood County Sheriff's Office is present and he
13 is --

14 Mr. Blalock, let me ask you, if you would,
15 to come up and bring that with you and we'll get it
16 identified, and we sort of leave it in the packaging if
17 you haven't opened it up. If you will confirm what it
18 says. It has -- you've got a long box and it looks like
19 that is holding a rifle; is that correct?

20 DEPUTY BLALOCK: Yes, sir.

21 THE COURT: Can you recognize what that is?

22 DEPUTY BLALOCK: Yes, sir, I can.

23 THE COURT: How can you recognize it?

24 DEPUTY BLALOCK: You can tell by the
25 markings on the tag, the box that we've labelled it in,

1 and also the recognition of a .30-30 rifle.

2 MR. WHEELER: Would you please state your
3 name for the record?

4 DEPUTY BLALOCK: Jerry Blalock.

5 MR. WHEELER: How are you currently
6 employed?

7 DEPUTY BLALOCK: I'm the lieutenant with
8 the Criminal Investigation Division of the Wood County
9 Sheriff's Office.

10 MR. WHEELER: And can you describe the
11 package?

12 DEPUTY BLALOCK: The packaging is a white
13 evidence box designed to place long-barrelled firearms
14 in. The box is labelled as "EVIDENCE". It says it has
15 one item in it. The date on this box is 3/28 of '08 and
16 has an inventory number of L-369051.

17 MR. WHEELER: The State asks that pursuant
18 to this court's order, that the firearm be delivered in
19 the custody of Defense Investigator, Jim Brown at this
20 time.

21 (Delivery of evidence to Investigator
22 Brown.)

23 MR. PARKS: Your Honor, we
24 accept -- Mr. Brown is standing here. We will accept
25 delivery of the evidence and we're going to return it in

1 an unaltered condition.

2 DEPUTY BLALOCK: This is the firearm. I
3 need for you to sign this chain of custody form, please,
4 sir, at "RECEIVED".

5 (Investigator Brown complies.)

6 DEPUTY BLALOCK: And I'm going to sign at,
7 "RELEASED BY," and I'm going to put today's date which
8 is 11-12-09.

9 Does the Court want me to give him a copy
10 of this?

11 THE COURT: If you would like that.

12 INVESTIGATOR BROWN: Yes, sir.

13 THE COURT: If you'll get a copy of that to
14 him.

15 DEPUTY BLALOCK: Yes, sir. Thank you.

16 THE COURT: Thank you, sir.

17 MR. WHEELER: Thank you, Your Honor.

18 MR. PARKS: Thank you, Your Honor.

19 (End of Proceedings.)

20 * * * * *

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

22 (December 14, 2009)

23 THE COURT: Cause 20,529-2008 State of
24 Texas versus Jason Payne.

25 MR. PARKS: Your Honor, at this time the

1 Court will recall that several days ago the sheriff,
2 pursuant to the Court's order, delivered a .30-30 rifle
3 to the Defense for our investigation and inspection, and
4 we are at this time tendering that rifle back to the
5 sheriff. And we report to the Court and to the sheriff
6 that it is in the same condition it was in when it was
7 received by the Defense.

8 THE COURT: Does anybody need anything done
9 beyond this for purposes of maintaining the chain of
10 custody?

11 MR. WHEELER: For purposes of the record,
12 representatives of the Wood County Sheriff's Office are
13 present in the courtroom today. Detective Jerry Blalock
14 is here to take possession of the rifle. And we would
15 ask the Court to order the rifle into the possession of
16 the state by and through the sheriff's office, Jerry
17 Blalock.

18 THE COURT: I don't know whether this is
19 ordering it, but, Mr. Blalock, you're ready to take
20 possession of it?

21 MR. BLALOCK: Yes, sir.

22 THE COURT: Go right ahead. And that is a
23 matter of record.

24 (End of proceedings.)

25

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

1 THE STATE OF TEXAS)

2 COUNTY OF SMITH)

3 I, Kimberly Julian, Deputy Official Court
4 Reporter in and for the District Court of Wood County,
5 State of Texas, do hereby certify that the above and
6 foregoing contains a true and correct transcription of
7 all portions of evidence and other proceedings requested
8 in writing by counsel for the parties to be included in
9 this volume of the Reporter's Record, in the
10 above-styled and -numbered cause, all of which occurred
11 in open court or in chambers and were reported by me.

12 I further certify that this Reporter's Record of
13 the proceedings truly and correctly reflects the
14 exhibits, if any, admitted by the respective parties.

15 WITNESS MY OFFICIAL HAND this the 3rd day of June,
16 2010.

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25

KIMBERLY JULIAN
Texas CSR No. 3116
Expiration Date: 12/31/10
Deputy Official Court Reporter
402nd District Court
Wood County, Texas
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REPORTER'S RECORD
VOLUME 3 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
)
)
VS.) WOOD COUNTY, TEXAS
)
)
)
JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

TEXAS RULES OF EVIDENCE

RULE 702 HEARING

On the January day of 13th, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

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

2 THE COURT: Let me call 20,529-2008, styled
3 State of Texas versus Jason Thad Payne for pretrial
4 hearing. Let the record reflect counsel for the State,
5 counsel for the Defendant, and the Defendant is present.

6 Is the State ready to proceed?

7 MR. WHEELER: We have one witness that is
8 about ten minutes from the courthouse. We're waiting on
9 him; otherwise, we're prepared.

10 MR. PARKS: We're ready to proceed, Your
11 Honor.

12 THE COURT: You needed to take up that
13 issue involving him first or is there something maybe we
14 can take out of order?

15 MR. WHEELER: Well, he's one of our
16 experts. We'll just take him out of order. It's Tom
17 Bevel. He's travelling from Oklahoma.

18 THE COURT: But you're ready to go ahead
19 and start at this time?

20 MR. WHEELER: Yes, Your Honor.

21 THE COURT: All right. Very well. Does
22 the State want to take the first shot of what we need to
23 deal with here?

24 MR. WHEELER: Well, we are prepared to
25 present to the Court our two experts in this cause,

1 Richard Ernest and Tom Bevel. With the Court's
2 pleasure, we would call 702, 703, and 705 matters.

3 THE COURT: Do you have a summary ready as
4 to what opinions he's going to be tendering?

5 MR. WHEELER: That has been tendered to the
6 Defense.

7 May I approach, Your Honor?

8 THE COURT: And he may come on forward.

9 (Witness complies.)

10 Yes, sir. Let me get you to raise your
11 right hand.

12 (Witness sworn.)

13 THE COURT: Please have a seat.

14 MR. WHEELER: For purposes of this hearing
15 and purposes of the record, I'm tendering a copy of the
16 report that we have received from Richard Ernest, and
17 the Defense has been tendered a copy. In addition, Your
18 Honor, we are tendering to the Court a copy of the
19 resume of Richard Ernest which has also been tendered to
20 the Defense.

21 THE COURT: Let me attempt to summarize,
22 excuse me, the opinions that Mr. Ernest would be giving.
23 One would be that he was unable to reach any conclusions
24 concerning Item No. 5, but that Items 3 and 4 were his
25 conclusion that they were fired from the rifle in

1 question, and that that rifle is in good working
2 condition with no mechanical defects, that it appears
3 that as to Austin Wages that it was -- that the pattern
4 shown as far as distance most consistent of having been
5 fired I'm assuming that's of less than 2 inches or maybe
6 plus or minus 2 inches. I guess that's what it's
7 reading from the face.

8 MR. WHEELER: The findings are --

9 THE COURT: And that finally, that it would
10 be virtually impossible for Mr. Wages to have fired the
11 rifle at a distance of 10 inches or greater.

12 MR. WHEELER: With regard to Mr. Ernest,
13 his opinion is that the muzzle-to-target distance of
14 this working .30-30 rifle is 12 inches.

15 THE COURT: 1 inches, plus or minus 2.

16 MR. WHEELER: With a rate of error of plus
17 or minus 2 inches. And based on his testing of this
18 firearm, that it was virtually impossible to commit
19 suicide with this gun.

20 THE COURT: Do you wish to present any
21 other evidence concerning his expertise or capacity to
22 give those opinions --

23 MR. WHEELER: For purposes of --

24 THE COURT: -- other than what's set out in
25 his resume?

1 MR. WHEELER: I ask the Court to take
2 judicial notice of his resume and take judicial notice
3 of the report filed with this report.

4 THE COURT: I do take judicial notice of
5 those matters.

6 MR. WHEELER: Nothing further, Your Honor.

7 THE COURT: All right.

8 Yes, sir.

9 MR. PARKS: If it please the Court.

10 RICHARD ERNEST,
11 having been first duly sworn, testified as follows:

12 CROSS EXAMINATION

13 BY MR. PARKS:

14 Q. My name is Doug Parks and I'm one of the
15 lawyers representing Mr. Payne. I have a few questions
16 for you. If I ask a question that's confusing, let me
17 know, okay?

18 A. Yes, sir.

19 Q. As I understand your report, it's essentially a
20 three-page report? You're got three of three?

21 A. Yes, sir.

22 Q. You form an opinion with respect to the shell
23 casings and an opinion with respect to how far the
24 muzzle would have had to have been from the victim at
25 the time the rifle was fired; is that correct?

1 A. Yes, sir, that's correct.

2 Q. Do you anticipate offering any other opinions
3 to this jury?

4 A. Other than what's stated in my report.

5 Q. Which would be those two opinions, the shell
6 casings and the range of fire?

7 A. Nothing's anticipated at this time. I'll
8 respond to whatever questions are asked of me.

9 Q. Have you furnished to the district attorney all
10 of the opinions that they have asked you to furnish at
11 this point in time?

12 A. As far as I know, yes.

13 Q. All right. Now, I'm not going to quiz you with
14 respect to the shell casings, but with respect to the
15 range of fire, two of three things: What was your
16 methodology in making the determination of that
17 particular range of fire, please?

18 A. The use -- we have for several years used
19 plastic sheeting material -- I believe it's five-mill
20 plastic sheets -- simply because -- and we've used a
21 number of different materials over the years, just about
22 everything that's in the literature as far as cardboard,
23 card stock, paper, plastic of various kinds, bench coat,
24 even wallboard, painted wallboard, and painted ceiling
25 tiles, and things like that. In consideration of its

1 characteristics, we believe that the five-mill plastic
2 sheeting allows you to see where every gunpowder
3 particle and particle fragment strikes the plastic, and
4 it's using them to note where they struck the plastic
5 and look at the gunpowder density.

6 Q. Is this clear plastic or --

7 A. Yes.

8 Q. Clear plastic?

9 A. Clear, yes.

10 Q. Okay. Now, is it Dr. Ernest?

11 A. No.

12 Q. Mr. Ernest, did you make photographs of your
13 tests or videotapes of your tests?

14 A. I don't think that I made photographs of them.
15 I have those test materials with me.

16 Q. Okay. You have them here today?

17 A. Yes.

18 Q. Okay. Did you take a video of your process?

19 A. No.

20 Q. Okay. Now, you came to the conclusion that the
21 range of fire was 12 inches, give or take 2 inches.

22 That's your rate of error; is that correct?

23 A. Yes.

24 Q. Where does that derive from? How did you
25 decide 2 inches?

1 A. Taking a look at the gunpowder density, the
2 tattooing that's seen on the young man's face, and
3 noting the particle count as we see it on the face, and
4 then looking at that versus targets that were shot at a
5 number of different distances and comparing those back
6 to it.

7 Q. That would be a determination that you made
8 yourself rather than basing it upon any standard that's
9 used in the business of range of fire?

10 A. Excuse me --

11 Q. Well --

12 A. -- it is -- it's simply a matter of particle
13 count and the size of the pattern. And as far as any
14 standards go, those are the methodologies that are used.

15 Q. Across the board for everybody?

16 A. It depends on what kind of material you use,
17 but basically, the methods are the same.

18 Q. I guess -- and I may be just not understanding,
19 Mr. Ernest. I do work in mental retardation sometimes
20 and we know what the rate of error is standard on all
21 tests. If it's a 4, it's plus or minus 5. Regardless
22 of who it's given to you, that's the standard rate of
23 error.

24 Is there a standard rate of error in making
25 a determination of range of fire?

1 A. That's worked into the results here:
2 12 inches, plus or minus 2 inches. That's your rate of
3 error.

4 Q. In all cases?

5 A. No.

6 Q. Just in this case?

7 A. Given the testing in this case.

8 Q. Okay. Did you have your results peer reviewed?

9 A. Yes, in essence, I did. I had this looked at
10 by another firearms examiner. This is a standard course
11 of testing in our laboratory and this type of testing
12 has been done -- I've been in this field for, like, 32
13 years at this point. These were tests that were in
14 existence before I ever started in this field.

15 Q. Okay. You've had an opportunity to review your
16 report?

17 A. Yes.

18 Q. Before we go to trial next week, are there any
19 things you want to add to or take from your report or do
20 you stand by it?

21 A. I stand by it.

22 MR. PARKS: That's all I have, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. WHEELER:

25 Q. One further matter, Mr. Ernest, before we

1 conclude: Will you be discussing in front of this jury
2 anything that was provided with regard to the trajectory
3 of bullets?

4 A. I will respond to the questions that are asked
5 of me based on the materials that I've been given for
6 review.

7 Q. I ask that question for several reasons, but
8 primarily, you did, in formulating your opinion, use as
9 a basis for your opinion the evidence that was provided
10 to you, including but not limited to, a spent bullet?

11 A. Correct.

12 Q. And a type of cartridge that fundamentally
13 destroyed itself once it hit its target?

14 A. You mean the bullet?

15 Q. Right.

16 A. Yes.

17 Q. So the trajectory and part of that bullet is
18 what you looked at when you did your analysis?

19 A. Trajectory in the limited sense of the entry
20 versus the exit hole on the body, whatever can be made
21 of that. In essence, my results regard the distance
22 from the gunshot entry hole to the mouth and what is the
23 distance from there to the muzzle of the gun, the end of
24 the barrel.

25 Q. And when we're talking about the trajectory,

1 we're also talking about the pattern that was on that
2 boy's face and the angle at which that bullet entered
3 the boy?

4 A. In essence, that's true.

5 Q. And you did look at photographs of the boy?

6 A. Yes.

7 Q. And study reports with regard to the
8 trajectory?

9 A. Yes.

10 MR. WHEELER: Pass the witness.

11 RECROSS EXAMINATION

12 BY MR. PARKS:

13 Q. I just want to be clear: Obviously, you would
14 have had to have to some pattern from which you could
15 make a comparison with your tests?

16 A. Yes.

17 Q. And that I'm assuming there were autopsy
18 photographs; is that correct?

19 A. Yes.

20 Q. And with respect to those autopsy photographs
21 or any other material that you reviewed, that material
22 went simply to your ultimate determination of range of
23 fire, which is your ultimate opinion; is that correct?

24 A. Yes.

25 Q. So there would be no other opinions with

1 respect to trajectory or blood splatter or those things?

2 A. That's correct.

3 MR. PARKS: Nothing further, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. WHEELER:

6 Q. I probably need to be more precise. We're
7 talking about the muzzle and the muzzle lines up with
8 what it hit?

9 A. Yes.

10 Q. Did you look at that on the boy and --

11 A. Well, obviously, with a high-powered rifle like
12 this, it is essentially a straight line through the
13 longitude and axis of the barrel of the gun into the
14 entry hole into the boy's head through the exit hole,
15 all of that's lined up as one line.

16 Q. And you have discussed this matter with others?

17 A. Yes. I've had -- I've had another firearm
18 examiner look at that, but these -- as I say, these are
19 standard tests that we've run for my entire career.

20 MR. WHEELER: Thank you, Your Honor.

21 MR. PARKS: Nothing further.

22 THE COURT: Thank you, sir. You may step
23 down.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Before he leaves --

1 MR. PARKS: Yeah.

2 THE COURT: -- are there any objections
3 to --

4 MR. PARKS: I don't have any objection to
5 his testimony with respect to cartridges and the range
6 of fire. I'm at a loss to understand what the exit
7 wound has got to do with anything and I'm going to
8 object to any ultimate opinion. I don't have a problem
9 with what he looked at to form his opinion that was
10 relevant to that, and it seems to me, based on the
11 direct examination, I'm not clear if he's going to be
12 asked other opinions. And it's our position that he's
13 only qualified on those two specific ultimate opinions;
14 range of fire and whether or not the spent cartridges
15 were out of that .30-30 rifle.

16 THE COURT: There's a third opinion listed
17 here that no one has talked about and that was the
18 opinion given the physical dimensions of the rifle and
19 its operating characteristics, it would all be
20 impossible to shoot oneself at a target distance of 10
21 inches or greater. Is that anything we need to discuss
22 before we go to trial and recess the jury and talk about
23 it when --

24 MR. PARKS: If -- so as long as he's not
25 changing his opinion. I don't know. Probably.

1 THE COURT: All right.

2 MR. KING: Your Honor, could we retain him
3 for just a few minutes? And then during the next break,
4 we can at least discuss this and see if there's any
5 further questions since he's already here.

6 THE COURT: I say if we've got any other
7 questions, let's deal with them right now.

8 MR. KING: All right. Can we have a break?

9 THE COURT: We'll take about a five-minute
10 recess.

11 MR. WHEELER: Thank you.

12 (Pause in the proceedings.)

13 THE COURT: Let me get back on the record
14 in Cause 20,529-2008, State vs. Jason Thad Payne.

15 Is the State ready to proceed?

16 MR. WHEELER: We're ready, Your Honor.

17 THE COURT: Is the Defendant ready to
18 proceed?

19 MR. PARKS: Yes, sir.

20 THE COURT: Is there anything we need to do
21 in regard to Mr. Ernest?

22 MR. PARKS: No, sir.

23 MR. KING: No, sir.

24 MR. WHEELER: No, sir.

25 THE COURT: If there's no objection, may he

1 be excused?

2 MR. PARKS: Well, I think he's going to
3 stay around a little while, Judge, so he and Mr. Hueske
4 can get together and --

5 THE COURT: Go over his underlying
6 information?

7 MR. PARKS: Yes, sir.

8 THE COURT: All right. Very well.

9 Is the State ready to proceed with the next
10 witness?

11 MR. WHEELER: Yes, Your Honor. And the
12 next witness is Tom Bevel. I'm tendering to the Court
13 for purposes of the record a copy of the report which
14 has been provided to the Defense prior to this date as
15 well as a copy of his CV --

16 THE COURT: All right.

17 MR. WHEELER: -- which has been provided to
18 the Defendant.

19 THE COURT: Mr. Bevel, if you want to come
20 on up and let me get you to raise your right hand.

21 (Witness sworn.)

22 THE COURT: Please have a seat.

23 MR. WHEELER: For purposes of this hearing,
24 we ask the Court to take judicial notice of the two
25 items.

1 THE COURT: Very well. That request is
2 granted. And I think maybe rather than trying do it the
3 way I did it last time, let me just let the State if you
4 wish to bring out any of the opinions you may or I can
5 just let the Defense address those as set out in the
6 report.

7 MR. WHEELER: It would be merely
8 accumulative if we went through his report at this
9 point.

10 THE COURT: Very well.

11 TOM BEVEL,
12 having been first duly sworn, testified as follows:

13 CROSS EXAMINATION

14 BY MR. PARKS:

15 Q. Mr. Bevel, my name is Doug Parks. I don't
16 think we've formally met before. I represent the
17 Defendant in this case?

18 A. Yes, sir.

19 Q. I'll have a few questions for you, probably not
20 too many. I've reviewed your CV, and it may be in years
21 past in Dallas, we've had cases together. It's just
22 been a long time and --

23 A. I don't know, sir.

24 Q. -- I can't remember, but what I really want to
25 get down to is you've been hired by the State to review

1 some materials and to render opinions. And you've given
2 us a written report on your findings; is that correct?

3 A. That is correct.

4 Q. Okay. And just so that we're clear for the
5 record, if you could, please tell us, Mr. Bevel, what
6 opinions you believe you are going to be asked by the
7 State to state to the jury in this case?

8 A. Yes, sir. Starting with the adult female, the
9 distance from the end of muzzle, as whether or not that
10 was a contact wound or some distance away. In my
11 opinion, that is consisted with a contact wound from end
12 of muzzle to entry.

13 On information that was provided through
14 the investigation relative to the smell of gunpowder in
15 the adult female's room versus the young man's room,
16 that there was quite a difference relative to the
17 investigators as to what they smelled in the way of
18 burned gunpowder in those two rooms.

19 Q. Let me stop you right there so I'm clear: Is
20 it your intention of stating to the jury that what the
21 police officers smelled was, in fact, gunpowder?

22 A. No, sir, that I did consider that information
23 in forming my ultimate opinions.

24 Q. Yes, sir. Okay. Right now --

25 A. I can't --

1 Q. Right now, I'm just looking for your ultimate
2 opinions. I'm going to work backwards from there.
3 Ultimately, what is your understanding of the opinions
4 that the State intends to have you relay to the jury?
5 Then we'll talk about the basis for it.

6 A. Okay.

7 MR. WHEELER: I'm going to object to that
8 question as needlessly accumulative. It is reflected in
9 his report, including his conclusions.

10 THE COURT: I'm going to overrule that and
11 let him speak to those opinions.

12 THE WITNESS: Okay. That my opinion is
13 that this is inconsistent with a homicide/suicide and
14 that is the ultimate opinion that I have.

15 Q. (BY MR. PARKS) Do you intend to render an
16 opinion with respect -- I know you have range of fire
17 with respect to the female. Do you intend to state an
18 opinion with respect to the range of fire for the young
19 man?

20 A. Okay. That is in my report. In meeting with
21 the prosecutors, I recommended that they get a second
22 opinion from any qualified firearms examiner. They went
23 and ask that of Mr. Ernest. Whether or not there would
24 be a question, I would rely upon his -- his testing,
25 even though I did it. It would depend whether or not

1 I'm asked that question relative to the testing I did.

2 Q. Okay. I guess you did some testing?

3 A. I did do some testing.

4 Q. You rendered an opinion in your report --

5 A. Yes, sir.

6 Q. -- about that testing?

7 I'm assuming you will respond to any
8 question asked you about that in the same way you did in
9 your report?

10 A. I absolutely would.

11 Q. But do I understand you to say that you would
12 defer to Mr. Earnest's testing because you recommended
13 that the State get someone else to do that?

14 A. I would.

15 Q. Okay. Now, your opinion, based on your test,
16 was the range of fire was 10 inches, give or take 2
17 inches?

18 A. Basically, yes, sir.

19 Q. So that's a little bit different from
20 Mr. Ernest, but not too much?

21 A. It's not too much. We approach it from a
22 different methodology. I was not aware of the front-on
23 photographs from the autopsy of the young man, and what
24 I depended upon was the description given by the medical
25 examiners to the overall pattern, and that is also what

1 I put in my report, that that would encompass anything
2 that would miss the face.

3 Q. So you didn't actually see a copy of the
4 autopsy photos?

5 A. I did --

6 (Interruption in the proceedings.)

7 THE COURT: Just wait a second.

8 (Pause in the proceedings.)

9 Q. (BY MR. PARKS) Let me restate that:

10 A. Yes, sir.

11 Q. Do I understand correctly that you did not have
12 a copy of the autopsy photographs at the time you did
13 your testing to prepare --

14 A. I did not.

15 Q. -- your patterns with those patterns?

16 A. That is correct.

17 Q. Okay. Have you seen those photographs since
18 that time?

19 A. I have.

20 Q. And would you change your opinion?

21 A. I would change the methodology that I would go
22 about doing it.

23 Q. What was your methodology and --

24 A. Okay.

25 Q. -- how would you change it?

1 A. I would do it the same way Mr. Ernest did which
2 is taking a representative measured area and identifying
3 the numbers of stippling that was created within that,
4 that pattern, and comparing those two. What I had to
5 do, not having that ability because I didn't have those
6 photographs, was to look at the overall pattern that was
7 described in the medical examiner's report from the
8 autopsy. Granted, they are not too terribly far apart,
9 but I believe the methodology Mr. Ernest used is more
10 accurate.

11 Q. Okay. So just as a summary, in your expert
12 opinion, Mr. Earnest's testing would be, in all
13 likelihood, more accurate than yours because of the
14 reason --

15 A. Yes, sir, I do believe that.

16 Q. Okay. So we've got in here test shots to
17 identify the distance range to Taylor. You're going to
18 testify about that if you're asked. I believe you said
19 that you would testify that in your opinion this was
20 inconsistent with homicide/suicide?

21 A. The wording that I use in the report is, "the
22 best explanation," and that's based upon my analysis,
23 looking at the physical evidence that's there.

24 Q. And that's what you have set out in your
25 report; is that correct?

1 A. That is correct.

2 Q. Now, in your report, you state the purpose of
3 it is an in-depth crime reconstruction based upon
4 objective methods. Have you used any subjective
5 information or -- well, information in rendering any of
6 the opinions that you're going to render or have you
7 based them strictly on the objective information so far?

8 A. Where the analysis is the -- based upon the
9 objective application of the scientific method, when
10 you're working with any one of the investigative
11 questions you're trying to answer, but your question is
12 there any substantive information that I relied upon,
13 and that was where we were at before you switched lines
14 previously. It is subjective information from the
15 investigators in them believing that they smelled or
16 didn't smell a stronger presence of burned gunpowder.
17 That is subjective.

18 Q. And that's something you factor into your
19 analysis?

20 A. I did consider that information, yes, sir.

21 Q. Okay. As well as various other items of
22 information --

23 A. Yes, sir.

24 Q. -- you told us about; temperature, skin
25 temperatures, and things like that?

1 A. Well, feelings whether or not one was warmer
2 than the other, whether or not rigor was beginning to
3 set in on one and not the other.

4 Q. But those were the factors you considered in
5 your final analysis?

6 A. Yes, sir, I did consider those.

7 Q. Okay. Is there anything at this point,
8 Mr. Bevel, having gone down the road a little bit -- I
9 believe your report is dated September 5th -- is there
10 anything you would alter about your report at this time,
11 either add something to or take anything from?

12 A. Other than what we've already discussed that I
13 think the methodology that Mr. Ernest used was more
14 accurate.

15 Q. So just in summary, we've got opinions with
16 respect to distance of fire on both victims and your
17 analysis of the consistency of the evidence; visa-a-vis,
18 suicide/murder or murder/murder?

19 A. Yes, sir.

20 Q. Is that all, as far as you understand, you'll
21 be called upon to testify about?

22 A. To my knowledge, yes, sir.

23 MR. PARKS: Okay. Pass the witness.

24 MR. WHEELER: Nothing further, Your Honor.

25 THE COURT: All right. Before he leaves,

1 any objections to those opinions?

2 MR. PARKS: No objection.

3 THE COURT: All right. Thank you, sir.

4 THE WITNESS: Yes, sir.

5 MR. WHEELER: May I approach, Your Honor?

6 THE COURT: Yes, sir.

7 (Bench.)

8 MR. WHEELER: There were several experts to
9 which we had agreements and I want to talk about that if
10 we could. Our gunshot residue experts and our DNA
11 expert out of the Texas Department of Public Safety, we
12 have an agreement to their opinions, as I understand.
13 We also have the medical examiner's.

14 MR. PARKS: No question about the medical
15 examiner. No question about the DNA people. GSR no
16 problem.

17 (Discussion held off the record.)

18 MR. WHEELER: And the folks that did the
19 work on the rifle.

20 MR. PARKS: Okay. Well, you've given
21 notice of an Ed Jones and I don't have a clue what he is
22 or what he's supposed to say.

23 MR. WHEELER: Let me borrow your -- Ed
24 Jones?

25 MR. PARKS: You told us --

1 MR. KING: You just sent me a --

2 MR. WHEELER: Let's see which one that is.

3 Can we have a two-minute recess?

4 THE COURT: We'll go off the record for a
5 moment.

6 (Pause in the proceedings.)

7 (Open court.)

8 THE COURT: That is on the record, there is
9 no Ed Jones?

10 MR. WHEELER: There's no Ed Jones.

11 THE COURT: All right. Anything further
12 from the State, then?

13 MR. WHEELER: I believe we've got on the
14 record all of our experts and we've got our agreements
15 and we got the Court's rulings. That concludes the
16 Daubert issue from the State's side.

17 THE COURT: Do we have any Daubert issues
18 from the Defendant's side?

19 MR. PARKS: We have two witnesses -- and I
20 guess three witnesses, Judge. We've been given notice
21 that Noel Martin is a witness from the State.

22 MR. WHEELER: We're going to --
23 [inaudible] -- with regard to his qualifications to give
24 an opinion. We've used --

25 MR. KING: That's all we need.

1 THE COURT: So it's agreed that his
2 opinions, whatever they are, are not objected?

3 MR. WHEELER: I've called him as a witness
4 for the State, so I'm in no position to challenge his
5 qualifications.

6 MR. PARKS: Okay. That's -- so if -- to
7 the extent that the State wishes us to make him
8 available, our witness, Ed Hueske, is here, and if they
9 want to stipulate to him, that's fine, or if they want
10 to --

11 MR. KING: They have been furnished, Your
12 Honor, with a vitae and the report. We've given that to
13 the Court as well.

14 MR. WHEELER: We're going to ask him to
15 produce his file, all documents and reports and
16 literature he's reviewed to render his opinion. We
17 would like a little recess to review that material
18 because we haven't been privy to any of that.

19 THE COURT: Why don't we establish on the
20 record what his opinion are, so we can focus it a little
21 bit?

22 Mr. Hueske, get you to come on around and
23 swear you in.

24 (Witness sworn.)

25 THE COURT: Please have a seat.

1 EDWARD HUESKE,
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. KING:

5 Q. Would you state your name, please, sir?

6 A. My name is Edward Hueske.

7 Q. What kind of occupation do you have,

8 Mr. Hueske?

9 A. I'm a full-time professor at the University of
10 North Texas in the Department of Criminal Justice. I'm
11 the criminalistics coordinator and I hold the rank of
12 senior lecturer. I've been there 10 years.

13 MR. KING: May I approach the witness, Your
14 Honor?

15 THE COURT: Yes, sir.

16 MR. KING: May I borrow back the materials
17 I gave you?

18 THE COURT: Yes, sir.

19 Q. (BY MR. KING) Professor Hueske, am I
20 pronouncing your name correctly?

21 A. Yes, sir.

22 Q. Would you take a look at that document and see
23 if you can identify it?

24 A. This is a copy of an earlier curriculum vitae,
25 2006. I actually have a current copy with me.

1 Q. Do you just --

2 A. Yes.

3 Q. I assume it just adds more luster to the
4 already glowing --

5 A. I suppose.

6 Q. All right.

7 MR. WHEELER: State has no objection to his
8 CV.

9 Q. (BY MR. KING) If I ask you to delineate your
10 accomplishments, would this be a summary of them?

11 A. That's correct.

12 MR. KING: Your Honor, we offer that and
13 ask that that be allowed to copy so we'll all have it.

14 MR. WHEELER: We do need a copy.

15 THE COURT: Yes, that will be fine.

16 Q. (BY MR. KING) Likewise, you had given us,
17 first, a preliminary draft of a report on this
18 particular case?

19 A. Correct.

20 Q. The work you have done on that?

21 A. That's correct.

22 Q. And you gave us an actual report?

23 A. That's correct.

24 Q. Would it be a summary of your opinions and the
25 work you did on this case?

1 A. Yes, it is.

2 Q. All right.

3 MR. KING: This is the final.

4 MR. WHEELER: It says "Preliminary."

5 MR. KING: All right.

6 MR. WHEELER: That's what this is.

7 MR. KING: That's the last one.

8 MR. WHEELER: For purposes of this hearing,

9 this particular exhibit says, "Re: State of Texas
10 versus Jason Thad Payne, FT&C Case Number 09-5912,
11 Preliminary Report." This preliminary report is being
12 tendered to the Court as a final report, and the copy we
13 have received has the same mark on it, that it's
14 preliminary.

15 Q. (BY MR. KING) It is, at least at this point,
16 the final report you --

17 A. That is correct.

18 Q. You have done no particular work on this case
19 since this report was written?

20 A. That's correct.

21 Q. So your conclusions today here in this
22 courtroom are the same as you came to in this report?

23 A. They are.

24 Q. All right.

25 MR. KING: And could we have a copy of that

1 as well, Your Honor?

2 THE COURT: Yes, sir.

3 MR. KING: Pass the witness, Your Honor.

4 CROSS EXAMINATION

5 BY MR. WHEELER:

6 Q. Good afternoon, Professor Hueske. My name is
7 gym Wheeler. We've never discussed this case before,
8 have we?

9 A. No, sir.

10 Q. With regard to this cause, did you bring to the
11 court today your file and all documents, reports, and
12 literature you reviewed in order to render an opinion?

13 A. No, sir. I was not asked to do that.

14 Q. Did you consult all the documents in this cause
15 that were supplied to you?

16 A. Yes, I did.

17 Q. And do you have those documents or copies of
18 those documents at your office?

19 A. Yes, sir, I do.

20 Q. Did you consult any reports in the preparation
21 of this opinion?

22 A. No, sir.

23 Q. Did you not read any of the offense reports in
24 this cause?

25 A. I'm sorry. I misstated that.

1 MR. PARKS: Judge, Page 2 of his report
2 sets out 15 things that he has reviewed.

3 MR. WHEELER: I haven't had a time or
4 opportunity to review the basis of his opinion at all
5 other than what's in this document. I need a little
6 leeway to ask the questions.

7 THE COURT: Very well.

8 MR. WHEELER: Thank you, Your Honor.

9 Q. (BY MR. WHEELER) And then with regard to the
10 literature, of course, the field that you practice in,
11 crime scene reconstruction, is a peer reviewed field, is
12 it not?

13 A. Yes.

14 Q. When were you first contacted concerning this
15 case; what day, what month?

16 A. I don't have my case file with me as we've
17 already established. I don't recall. A couple of
18 months ago, perhaps.

19 Q. Do you have an oral or written contract with
20 the Defense?

21 A. My recollection is oral.

22 Q. How were you introduced to the defense
23 attorneys in this cause?

24 MR. PARKS: Judge, we object to that. This
25 does not go to the basis of a 701, 702 hearing.

1 MR. WHEELER: With regard to this expert
2 and how he became involved in this case as well as his
3 expertise I think is absolutely crucial. How he came to
4 the evidence, how it was presented to him, and if he had
5 a chance to --

6 MR. PARKS: He's either qualified or --

7 THE COURT: I would have to sustain the
8 Defense's objection. It's not what's involved in these
9 issues.

10 Q. (BY MR. WHEELER) So a couple of months ago,
11 you agreed that you were going to testify in this cause
12 and render an opinion?

13 A. A couple of months ago, I agreed to review the
14 material. The testimony obviously was subsequent to my
15 review and findings, but, yes, that's clearly in the
16 offering. May I have some water, please?

17 Q. Yes.

18 (Pause in the proceedings.)

19 Q. (BY MR. WHEELER) Okay. Can you give me an
20 approximation of how many times you've appeared in court
21 in the past, say, 10 years?

22 A. A hundred times, conservatively.

23 Q. Any idea how many consultations involving legal
24 actions within the same time frame?

25 A. Several hundred.

1 Q. Is there a particular subject matter where your
2 expertise is most useful or do you testify in a variety
3 of cases?

4 A. Well, my primary expertise is shooting
5 reconstruction.

6 Q. Have you ever been challenged and disallowed as
7 an expert in any cause?

8 A. No, sir.

9 Q. With regard to this case, could you tell the
10 Court, please, as specifically as possible, a summary of
11 your opinion?

12 A. Well, as articulated in my report under the
13 last heading, Opinions, the second and last paragraph,
14 my opinion is that the shot was fired from a distance
15 between -- that is the shot to Taylor Wages was shot at
16 a muzzle-to-target distance between 4 and 10 inches and
17 he shot that -- shot himself either using one of his
18 feet or reaching down with his left hand and depressing
19 the finger lever of the rifle and releasing the pin.

20 Q. With regard to the report that you've written,
21 at one point you refer to a comment involving rigor, and
22 when you discuss this reference to rigor mortis on
23 Page 6 of your report, you say that that reference to
24 rigor mortis was refuted by Ranger Kemp according to
25 Sergeant Martin's report, so -- and you base that

1 opinion with regard to rigor mortis on a report which is
2 hearsay written by Sergeant Martin repeating what was
3 said to him by Ranger Kemp which is hearsay within
4 hearsay. Is it normal in your field to use as a basis
5 for an opinion hearsay within hearsay?

6 A. Well, that's your legal definition. I had a
7 direct conversation with Sergeant Martin considering
8 this as well. This designation of that statement as
9 hearsay is certainly out of my purview, but that was the
10 information that I was provided along with the other
11 reports, so I can't comment on the legality of that
12 information, but that was information I considered, yes.

13 Q. I understand you considered it, but my question
14 is a little more precise than that. I want to know that
15 within your field it is in the regular course of
16 conducting this practice of crime investigation to rely
17 less than firsthand information and more precisely to
18 rely on hearsay from another person, which is hearsay,
19 which is to rely on a statement from another person
20 which states it to you? Is it normal to rely on that
21 evidence to form an opinion?

22 A. From time to time that happens, yes.

23 Q. Thank you. And in two paragraphs later, there
24 is a comment about a room that's a converted garage and
25 talking about the air tightness of the room. Do you

1 have any specific training or experience with regard to
2 rooms and their ventilation?

3 A. No more than a lay knowledge, which is all
4 that's required to assess the situation here.

5 Q. So it's a common sense argument there,
6 requiring no expertise?

7 A. I'm not sure common sense necessarily. It's an
8 observation. I went to the scene. I saw the metal
9 garage door with large gaps in it. I went to the
10 bedroom where the female was shot. It's clearly
11 insulated. So that's the basis for my opinion there.

12 Q. But in response to my question whether or not
13 you've had any specific training with regard to
14 ventilation of structures and rooms, you haven't had
15 any?

16 A. No, sir, I haven't any specific training in
17 ventilation, insulation, heating or air-conditioning.

18 Q. A few more paragraphs in this report 2, 3, 4,
19 5, 6 -- the bottom --

20 THE COURT: What page?

21 Q. (BY MR. WHEELER) On Page 6, the final
22 sentence, you write, "It is inconsistent with someone
23 other than Taylor Wages going into Taylor Wages'
24 room and reloading in the midst of a confrontation with
25 a wide-awake Taylor Wages."

1 What evidentiary basis for you having an
2 opinion with regard to the state of consciousness of
3 Austin Taylor Wages at the time he received his mortal
4 wound?

5 A. Perhaps, I could have stated that a little more
6 clearly. The reference there has to do with the fact
7 that if you discharge a .30-30 rifle within the confines
8 of that residence, as I observed it, certainly there
9 would be a loud report. Otherwise, Taylor Wages was
10 seated on the side of the bed. That would indicate that
11 he was awake. It's a combination of those two factors
12 that formed the basis for making that statement.

13 Q. But it assumes something that was not presented
14 to you and forms no basis for your opinion. The state
15 of consciousness of the boy, that's an assumption?

16 A. Yes, that is an assumption.

17 Q. Okay. On the next page, on Page 7, we have a
18 comment that you just referred to with regard to the
19 audible nature of the report from a .30-30 rifle. Did
20 you perform any tests inside that home to determine how
21 loud that report is and its audibility?

22 A. No.

23 Q. Is this something that a person with common
24 sense -- is this a deduction that a person with common
25 sense could make?

1 A. If they've fired a .30-30 rifle, as I have,
2 yeah.

3 Q. So it's logical, guns are loud?

4 A. 30.30s in particular.

5 Q. Lay opinion?

6 A. No, opinion of a journeyman firearms examiner.

7 Q. I love that word, "journeyman." I don't get to
8 hear it very often in the courtroom. Thank you.

9 Well, you're more than that. You have
10 testified many, many times. You're a professor at the
11 University of North Texas where my daughter goes to
12 school. That's an impressive curriculum vita.

13 A. Thank you. She made a wise choice.

14 Q. I agree with you.

15 All right. Now, there's a following
16 question in the next paragraph: "If these were graves
17 prepared in advance for the burying Taylor and Nicole by
18 Jason Payne, the obvious question is why did he call 911
19 and report the deaths?" None of your expertise is
20 applied in writing a comment like that, is there?

21 A. Well, yes. Once again, a visit to the scene,
22 seeing where those alleged graves -- let's call them
23 holes in the ground were, they certainly weren't readily
24 acceptable. So perhaps, again, I could have done a
25 better job of articulating my concerns about those being

1 possibly being empty graves.

2 Q. I understand. On the last -- on Page 7, the
3 last full paragraph, you write in your analysis this:
4 "It's unfortunate that the DNA testing of the rifle and
5 ammunition that was initially requested by Wood County
6 Sheriff's Office not carried out. The results of that
7 testing might have provided useful additional
8 information in this case."

9 Now, that comment there, that the
10 fundamental basis of that comment is your belief that
11 the police could have done a more thorough job in
12 analyzing and recording details of the crime scene; is
13 that right?

14 A. No, sir. I believe the Wood County Sheriff's
15 Office, according to the records I have, they requested
16 that testing. I don't know where it went awry. By the
17 document I provided or was provided states that they
18 wanted just that testing and then, for whatever reason,
19 it was never forthcoming.

20 Q. But your opinion with regard to this particular
21 paragraph is that the police could have gotten a more
22 accurate picture of the crime through forensic evidence
23 that does not exist and you could have reviewed?

24 A. Well, we all could have gotten a more accurate
25 review if that testing would have been done.

1 Q. We all could have gotten a more accurate view?

2 A. Perhaps.

3 Q. And then with regard to your opinion on the
4 entry wound which is -- let's see, where -- where do you
5 talk about the soot, the thin layer of soot in this
6 report? Could you remind me there?

7 A. I'll have to --

8 Q. Oh there it is. The bottom of Page 3.

9 A. Yeah.

10 Q. You write in the last line, "A thin layer of
11 soot is eccentrically...deposited." And there is an
12 ellipsis followed by a period. After you write that,
13 you write, "It can be seen in the images that stippling
14 is present in areas, such as under chin, that are
15 consistent with the upward trajectory indicated by entry
16 and exit wounds locations."

17 In fact, in autopsy reports -- on Page 2 of
18 Austin's autopsy report, it says, "A thin layer of soot
19 measuring one-and-a-half inch in maximum length is
20 deposited around the entrance wound predominantly
21 inferiorly on the lower lip extending up to
22 approximately one inch from the center of the entrance
23 wound."

24 So the wound above his lip, the corner of
25 his mouth extends one inch, according to the autopsy

1 report, right?

2 A. Yes, I think that's correct.

3 Q. But the gist of the paragraph that you've
4 written here indicates that there is soot deposited
5 under the chin, the way I read it on Page 3 and 4, but
6 that's not what the autopsy report reflects. That's
7 inaccurate?

8 A. That refers to stippling under the chin, not
9 soot.

10 Q. We're not talking about soot there. And that
11 can be delineated from the autopsy, there's no soot
12 under the chin?

13 A. Well, that sentence has a period after the
14 reference to the autopsy report. Then there's a new
15 sentence referring to stippling, so those are two
16 entirely different subjects.

17 Q. With no linking clause, phrase, verb, adverb
18 between the two?

19 A. I am a chemist, sir, not an English professor.

20 Q. I'm an English professor, not a chemist. Okay.
21 I get it.

22 All right. Let's see. Can you provide to
23 this court within the next 24 hours your file, all
24 documents, reports, and a copy of the bibliography that
25 you used, you refer to in --

1 A. I would be hard pressed to do that within 24
2 hours, sir. I don't intend to be back in Denton at my
3 office until tomorrow night.

4 Q. I understand.

5 MR. WHEELER: Thank you. Pass the witness.

6 MR. PARKS: No further questions.

7 THE COURT: Any objections to his testimony
8 or his opinion?

9 MR. WHEELER: We would object, Your Honor,
10 to any opinions that reaches the following conclusion:
11 That the police or any other investigative agency could
12 have done a more thorough job in recording and analyzing
13 the crime screen. Specifically, that is something we
14 don't need expertise to give us a running critique of
15 the crime scene itself and that's beyond what he's
16 called for, to give a comment about anybody else's job.

17 MR. KING: Judge, the mere comment if we
18 had additional information, we might know more. It's
19 police procedure. That's his comment as a scientist.

20 MR. WHEELER: It relates to nothing else.
21 That makes itself clear. And under 702, 703, and 705,
22 the standard, particularly 705, is helpful to the jury.
23 That's not helpful. That's something that the jury can
24 do on its own and any person can do.

25 MR. KING: Judge, this is simple. As an

1 expert, there is no way that the Defense could be
2 prevented from asking the simple question, could your
3 analysis have, perhaps, been better or different had you
4 had certain things. That's just a way of quantifying an
5 opinion. It's not -- it's a statement of fact. It's
6 not a criticism of the police. It's the same as,
7 "Wouldn't this be clearer if you found a fingerprint,
8 officer? Well, yes. But you didn't? No, I didn't."
9 It's the same thing, "Wouldn't it have been helpful to
10 have had DNA on this item? Yes, it would. But you
11 didn't have it? No, I didn't."

12 MR. WHEELER: I understand the logic. The
13 question is the rule, is it helpful for the jury. It's
14 unfortunate that DNA testing wasn't carried out. Any
15 person anywhere can give that opinion. It doesn't
16 require expertise.

17 THE COURT: I'm going to overrule the
18 objection.

19 MR. WHEELER: And then with regard to the
20 matters which base the opinions under 702, 73, 705, here
21 are the things that have been listed during the Daubert
22 hearing: We have hearsay within hearsay that's relied
23 on. I understand hearsay. I know experts can rely on
24 hearsay in rendering their opinions. Hearsay within
25 hearsay, I have not heard that. Ranger Kemp said

1 Sergeant Martin said to me and then I'm going to give an
2 expert opinion on it, that's not reliable.

3 We have a person here who, in spite of his
4 CV, is also giving an opinion with regard to
5 airtightness of a room with no training or expertise
6 with regard to ventilation and also giving an opinion as
7 to the state of consciousness of the victim at the time
8 he received the gunshot wound and there is no
9 evidentiary basis at all for that opinion.

10 So we have three specific evidentiary
11 problems with regard to the opinion that's rendered, and
12 then we also have this commentary on -- with the word
13 "unfortunate" on the way the testing was conducted. So
14 we object on the grounds that there's no appropriate
15 basis for this testimony.

16 THE COURT: Any response?

17 MR. PARKS: Well, Judge, I think the most
18 important point of that was that the inference that
19 Mr. Wages was conscious, as indicated by his seated
20 position on the bed. This is a person whose expertise
21 is in blood splatter and in crime scene reconstruction.
22 He takes the information that he is given and arrives at
23 opinions and inferences based on that information.

24 It may be that I am not conscious standing
25 here, but it is fair to infer from -- from -- that I

1 am -- it can be inferred -- what can be related on what
2 I'm doing now to someone outside, it would be fair for
3 them to infer that. So he's seated on the edge of the
4 bed. That's a fair inference that a criminalist in
5 criminal screen reconstruction. They can certainly
6 attack it. Maybe he was conscious sitting there on the
7 bed. That's a fair inference.

8 MR. WHEELER: I left out one other factor
9 that I want to get on the record and that's the auditory
10 nature of the report of gunshot. That is without a
11 doubt something that a layperson can figure out without
12 help from an expert.

13 THE COURT: And I'm going to overrule the
14 objection, but let me just speak to it because I think,
15 certainly, the matters that don't require expert
16 testimony are subject to objections in this matter.

17 My understanding, however, what we're
18 dealing with really are essentially facts that are
19 reported to someone which they're basing their opinion
20 on and they are subjected to being attacked whether the
21 facts stand up to that, and we're not dealing with
22 opinion, but facts.

23 Certainly, I understand he hadn't been
24 qualified on ventilation. He looked at the room and saw
25 holes and using some -- drawing logical conclusion, his

1 ultimate conclusion. I think that's what -- if I'm
2 understanding, that's what crime reconstruction experts
3 do.

4 I think you can make a pretty good argument
5 when you get beyond stippling and distances. You could
6 argue the crime reconstructionist's logical conclusion
7 from circumstances and the jury can do that without the
8 expert. We're going to have expert on the other side
9 going to be able use the facts, and so that's the basis
10 of the Court overruling those objections.

11 All right. Anything else -- is this -- do
12 you have another -- thank you, sir. You can go ahead
13 and step down.

14 Any other Daubert matters?

15 MR. PARKS: I took the liberty to give to
16 the State an agenda for --

17 MR. WHEELER: An agenda that --

18 THE COURT: Very good. I might want to
19 take --

20 MR. WHEELER: Can we take a brief recess
21 and go off the record and do a little housekeeping?

22 THE COURT: If you feel like you need to.

23 Let me, first, in terms of the persons who
24 are here as experts who were subpoenaed, if you don't
25 have anybody else that you need, I'm going to release

1 all those persons as witnesses. And I know they need to
2 exchange some information. They're free to go do that
3 at this time.

4 (Pause in the proceedings.)

5 THE COURT: Get on the record in Cause
6 20,529-2008, State vs. Jason Thad Payne on pretrial
7 hearing. Let the record reflect that counsel for the
8 State, counsel for the Defendant, and the Defendant are
9 present.

10 Yes, sir, Mr. Parks.

11 MR. PARKS: Judge, you may recall that
12 Mr. Ernest made his opinions based on patterns of
13 gunfire residue on some plastic sheets that he compared
14 with photographs from the autopsy and that was the basis
15 for his opinion regarding range of fire. It's my
16 understanding that those plastic sheets are in his
17 possession here today. It's my understanding that those
18 will be offered in evidence for the jury at the time
19 Mr. Ernest testifies.

20 We have requested that our expert be
21 allowed to view them, not take them in possession, to at
22 least view those plastic sheets today and we've been
23 refused that. We ask the Court to order that they be
24 produced.

25 MR. WHEELER: The State has made the same

1 request; file documents, report, literature, trial aids,
2 exhibits, anything out of their expert, that we get it.
3 We asked for an order and haven't gotten it.

4 Here's what I think: We have an expert
5 here who has exhibits that we will work with at trial.
6 He has a controlled setting in his office and he has to
7 preserve his evidence and protect it because he
8 testifies here -- and he's testified for 30-something
9 years all over and his professional reputation is
10 involved here.

11 If he says to me, and he has, I want these
12 exhibits in a controlled setting where they can be
13 reviewed and not let the fox loose in the henhouse in an
14 ambush him. We didn't anticipate this or had any notice
15 of it, let's do this: Why don't we have a mutual order
16 that all trial aids, exhibits, underlying information,
17 things like that be made mutually available at a time
18 that is convenient to both parties. That's recourse
19 number one.

20 Recourse number two is this: If I'm not
21 going to get an order to go through everything in regard
22 to their expert, if they want to review this particular
23 exhibit in its form for presentation at trial, then
24 let's have an agreement between their expert and our
25 expert on a time that's convenient to our expert who

1 needs to get on a plane to Montana and go to Fort Worth.
2 That's what our expert would like and that's -- I think
3 that's a more appropriate resolution.

4 MR. PARKS: If I could respond, Your Honor.

5 THE COURT: Yes, sir.

6 MR. PARKS: There is nothing in our
7 expert's possession that we intend to offer in the
8 presence of the jury by way of aids other than
9 photographs, which we have attached copies of in the
10 report that was given. I would certainly be happy for
11 them to look at those photographs.

12 If this item is so fragile, why is
13 Mr. Ernest carrying them around with him? There is
14 significant difference between what the State has been
15 asking our expert, which is something that is
16 essentially nonexistent, and something we know is here
17 in a corporate form. It will be offered to the jury.
18 It is no different than a photograph, I would expect,
19 and no reason why we shouldn't be able to look at it
20 while we've got it here.

21 MR. WHEELER: I have a very unhappy expert
22 and I understand why. He didn't come here to produce
23 this exhibit in this form and allow inspection. Fine,
24 we will be happy to do it at his convenience, but he
25 needs to get on a plane at his office.

1 THE COURT: First, why don't we get him on
2 the stand since he's here?

3 Mr. Ernest, why don't you come on up, and
4 just have go ahead and have a seat and you remain under
5 oath.

6 FURTHER EXAMINATION

7 BY THE COURT:

8 THE COURT: First, Mr. Ernest, let me just
9 ask you, if I can, concerning the time -- concerning the
10 time considerations: How much time do you have that you
11 can afford?

12 THE WITNESS: I need to get back to Dallas
13 and get on a plane -- well, I'll be on the stand
14 tomorrow morning in Montana, and I need to get back. I
15 had no Earthly idea that this was going to turn into
16 anything other than about a one- or two-hour hearing,
17 get back to Dallas where I can make my flight, and now
18 this was turned into an evidence inspection and a
19 general rummaging through my file.

20 THE COURT: We are still within that
21 two-hour frame. That's what I'm asking: What is your
22 drop-dead time when you need to leave?

23 THE WITNESS: I need to leave -- I needed
24 to have left probably 30 minutes ago, so I've got a lot
25 of traffic to go back through. And, Your Honor I have

1 no problem in the early part of next week in having
2 Mr. Hueske come down to my lab and look at these targets
3 that have been shot. I'd be more than happy to open the
4 doors and --

5 THE COURT: Let me ask you another
6 question: If he were to take 10 to 15 minutes to look
7 at them here today, what sort of harm does that do
8 potentially to that evidence?

9 THE WITNESS: The plastic sheets as they
10 are right now will be in a different form for trial.
11 They will be prepared as mounted exhibits and in
12 substantially different form than they are right now,
13 so...

14 THE COURT: Will they suffer injury if he
15 looked at them at this point in time.

16 THE WITNESS: No, I don't think so.

17 THE COURT: Is it just your concern that he
18 might see them differently than when --

19 THE WITNESS: Number one, that they will be
20 in a different form at the point when he sees them, and,
21 number two, and pressing to me is that I be able to
22 leave and go catch a flight.

23 MR. PARKS: Well, why don't you leave them
24 in the custody of the District Attorney's Office?
25 They're not going to do anything with them.

1 THE WITNESS: As soon as I get back from
2 Montana, I'll be putting them together for trial
3 purposes. As I understand it, this action is coming up
4 to trial, is it not?

5 THE COURT: Yes, sir. Supposed to be
6 picking a jury Tuesday morning.

7 MR. WHEELER: This is a no-notice matter,
8 Your Honor, and he's entitled to that kind of preference
9 as well as we are. There's no written motion for this
10 court, either. I will be happy to provide them in --
11 it's his exhibit.

12 THE COURT: Let me just say this: I've got
13 no problem trying do anything that -- I don't want to
14 keep this man stuck here. I am concerned that I do have
15 something that we understand is going to be submitted in
16 evidence and then we've got basically a global request
17 on the other side that has never been specified except
18 to say, I didn't get this at this time and they want to
19 do this at this time or at that time and -- I'm not
20 interested in things like that. So I'm going to ask
21 that you make arrangements for when the Defense expert
22 can see these exhibits. It needs to be in a timely
23 matter and no more inconvenient than necessary.

24 As to the other matters, if you
25 need something and it's something like, I need to know

1 everything, that's just totally unrealistic.

2 MR. WHEELER: Well, I just heard that he
3 didn't have anything like that. The only thing that I
4 have are legible photographs.

5 THE COURT: Then you what need is to have
6 an opportunity to inspect the original photographs?

7 MR. WHEELER: Absolutely, I need to see
8 what he relied on.

9 MR. PARKS: Sure.

10 THE COURT: Okay. And let me let you get
11 off the stand so you can get going as quick possibly.
12 Visit briefly when you are available. I'll, then, ask
13 the attorneys to work out an understanding as to, you
14 know, when they're going to get all that stuff down so
15 somebody have a chance to look at it before trial.
16 Thank you, sir.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: If you just want to let him
19 know when you're going to be available there, then you
20 ought to be able to be free to head on out. If not,
21 make other arrangements. In other words, he needs to
22 make it available in a reasonable way for the Defense
23 expert.

24 MR. KING: Mr. Ernest suggested Tuesday
25 morning.

1 THE COURT: Mr. Ernest suggests that?

2 MR. KING: Yeah.

3 THE COURT: We're not going to --

4 MR. PARKS: Assuming -- I don't know where

5 Jim went.

6 THE COURT: At any rate, if that isn't good

7 enough, he needs to make it available. If you need the

8 Court's intervention, that's fine, but I think -- I'm

9 hoping Mr. --

10 MR. PARKS: Ernest.

11 THE COURT: He produces --

12 MR. PARKS: Whichever, and we will also, at

13 the same time, make arrangements to get legible copies

14 of --

15 THE COURT: Anything else?

16 MR. PARKS: Not on that particular issue.

17 MR. KING: I really thought about doing

18 anything else on --

19 THE COURT: Any other matters that we need

20 to take up?

21 MR. PARKS: Scheduling. I think we need to

22 talk about scheduling --

23 MR. WHEELER: Sure.

24 MR. PARKS: -- because we've got -- Monday

25 is a holiday. We pick a jury on Tuesday.

1 THE COURT: Yes, sir.

2 MR. PARKS: The following Monday is --

3 MR. KING: Docket call.

4 MR. PARKS: -- docket call and --

5 THE COURT: Now, if everybody wants this on
6 the record, we only need to have one person talking at a
7 time. Okay. Off the record.

8 (Recess taken at 2:48 to 3:03.)

9 MOTIONS IN LIMINE

10 THE COURT: Back on the record, then, in
11 20,529-2008, State versus Jason Thad Payne. Everyone is
12 still present; that is to say, let the record reflect
13 that counsel for the State, counsel for the Defendant,
14 and the Defendant is present.

15 On those motions y'all have talked about,
16 you want to volunteer -- Mr. Parks, go right ahead. And
17 if the State disagrees with you, I'll invite you to jump
18 in.

19 MR. WHEELER: Sure.

20 MR. PARKS: Judge, the first thing I'll do
21 is address the State's motion in limine because it's
22 right here kind of before me, and I don't believe that
23 we have any disagreement with respect to that.

24 Their Item No. 1, we agree to; just to say
25 that we're not to bring to the jury's attention that the

1 State filed a motion in limine. No. 3, we agree to.
2 No. 5, we agree to and ask that that be a mutual motion
3 in limine as we have a motion in limine on that very
4 same issue.

5 MR. WHEELER: In regard to polygraphs?

6 MR. PARKS: In regard to polygraphs.

7 MR. WHEELER: I think we are in agreement
8 on that.

9 MR. PARKS: We certainly agree with No. 6
10 as long as that's mutual, the testimony of the -- they
11 say any defense witness. We say the testimony of any
12 witness about their personal opinion concerning the
13 truthfulness of any party, and then we'll talk about
14 other opinions in a minute.

15 THE COURT: Now, you skipped No. 4.

16 MR. PARKS: I did because that looks like
17 to me like, if I'm reading it correctly, would prevent
18 us from going into what would essentially be normally a
19 defense motion to reveal the deal. Am I misreading
20 that?

21 MR. WHEELER: That is a stock motion. I
22 don't have any deals with any witnesses in this case,
23 but I don't want to get into it just in case there's
24 something floating around out there without a hearing
25 outside the presence of the jury.

1 MR. PARKS: Of course we would agree to
2 that as a limine motion, but I guess I would orally say
3 that if there comes a time when a deal is made with a
4 witness, we would like to be apprised of that.

5 MR. WHEELER: Right, be a good idea.

6 THE COURT: At any rate, I do grant all of
7 those, then, in the State's motion in limine. With
8 those -- with the polygraph and the No. 5 and 6 being
9 mutual.

10 MR. PARKS: Defense has a motion in limine
11 which I believe -- well, let's just go -- if you've got
12 it there before you, Page 3.

13 THE COURT: Just a second, I'm looking for
14 it. You're talking about the Defendant's motion in
15 limine?

16 MR. PARKS: Yes, sir.

17 THE COURT: All right, Page 3.

18 MR. PARKS: 3. Is that the page that's got
19 all the ABCs?

20 THE COURT: Yes, sir.

21 MR. PARKS: I'm not sure what the State's
22 position may be. That would be better to let Mr.
23 Wheeler state his position on each of these three items.

24 MR. WHEELER: So Item A on Page 3 of the
25 Defendant's motion in limine, Roman Numeral VI, that

1 concerns testimony of people's affect on the Defendant
2 as indicative of guilt; he sounds like he's guilty and
3 I've heard him on the 911 tape. Agreed to the motion in
4 limine.

5 MR. PARKS: Let me expand on that just a
6 little bit, Judge, and make that motion in limine about
7 any opinion that someone might express as to their
8 judgment regarding that. I mean the 911 tape.

9 THE COURT: Recording guilt or innocence?

10 MR. PARKS: Guilt or innocence, remorse or
11 lack of remorse, peculiar or not peculiar. Those are
12 all substantive opinions and the State can play -- well,
13 the State can speak for itself.

14 THE COURT: Certainly as to guilt and
15 innocence, the Court would grant that as to -- you know,
16 grant that. And as to --

17 MR. WHEELER: As to others, I'm not
18 prepared to talk about that because I hadn't given it
19 any thought coming to the hearing. Guilt/innocence, I
20 get. We're not going to comment on guilt and innocence
21 based on affect, whether someone's behavior is peculiar
22 or not. I don't know. I hadn't thought about it. I
23 didn't have it in front of me.

24 MR. PARKS: At least, we ought to be able
25 to approach before anything like that pops out. Yeah,

1 we've got -- the discovery that we've got, particularly
2 with respect to various deputy sheriffs, is rife with
3 such opinions. That's why I bring it up. It's not --
4 we've got -- we've got an opinion that he --

5 THE COURT: Well, I guess I'm going to
6 direct the State to approach on those matters. If you
7 know you got something coming up on that, why, let's
8 come on up and let me know what you're anticipating is
9 going to be gone into and --

10 MR. WHEELER: Now, I haven't prepared any
11 response to that. I didn't receive any motions saying
12 we're going to discuss whether a particular person's
13 behavior was peculiar in my experience or whether or not
14 it was -- it was something that looked construed or
15 concocted. I just haven't -- the guilt or innocence and
16 the rest of this I'm asked to agree to and getting a
17 ruling from the Court, I have no notice that I'm going
18 to address --

19 MR. PARKS: You're not being asked that.
20 It's no different if it comes up on the trial because I
21 would at that point be objecting and asking to approach
22 the bench and have a ruling on it. All I'm saying is
23 that before anything pops out of their mouths with that
24 kind of thing, we at least be given an opportunity to
25 object and approach --

1 THE COURT: And certainly, Mr. Wheeler, if
2 you have something in mind and it's not a limine ruling
3 and it's not evidentiary, that the Court needs to
4 reconsider it, I'd be happy to reconsider it. I just
5 feel safer -- I guess my concern is, I can certainly
6 imagine -- certainly, with a skunk in the jury box, it
7 wouldn't matter what kind of objections we'd have, we
8 wouldn't get the odor out. That's really the Court's
9 concern on it, but if you've got something coming up,
10 you know, that, you know, you think somebody ought to
11 have the expertise that's an opinion rather than just
12 describing facts, why, that's -- you know, we'll be
13 happy to take it up, but I feel safer than doing it as a
14 limine to say not to be --

15 MR. WHEELER: I understand.

16 THE COURT: -- making statements that
17 appear to be fact statements but really aren't fact
18 statements, they're really conclusions as to state of
19 the mind of the Defendant or something like that, that
20 going into --

21 MR. WHEELER: We can't crawl into his state
22 of mind without having an out-of-the-presence-of-jury
23 hearing. I've tried in front of you lots of times and I
24 don't throw skunks in the jury box. I don't do that.

25 THE COURT: I understand that. It helps

1 if --

2 MR. WHEELER: My problem --

3 THE COURT: -- thinking in terms of --

4 MR. WHEELER: My problem in what -- in what
5 I'm trying to say is logistics. I've got all of my
6 witnesses apprised of it. I'm going to do my best on
7 that, okay, but I don't want to be throwing any skunks
8 in your box, so I understand the Court's ruling. I'll
9 do what I can.

10 MR. PARKS: 2-B there is pretty much along
11 the same lines.

12 THE COURT: Same thing as a guilt thing?

13 MR. PARKS: Right.

14 THE COURT: Any problem with that one,
15 Mr. Wheeler?

16 MR. WHEELER: Inconsistent with -- I'm
17 agreed with that.

18 THE COURT: All right. Granted.

19 MR. PARKS: C is along the --

20 MR. WHEELER: Profile --

21 THE COURT: Granted.

22 MR. PARKS: D, I withdraw. E, the person
23 who says this is not on the State's witness list. I'm
24 assuming that's not going to be an issue.

25 MR. WHEELER: I don't see how I can get

1 that testimony in, but I have given notice on Misty
2 Burns about putting her there. We sent it over, and if
3 it's not in the file -- I believe it was sent over. And
4 I give notice on the record here prior to jury selection
5 on Tuesday and prior to evidence beginning on Wednesday,
6 Misty Burns on the State's witness list, Misty Burns
7 will be testifying.

8 THE COURT: I'll just grant the motion in
9 limine, then.

10 MR. KING: Is she on there?

11 MR. WHEELER: Yes, we sent an addendum.

12 MR. KING: Who did you send it to?

13 THE COURT: If we have --

14 MR. WHEELER: It was sent to you.

15 THE COURT: If -- I grant the motion in
16 limine.

17 MR. WHEELER: We've been
18 anticipating -- she wrote a report that's been furnished
19 to the Defense. We'll been anticipating -- she's a
20 witness, so we'll designate.

21 THE COURT: I think we have already
22 addressed F, so that's granted.

23 MR. PARKS: Right.

24 THE COURT: G?

25 MR. PARKS: I don't know that there are any

1 of those. I'll just throw that --

2 MR. WHEELER: Content of any oral after
3 arrest?

4 MR. PARKS: Yes.

5 MR. WHEELER: We don't have any of those.

6 MR. PARKS: That's what I just said.

7 THE COURT: I'll grant it. If any come up
8 and you think you're going to have a basis, we need to
9 approach first.

10 All right. H?

11 MR. PARKS: I think the State --

12 MR. WHEELER: Agreed.

13 THE COURT: That's agreed, okay.

14 MR. PARKS: Then I filed this motion this
15 morning. That's rendered moot.

16 All right. I know there's a State's motion
17 to disclosure. We disclosed all our experts.

18 MR. WHEELER: And then for purposes of this
19 hearing and on the record, Tom Allen was designated, as
20 is set forth in the State's motion to exclude witnesses.
21 We understand that the Defense is not calling Dr. Tom
22 Allen in their case in chief.

23 With regards to the other two experts, Max
24 Courtney and Ed Hueske, Max Courtney is not going to be
25 called. Ed Hueske has been approved by this Court as an

1 expert and his opinions have been identified, and the
2 State has no further objection to Ed Hueske.

3 MR. PARKS: And there's no Ed Jones, we
4 just heard that.

5 MR. WHEELER: I'm not calling Ed Jones.

6 MR. PARKS: All right. Let's see, there is
7 this motion, and I think we've probably beaten this
8 motion to death already, informally. It's a motion to
9 suppress testimony concerning Defendant's state of mind
10 and to instruct the State's witness in regard to such
11 testimony. That's basically a motion in limine about
12 matters we've discussed.

13 MR. WHEELER: And we'll take that up after
14 voir dire.

15 MR. PARKS: After voir dire.

16 MR. WHEELER: Okay.

17 MR. PARKS: And we have the issue of --

18 MR. WHEELER: Have you had an opportunity
19 to sit down and review the photographs that --

20 MR. PARKS: Well, not the photographs that
21 you intend to offer.

22 MR. WHEELER: Okay. Why don't we hold that
23 until I've had a chance to sit down with Henry and see
24 what he's planning on putting in and then get a ruling
25 on it. We can argue what the caselaw is. The caselaw

1 stands on its own, and we've got an opinion out of the
2 Court of Appeals, but if we reach an agreement on
3 photographs, that might short circuit the motion.

4 MR. PARKS: I anticipate he's going to
5 offer --

6 MR. WHEELER: We're not going to offer
7 every photographs in our possession. We do agree about
8 that.

9 THE COURT: And, again, I know everyone's
10 going to be tired at that point. That's probably -- you
11 know, after voir dire --

12 MR. PARKS: That's a good time.

13 MR. WHEELER: Yes, sir.

14 THE COURT: Anything, then, that we need to
15 address at this point in time?

16 MR. PARKS: I don't have anything on my
17 list.

18 MR. WHEELER: Not from the State.

19 (End of proceedings.)
20
21
22
23
24
25

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

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22

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402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 4 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE	)	402ND JUDICIAL DISTRICT

VOIR DIRE

On the 19th day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

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

2 (Veinier panel sworn.)

3 THE COURT: Please have a seat.

4 All right. Now, ladies and gentlemen, the
5 first thing I cover is the qualifications. That's
6 partly because that's when everybody should be the most
7 alert and this is the part that I have to have the
8 answers on if you're not qualified. Let me run over
9 these questions and make sure that you understand them.

10 First is: Except for failure to register,
11 are you a qualified voter under the Constitution and the
12 laws of the State of Texas? You must be able to answer
13 that question "yes".

14 Please note what that is not asking. It's
15 not asking are you registered to vote. It's not asking
16 did you vote in the last election. It's not asking
17 whether you plan to vote in the next election or whether
18 you believe in voting or anything else. It's asking you
19 about the qualifications to vote at this point in time
20 in this location or in this county.

21 In other words, are you qualified under the
22 laws to be registered to vote in Wood County, Texas, at
23 this point in time. So it has got to do age. It has to
24 do with -- it's also got a lot of overlap. It's got to
25 do with residence. It's got to do with whether you're a

1 a convicted felon. It's got all kinds of things that
2 overlap with others, but that's what it's asking,
3 whether you are qualified to register.

4 Now, the next question: Have you ever been
5 convicted of theft or any felony? You must be able to
6 answer that question "no".

7 I mentioned felony earlier. Crimes come in
8 two categories: Misdemeanors, which are the less
9 serious crimes, and felonies, which are the more serious
10 crimes. Any felony conviction will disqualify you as a
11 juror. Theft can be a misdemeanor or a felony at
12 various levels depending on the value of the property in
13 the theft, but all thefts are crimes of moral turpitude,
14 and the Legislature, in its wisdom, has said that any
15 theft conviction, including misdemeanor theft, will
16 disqualify you to serve as a juror in a criminal case.
17 If you've got any sort of theft conviction, regardless
18 of the level, you can't answer it in the manner
19 required.

20 The next question is related to the last
21 one, and it is: Are you under indictment or legal
22 acquisition or on deferred adjudication for theft or any
23 felony?

24 Same categories of crimes. This is just
25 three ways that you can presently be charged with a

1 theft or with a felony without yet being convicted, so
2 you must be able to answer that question, no, that you
3 are not currently under such charges.

4 I always this next question: You are
5 presently insane? And you must be able to answer that
6 "no".

7 You are 18 years of age or older? You must
8 be able to answer that question "yes".

9 Are you a citizen of Texas and a resident
10 of Wood County? You must be able to answer that
11 question "yes".

12 Now, that's sounds pretty simple, but in
13 Wood County, that can be a pretty dicy question.
14 Winnsboro, of course, sits in two counties and abuts
15 against a third and isn't very far from a fourth. You
16 can have a Mineola address and be over the line in Smith
17 County and, of course, Alba's got some of the same sorts
18 of problems.

19 The question is, you know, again: Are you
20 a citizen of Texas, which is as important as the rest,
21 but it's the rest that -- it's the residence in Wood
22 County is the problem. If you've got questions as to
23 whether you reside in Wood County, I'm going to need to
24 visit with you because you must be able to answer the
25 question, yes, that you are a citizen of Texas and a

1 resident of Wood County.

2 Are you of sound mind and good moral
3 character? You must be able to answer that "yes". I
4 don't know if anyone will disagree with you on that one,
5 but you're called upon to answer that in good faith.

6 And then: You are able to read and write
7 the English language? You must be able to answer that
8 question "yes".

9 And finally: Have you served as a petty
10 juror or a trial juror -- in other words, the kind of
11 juror that sits in the jury box and listens to the
12 evidence. Have you served as a petty juror for six days
13 during the last three months in county court or six days
14 in the last six months in district court?

15 Now, in urban counties, that can get more
16 complicated where you have county courts of law, but
17 here, we just have one county court. Judge Jeanes is
18 the judge of that court. The question is: Have you
19 served for more than three days in the last six months
20 in county court -- this is the district court -- or more
21 than six days during the last six months here in
22 district court as a trial juror? Now, that's -- and you
23 must be able to answer, no, that you have not.

24 That's the list of qualifications. I'm not
25 asking anyone to answer that list at this point in time,

1 but if anybody needs me to explain any of those
2 qualifications more completely at this point, I'd be
3 happy to attempt that. Does anybody need any more
4 further explanation?

5 Again, if you can't answer that in the
6 manner required, I will need to visit with you.

7 (No response.)

8 THE COURT: Seeing no hands, let me move to
9 the exemptions. First: If you are over 70 years of
10 age, you can claim that as an exemption. I just need to
11 get your name off the list, but that's your choice. It
12 does not disqualify you in any way. We'd be happy to
13 have you stay and serve.

14 The next exemption is: If you are a person
15 who has legal custody of a child or children under the
16 age of 15 years and jury service would necessitate
17 leaving that child or children without adequate
18 supervision. If both parts apply to that and you wish
19 to claim that as an exemption, you're welcomed do that.
20 Again, I just need to hear from you about that and get
21 your name off the list.

22 Similar to that is: If you are a person
23 who is the primary caretaker of someone who is an
24 invalid, unable to care for himself or herself, and
25 that's not the way you earn your living, then you may

1 claim that as an exemption.

2 Obviously, if you're an employee of a
3 nursing home and you'd be caring for people who are
4 invalids, not able to take care of themselves, your
5 employer is expected to be able to fill that vacancy if
6 you're called in for jury service, but if this is not
7 the way you're earning your living and that person is
8 depending on you providing them services and there's not
9 anybody taking your place, then you may do that.

10 If you are a person who is a student in a
11 public or private secondary school such as a high
12 school, then you may claim that as an exemption and
13 avoid jury service.

14 And if you are a person who is enrolled in
15 an institution of higher education such as a college or
16 university, then you may claim that as an exemption if
17 you wish. If you want to skip class and blame it on the
18 court, why then, you can do that too.

19 Finally, if you are a -- this is a pretty
20 narrow category, but I've had this claimed once or
21 twice, I guess: If you are a person who is an officer
22 or employee of the Senate, the House of Representatives,
23 any department, commission, board, office, or other
24 agency in the Legislative branch of government, then you
25 may claim that as an exemption. That's the first of the

1 exemptions.

2 Again, I'm not asking anybody to answer
3 those right now, but does anybody need any further
4 explanation?

5 The final category is hardships. Again,
6 that's simply the authority that the Court has to
7 recognizes that there's something seriously going on in
8 your life that would justify avoiding jury service at
9 this time or in rare occasions period. It's not totally
10 unlimited authority. For example, if your only hardship
11 is that serving as a juror at this point in time would
12 cause you severe economic hardship and there's nothing
13 else, all I can do is sympathize with you and tell you
14 I'm so sorry your name came up in the computer, but I
15 don't have the authority to release you from jury
16 service, but don't try to prejudge your situation. If
17 you've got a problem that you think ought to release you
18 from jury service, the time to talk to me about it is
19 going to be now.

20 I will, as we go through the process of
21 jury selection, at various points tell little brief
22 stories to illustrate points where we've had problems in
23 the past, and I've found that if I'll do that, it --
24 it -- you get an awful lot of instructions and it's real
25 to sort of float over people's heads sometimes, but if I

1 will stop and illustrate points where we've had
2 difficulties in the past, I found that I don't tend to
3 have those problems again.

4 This is one of the first stories. It's my
5 least favorite one. It illustrates this point to the
6 fact that if you've got a hardship, now is the time I
7 need to hear about it, not later, because what is easy
8 to be done now becomes more difficult later.

9 This was several years ago. If the lady
10 has been called in as a juror since then, I wouldn't
11 recognize her if I saw her at this point. I don't
12 remember her name. I'm going to call her Ms. Smith, and
13 I apologize to any Smiths out there.

14 Now, she appeared to be a very nice
15 responsible and respectable lady, but she has a hardship
16 and she did not bring it to my attention at this point
17 in time. Her hardship -- I don't remember the exact
18 reason, but I think she had an appointment with a doctor
19 in Tyler on Wednesday at 1:00 for a biopsy, I believe,
20 but it was something that certainly when I did hear
21 about it, regarded it as serious and I thought she
22 should have been able to do that.

23 She didn't tell us about it at this point.
24 She told us about it when she heard her name called as
25 the 11th member of the jury. At that point, she got

1 very upset and explained that she just couldn't serve.
2 We were picking a jury on a Monday then and that she
3 had -- she had to be there.

4 Well, that's a rather delicate time in jury
5 selection. The attorneys have relied on who's out there
6 and it's real easy to commit reservable error at that
7 point. And so I just -- rather than try to deal with it
8 right then, I just told her to come up and have a seat
9 and don't cancel your appointment and we'll see what we
10 can do.

11 I should have gotten back to her after that
12 and I didn't, and I'm perfectly happy to take
13 responsibility for that, but I did get with the
14 attorneys. I really thought we were going to be through
15 before then and -- but we had arranged that if we
16 weren't, to go ahead and released the jury on Wednesday
17 afternoon and come back Thursday if we had to and let
18 her make her appointment.

19 I should have let her know that. I didn't.
20 We wrapped it all up about 10:30 or 11:00 on Wednesday
21 morning, and when I was releasing the jury, I told her,
22 I said, Ms. Smith, you're going to make that
23 appointment, and she said, well, I've already cancelled
24 it.

25 Again, that's where I should have

1 communicated with her, but if you've got a problem,
2 don't wait to find out whether you're going to be
3 selected as a juror. Let me know about it up front so I
4 can deal with it. And again, I -- I may not agree with
5 you. I may say, sorry, you need to go ahead and serve
6 or I may say, I'm sorry, I don't have the authority to
7 release you, but I can't exercise that discretion unless
8 I know about the problem.

9 All right. Now, when you
10 come forward -- understand the way the roll is counted
11 here is by filling out that information card. So
12 everybody who's filled that card out and handed it in
13 has registered being present, and if you're going to be
14 released, we must get your name struck from the list;
15 otherwise, you're going to be receiving a real nasty
16 letter from me and have an opportunity to contribute to
17 the general welfare of the county.

18 So the first thing I need to know if you're
19 coming up is I need to have your number on the summons
20 card. That's the part of the card that did not have all
21 the information that you filled out. Most of y'all will
22 still have that. If you don't, why -- but at any rate,
23 if you do have that, I need that number and then I need
24 your last name, and then Jenica will get you located on
25 the list and then I'll visit with you about what -- the

1 facts about why you're not qualified, if you want to
2 claim an exemption, or talk to me about a hardship
3 whatever.

4 If you don't have that number, then I just
5 need your full name and we'll have to look you up. It
6 takes a while because the names are not in alphabetic
7 order. They're in this random order that the computer
8 has imputed and selected and it's the reason that you're
9 here.

10 But at any rate, this is the time -- if you
11 couldn't answer one of those qualifications questions in
12 the manner required or if you wish to claim an exemption
13 or if you wish to talk to me about a hardship, now is
14 the time to come forward and do that.

15 Good morning. What's that number?

16 VENIREPERSON: 154.

17 THE COURT: 154. And what's the last name?

18 VENIREPERSON: Wetzork, W-e-t-z-o-r-k.

19 First name, Katherine with a "K".

20 THE COURT: Yes, ma'am. What can I do for
21 you? Be careful there, that's her microphone.

22 VENIREPERSON: I apologize. I have a
23 little problem with getting rides. Is there someone who
24 could get me if I have to serve because all my friends
25 work, and the one that brought me today, she can't

1 continually take time to bring me. All of my other
2 friends work.

3 THE COURT: And the simple answer to that
4 is that probably we can if we had to. I mean, the
5 Sheriff's Office is a little bit shorthanded, but
6 basically have a deputy that could --

7 VENIREPERSON: Okay. Good. Otherwise,
8 that could cause a problem.

9 THE COURT: All right. Stay with us.

10 VENIREPERSON: Okay.

11 THE COURT: Yes, ma'am. What's that
12 number?

13 VENIREPERSON: I don't have my number.
14 It's Pamela Sue Harrison.

15 THE COURT: 209. Yes, ma'am.

16 VENIREPERSON: I own my own business. I'm
17 the only one that runs it. I own the diner in Golden
18 and I totally shut down today. If I don't open, I lose
19 everything, so...

20 THE COURT: Ms. Harrison, if you were
21 serving as a juror thinking about the fact, you know,
22 being totally shut down, is that something that would
23 interfere with your ability to listen to the evidence
24 and it will be distracting you?

25 VENIREPERSON: No, no, it wouldn't. No.

1 It's just my business. It's my only income. My
2 husband's retired.

3 THE COURT: That's one of those that if
4 that's all that's there --

5 VENIREPERSON: Yeah.

6 THE COURT: -- that's one of those things
7 that I just don't have the authority to release you.

8 VENIREPERSON: All right. Okay. Thank
9 you.

10 THE COURT: Stay with us.

11 Yes, sir. What's that number?

12 VENIREPERSON: 126.

13 THE COURT: 126. What's the last name?

14 VENIREPERSON: Byrd, B-y-r-d. Sorry.

15 THE COURT: Byrd?

16 VENIREPERSON: B-y-r-d.

17 THE COURT: Yes, sir.

18 VENIREPERSON: In 1982, when I lived in
19 Steward, Florida, I had a trespassing charge filed
20 against me, and I don't know how the outcome came out
21 because I never came to court and I don't know if it's
22 going to -- you know, they have different --

23 THE COURT: I would --

24 VENIREPERSON: See, I was with a buddy and
25 he took care of it and I never heard anything, so I

1 don't know if they pleaded no contest or --

2 THE COURT: I would say that a trespass is
3 typically going to be a misdemeanor. I would have a
4 hard time believing it was a felony.

5 VENIREPERSON: I have no idea.

6 THE COURT: But you never appeared in
7 court?

8 VENIREPERSON: No, I didn't.

9 THE COURT: You didn't pay a fine?

10 VENIREPERSON: The guy that I was with took
11 care of it.

12 THE COURT: I think you're bound to be safe
13 on that, so stay with us.

14 VENIREPERSON: All right.

15 THE COURT: Yes, sir. What's your number?

16 VENIREPERSON: Jimmy Martin.

17 THE COURT: What's the number?

18 VENIREPERSON: 66.

19 THE COURT: Yes, sir. Mr. Martin, what can
20 I do for you?

21 VENIREPERSON: I have arthritis and it's
22 making my back, you know, sit still because it hurts. I
23 can't really concentrate when I sit a lot.

24 THE COURT: You think that would be
25 something that would make it really hard on you?

1 VENIREPERSON: Yes, sir.

2 THE COURT: All right. Mr. Martin, I'm
3 going to go ahead and excuse you.

4 VENIREPERSON: Thank you so much.

5 THE COURT: You're free to go.

6 Yes, ma'am. What's that number? 190.

7 VENIREPERSON: My hardship is not --

8 THE COURT: Last name?

9 VENIREPERSON: R-o-l-i-n-g. I'm a nurse
10 case manager and I have appointments scheduled to go
11 with clients to doctor's appointments. I mean, it's
12 okay with me, but they're going to miss me.

13 THE COURT: Yes. You don't have anybody
14 they can substitute?

15 VENIREPERSON: I'm self employed. I run my
16 own business. I'm the only one. I did mark off today,
17 but then these things can -- I'm into next week, so I
18 don't mind serving, but --

19 THE COURT: Let me ask you this: If you
20 were serving as a juror and you were aware of the fact
21 that people were not getting to where they would need to
22 be, would that be something that would distract you and
23 interfere with --

24 VENIREPERSON: It's not my ability to earn
25 a living. I can do without, but these people --

1 THE COURT: Well, that would be something
2 that would make it difficult for you to focus on the
3 evidence?

4 VENIREPERSON: I have to say no.

5 THE COURT: Okay. Then stay with us.

6 VENIREPERSON: Okay.

7 THE COURT: Sorry.

8 That's 223. The last name is?

9 VENIREPERSON: Hooker.

10 THE COURT: Ms. Hooker, what can I do for
11 you?

12 VENIREPERSON: I can answer -- I don't
13 think I can answer "no" on the felony because I had a
14 hot check, so I don't know if that would be under it or
15 not.

16 THE COURT: It concerns me because the
17 checks -- typically checks can be charged two ways:
18 Either as, you know, insufficient check, which can be a
19 criminal matter, or it can be done as a theft by check,
20 which then comes a theft offense which disqualifies you.
21 Do you have any idea which way it was?

22 VENIREPERSON: I have no idea. I made it.
23 I mean, it was through here, but I don't -- I think it
24 was under the theft. I don't think it was --

25 THE COURT: You think it was a theft by

1 check?

2 VENIREPERSON: Yeah.

3 THE COURT: Then I'll find that you are

4 disqualified and release you. Thank you, ma'am.

5 VENIREPERSON: Do I just leave?

6 THE COURT: You're free to go, yes, ma'am.

7 Yes, ma'am. What's that number?

8 VENIREPERSON: 114, Debbie Last.

9 THE COURT: Yes, ma'am. What can I do for

10 you?

11 VENIREPERSON: I'm not qualified. I'm on

12 deferred adjudication.

13 THE COURT: For a felony?

14 VENIREPERSON: Yes, sir.

15 THE COURT: All right.

16 VENIREPERSON: One more year, then I'll be

17 done.

18 THE COURT: Thank you, Ma'am.

19 What's the number?

20 VENIREPERSON: 91.

21 THE COURT: 91. Last name?

22 VENIREPERSON: Brandt.

23 THE COURT: Sorry?

24 VENIREPERSON: Brandt.

25 THE COURT: B-r --

1 VENIREPERSON: a-n-d-t.
2 THE COURT: Yes, ma'am.
3 VENIREPERSON: I have charges.
4 THE COURT: They are --
5 VENIREPERSON: They're in a different
6 state, but --
7 THE COURT: They're currently pending?
8 VENIREPERSON: No, they're not pending.
9 THE COURT: But it was a conviction?
10 VENIREPERSON: Uh-huh.
11 THE COURT: Okay. Thank you, Ma'am.
12 VENIREPERSON: And do I --
13 THE COURT: You're free to go.
14 VENIREPERSON: Okay. Thank you.
15 THE COURT: What's your number?
16 VENIREPERSON: I don't know.
17 THE COURT: What's the full name?
18 VENIREPERSON: Philip Fullington.
19 THE COURT: Philip what?
20 VENIREPERSON: Fullington.
21 DISTRICT CLERK: Philip Scott?
22 VENIREPERSON: Yes, ma'am.
23 THE COURT: 203.
24 VENIREPERSON: I cracked my tooth. I was
25 going to go to the dentist, but --

1 THE COURT: It's hurting?
2 VENIREPERSON: Yeah. I think it might be
3 abscessed.
4 THE COURT: I'll just set you over.
5 VENIREPERSON: It's a hardship?
6 THE COURT: You'll get to come back and
7 deal with it later.
8 VENIREPERSON: Thank you.
9 THE COURT: Thank you, sir. It will be
10 about a month.
11 Yes, sir.
12 VENIREPERSON: 155.
13 THE COURT: Last name?
14 VENIREPERSON: Price.
15 THE COURT: Yes, sir. Mr. Price, what can
16 I do for you?
17 VENIREPERSON: I have a misdemeanor theft.
18 THE COURT: Conviction?
19 VENIREPERSON: (Moving head up and down).
20 THE COURT: Okay. Thank you, sir.
21 Yes, ma'am. It's 156.
22 VENIREPERSON: Yes, sir.
23 THE COURT: What's the last name?
24 VENIREPERSON: Jones.
25 THE COURT: Yes, ma'am. What can I do for

1 you?

2 VENIREPERSON: I have a seven year and a
3 nine year old. I worked at Raines I.S.D. I live in
4 Yantis, and my kids go to school in Raines and my
5 husband is butcher. He has to be at work very early.
6 Honestly, sir, I don't know how I'm going to get back to
7 school for a week because I do work there. That's why
8 they go to school there.

9 THE COURT: And so the problem is --

10 VENIREPERSON: And my.

11 THE COURT: -- how you're going to get them
12 to school?

13 VENIREPERSON: Yes, sir, because my nearest
14 relative is in Winnsboro, but my mom works at the school
15 and she can't take them because she drives the school
16 bus and --

17 THE COURT: She can't?

18 VENIREPERSON: Yes, sir.

19 THE COURT: Can they not ride the school
20 bus?

21 VENIREPERSON: No, sir, the school bus from
22 Raines doesn't come out to Yantis.

23 THE COURT: All right.

24 VENIREPERSON: I'm sorry.

25 THE COURT: Well, I'm just go to release

1 you.

2 VENIREPERSON: I apologize. Maybe next
3 time.

4 THE COURT: Yes, ma'am.

5 VENIREPERSON: Thank you.

6 THE COURT: Yes, ma'am. What's that
7 number?

8 VENIREPERSON: 214.

9 THE COURT: Last name?

10 VENIREPERSON: Davis.

11 THE COURT: Yes, ma'am.

12 VENIREPERSON: I have an appointment
13 scheduled for Thursday. It's been scheduled since
14 December.

15 THE COURT: I'll set you over and let you
16 come on back.

17 VENIREPERSON: Okay.

18 THE COURT: It would be in about a month.

19 VENIREPERSON: Okay. Thank you.

20 THE COURT: Good morning.

21 VENIREPERSON: Good morning.

22 THE COURT: What's that number?

23 VENIREPERSON: 204.

24 THE COURT: 204. Last name?

25 VENIREPERSON: Sanchez. I had cataract on

1 my eye and I can't wear my glasses and I can't see too
2 good.

3 THE COURT: If I set you over, Ms. Sanchez,
4 for about a month --

5 VENIREPERSON: Yes.

6 THE COURT: -- will you have a better guess
7 as to whether you can see better?

8 VENIREPERSON: Yes. Yes, I sure will.

9 THE COURT: I'll just treat that as a
10 hardship and set you over and see you in about a month.

11 VENIREPERSON: Thank you.

12 THE COURT: Thank you.

13 Good morning. What's that number, 218?

14 VENIREPERSON: Uh-huh.

15 THE COURT: Last name?

16 VENIREPERSON: Wright.

17 THE COURT: Yes, ma'am. What can I do for
18 you?

19 VENIREPERSON: I have got -- I have no
20 hearing. I have trouble distinguishing when there's
21 several -- everything that's going on.

22 THE COURT: All right. The acoustics Texas
23 in the courtroom are not good, so I'm going to go ahead
24 and excuse you.

25 VENIREPERSON: Thank you. I appreciate it.

1 THE COURT: Yes, ma'am. That number is
2 181. What's the last name?

3 VENIREPERSON: Johnson.

4 THE COURT: Yes, ma'am. What can I do for
5 you?

6 VENIREPERSON: I have a degenerative disc.
7 It goes all the way down to my tailbone and I cannot sit
8 very long.

9 THE COURT: Okay.

10 VENIREPERSON: Do I have to get a doctor's
11 excuse?

12 THE COURT: If you were selected, I could
13 put you back in the row and you could stand up if you
14 needed to. Would that make any difference?

15 VENIREPERSON: No.

16 THE COURT: Or --

17 VENIREPERSON: Yes, it's --

18 THE COURT: -- is it too painful and it's
19 going --

20 VENIREPERSON: Yes, sir, I can't do it.

21 THE COURT: All right. Then I'm just going
22 to release you.

23 VENIREPERSON: Thank you very much.

24 THE COURT: Yes, sir. What's that number?

25 VENIREPERSON: 42.

1 THE COURT: Last name?

2 VENIREPERSON: Westbrook.

3 THE COURT: Yes, sir. What I can do for
4 you?

5 VENIREPERSON: Well, my wife has to finish
6 all of her chemo and radiation and I have to take her
7 back and forth to Tyler --

8 THE COURT: Okay.

9 VENIREPERSON: -- for her appointments.

10 THE COURT: Yes, sir. Now, if I set you
11 over --

12 VENIREPERSON: And also, I own my own
13 business and I cannot -- I have to be in Georgia next
14 Sunday.

15 THE COURT: If I set you over --

16 VENIREPERSON: Maybe just what case falls
17 in -- you know what I mean?

18 THE COURT: I'm going to release you at
19 this time.

20 VENIREPERSON: Okay.

21 THE COURT: You'll get a notice to come
22 back in about a month.

23 VENIREPERSON: All right.

24 THE COURT: Thank you, sir.

25 Good morning. What's that number?

1 VENIREPERSON: 53.

2 THE COURT: 53. What's that last name?

3 VENIREPERSON: Rwen, R-w-e-n.

4 THE COURT: Yes, sir.

5 VENIREPERSON: Sir, I have a -- I'm running
6 a fever. I'm not feeling well right now.

7 THE COURT: Yes, ma'am. I'm going to set
8 you over and let you come back in about a month.

9 VENIREPERSON: Thank you, sir.

10 THE COURT: All right. Ladies and
11 gentlemen, in just a minute, we're going to take -- have
12 a recess, and when you come back, you will be seated in
13 order and those numbers will be different than the ones
14 you had on your summons card. We'll start seating on
15 the North on the front row. There will be five people,
16 then seven in the center and five and doing that until
17 everybody is seated.

18 When you come back, you will need to leave
19 the first couple of rows empty because the bailiffs will
20 be putting out these individual identification devices,
21 as you can see a model of them there. It's a very
22 sophisticated device consisting of -- I used to call
23 them Popsicle sticks and the bailiff corrected me and
24 said it was a tongue depressor, which is a much more
25 substantial base for that, and, of course, a piece of

1 cardboard and a number on it. And then, of course, as
2 the first row fills up, empty the third row, and so on.
3 It's a little bit like musical chairs. I'm always
4 amazed as well as it works.

5 It does help if you will listen for your
6 number as well as your name. The only problems we run
7 into it on this is -- Jenica has gotten where she's a
8 little faster and faster, and sometimes 13 will get
9 there before 12 and sit in No. 12's spot and Mr. Smith
10 and Mr. Jones will be answer to the information because
11 the attorneys will have it in the order we think it's
12 going to be, so if you think somebody's in the wrong
13 seat sitting in your seat, please stop the process and
14 draw it to everybody's attention and get it straightened
15 out and make sure we got it right, but that's generally
16 the only problem we run into on that.

17 I am going to give you some basic
18 instructions at this point for you to remember. These
19 will carry for all the time you're serving on the jury
20 panel or it will also continue if you are selected as a
21 member of the jury. These basic instructions are that
22 you should not talk to one another or to let anyone talk
23 to you about anything that might be related to the case
24 that's going to be tried.

25 Now, I hadn't called the case, so you

1 probably don't know what the case is, but you might.
2 And if you think you do, don't talk to anybody about it,
3 and if somebody thinks they do and they're talking to
4 you about it, you need to report that to the bailiff or
5 to me at once.

6 Now, that sounds like a real simple
7 straightforward instruction, but this is actually where
8 I started this process of telling stories because we had
9 a problem. I probably hadn't been on the bench a year
10 when this happened and it involved a lady that I had
11 known before I had gotten on the bench.

12 I had represented her or her husband on
13 some minor matters. Didn't know her real well, but knew
14 who they were and knew her personality. She was full of
15 life. As the old song says, she walked on the sunny
16 side of life. Observed everything. She thought all of
17 life was grand soap opera. I know she liked to watch
18 them.

19 She sat out here in the center section on
20 the front row on the second seat on the north and was
21 listening. She had been there and was listening to the
22 voir dire examine when the attorneys are supposed to be
23 talking about cases like the one that was being tried,
24 but not the one on trial. Sometimes they get into a
25 little more detail than they should have.

1 She hadn't heard a shred of evidence, but
2 her mind had been whirling. And as they got -- the
3 attorneys went out to make their strikes, which, again,
4 is kind of a delicate stage of the proceedings, she
5 turned to the person next to her and told her who did
6 what to whom and why. It was all, you know, pure
7 speculation, but the person she talked to didn't know
8 that. She spoke as someone with authority.

9 We got into a downward spiral at that point
10 into a situation where we declared a mistrial, but I
11 did -- and I held her in contempt. I didn't put her in
12 jail. I was convinced there was no evil intent on her
13 part, just a failure to follow instructions. I did
14 charge her a significant fine to help compensate the
15 taxpayers for the cost of the jury, but it was just a
16 drop in the bucket about the actual cost of running a
17 trial.

18 At any rate, I told her that I would take
19 her story and try to use it as illustrating this point,
20 and it has really worked very well. I will say that I
21 have never known any member of the jury panel or the
22 Veinier who has sat out here and deliberately tried to
23 violate instructions and mess things up, but it's pretty
24 easy with as many instructions as they're given not to
25 talk about the case.

1 It's -- you know, the experience that
2 everybody is going through is what you have in common is
3 what you're going through right here and it's common to
4 want to talk about that. You know, if you want to talk
5 about how badly the Cowboys played, but they had a
6 pretty season than usual, that's fine. If you're really
7 brave, you can opine whoever's -- what's going to happen
8 in Massachusetts today. Maybe you'll get lucky with who
9 agrees with you, but whatever you're doing, don't talk
10 about anything that might be, you know, involved in
11 thinking that could be going on with this case. That is
12 absolutely forbidden, but if you hear somebody doing
13 that to you, then, again, you need to report it to the
14 bailiff or to me.

15 Similarly, you need to avoid any appearance
16 of impropriety. If you see an attorney that you know
17 and that attorney just sort of passes by, maybe says
18 good morning, he's obviously trying to avoid getting
19 into a conversation, they're not trying to be rude,
20 they're simply trying to avoid any problem involved in
21 the case that might be on trial this week.

22 If anybody tries to do favors for you,
23 thank them, but don't accept those favors. Don't offer
24 to do any favors. Like Caesar's wife, not only should
25 you be pure, but to appear to be pure, and lawyers get

1 real paranoid when they might be involved somewhere. So
2 be sure to be careful in whatever you're doing, and if
3 you see something that disturbs you, don't hesitate to
4 report it.

5 If you'll bear all those instructions in
6 mind and be back here -- I think that clock is pretty
7 accurate. I try to get my watch rear close to it. Use
8 that clock as your guide -- be back here at 10:15. We
9 should be ready to start seating people at that point.
10 We're in recess at this time.

11 (Recess taken from 9:51 a.m. to 10:23.)

12 (Venire panel seated.)

13 THE COURT: And, Jenica, thank you very
14 much.

15 At this time, then, let me call Cause No.
16 20,529-2008, styled State of Texas versus Jason Thad
17 Payne.

18 What says the State?

19 MR. WHEELER: Ready.

20 THE COURT: What says the Defendant?

21 MR. PARKS: Defense is ready, Your Honor.

22 VOIR DIRE EXAMINATION

23 BY THE COURT:

24 All right. Ladies and gentlemen, we're
25 about to start that phase of the trial known as the Voir

1 Dire Exam. I want to take just a brief time to go over
2 some basic principles of criminal law and ask you some
3 questions about that, and then the State's attorney will
4 have an opportunity to go over that and then the Defense
5 will have an opportunity to go over that and ask you
6 questions as well.

7 I want to remind you first that the oath or
8 affirmation that you took earlier applies to this phase
9 of the trial. It is absolutely incumbent on you that
10 you fully answer questions that you're asked. Don't
11 hold anything back from embarrassment or just lack of
12 interest. Our system is based on the assumption that
13 the members of the jury panel will, in good faith,
14 follow the instructions that you're given.

15 I told you that the whole system, that
16 the -- they follow the rules that the Court will be
17 giving you. There's not any hidden or secrete agendas.
18 It's exactly what's been set out, and it's really
19 designed and does work the way that, you know, it seems
20 to be working.

21 Let me start by talking about the term,
22 "voir dire". It is interesting in its own right. It is
23 an archaic French phrase dating back to the 11th Century
24 or 12th Century. The reason we have juries, as you all
25 have an opportunity to serve on, is because of the fact

1 that we derive our legal traditions from the English
2 common law.

3 We are the only legal system -- when I say
4 "we," I mean all of those legal systems that are based
5 on the English common law. We are the only system that
6 uses juries in this matter. There are a number of legal
7 systems in the world and I don't claim to be an expert
8 on all of them.

9 Most of Europe draws their legal traditions
10 from Roman law which doesn't use juries in this matter
11 and that will extend on through Russia and, of course,
12 much of Asia. And I wouldn't try to get into Chinese
13 law, but I will tell we are a unique system. Most of
14 the world doesn't use juries the way we do because it's
15 basic to our system.

16 The term "voir dire" probably dates to the
17 earliest development of the English common law. We
18 formally mark that as something that began with William
19 The Conqueror. He was, of course, the Duke of Normandy
20 in France. He conquered England and imposed this French
21 speaking nobility on England and for about 200 years the
22 king's courts were conducted in French.

23 Of course, today it would be an archaic
24 phrase and the word "voir dire" is a holdover from all
25 of that. They used juries dramatically different than

1 they do now, but the fact that we have juries dates to
2 the fact that they use juries and the use of jury
3 service has evolved.

4 What juries do is, they are the people who
5 listen to the evidence and who decide the disputed facts
6 between the parties, and in carrying out that duty, they
7 are sovereign. The jurors, in listening to that
8 evidence, have the right to apply their common sense to
9 the evidence they hear.

10 And if they've got a witness, for example,
11 on the stand testifying, each individual juror can
12 listen to that witness and believe everything that
13 witness says or they can believe that witness is lying
14 and not believe a word they're saying or they can
15 believe that witness doesn't know what he or she is
16 talking about and not believe a word they say; they can
17 believe the witness is right on this part and mistaken
18 or inaccurate on some other part. In other words, you
19 can believe all, some, or none of what a witness says to
20 you.

21 The same goes with exhibits admitted into
22 evidence. If you're selected as a juror, you can't
23 consider anything that's not admitted into evidence
24 because that comes into the court's role. My job is to
25 see to it that the case is tried in accordance with the

1 law.

2 In connect with that, I'll give the members
3 of the jury various instructions as we go through. One
4 of those instructions may be to disregard what you just
5 heard. What that means is not that you didn't hear it,
6 it just means it is not evidence. The Court has ruled
7 it's not evidence, and, therefore, you can't consider it
8 in reaching your verdict.

9 Now, I'll just tell you that's something
10 that sounds kind of illogical. A lot of people like to
11 make lots of jokes about it. It's something I do all
12 the time. When I'm called on to do a hearing where we
13 don't have a jury present, if something is brought out
14 that is not something that I can base a decision on,
15 I've got to set that off to the side and not consider
16 it. As I say the system is designed to work exactly the
17 way it works. If you're selected as juror, listen to
18 what you hear. It's going to be your job at the end of
19 the trial to reach a verdict and to decide the disputed
20 issues based on what evidence has been presented to you.

21 Now, before I go further, I just want to
22 talk to you a little about some basics of criminal law
23 because I think they're often misunderstood. I think
24 you've all heard these phrases before. I don't think
25 there's anyone here who's not going to hear something

1 for the first time, but it kind of hides in plain sight.
2 I think there's a misunderstanding of the rules and how
3 we apply them.

4 We are a society that engages in a lot of
5 sports, and the essence of sports is the fact
6 that -- you know, we talk about a level playing field,
7 and just in case, you know, a football field is not
8 completely level, the teams change ends every quarter or
9 to make up for the fact that the wind may be blowing
10 from one direction. The basketball goal is the same end
11 on both sides, and, again, they change ends there.

12 We talk about everything being even.
13 Criminal cases don't work like that at all. Everything
14 is not even. Criminal cases are the State's case. It
15 is the State's burden. The State brings the charges.
16 It's the State's burden to prove those charges and those
17 are specific charges that the State has brought and each
18 of those charges have certain elements they must prove
19 before the Court on that particular day.

20 Whatever the elements of that offense are
21 as set out in the indictment, that's what the State has
22 to prove, and they have to prove each element of that
23 beyond a reasonable doubt. So that's what we call,
24 taking it all together, the State's burden of proof. It
25 is both a matter of bringing the evidence forward and

1 bringing it forward in sufficient quantity to constitute
2 proof beyond a reasonable doubt, and it's got to bring
3 it forward as to each of the elements of the offense.

4 Now, that's what the State has to do. If
5 the State does that, the State should get a verdict of
6 guilty. If the State doesn't do that, there should be a
7 verdict of not guilty.

8 Now, this is probably the first broad
9 misconception: Criminal trials are not about whether
10 the defendant is innocent. We use that term. Criminal
11 trials are about whether the State has met its burden of
12 proof or not, whether the State has proved the defendant
13 guilty as charged. So it's really all the State's
14 trial. The State either meets that burden or the State
15 doesn't meet that burden, and that's what juries are
16 called upon to do. So you reach a verdict of guilty if
17 the State has met it's burden or a verdict of not guilty
18 if the State hadn't met that burden.

19 The defendant can do -- the defendant has
20 the same right to subpoena witnesses and to put on
21 evidence the state Does. The defendant has no
22 obligation to do it. If the State chooses not to put
23 anything on, then it's all over with and the only proper
24 verdict is not guilty. If the defendant doesn't put on
25 any evidence, that doesn't change the fact the jury has

1 to decide whether the State has proved its case or not,
2 so that's what makes it so unlike a sporting event.

3 And before I get into specifics, let me
4 just cover some other points: I'm going to ask you
5 about what you think of different elements in terms of
6 the law, and I want you to look deep into your own
7 values in terms of what the true answers are. You will
8 hear people say, and I'll be the first one to do it,
9 there are no right answers or wrong answers for people
10 serving on a jury.

11 Now, what that really means, you know,
12 there is the law. I'm going to ask particularly about
13 that. People also have opinions about things that
14 aren't the law. The law is what it is, and it's my job
15 to see to it the case is tried in accordance with it,
16 but nobody here has to agree with it. Sometimes I don't
17 agree with what the law is, but it is what it is.

18 But if you don't agree with it, well, I
19 need to know that and particularly if you disagree with
20 something I'm asking you about, that it would offend
21 your conscience to follow that law. No one's asking you
22 to act contrary to your conscience. You don't have to
23 act against your beliefs. If it's something that's
24 going to be offensive to your conscience, I need to know
25 that. And if you don't understand it, you need to let

1 me know you don't understand. You know, when you're
2 answering the questions, I need to know that's, in fact,
3 the answers. That's sort of the layout of what we're
4 talking about here.

5 But on this point of the burden of proof, I
6 usually like to do a little exercise. I didn't invent
7 this. It's been around for a long time. It's not
8 really intended to, you know, make anybody look bad, but
9 it's the best way I know to illustrate the point.

10 I'm going to pretend for a moment, based on
11 the principles of law we talked about, that we're going
12 to move forward and speed this case along and ask
13 everybody -- instead of getting 12 jurors, I'm just
14 going to ask if you had to vote right now, how many of
15 you would find the Defendant guilty? Hold up your
16 cards.

17 (No response.)

18 THE COURT: Not seeing any.

19 How many of you would find the Defendant
20 not guilty if you had to vote right now?

21 (No response.)

22 THE COURT: Not seeing a single one.

23 How many of you think you hadn't heard
24 enough evidence, yet?

25 (Response from panel.)

4 Let me try this again: Criminal cases are
5 about whether the State has proved its case. Charges
6 are brought by the State. They define what the
7 defendant is charged with and they have certain
8 elements. The State either proves each of those
9 elements beyond a reasonable doubt, comes forward with
10 the proof -- I do admit I didn't get the State to do it
11 in this little exercise, but in the trial, if they prove
12 them beyond a reasonable doubt; in which case, if they
13 do that, they're entitled to a guilty verdict and it's
14 proper for a jury to return it, or if they don't do
15 that, then the proper verdict is not guilty.

25 Let me talk a little bit about what that

1 standard of prove is. And I'll just tell you right now
2 that whenever there is a legal definition for a term or
3 a word or a phrase, I'll give you instructions on what
4 that word or phrase means in terms of a legal
5 definition, and if you have that, then you need to
6 forget about every other meaning. You apply it to that
7 word or phrase and just use the one that I give you.

8 If I don't give you a legal definition,
9 then there's not a legal definition. In that case, one
10 of the qualifications was that you understood the
11 English language. You're just required, then, in good
12 faith to apply your understanding of what those
13 definitions mean and do that.

14 Now, beyond a reasonable doubt is kind of
15 an obvious phrase on its face. It does not have a legal
16 definition under the laws of the State of Texas. It
17 means something that's proved beyond a reasonable doubt
18 to the contrary.

19 Now, it is the highest level of proof that
20 we have in our legal system. It's higher than you have
21 in various kinds of circumstances. In an ordinary civil
22 case, we'd use proof beyond a reasonable doubt, so the
23 plaintiff or the party bringing the lawsuit has to prove
24 that their version is, more likely than the other
25 version of what happened.

1 Then you've got another standard of proof
2 that's used in certain restricted civil case which is
3 proof by clear and convincing evidence, which is higher
4 than preponderance of the evidence, but it's lower than
5 proof beyond a reasonable doubt. So it's the highest
6 level of proof that we have in our legal system, but,
7 again, I don't want to confuse you on it. It's not
8 proof beyond all doubt. The State does not have to
9 prove someone guilty beyond all doubt. They just have
10 to prove someone guilty beyond a reasonable doubt.

11 Now, if I can give you a clearer definition
12 than that, I would, but I will simply say that if you're
13 selected as a juror, it will be your job in good faith
14 to apply that standard as you understand it in light of
15 the evidence that you hear.

16 So let me just ask you: Is there anybody
17 here either as to the fact that it's the State's duty to
18 come forward with the evidence, and if they don't come
19 forward with the evidence, they can't prevail, or that
20 is so offended by the idea that that has to be proof
21 beyond a reasonable doubt, that your conscience would be
22 troubled and you would have difficulty applying either
23 of those principles of law if you were selected as a
24 juror, if either of those points are things that would
25 cause you trouble or if you have any questions about

1 them, I need for you to go ahead and hold your --

2 Yes, ma'am, No. 41.

3 VENIREPERSON: [Inaudible].

4 THE COURT: Let me ask you to stand. That
5 might help, and then, of course, speak up if you will.
6 Just repeat what you were --

7 VENIREPERSON: There's so many people that
8 have been put in jail and later found out that they were
9 innocent. I don't know if I could say someone was
10 guilty and then later find out that they weren't. I
11 think that would really bother me.

12 THE COURT: And what you're saying
13 basically is that you just have a hard time, then --

14 VENIREPERSON: Saying guilty or not guilty.
15 What I'm saying if they're not guilty --

16 THE COURT: You would have --

17 VENIREPERSON: -- I would have a hard time
18 sending them to jail, and if they were guilty, I would
19 have a hard time with whatever they did and then proving
20 beyond any doubt whatsoever.

21 THE COURT: Yes, ma'am. And I think I
22 understand your concern, but I just want to understand:
23 You're saying you would have a hard time one way or the
24 another applying the standard of proof?

25 VENIREPERSON: Yes, sir, I would.

1 THE COURT: And it's something such that
2 you wouldn't be able to do that?

3 VENIREPERSON: Yes, sir.

4 THE COURT: I want to use you. I'm not
5 trying again to embarrass you. I'm going to use you as
6 an example. This is the sort of thing if someone feels
7 that way, I need to know it.

8 And I appreciate you letting me know your
9 feelings. Sometimes people -- and you can go ahead and
10 have a seat.

11 VENIREPERSON: Thank you.

12 THE COURT: Sometimes people are
13 embarrassed, you know, to stand up and say what they
14 think, but that's what I talk about in voir dire. It's
15 the origins of -- it's what it means. It means to speak
16 the truth. And this is the opportunity to let us know
17 what your feelings are, and so I very much appreciate
18 you bringing that to the Court's attention and letting
19 me know that.

20 Is there anybody else?

21 VENIREPERSON: Yes, I feel, like, the same
22 way. If --

23 THE COURT: That you would not be able to
24 follow -- to hold the State to its burden of proof
25 or -- more or less.

1 VENIREPERSON: Yes, I would.

2 THE COURT: Thank you, Ma'am.

3 That's No. 17.

4 Anybody else that would have a problem with
5 the standard of proof that's provided?

6 (No response.)

7 THE COURT: All right. Let me go to
8 another point here: This is really -- I always think of
9 this as the other side of the coin of the State's burden
10 of proof. It's just another way of saying the same
11 thing, but it's often stated independently; and that is,
12 you've heard it that someone is presumed innocent.
13 You've heard about the presumption of innocence.
14 Technically, they're presumed to be not guilty until the
15 State has proven them guilty beyond a reasonable doubt,
16 and it's one of these things, again, we've heard so
17 much.

18 It's often misused. It's a phrase that
19 applies to criminal cases and only to criminal cases.
20 Probably the most commonplace I hear it, and I don't
21 know whether that's where you hear it, but if somebody
22 in the entertainment industry gets caught doing
23 something they shouldn't be doing and it may or may not
24 be a crime, their friends are more concerned popularity
25 and the other way is when politicians get caught doing

1 something embarrassing, all their friends immediately
2 get on the air and talk about, well, they're presumed to
3 be innocent until proven guilty.

4 Well, you can presume anybody's innocent
5 outside a criminal case, but the only place where it
6 really has any teeth is the fact it applies to the way
7 we try criminal cases. There is such a thing as
8 presumption of innocence or at least a presumption of
9 not guilty. Innocence in a criminal case -- innocence
10 really means not guilty. These are distinctions.

11 You can think of innocence in the way that
12 God sees things and that's a whole different concept.
13 Here is the State. The person is presumed to be
14 innocent or not guilty until the state has proved them
15 to be guilty beyond a reasonable doubt as to each of the
16 elements, but that's a presumption that goes with a
17 defendant until that burden has been met by the State.

18 Again, I don't think I'm really telling you
19 anything new that I didn't tell you earlier, but it's a
20 different way it's phrase and a common way it's phrase
21 and a way to sum it up real quick.

22 But is there anybody who has problems in
23 following -- you know, your conscience would not permit
24 you to follow those instructions if you sat as juror?

25 (No response.)

1 THE COURT: Is there anybody else?

2 VENIREPERSON: I think I might have a
3 little problem.

4 THE COURT: This is No. 50.

5 VENIREPERSON: I've seen or in my
6 experience, most people do not get arrested unless -- it
7 would color my -- I'm not -- it would differently color
8 it.

9 THE COURT: Is that something you would
10 likely to take with you into the jury room so that the
11 State would be starting ahead before --

12 VENIREPERSON: Yeah.

13 THE COURT: -- before you could consider
14 your verdict?

15 VENIREPERSON: Yeah, I think so.

16 THE COURT: All right. And, again, I just
17 want to -- I appreciate and thank everybody who let's me
18 know what their thoughts are. This is the whole idea.

19 Jury panels are not made up robots, and
20 just because the Legislature says you must go into it
21 with yours brains and everybody has the right to think
22 what they think, and that's the reason we have this
23 question and answer period.

24 All right. There's another
25 principle that's related to the State's burden, you

1 know. It's not -- it's a different -- it has a lot of
2 different elements as well. And that is the fact that
3 when someone under our legal system is charged with a
4 crime, they have the right to remain silent. And they
5 can testify if they want to. Nobody can keep them from
6 testifying, but if they choose not to, they have the
7 right to remain silent, and that is not something the
8 State can use to meet its burden of proof.

9 In other words, it's not evidence of guilt
10 and cannot be considered as such and, in fact, if you're
11 selected as a juror, you would even be instructed -- and
12 if a defendant didn't testify, you would be instructed
13 that you couldn't even talk about it in the jury room as
14 well as consider it.

15 Now, this is sometimes phrased the other
16 way around, and that is: If you were selected as a
17 juror, are you going to need to hear from the defendant?
18 And if you don't hear from the defendant, is that
19 something you're going to carry with you in the jury
20 room?

21 So when I ask you the question, is there
22 anything in your value system that is so offended by
23 this principle of law that a defendant has the right to
24 remain silent and cannot be compelled to testify; and if
25 the defendant chooses not to testify, that is no

1 evidence against them and you can't even talk about it;
2 included in that thinking about it the other way that,
3 you know, if you don't hear something from the
4 defendant, is that something that's going to bother and
5 carry -- are you going to give it some weight?

6 Now, thinking of it from both standpoints,
7 is this concept of law something that's going to offend
8 anybody's values such that it creates a problem for
9 them?

10 Yes, sir. No. 24. And I haven't been
11 calling y'all's names out, I apologize. I've got a
12 list, but I don't have it all laid out, but that's
13 Mr. Taylor.

14 Mr. Taylor --

15 VENIREPERSON: Right.

16 THE COURT: -- when you're saying that that
17 would bother you, what you're saying is that that would
18 be something you wouldn't be able to put out of your
19 mind and you think --

20 VENIREPERSON: Right, I would want to hear
21 a response -- [inaudible].

22 MR. WHEELER: Judge, we cannot hear.

23 THE COURT: Let me ask you speak up.

24 VENIREPERSON: I said that's correct, I
25 would want to know their point of view versus what the

1 attorneys or whoever is saying about the case.

2 THE COURT: And I thank you very much,
3 Mr. Taylor.

4 Is there anybody else that feels that way?

5 No. 2, that's Ms. Rhodes.

6 Yes, ma'am. And are you saying that is
7 something you wouldn't be able to put out of your mind?

8 VENIREPERSON: That is correct.

9 THE COURT: And it would be something you
10 would take back to the jury room and influence your
11 verdict?

12 VENIREPERSON: It possibly could.

13 THE COURT: All right. Thank you, Ma'am.

14 Yes, No. 45. That is Ms. Miranda.

15 Yes, ma'am.

16 VENIREPERSON: Yes. I feel the same way.

17 I would want to hear from the defendant and get their
18 side of the story, too, and that would definitely
19 influence me if they did not speak to or answer any
20 questions.

21 THE COURT: Thank you, Ma'am. I appreciate
22 that.

23 No. 15?

24 VENIREPERSON: I feel the same way, I would
25 want to hear their side.

1 THE COURT: You wouldn't be able to put it
2 out your mind?

3 VENIREPERSON: No, sir.

4 THE COURT: Very well. I appreciate that.
5 Anybody else?

6 (No response.)

7 THE COURT: All right. I've got sort of a
8 similar point I want to cover. It's not breaking a
9 whole lot of new ground: If you serve as a juror, you
10 will be instructed that a grand jury indictment is not
11 evidence, cannot be considered as adding any weight or
12 helping the State prove its case.

13 A grand jury indictment is the method by
14 which -- it serves several purposes: One is to
15 determine whether there's probable cause to believe that
16 a crime occurred in Wood County or wherever the county
17 is that the grand jury sits on and there's probable
18 cause to believe that a particular person did it.

19 It sets forth what the crime is and what
20 the elements are, and so the State then knows what it
21 has to prove and the defendant knows what he or she is
22 defending against. It's not a trial. And probable
23 cause is below any of the levels of proof we've talked
24 about earlier. And just to understand it, it's not
25 unusual for grand juries to return 30, 40 -- I've seen

1 60 or 65 indictments in a single day.

2 So that -- again, grand juries are not
3 conducting trials. This is the trial. Grand juries
4 determine whether there's probable cause and then to set
5 it up so we can have a trial, but if you're selected as
6 a juror, you will be instructed that you cannot consider
7 that grand jury indictment as any evidence against the
8 defendant. You can't give it any weight to help the
9 State meet its burden of proof.

10 Some people will take the position, again,
11 where there's smoke, there's fire, and I wouldn't be
12 able to put that grand jury indictment out of my mind.
13 So, again, I want to ask a similar question here: Is
14 there anybody who would not be able, in good
15 consideration, to follow that instruction, that you can
16 not give any weight to the indictment who hasn't already
17 talked to me about something similar to this? If so, I
18 need for you to hold up your cards.

19 Yes, 57. That's Mr. Ferguson.

20 Yes, sir.

21 VENIREPERSON: Yes, sir. I just -- I
22 really don't think I would be able to put it out of my
23 mind, a grand jury indictment. I feel like where
24 there's smoke, there's a good possibly of fire.

25 THE COURT: You think it would be something

1 you would be carrying back with you in the jury room?

2 VENIREPERSON: It would on my mind.

3 THE COURT: That the State would
4 effectively be starting out ahead?

5 VENIREPERSON: It might. I can't say for
6 sure, but it might.

7 THE COURT: I'm going to use you as an
8 example and save the attorneys some time. There's
9 nothing more common with people in talking about these
10 sorts of things, like, I'm not sure about or I would try
11 not to, but it could, and that sort of thing, that
12 probably accurately reflects what they're thinking. The
13 problem is the Court needs to know up or down. And when
14 there's an answer that equivocates, then it's basically
15 not an answer.

16 And so either I will keep asking, and later
17 when the attorneys are asking, they will keep asking
18 until the only situation is -- you need to, sort of,
19 look into your soul and try to decide because you know
20 what you're thinking more than we do which is the more
21 likely answer that's correct and give that as your
22 answer.

23 So understanding that, I'm asking you to
24 tell me one way or the other that it will or it won't.
25 Which one is it that you think is the correct answer,

1 that it will be something that you carry back in the
2 jury room so the State starts out ahead, or will you be
3 able to set it aside and give it no weight?

4 VENIREPERSON: I would have to say it
5 would, to be fair.

6 THE COURT: All right. And I thank you for
7 that answer and I appreciate it, sir.

8 Anybody else?

9 (No response.)

10 THE COURT: The only other thing I want to
11 cover before I hand this over is the fact that sometimes
12 the questions will be embarrassing, and the attorneys
13 are not trying to ask anything embarrassing, but if it's
14 embarrassing to you, you don't have to do that.

15 I'm going to have a list of people who are
16 asking to approach the bench. If that comes up, all you
17 have to do is say, I'd like to approach the bench on
18 that one, and I'll put your number down. If you're
19 still within the reach of someone that's selected, I'll
20 give you an opportunity to -- you still have to answer
21 the question, but you're going to be answering it among
22 a much smaller group and not in front of the entire
23 panel.

24 Now, the more common situation where this
25 is used is but to simply answer the question, you're

1 going to be basically turning yourself into a witness.
2 And the best way I know to illustrate this is to take a
3 hypothetical and say we've got -- let's say this is a
4 civil case involving a car wreck and you were being
5 asked, do you know Joe Blow.

6 And you know Joe blow. He used to be your
7 brother-in-law. You never knew him to drive sober in
8 his life, and even if he had been sober, you know, he
9 couldn't drive straight anyway. He's the sorriest
10 driver you ever saw. He was a danger. Never knew how
11 he got a license in the first place. And furthermore,
12 he mistreated your baby sister, and most of his time,
13 you know, he was out of work and sleeping on your couch,
14 and you would love to tell people about that.

15 Well, that's fine. And if you're asked how
16 do you know Joe Blow, you're going to be obligated to
17 answer that question. The lawyers need to know what you
18 think about Joe Blow and what you know about him, but
19 the rest of the jury panel doesn't because you're really
20 getting -- you're becoming a witness, then, with the
21 credibleness of other witnesses, and that's something
22 that needs to be taken care in a different form and in a
23 different manner.

24 So you all have a sense of what's
25 appropriate and what's inappropriate because you have an

1 obligation to fully and completely answer the questions,
2 and in order to do that, to answer a question you're
3 asked you're going to be getting into something you
4 think is inappropriate, then you what need to do in that
5 situation is simply say, Judge, I'd like to approach the
6 bench on that, and I'll put your number down. And,
7 again, if you're still in the zone of range, you'll get
8 a chance to talk about it. Never fail to answer just
9 because what you say might make someone unhappy. You
10 might get into whatever -- but you don't have to do it
11 in front of the whole group.

12 Let me introduce the attorneys at this
13 point: Representing the State of Texas is your elected
14 criminal district attorney, Jim Wheeler. And as we've
15 noted for a long time, the term criminal is not intended
16 to be a reflection on his character; it has do with the
17 misdemeanor jurisdiction that's part of his title.

18 Mr. Wheeler, I'll let you just introduce
19 your people whenever you get up.

20 And then representing the Defendant, Doug
21 Parks and Larry King.

22 MR. PARKS: Good morning.

23 THE COURT: And then the Defendant,
24 Mr. Payne.

25 Mr. Payne, let me get you to stand so they

1 can see you. Jason Payne there at the end of the table.

2 All right. In all things, the State goes
3 first because they have that burden of proof.

4 So Mr. Wheeler, if you're ready to go, you
5 may do so?

6 VOIR DIRE EXAMINATION

7 BY MR. WHEELER:

8 May it please the Court?

9 THE COURT: Yes, sir.

10 MR. WHEELER: Hello, I'm Jim Wheeler. I'm
11 the district attorney. Working with me today will be
12 Joey Fenlaw and Henry Whitley.

13 Okay. Let's get you familiar with your
14 surroundings a little bit. This is Una Garland. Una is
15 the court reporter. I have a wife that's been a court
16 reporter for about 20 years.

17 If you say in response to my question,
18 "uh-huh," she will write, "u-h," dash, "h-u-h," and when
19 the Court of Appeals reads it, it will mean nothing, so
20 you have to say, "yes". If you have to say, "no," and
21 you use the phrase, "huh-uh," that's, "h-u," dash,
22 "h-u-h". That's what she'll write, and the Court of
23 Appeals will not understand it as "no," so you have to
24 answer your questions "yes" or "no" for Ms. Garland, and
25 you have to answer loud enough for her to be able to

1 write it because this record is something that other
2 courts look at.

3 Let me explain to you a little bit how the
4 trial will proceed beginning with the voir dire process.
5 The first three words of the United States Constitution
6 are, "We The People..." That means that all power of
7 the government of the United States and of this state,
8 the State of Texas, belongs to you. So when somebody
9 starts pointing fingers and saying, "The government,"
10 just remember, we the people means that's you. What it
11 means more importantly is that this case is your case.
12 It belongs to you, and you will decide guilt or
13 innocence if you're selected for this jury.

14 Here, we discuss principles of law
15 truthfully and we discuss your views and attitudes about
16 these principles and we get to know you a little bit.
17 This is where you get to talk.

18 This case is a capital murder case. The
19 Defendant is Jason Thad Payne. In the Texas Penal Code
20 murder is described this way: A person commits an
21 offense if he intentionally or knowingly causes the
22 death of an individual. This case is a capital murder
23 under 19.03, and it is a capital murder case if a person
24 murders more than one person during the same criminal
25 transaction. That's what we're here for.

1 The allegation is that Jason Thad Payne
2 murdered Austin Taylor Wages and Nichole Payne on or
3 about December 11th, 2007. That's why we're here. And
4 what I'm putting up is the penal code section that
5 describes what murder is.

6 We start this way during voir dire: A
7 courtroom is a place where justice takes place. Both
8 sides deserve a fair trial, so we'll start with the
9 people that are involved, and I'm going to ask some very
10 specific questions of you. Remember this as we begin:
11 They are no right answers. You can't please everybody
12 with your answers. You have to answer truthfully just
13 the way you feel, what you know.

14 There are no wrong answers. There are, in
15 cases like this, embarrassing answers or things that you
16 don't want to talk about in front of other people. If
17 you feel that way, please raise your card and say, I
18 would like to talk about this at the bench.

19 Let me give you an example of how something
20 can go that way where you want to talk at the bench:
21 Please raise your card if you personally have been a
22 victim of a violent crime. Raise it and hold it high.

23 Juror No. 20.

24 Anybody else on the panel that has been a
25 victim of a violent crime, please raise your card.

1 Number 39.

2 Anybody else that's been a victim of a
3 violent crime?

4 (No response.)

5 MR. WHEELER: Okay. Now, Juror No. 20, you
6 are Ms. Reimers; is that correct?

7 VENIREPERSON: Yes, sir.

8 THE COURT: Would you like to discuss that
9 at the bench?

10 VENIREPERSON: Yes, sir.

11 MR. WHEELER: Do you understand that there
12 are some things that have occurred that you want to talk
13 about those matters at the bench? Does everybody
14 understand that? If you understand that you may want to
15 talk about something at the bench, raise your card.

16 (Response from venire panel.)

17 Okay. I see just about every card.

18 Now, I have been in a jury where, when
19 talking about witnesses, a person has hollered out, I'd
20 kill the sorry guy myself. When the judge talks about
21 jurors being witnesses, that is testifying to somebody's
22 character in front of the rest of the panel and that is
23 wholly inappropriate.

24 If you have sentiments along those lines,
25 if we're going to have a fair trial, I ask you to raise

1 your card and approach and not, sort of, shout those
2 sentiments out instead of trying to sway your fellow
3 jurors. If you can promise me you can do, that raise
4 your card.

5 (Response from venire panel.)

6 MR. WHEELER: I see all the cards.

7 Now, I asked about violent crime and that
8 was Juror Nos. 20 and 39.

9 Mr. Byrd, would you like to discuss your
10 matter at the bench?

11 VENIREPERSON: Yes, sir.

12 MR. WHEELER: Okay.

13 Please raise your card if you had been a
14 victim of crime?

15 (Response from venire panel.)

16 MR. WHEELER: Hold it up. I have to call
17 out your numbers. 4, 6, 7, 21, 30, 37, 40, 42, 45, 62,
18 63, 64, 66, 51.

19 Anybody else that's been a victim of a
20 crime?

21 (No response.)

22 MR. WHEELER: I see no other cards.

23 And I asked about you personally. How many
24 of you on this panel know someone who's been a victim of
25 a violent, know someone who has been a victim of a

1 violent or related to someone who has been a victim of a
2 violent crime? Raise your card.

3 (Response from venire panel.)

4 MR. WHEELER: Nos. 5, 6, 8, 21, 26, 30, 35,
5 36, 40, 53, 57, 61, 63, 66, 71, 73, and I missed No. 3.

6 Thank you, Mr. Gould.

7 I'll start with Mr. Gould: The situation
8 that you raised your card about --

9 VENIREPERSON: Yes, sir.

10 MR. WHEELER: -- that you know, know of, or
11 is related to someone who's been a victim of a violent
12 crime, is that something that's in your head?

13 VENIREPERSON: No.

14 MR. WHEELER: Is it something that you
15 would carry into the jury room?

16 VENIREPERSON: No, sir.

17 MR. WHEELER: Is it something that could
18 affect your deliberations in this case?

19 VENIREPERSON: No, sir.

20 MR. WHEELER: Thank you. I've got to ask
21 these questions.

22 No. 4 and No. 40, both have the last name.
23 Are y'all related?

24 VENIREPERSON: Husband and wife.

25 VENIREPERSON: 43 years.

1 MR. WHEELER: 43 years married. Now, in a
2 jury room, if I were in there with my wife and we
3 disagreed, that could lead to a permanent and
4 debilitating problem. Not really.

5 I do have to ask the question: You're
6 relatively close together. If you to end up on the same
7 jury panel, if that would happen, would that affect your
8 ability --

9 VENIREPERSON: Wouldn't bother me.

10 VENIREPERSON: I don't know. We've never
11 served. I just -- probably not.

12 MR. WHEELER: Could it pose any kind of a
13 difficulty in your service whatsoever?

14 VENIREPERSON: No.

15 MR. WHEELER: No?

16 VENIREPERSON: No.

17 VENIREPERSON: [Inaudible].

18 MR. WHEELER: We'll talk about domestic
19 issues here in a minute.

20 Juror No. 5 -- thank you. I appreciate it.

21 Mr. Altman, you know, know of, or related
22 to someone who was a victim of a violent crime?

23 VENIREPERSON: Yes.

24 MR. WHEELER: Would that affect your
25 deliberations?

1 VENIREPERSON: No.

2 MR. WHEELER: Is it something you would
3 keep completely out of your mind if you were on this
4 jury?

5 VENIREPERSON: Yes.

6 MR. WHEELER: Juror No. 6, Mr. Vallance,
7 have I pronounce your name correctly?

8 VENIREPERSON: Yes, sir.

9 MR. WHEELER: The experience that you have,
10 is that something weighs heavily on you?

11 VENIREPERSON: No, sir.

12 MR. WHEELER: Is it something you could get
13 out of your mind?

14 VENIREPERSON: Yes.

15 MR. WHEELER: Would it affect your
16 deliberations in any way?

17 VENIREPERSON: No, sir.

18 MR. WHEELER: Thank you.

19 Juror No. 8, Ms. Cummings, what you know or
20 know of, would that affect your deliberations?

21 VENIREPERSON: No, sir.

22 MR. WHEELER: Would you carry that
23 experience into the jury room with you?

24 VENIREPERSON: (Moving head side to side).

25 MR. WHEELER: Thank you.

1 Now, I can either say this over and over
2 repetitively or keep bothering you or you can raise your
3 card such that you will carry it into the jury room with
4 you.

5 No. 66, Mr. Capps.

6 Anybody else whether the experience is so
7 present in your mind, it's lingering in your mind so
8 significantly that you would carry it into the jury room
9 with you and it's something you couldn't clear out when
10 you consider this case? Please raise your card.

11 Mr. Capps, would you like to talk about
12 that matter at the bench?

13 VENIREPERSON: It doesn't matter.

14 MR. WHEELER: Okay. Mr. Capps, the
15 experience that you have, is it an experience that has
16 made a lasting impression on you?

17 VENIREPERSON: Yes, sir.

18 MR. WHEELER: Would it affect your
19 deliberations in this case if you were called upon to be
20 a juror?

21 VENIREPERSON: I don't really know what the
22 case is about, but, yes, I'm sure it would.

23 MR. WHEELER: It's something that you would
24 carry into the jury room and it would affect your
25 deliberations --

1 VENIREPERSON: Yes.

2 MR. WHEELER: -- this experience? Okay.

3 Thank you, Mr. Capps.

4 MR. PARKS: Excuse me, Jim. What number
5 was that?

6 THE COURT: No. 66.

7 MR. WHEELER: Does anybody on this panel
8 know -- do they know of or are they related to Joey
9 Fenlaw, Mr. Fenlaw here? Please raise your card. He is
10 an new attorney. He's from a family in Upshur County
11 that has been in that county for years and years. Is
12 anything related to Mr. Fenlaw that would affect you in
13 any way, please raise your card.

14 (No response.)

15 MR. WHEELER: Henry Whitley was a
16 prosecutor in the Dallas County District Attorney's
17 Office for several years. He's here in Wood County and
18 lives at Holly Lake. If you know, know of, or related
19 to Mr. Whitley, please raise your card.

20 (Response from venire panel.)

21 MR. WHEELER: I need you to hold them up,
22 please. No. 12, No. 30.

23 Anybody else know, know of, or related to
24 Henry Whitley?

25 Ms. Greer, knowing of him, would that

1 affect your deliberations in this cause?

2 VENIREPERSON: No.

3 MR. WHEELER: Would one side start ahead or
4 behind the other because you know him?

5 VENIREPERSON: No.

6 MR. WHEELER: Okay. Thank you.

7 Mr. Cathey, would knowing Mr. Whitley
8 affect your deliberations in this case?

9 VENIREPERSON: No.

10 MR. WHEELER: Would it cause you to have
11 any impartiality to one side or the other?

12 VENIREPERSON: No, sir.

13 MR. WHEELER: Thank you.

14 On the Defense side are Larry King, Doug
15 Parks, or Jim Brown, the investigator. If you know,
16 know of, or related to Larry King, please raise your
17 card.

18 (Response from venire panel.)

19 MR. WHEELER: Let me write down your
20 numbers: 9, 28, 30, 11, 47, 19, 37.

21 Any other cards?

22 No. 15, No. 17. Okay. Thank you.

23 Beginning with Mr. Reynolds, knowing of
24 Mr. King or knowing him, would that affect your ability
25 to be fair and impartial in this case?

1 VENIREPERSON: No, sir.

2 MR. WHEELER: Would one side start ahead of
3 or behind the other because you know him?

4 VENIREPERSON: No, sir.

5 MR. WHEELER: Juror No. 11, Ms. Ferguson?

6 VENIREPERSON: No.

7 MR. WHEELER: Okay. Thank you.

8 Juror No. 19, Mr. Vanderschaaf --

9 VENIREPERSON: No.

10 MR. WHEELER: -- knowing or knowing of him,
11 would that affect your ability to be fair and impartial?

12 VENIREPERSON: No.

13 MR. WHEELER: Anybody else that raised your
14 card that knowing or knowing of Mr. King would affect
15 you in any way?

16 VENIREPERSON: No.

17 VENIREPERSON: No.

18 MR. WHEELER: I see no more cards.

19 Better ask about myself: If you know, know
20 of, or related to me?

21 Nos. 3, 9, 47, 60.

22 Hi, Pat.

23 VENIREPERSON: Hi.

24 MR. WHEELER: Anybody else?

25 (No response.)

1 MR. WHEELER: All right. I would ask the
2 question, but I know y'all are on one side, so I won't
3 ask if it's good or bad, so we'll go on with jury
4 selection.

5 Doug Parks, do you know, know of, or
6 related to him, please raise your card.

7 Juror No. 45, Ms. Miranda.

8 Anybody else?

9 I have to ask this question: Have you ever
10 imagined what it would be like to try a jury trial and
11 find out that the lawyer on the other side, their first
12 cousin's on the panel or their spouse? You've got to
13 ask the question. You don't need that kind of surprise.

14 I'll ask you another surprise question.
15 I've asked this before: Raise your card if you're not a
16 citizen of Wood County? I have actually tried a case
17 and found out one of my jurors is not a resident of Wood
18 County. You do not want to be in that position at the
19 Court of Appeals. That's why you have to ask the
20 question.

21 Next: Jim Brown, if you know, know of, or
22 related to Jim Brown, please raise your card.

23 No. 30.

24 Anybody else?

25 Mr. Cathey, would that affect your

1 deliberations in any way?

2 VENIREPERSON: No.

3 MR. WHEELER: Okay. Thank you.

4 Like I said, a fair trial is what we have
5 in the United States, and when you have publicity on a
6 case, it can make things difficult for everybody
7 involved for trial in the case.

8 In this case, who has heard some report,
9 either by word of mouth or in the newspaper, about Jason
10 Thad Payne and this capital murder? Please raise your
11 card.

12 (Response from venire panel.)

13 MR. WHEELER: Need you to keep those up,
14 please. 7, 8, and 9. 13 and 14. 18 and 21. No. 30,
15 No. 47, 56, 58.

16 Who else?

17 69, 70, and 71. 66 and 68.

18 Beginning with Panel Member No. 7,

19 Ms. Terrell --

20 VENIREPERSON: Uh-huh.

21 MR. WHEELER: -- have you reached any
22 conclusions from what you've heard about this case?

23 VENIREPERSON: No. I mean, I heard about
24 it when it happened and I didn't even know it was being
25 tried until I showed up here today.

1 MR. WHEELER: Have you made up your mind
2 about any facts in the case?

3 VENIREPERSON: No.

4 MR. WHEELER: Will you set aside anything
5 you heard about the case?

6 VENIREPERSON: (Moving head up and down).

7 MR. WHEELER: Juror No. 8, Ms. Cummings,
8 from what source have you heard something about this
9 case?

10 VENIREPERSON: The murder?

11 MR. WHEELER: Uh-huh.

12 VENIREPERSON: At work.

13 MR. WHEELER: Have you heard about it at
14 work?

15 Have you made any decisions about the
16 facts?

17 VENIREPERSON: (Moving head side to side).

18 MR. WHEELER: Can you put anything out of
19 your mind that you've heard about this case?

20 VENIREPERSON: Yes.

21 MR. WHEELER: Juror No. 9, Mr. Reynolds,
22 you've heard about this case from the press or
23 otherwise?

24 VENIREPERSON: Yes, sir.

25 MR. WHEELER: Have you drawn any

1 conclusions from what you've heard about this case?

2 VENIREPERSON: No, sir.

3 MR. WHEELER: Would it influence -- what
4 you've heard, would it influence your verdict in any
5 way?

6 VENIREPERSON: No, sir.

7 MR. WHEELER: Can you set aside any
8 opinions you may have concerning what you've heard?

9 VENIREPERSON: Yes, sir.

10 MR. WHEELER: Thank you.

11 Juror No. 13, Ms. Hooks --

12 VENIREPERSON: Uh-huh.

13 MR. WHEELER: -- have you heard about this
14 case through the press or otherwise?

15 VENIREPERSON: Uh-huh.

16 MR. WHEELER: And having heard those
17 things, have you drawn any conclusions about the case?

18 VENIREPERSON: No.

19 MR. WHEELER: Has the coverage influenced
20 you or what you've heard influenced you in any way?

21 VENIREPERSON: No. It just upset me.

22 MR. WHEELER: Other than -- that's
23 influence.

24 VENIREPERSON: Right.

25 MR. WHEELER: Okay. If it upset you, it

1 influences you. The question is: The nature of your
2 emotional reaction of what you heard, is that something
3 you would carry into the jury room with you?

4 VENIREPERSON: No.

5 MR. WHEELER: Is it something that would
6 affect your deliberations?

7 VENIREPERSON: No.

8 MR. WHEELER: Is it something that would
9 cause you to favor one side or the other in this case?

10 VENIREPERSON: I can't honestly say yes or
11 no.

12 MR. WHEELER: Well, you heard the judge --

13 VENIREPERSON: Yeah.

14 MR. WHEELER: -- earlier when he said we
15 have to press you. That's not because we want to press
16 you --

17 VENIREPERSON: Right.

18 MR. WHEELER: -- it's because we have a
19 Court of Appeals that listens to these cases that
20 requires us to give a definitive answer.

21 VENIREPERSON: Maybe I should say "yes,"
22 then.

23 MR. WHEELER: Well, you have to tell the
24 truth, and if it would affect your deliberations, it
25 affects a fair trial. So if your emotional reaction is

1 such that you would carry that into the jury room and it
2 would affect your deliberations in a way where one side
3 starts off a little better than the other, we need to
4 know that now.

5 VENIREPERSON: Yes.

6 MR. WHEELER: Yes, what you've heard --

7 VENIREPERSON: Yes.

8 MR. WHEELER: -- would influence your
9 verdict?

10 VENIREPERSON: Yes, sir.

11 MR. WHEELER: Okay. Thank you. I'm an old
12 teacher and I have to make notes. I'm not grading you,
13 but I have to write things down or I won't remember.

14 Okay. Ms. Judkins --

15 VENIREPERSON: Yes.

16 MR. WHEELER: -- what you've heard about
17 this case from the press or otherwise, has, from what
18 you've heard, this information, caused you to reach some
19 conclusions?

20 VENIREPERSON: No, sir.

21 MR. WHEELER: Would it affect your verdict
22 in any way?

23 VENIREPERSON: No, sir.

24 MR. WHEELER: Is it something you would set
25 aside and put out of your mind?

1 VENIREPERSON: Yes, sir.

2 MR. WHEELER: Thank you, Ms. Judkins.

3 Juror No. 18, Mr. Johnson --

4 VENIREPERSON: Yes, sir.

5 MR. WHEELER: -- have you heard something
6 about this case from the press or otherwise?

7 VENIREPERSON: Yes, sir.

8 MR. WHEELER: What you've heard, has it
9 caused you to draw some conclusion about this case?

10 VENIREPERSON: Yes, sir.

11 MR. WHEELER: Would it influence your
12 verdict?

13 VENIREPERSON: Yes, sir.

14 MR. WHEELER: Is it something you would
15 carry in the jury room?

16 VENIREPERSON: (Moving head up and down)
17 yes, sir.

18 MR. WHEELER: And you can't get it out of
19 your head?

20 VENIREPERSON: No, sir.

21 MR. WHEELER: And that causes you not to be
22 able to sit as a fair and impartial juror in this case?

23 VENIREPERSON: Yes, sir.

24 MR. WHEELER: Okay. Thank you.

25 Juror No. 21, Ms. Thompson, have you heard

1 something about this case from the press or otherwise?

2 VENIREPERSON: Yes, sir.

3 MR. WHEELER: What you've heard, has it
4 caused you to draw some conclusion about the facts in
5 this case?

6 VENIREPERSON: Yes, sir.

7 MR. WHEELER: Is it something that would
8 influence your verdict?

9 VENIREPERSON: Yes, sir.

10 MR. WHEELER: Would you carry what you
11 heard into the jury room with you?

12 VENIREPERSON: Yes, sir.

13 MR. WHEELER: Would it affect your ability
14 to be a fair and impartial juror?

15 VENIREPERSON: Yes, sir.

16 MR. WHEELER: Okay. Thank you,
17 Ms. Thompson. I appreciate it.

18 Juror No. 30, Mr. Cathey --

19 VENIREPERSON: Yes.

20 MR. WHEELER: -- I'm going to ask you the
21 same series of questions. First, what you've heard
22 about this case, from whatever source, have you drawn
23 some conclusions about this case as a result?

24 VENIREPERSON: No.

25 MR. WHEELER: Is what you've heard

1 something that would you influence your verdict in any
2 way?

3 VENIREPERSON: No.

4 MR. WHEELER: What you've heard, is it
5 something you would carry into the jury room with you?

6 VENIREPERSON: No.

7 MR. WHEELER: Would you think about it at
8 all? Is it lingering in the woods there?

9 VENIREPERSON: No.

10 MR. WHEELER: Is it something you can and
11 will set aside?

12 VENIREPERSON: Yes.

13 MR. WHEELER: Okay. Thank you.

14 And this is probably an appropriate time,
15 before I go on, to remind you that the way a trial works
16 is a jury takes an oath, and you swear that the only
17 things you're going to consider are the evidence and the
18 witnesses. Do you understand? That means what comes
19 out of that chair right there and whatever tangible
20 things are offered and admitted into evidence.

21 What that means is, before I continue, that
22 what you've heard out of the papers or you heard some
23 other way is not evidence, so you don't consider it. It
24 also means that what the lawyers say, no matter how loud
25 we get -- what that's movie where they say, "I

1 strenuously object"?

2 An objection is a way to make a legal point
3 for the Court of Appeals, so if you hear a tone of
4 ridicule out of an attorney, that is not evidence and
5 that is something you do not consider. Having sat where
6 you're sitting, I guarantee, all you're going to hear is
7 the witnesses and hear the evidence, but what we say,
8 what anybody else says about the case, our tone of voice
9 is nothing for you to consider in your deliberations.

10 Juror No. 30, I've talked to Mr. Cathey.
11 Thank you.

12 Ms. Askins, did you raise your card?

13 VENIREPERSON: About what?

14 MR. WHEELER: About publicity.

15 VENIREPERSON: I don't think we lived here
16 in 2007, I don't think so.

17 MR. WHEELER: Okay. Well, I've got a
18 No. 4. Did No. 34 and a No. 24.

19 Mr. Helping, did you?

20 VENIREPERSON: Yes.

21 MR. WHEELER: And No. 34 -- well, let's
22 see.

23 MR. PARKS: Your next one was 47.

24 MR. WHEELER: 47, I didn't write the number
25 down.

1 No. 47?

2 VENIREPERSON: That's me.

3 MR. WHEELER: I had the four. That's

4 Ms. Thomas.

5 VENIREPERSON: Yes, sir.

6 MR. WHEELER: Have you heard about this

7 case?

8 VENIREPERSON: Yes, I have.

9 MR. WHEELER: The things that you've heard,

10 would you carry them into the jury room with you?

11 VENIREPERSON: I would have to honestly say

12 yes.

13 MR. WHEELER: Would that affect your

14 deliberations?

15 VENIREPERSON: Yes.

16 MR. WHEELER: And would it cause you not to

17 sit as a fair and impartial juror in this case?

18 VENIREPERSON: Yes.

19 MR. WHEELER: Thank you, Ms. Thomas.

20 No. 56 is Ms. Cue?

21 VENIREPERSON: Yes.

22 MR. WHEELER: Have you heard something

23 about this case from the press or otherwise?

24 VENIREPERSON: Yes.

25 MR. WHEELER: And what you've heard, has it

1 caused to you draw some conclusions about this case?

2 VENIREPERSON: (Moving head side to side).

3 MR. WHEELER: Would it influence your
4 verdict?

5 VENIREPERSON: No.

6 MR. WHEELER: The things you have heard,
7 can you set those aside?

8 VENIREPERSON: Yes.

9 MR. WHEELER: And can you base any decision
10 you make solely on the evidence and the witnesses you
11 hear?

12 VENIREPERSON: No.

13 MR. WHEELER: You wouldn't hear the
14 witnesses or the evidence?

15 VENIREPERSON: I heard it wrong. Repeat
16 it.

17 MR. WHEELER: You would listen to the
18 evidence and the witnesses?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Okay. Sorry, I wasn't
21 intending to trick you there. Thank you, Ms. Cue.

22 No. 58, Ms. Bridges --

23 VENIREPERSON: Yes.

24 MR. WHEELER: -- you've heard about this
25 case, haven't you?

1 VENIREPERSON: Yes.

2 MR. WHEELER: It would affect your verdict?

3 VENIREPERSON: Yes.

4 MR. WHEELER: And you can't put those

5 things out of your head, can you?

6 VENIREPERSON: (Moving head side to side).

7 THE COURT REPORTER: They need to speak up.

8 MR. WHEELER: Okay. And my court reporter,

9 Ms. Garland, my friend, has reminded me that we need to

10 have you speak up so we can make sure that she hears

11 you.

12 Juror No. 69, Mr. Harris --

13 VENIREPERSON: Yes, sir.

14 MR. WHEELER: -- have you heard something

15 about this case from the press or otherwise?

16 VENIREPERSON: Yes, sir.

17 MR. WHEELER: Has it caused to you reach

18 some conclusions about this case?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Would it influence your

21 verdict?

22 VENIREPERSON: Yes, sir.

23 MR. WHEELER: Would you carry those things

24 in the jury room with you?

25 VENIREPERSON: Yes, sir.

1 MR. WHEELER: And it would cause you to not
2 be able to sit as a fair and impartial juror?

3 VENIREPERSON: Yes, sir.

4 MR. WHEELER: Thank you.

5 Juror No. 70 --

6 VENIREPERSON: Yes.

7 MR. WHEELER: -- Ms. Allen, have you heard
8 something about this case from the press or some other
9 place?

10 VENIREPERSON: [Inaudible].

11 THE COURT: Ms. Allen, let me ask you to go
12 ahead and stand.

13 MR. WHEELER: Hi, Ms. Allen.

14 VENIREPERSON: Hi.

15 MR. WHEELER: Those things that you heard,
16 has it caused you to draw some conclusions about this
17 case?

18 VENIREPERSON: No, sir.

19 MR. WHEELER: Would it affect your
20 deliberations in any way?

21 VENIREPERSON: No.

22 MR. WHEELER: The things that you have
23 heard, can you put those things out of your mind?

24 VENIREPERSON: Yes.

25 MR. WHEELER: And can you promise to be a

1 fair and impartial juror?

2 VENIREPERSON: Yes, sir.

3 MR. WHEELER: Thank you, Ms. Allen.

4 Juror No. 71, Ms. Reeves --

5 VENIREPERSON: Yes, sir.

6 MR. WHEELER: -- I'm going to ask you the
7 same -- I think the judge would like you to stand so we
8 can hear you a little better.

9 VENIREPERSON: Okay.

10 MR. WHEELER: Now, I have to ask you if
11 whether what you've heard has caused you to reach any
12 conclusions about this case?

13 VENIREPERSON: Yes, it has.

14 MR. WHEELER: And the conclusions you
15 reach, would you carry those into the jury room?

16 VENIREPERSON: Yes.

17 MR. WHEELER: Would they affect your
18 deliberations?

19 VENIREPERSON: Yes.

20 MR. WHEELER: And would that cause you not
21 to be able to a fair and impartial juror?

22 VENIREPERSON: Yes.

23 MR. WHEELER: Thank you, Ms. Reeves.

24 Next is Mr. Clark. Did you raise your
25 card, Mr. Clark?

1 you heard, would it cause you not to be a fair and
2 impartial juror in this case?

3 VENIREPERSON: I think I'm always
4 impartial. I don't know.

5 MR. WHEELER: Well --

6 VENIREPERSON: I'll say "no".

7 MR. WHEELER: So you can't be impartial in
8 this case?

9 VENIREPERSON: I don't think so.

10 MR. WHEELER: Okay. Thank you, Mr. Capps.
11 I appreciate that.

12 And Juror No. 68 is Ms. Jackson. Those
13 things that you have heard, whether in the press or some
14 other place, have they caused you to reach any
15 conclusions about this case?

16 VENIREPERSON: Yes.

17 MR. WHEELER: And the conclusions you've
18 reached, would they influence your verdict?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Would you carry those into
21 the courtroom with you?

22 VENIREPERSON: Yes.

23 MR. WHEELER: And would that cause you to
24 not be able to sit as a fair and impartial juror in this
25 case?

1 VENIREPERSON: Yes, I'm afraid so.

2 MR. WHEELER: Would you favor one side over
3 another in this case?

4 VENIREPERSON: Yes.

5 MR. WHEELER: Thank you. Thank you,
6 Ms. Jackson.

7 Our system of justice --

8 VENIREPERSON: Mr. Wheeler, I raise my
9 card.

10 MR. WHEELER: I'm sorry. You're
11 Mr. Jackson.

12 VENIREPERSON: Yes, sir.

13 MR. WHEELER: You are related to
14 Ms. Jackson?

15 VENIREPERSON: No, sir.

16 MR. WHEELER: Okay. Now, what you've
17 heard, those things that you've heard, have you reached
18 any conclusions about the facts of this case?

19 VENIREPERSON: Yes, sir.

20 MR. WHEELER: Would it influence your
21 verdict?

22 VENIREPERSON: Yes, sir.

23 MR. WHEELER: Would you carry those things
24 you've heard into the jury room with you?

25 VENIREPERSON: Yes, sir.

1 MR. WHEELER: And would it cause you not to
2 be able to sit as a fair and impartial juror?

3 VENIREPERSON: Yes, sir.

4 MR. WHEELER: Thank you, Mr. Jackson. I
5 appreciate it.

6 Is there anybody else who has heard some
7 sort of press report or heard something from another
8 source that has caused them to judge some facts in this
9 case? Raise your card. Anybody else?

10 (No response.)

11 MR. WHEELER: I see no further cards.
12 Thank you.

13 Our system of justice in the United States,
14 when we had the American Revolution, we were under the
15 British system of justice. It's a little different
16 because that system of justice was confession based.

17 Now, raise your card if you've ever heard
18 of the rack?

19 (Response from venire panel.)

20 MR. WHEELER: What about the Spanish
21 Inquisition?

22 (Response from venire panel.)

23 MR. WHEELER: We have a little different
24 system of justice in the United States based on the
25 history we come from, and our system of justice is proof

1 based. What that means is convictions aren't based on
2 confessions, that they're based on evidence. And the
3 burden in the prosecution in this case is to prove to
4 you the case to the fact -- to the exclusion of a doubt
5 that's reasonable. If you've got a doubt, you have to
6 acquit. That's it. If you've got no doubt that's
7 reasonable, then you must convict; otherwise, we don't
8 have justice.

9 Let me put it a little more simply for you:
10 Too little justice results in anarchy in any civilized
11 society and too much justice results in tyranny. So
12 what you do, because this is your case, is you listen to
13 the facts and you decide based on those facts whether a
14 person is guilty or not guilty. You are justice in a
15 criminal case.

16 Now, we can stop and we can sputter and
17 talk about what your duty is all day, but it's better to
18 do it this way: How many of you have judged the
19 credibility of another person? Raise your card.

20 (Response from venire panel.)

21 MR. WHEELER: Okay. Now, I've judged
22 credibility of another person. Now, try it this way:
23 Raise your card if you believe children tell the truth
24 all the time?

25 (Laughter.)

1 MR. WHEELER: Nope? Okay. I see no cards.

2 Well, what that means is that at some
3 point, those of you who laughed and everybody else who
4 raised your card had to look at somebody and tried to
5 decide whether they're telling you the truth or not.
6 That's a common sense activity. You do it every day,
7 and if you're selected for this jury, you sit in that
8 box and do that job.

9 So question number one along those lines
10 when we start talking about the burden of proof is
11 knowing that your job is to assess credibility, you have
12 to start everybody off on equal ground, everybody. The
13 witnesses from the State of Texas side don't start off
14 in a worst position because it's a criminal case. They
15 start off equally as any other witnesses. The witnesses
16 for the Defense don't start off in a better position.
17 They start off equally.

18 Witnesses are just a blank slate when they
19 get on the stand. You can't give someone more or less
20 credibility. You can't when you're sitting on a jury
21 because that person is a priest or a police officer or
22 like that. You can't give someone more credibility.
23 You can't give them less until you hear about that
24 person's training, their education, their experience,
25 those things that are facts that start to build

1 credibility.

2 See, a person starts off on this level
3 playing field when they're in the witness box and you
4 start to hear the facts and then credibility starts to
5 build.

6 Does that sound reasonable, Ms. Cummings?

7 VENIREPERSON: Yes, sir.

8 MR. WHEELER: Okay. Can everyone promise
9 to start every witness off on an equal footing including
10 police officers, experts, priests? If you can't start
11 everyone on --

12 VENIREPERSON: Did you say --

13 MR. WHEELER: Can you start everybody -- if
14 you promise to start everybody off on equal footing,
15 raise your card.

16 (Response from venire panel.)

17 MR. WHEELER: All right. Now, if you can't
18 do that, if you can't make that promise, I need to see
19 your card.

20 (Response from venire panel.)

21 MR. WHEELER: No. 64, No. 24.

22 Anybody else that can't make that promise?

23 (No response.)

24 MR. WHEELER: Now, the first question I
25 have, Mr. Taylor, is: Do you find you can't sit in

1 judgment of another person?

2 VENIREPERSON: I can.

3 MR. WHEELER: You can? Well, knowing that,
4 then, do you find that some witnesses do not start off
5 in the same position as other witnesses?

6 VENIREPERSON: Yes.

7 MR. WHEELER: Is that because of some
8 personal experience that you've been through?

9 VENIREPERSON: Yes.

10 MR. WHEELER: Is it something you'd like to
11 discuss at the bench?

12 VENIREPERSON: Yes.

13 MR. WHEELER: Okay. And Juror No. 64, you
14 are Ms. Ballard?

15 VENIREPERSON: Yes.

16 MR. WHEELER: And similar questions: Do
17 you find that some witnesses do not start off in the
18 same position as other witnesses with you?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Would that affect your
21 ability to be fair and impartial?

22 VENIREPERSON: Yes.

23 MR. WHEELER: Is it something you would
24 like to talk about at the bench?

25 VENIREPERSON: Yes.

1 MR. WHEELER: Thank you. Thank you,
2 Ms. Ballard.

3 Okay. So you sit there and you listen and
4 you decide what the facts are and you judge credibility.
5 Well, that's really not the whole thing. You listen and
6 you've got to decide whether something is true or not,
7 but in this case, the State must prove beyond a
8 reasonable doubt that the Defendant committed the
9 offense of capital murder, which means that the State,
10 the prosecution has a significant burden, a burden which
11 we gladly accept because that's the way the system works
12 in the United States.

13 The evidence has to do more than simply tip
14 the scale in our favor. If this were a civil case, if
15 we proved a little bit more than -- we didn't prove that
16 he's guilty. That's not how it works in a criminal
17 case, okay? Instead, at the end of the presentation of
18 the evidence in this case, you must not have a
19 reasonable doubt about the Defendant's guilt for the
20 State to prevail.

21 Now, reasonable doubt is not defined in
22 Texas, which isn't so bad. I mean, you get to decide
23 what reasonable doubt is for you, right? It's not
24 defined. You know what kind of doubt is reasonable to
25 you. I can tell you that although we don't have an

1 official definition on reasonable doubt, that there are
2 some absolute certainties. It does not mean no iota of
3 a doubt.

4 Mr. Wilson, let me ask you this question:
5 How can you know 100 percent beyond all doubt that it's
6 raining outside?

7 VENIREPERSON: You get wet.

8 MR. WHEELER: You get wet, okay. Now, in a
9 criminal case if you come up and get in the witness box
10 and you say it was raining outside because I got wet,
11 that makes you a witness, doesn't it?

12 VENIREPERSON: Yes.

13 MR. WHEELER: You can't be a witness and be
14 a juror, can you?

15 VENIREPERSON: No.

16 MR. WHEELER: No.

17 Do y'all see the distinction? Do you see
18 the distinction that I just drew?

19 If you know 100 percent beyond all doubt,
20 if you have no iota of doubt in this case, you're a
21 witness. You're a witness. The system is not built on
22 putting 12 witnesses on the box and having them decide
23 guilt or innocence. It's built on blank slates and
24 hearing the evidence and deciding whether you have
25 reasonable doubt.

1 Now, beyond a reasonable doubt does not
2 mean convinced to a certainty because then you would be
3 a witness. It doesn't mean beyond a shadow of a doubt
4 because then you would be a witness. It does not mean
5 100 percent proof because you would be a witness if you
6 had 100 proof. You can see you may have doubt at the
7 end of this trial and that's normal in a criminal case.
8 The question, then, ultimately is: Is your doubt
9 reasonable? Is your doubt reasonable? I suggest that
10 the answer to this question you ask yourself -- well,
11 what do you ask yourself? What does the evidence show
12 me, evidence.

13 Now, let's break evidence down a little bit
14 for you because there are two types. We've talked about
15 you judging credibility and we talked about proof beyond
16 a reasonable doubt based upon the evidence and you're
17 the fact finders based on the evidence. What is
18 evidence? There are two kinds: There is circumstantial
19 evidence and there's direct evidence.

20 Mr. Vanderschaaf, a confession is direct
21 evidence, isn't it? That's somebody who was there and
22 participated, right?

23 VENIREPERSON: Yes.

24 MR. WHEELER: An eyewitness is direct
25 evidence, isn't it?

1 VENIREPERSON: Yes.

2 MR. WHEELER: A video of the criminal act,
3 that's direct evidence, isn't it?

4 VENIREPERSON: Yes.

5 MR. WHEELER: Yeah. Most cases don't have
6 that, you understand?

7 VENIREPERSON: Yes.

8 MR. WHEELER: You also understand that this
9 is a real live courtroom; this is not CSI on the T.V.
10 set?

11 VENIREPERSON: I understand.

12 MR. WHEELER: I don't have a redheaded guy
13 in Miami who's a super genius who comes along and does
14 every little test known to man, basically, and we've got
15 it 100 percent beyond all doubt forever. That's not the
16 way a criminal justice case works.

17 Beyond a reasonable doubt, that means most
18 criminal cases are built on a second thing, what's
19 called circumstantial evidence. Let me give you an idea
20 of what circumstantial evidence is: It's evidence that
21 tends to prove a fact by proving other events or
22 circumstances, evidence that proves circumstances, which
23 affords a basis for a reasonable inference that it's
24 reasonable to conclude that the occurrence of the fact
25 at issue actually happened.

1 Basically, it's building a wall out of
2 bricks. One brick alone doesn't make a wall, but you
3 put a bunch of bricks together and you use mortar and
4 you've got a wall and you know that beyond a reasonable
5 doubt. That's how circumstantial evidence works. And
6 I'll tell you more about circumstantial evidence versus
7 what we just talk about, this eyewitness stuff.
8 Circumstantial evidence, things, events, they just are.
9 They don't lie to you and they don't tell the truth.
10 They just are. So you're going to use the evidence in
11 this case and what you brought into the courtroom today.

12 Raise your card if you didn't bring common
13 sense with you today.

14 (No response.)

15 MR. WHEELER: You brought it. So you're
16 doing something you do every day, judge credibility.
17 You have your common sense, you have your life
18 experiences, and you have the evidence, and then you
19 decide whether a person is guilty or not guilty to the
20 exclusion of a reasonable doubt.

21 And I've seen this reasonable doubt defined
22 in terms of stairsteps, ladders. I could tell you that
23 beyond a reasonable doubt is past the horizon on out
24 there, but that wouldn't mean that I'm right, because
25 remember, reasonable doubt is in you.

1 Have we excluded it, that's the question.
2 If we exclude all reasonable doubt, you must convict;
3 otherwise, we don't have justice. If we don't exclude
4 all your reasonable doubt, then you must acquit;
5 otherwise, we don't have justice. And what do we have
6 to prove? We have to prove that on that board right
7 there, that Jason Thad Payne intentionally or knowingly
8 killed his two victims.

9 Notice some things I didn't tell you when
10 you're thinking about reasonable doubt. That's what I
11 have to prove. That's what I have to prove. I don't
12 have to prove how. I have to prove he killed them. I
13 don't have to prove how. I have to prove he killed
14 them. I don't have to prove why. I have to prove he
15 killed them intentionally and knowingly. And I don't
16 have to have direct evidence under the laws of the State
17 of Texas. In fact, after proving at or near the date in
18 the indictment, I don't have to prove when. I just have
19 to prove he killed them, all right?

20 Now, that's real important when you're
21 starting to work on a murder case because if you would
22 require proof beyond all doubt, if you would require
23 proof of more than what's defined on that board and you
24 can't follow that part of the law, we need to know that
25 now, okay?

1 So I'm going to ask these things:

2 Mr. Havens, these things having being said, would you be
3 unable to find someone guilty unless you were
4 100 percent sure beyond all doubt?

5 VENIREPERSON: No, sir.

6 MR. WHEELER: Thank you.

7 Ms. Rose --

8 VENIREPERSON: Sir?

9 MR. WHEELER: -- same question: Would you
10 require 100 percent proof beyond all doubt?

11 VENIREPERSON: No.

12 MR. WHEELER: Ms. Gould?

13 VENIREPERSON: No.

14 MR. WHEELER: Ms. Askins?

15 VENIREPERSON: No.

16 MR. WHEELER: Mr. Altman?

17 VENIREPERSON: No.

18 MR. WHEELER: Is there anyone here who
19 could not find someone guilty unless they were
20 100 percent sure beyond all doubt? Raise your card.

21 (Response from venire panel.)

22 MR. WHEELER: No. 41, No. 24, No. 64,
23 No. 22.

24 Mr. Young, you would require more than
25 beyond a reasonable doubt, you would require 100 percent

1 certainty beyond all doubt?

2 MR. PARKS: Judge, we would object to that.
3 There's no definition beyond a reasonable doubt. How
4 can he know that?

5 MR. WHEELER: Actually, we have a
6 100-percent proof. It's defined in Drew versus State.

7 THE COURT: I'm overruling the objection.

8 MR. WHEELER: Thank you.

9 Again, you would require, Mr. Young,
10 100-percent proof beyond all doubt from the State?

11 VENIREPERSON: Yes.

12 MR. WHEELER: Thank you.

13 Is there anybody else who agrees with
14 Mr. Young, you would require 100-percent proof beyond
15 all doubt after we've talked? Anybody else?

16 (No response.)

17 MR. WHEELER: Thank you.

18 Now, you understand that the law does not
19 require proof beyond all doubt, and if you require more,
20 you fundamentally have to be a witness to the case, then
21 you're requiring more than the law allows. Though this
22 may not be a case you need to sit on, there are plenty
23 of cases where it may be appropriate, but we've got to
24 have a fair trial, and if you're making the burden too
25 high, it's not fair, all right?

1 So is there anybody else who would require
2 100-percent proof beyond all doubt?

3 (Response from venire panel.)

4 MR. WHEELER: No. 64, thank you, Ma'am.

5 Anybody else?

6 (No response.)

7 MR. WHEELER: Thank you.

8 In a criminal case, the defendant's burden
9 is nothing. The State has to prove its case. What that
10 means is Jason Thad Payne has no burden. He only has
11 rights. He has the right to a jury trial regardless of
12 the evidence against him. Anybody can have a jury trial
13 that stands on a criminal acquisition. Doesn't matter
14 what the evidence is. You get it if you want it.

15 He has the right to testify. He has the
16 right to get on the witness stand and talk to you. He
17 has the right not to testify, and you can't do anything
18 if he chooses not to evidence. You can't draw any
19 conclusions from it, but you must remember that he's
20 presumed innocent. Jason Thad Payne is presumed
21 innocent.

22 He is not presumed truthful. Did you hear
23 that? He is not presumed truthful. Just like every
24 other witness, a criminal defendant starts off with the
25 same blank slate. You have to evaluate the credibility

1 of his testimony and any biases and motives may have.

2 He has equal subpoena power. He has the
3 right to subpoena any witness. He has the right -- and
4 this is important, I want you to hear this -- he has the
5 right to all exculpatory evidence that the State may
6 have; meaning, that the State has to turn over to him
7 any favorable evidence we may have.

8 And he has the right to bring up any
9 defenses, so if Jason Thad Payne brings up a defense,
10 the State will hear about it when you do. If he
11 presents evidence of a defense, the defense will be
12 included in the Court's charge and you can consider it.

13 What's the court's charge? At the end of
14 the evidence, you'll be given a piece of paper that has
15 the law in it from the Court. That's the Court's
16 charge. It's the paper you take to the jury room with
17 you. If he presents evidence of a defense, it will be
18 included in the Court's charge. The defense will be in
19 that paper that you take into the jury room.

20 If Jason Thad Payne presents no evidence,
21 then it will not be in the charge and you cannot
22 consider it. More to the point: You cannot consider
23 this case and say, "No one mentioned this, but is it not
24 possible that..." You don't go into a jury room and
25 start speculating about could-haves, would-haves, or

1 should-haves. The only evidence for you to consider is
2 witness testimony; witness testimony, that's it, and
3 that which is admitted into evidence, nothing else.
4 Nothing that I say, nothing that the Defendant's
5 attorneys say is evidence in this case. Do you
6 understand?

7 (Response from venire panel.)

8 MR. WHEELER: So now you understand what
9 the kinds of evidence are. We've got direct and we got
10 circumstantial. You know the proof is beyond a
11 reasonable doubt, which is not an impossible burden, and
12 you understand that the Defendant has his rights and you
13 understand what the charge is and you know it goes back
14 into the jury room with you and you know what the
15 evidence is, the source of direct and circumstantial
16 evidence. It's what's in the witness box and what's
17 admitted.

18 May I approach, Your Honor?

19 THE COURT: Yes, sir.

20 (Bench.)

21 MR. WHEELER: Probably a good time for
22 lunch. I've got about another hour or so.

23 THE COURT: Another hour?

24 MR. WHEELER: Yes, sir.

25 THE COURT: Well, we'll definitely take a

1 recess at this time.

2 (Open court.)

3 THE COURT: Ladies and gentlemen, I think
4 we're going to go ahead and take your lunch recess at
5 this time. I want to, number one, remind you of the
6 instructions that I gave you earlier. You hadn't heard
7 any evidence, but you know basically what the case is
8 about. Don't talk to one another or to anyone else.
9 Don't let anybody else talk to you about anything
10 whatsoever that has to do with this case. If anybody
11 attempts to talk to you about it, you need to report it
12 back to me or to the bailiff.

13 Now, the other concern is that there are so
14 many of you. The attorneys and people associated with
15 them have had a chance to look at you, but that doesn't
16 mean they're going to recognize everybody if they're
17 sitting at a restaurant near you. If you see anybody at
18 a restaurant anywhere in your vicinity who looks like
19 he's involved, don't talk about the case, but just go
20 tell them, "Just want you to know, I'm on the jury
21 panel," so they know you're there so somebody doesn't
22 say something inadvertently they shouldn't say.

23 Now, the other thing I do is give a little
24 extra because, frankly, the restaurant situation in
25 Quitman gets a little bit overloaded when we have a jury

1 panel all released at the same time. Some of you are
2 going home, but enough of you are going to go out to
3 eat. It's going to overload the system a little bit, so
4 we give a little extra time for lunch when we've got the
5 panel here, but we can't start back until we have
6 everybody back.

7 So I ask you to remember, number one, where
8 you're sitting. The best way to do that is to remember
9 what your number is and leave that fan in that spot and
10 then come back to that spot. Please make an attempt to
11 keep your watches coordinated with the clock up here and
12 be back here at 1:15. We'll start then at that time.
13 So if you'll bear all those instructions in mind and be
14 back at 1:15. We'll be in recess at this time.

15 (Luncheon break taken from 11:55 to 1:14.)

16 THE COURT: Back on the record in
17 20,529-2008, State vs. Jason Thad Payne. Let the record
18 reflect that counsel for the State, counsel for the
19 Defendant, and the Defendant is present.

20 Ladies and gentlemen, I believe that the
21 panel is complete, but let me do this: If you will look
22 to your left and look to your right and tell me if there
23 is anyone missing, and if there are, bring that to my
24 attention at this time.

25 (No response.)

1 THE COURT: Seeing nothing, then I certify
2 that the panel is complete.

3 Mr. Wheeler, whenever you're ready to
4 proceed, you may do so.

5 MR. WHEELER: May it please the court.

6 Hello after lunch. If you feel an urge to
7 go to sleep, please don't. Speaking of sleeping, let's
8 talk about the length of time we anticipate this trial
9 will last. We anticipate this trial will last anywhere
10 from 10 days to two weeks.

11 So I'll start with Juror No. 1, Mr. Havens:
12 Would it be -- would it impose a burden, a significant
13 burden to have to sit and listen to evidence for 10
14 days?

15 VENIREPERSON: No.

16 MR. WHEELER: Ms. Rhodes?

17 VENIREPERSON: No.

18 MR. WHEELER: Mr. Gould?

19 VENIREPERSON: No.

20 MR. WHEELER: Ms. Askins?

21 VENIREPERSON: No.

22 MR. WHEELER: Mr. Altman?

23 VENIREPERSON: No.

24 MR. WHEELER: Mr. Vallance?

25 VENIREPERSON: No.

1 MR. WHEELER: Ms. Terrell?

2 VENIREPERSON: No.

3 MR. WHEELER: Anybody on the first row
4 where a trial lasting from 10 days to two weeks would
5 pose a significant burden to them, on the first row?

6 No. 12.

7 Anybody else on the first row?

8 No. 8.

9 MR. PARKS: 15.

10 MR. WHEELER: No. 15.

11 Anybody else on the first row?

12 (No response.)

13 MR. WHEELER: On the second row?

14 Nos. 18, 19, 21, 24, 26, 30, 34.

15 Third row, please raise your cards if a
16 trial from 10 days to two weeks would pose a significant
17 burden to you.

18 38 and 47.

19 Fourth row?

20 60 -- go ahead and hold your cards up. 54,
21 55, 56, 60, 63, 64, 65, 66, and 67.

22 Last row, if it would pose a significant
23 burden on you.

24 Juror No. 75.

25 Ms. Cummings, Juror No. 8, understanding

1 that this trial may last that long, would that be
2 something you would hold potentially against one of the
3 parties as you entered into your deliberations?

4 VENIREPERSON: No.

5 MR. WHEELER: Would you be focused on the
6 evidence knowing the trial will last that long --

7 VENIREPERSON: No.

8 MR. WHEELER: -- or would you be
9 distracted?

10 Is there any reason why you could not be a
11 fair and impartial juror knowing that the trial would
12 last that long?

13 VENIREPERSON: No.

14 MR. WHEELER: Okay. Thank you.

15 Juror No. 12, Ms. Greer?

16 VENIREPERSON: Yes.

17 MR. WHEELER: It would?

18 VENIREPERSON: It would be a problem to go
19 home and reschedule some doctor's appointments for my
20 husband.

21 MR. WHEELER: Thank you, Ms. Greer.

22 VENIREPERSON: Uh-huh.

23 MR. WHEELER: Juror No. -- let's see
24 now -- 19, Mr. Vanderschaaf, would being on the jury
25 that length of time cause a significant distraction to

1 you?

2 VENIREPERSON: No. You mean as far as my
3 family or in the trial itself?

4 MR. WHEELER: In the courtroom itself,
5 would it pose a significant distraction to you?

6 VENIREPERSON: No.

7 MR. WHEELER: Would it keep you from
8 listening to the evidence?

9 VENIREPERSON: No.

10 MR. WHEELER: Would you able to serve as a
11 juror without any problems whatsoever you would carry
12 into the jury room?

13 VENIREPERSON: Yes.

14 MR. WHEELER: Would you hold it against
15 either of the parties if the trial lasted that long?

16 VENIREPERSON: No, sir.

17 MR. WHEELER: Could you be a fair and
18 impartial juror knowing the trial lasts 10 days to two
19 weeks?

20 VENIREPERSON: Yes.

21 MR. WHEELER: Thank you.

22 Juror No. 26, Mr. Jones --

23 VENIREPERSON: Yes, sir.

24 MR. WHEELER: -- you understand that the
25 trial could last anywhere from 10 days to two weeks?

1 VENIREPERSON: Yes, sir.

2 MR. WHEELER: Would that pose a significant
3 burden to you?

4 VENIREPERSON: The only burden it would
5 pose to me would be a financial burden for my job, not
6 being able to get paid.

7 MR. WHEELER: Is that burden such that you
8 would hold it against either of the parties for having a
9 trial that long?

10 VENIREPERSON: No, sir.

11 MR. WHEELER: Is it something you would
12 carry into the jury room with you?

13 VENIREPERSON: No, sir.

14 MR. WHEELER: Would it have a negative
15 effect on your jury service at all?

16 VENIREPERSON: No, sir.

17 MR. WHEELER: Thank you, Mr. Jones.

18 VENIREPERSON: You're welcome.

19 MR. WHEELER: Dr. Cathey?

20 VENIREPERSON: I'm mainly concerned about
21 my patients, and my colleagues would have to cover for
22 me on a large panel of patients.

23 MR. WHEELER: Would a trial of this length
24 pose a significant distraction to you because of your
25 practice?

1 VENIREPERSON: No.

2 MR. WHEELER: Would it be something within
3 your practice that you would be missing be lingering in
4 your mind while you --

5 VENIREPERSON: Yes.

6 MR. WHEELER: It could pose a significant
7 enough distraction where you might not hear some of the
8 evidence because your mind drifts somewhere else?

9 VENIREPERSON: No.

10 MR. WHEELER: Is it something that would
11 affect your deliberations in any way?

12 VENIREPERSON: No.

13 MR. WHEELER: Can be you a fair and
14 impartial juror knowing you're going to miss a
15 significant amount of time?

16 VENIREPERSON: Yes.

17 MR. WHEELER: Thank you, Dr. Cathey.

18 Juror No. 34, Mr. Helping, is the burden
19 such from a trial this long that you would not be able
20 to be a fair and impartial juror?

21 VENIREPERSON: No.

22 MR. WHEELER: Would it distract you in any
23 way from your service?

24 VENIREPERSON: No, sir.

25 MR. WHEELER: Juror No. 38, Mr. Stevenson,

1 would the length of this trial distract you in any way?

2 VENIREPERSON: Possibly.

3 MR. WHEELER: Is it something that would
4 bias you against one of the parties if the trial lasts
5 this long?

6 VENIREPERSON: No.

7 MR. WHEELER: Would the fact that the trial
8 could last 10 days to two weeks cause you not to be able
9 to concentrate on the evidence?

10 VENIREPERSON: That's possible.

11 MR. WHEELER: Well, you know I have to pin
12 you down. If your mind's going to be somewhere else
13 where you're not focused --

14 VENIREPERSON: Yeah.

15 MR. WHEELER: So you would be distracted
16 because of the length of time?

17 VENIREPERSON: Yes.

18 MR. WHEELER: And that means at times you
19 would not be focused on the evidence; is that correct?

20 VENIREPERSON: Yes, sir.

21 MR. WHEELER: And that means it would
22 affect your deliberations as a juror?

23 VENIREPERSON: Yes.

24 MR. WHEELER: And you could not be a fair
25 and impartial juror in this case because of its length?

1 VENIREPERSON: That's --

2 MR. WHEELER: By "fair" -- let me continue
3 by saying "fair," you can't pay attention to all of the
4 evidence, can you?

5 VENIREPERSON: What?

6 MR. WHEELER: You can't pay attention to
7 all of the evidence because you're going to be
8 distracted; is that right?

9 VENIREPERSON: Right.

10 MR. WHEELER: You couldn't?

11 VENIREPERSON: Yes.

12 MR. WHEELER: That means you 'wouldn't be
13 able to fair to both parties?

14 VENIREPERSON: Yes.

15 MR. WHEELER: Because your mind would be
16 somewhere else; is that correct?

17 VENIREPERSON: Yes.

18 MR. WHEELER: As a result, you cannot be a
19 fair and impartial juror?

20 VENIREPERSON: Yes, sir.

21 MR. WHEELER: Thank you.

22 Ms. Raulston --

23 VENIREPERSON: Yes.

24 MR. WHEELER: -- is the length of this
25 trial going to pose a signature problem for you?

1 VENIREPERSON: As a nurse advocate/patient
2 advocate, it might upset my patients, but I'm like the
3 doctor, it's not going to affect my judgment, no.

4 MR. WHEELER: So you still can be a fair
5 and impartial juror?

6 VENIREPERSON: Yes.

7 MR. WHEELER: Thank you, Ma'am.

8 Ms. Smith, Juror No. 54, the length of
9 trial, is that going to pose a significant burden to
10 you?

11 VENIREPERSON: A financial burden.

12 MR. WHITLEY: Judge, we cannot hear the
13 lady.

14 MR. WHEELER: Can I ask you to --

15 VENIREPERSON: It will be a financial
16 burden.

17 MR. WHEELER: Is it a burden that would
18 distract you?

19 VENIREPERSON: No.

20 MR. WHEELER: Okay. Can you be a fair and
21 impartial juror?

22 VENIREPERSON: Yes.

23 MR. WHEELER: Thank you, Ma'am. Appreciate
24 it.

25 Mr. Humphreys --

1 VENIREPERSON: Yes, sir.

2 MR. WHEELER: -- would the length of this
3 trial pose a significant burden to you?

4 VENIREPERSON: No, sir.

5 MR. WHEELER: Okay. Thank you.

6 Ms. Cue?

7 VENIREPERSON: Yes.

8 MR. WHEELER: Okay. And because the length
9 of the trial could be 10 days to two weeks, would you
10 find -- would you be distracted?

11 VENIREPERSON: Possibly.

12 MR. WHEELER: Well --

13 VENIREPERSON: Yes. I have got some severe
14 back problems I'm getting treatment for. It -- it's
15 hard for me to sit at length sometimes, and the length
16 of it and the possibility of doctor's appointments in
17 this period of time would be a problem, so I would say
18 yes.

19 MR. WHEELER: So you have a physical
20 condition that you're bringing to the attention of the
21 Court?

22 VENIREPERSON: Yes.

23 MR. WHEELER: That physical condition is
24 enough, if not treated, will distract you?

25 VENIREPERSON: Yes.

1 MR. WHEELER: Because of the pain
2 associated with the injury?

3 VENIREPERSON: The pain.

4 MR. WHEELER: As a result, you would not be
5 able to focus on the evidence?

6 VENIREPERSON: Yes.

7 MR. WHEELER: Because you can't focus on
8 the evidence, you can't give a fair trial to both sides
9 in this case?

10 VENIREPERSON: Yes.

11 MR. WHEELER: And this would be a matter
12 that would continue on into the jury room and affect
13 your deliberations?

14 VENIREPERSON: I would have to say yes.

15 MR. WHEELER: Because you can't focus on
16 the evidence if you're distracted?

17 VENIREPERSON: Right.

18 MR. WHEELER: Okay. Thank you.

19 Mr. Davis --

20 VENIREPERSON: Yes.

21 MR. WHEELER: -- would the length of this
22 trial pose a significant burden to you?

23 VENIREPERSON: Financial burden.

24 MR. WHEELER: Okay. Is there any reason
25 you wouldn't be able to focus on the evidence in this

1 case?

2 VENIREPERSON: No.

3 MR. WHEELER: Okay. Thank you.

4 VENIREPERSON: Excuse me, sir.

5 MR. WHEELER: No. 50, you are Ms. Wetzork?

6 VENIREPERSON: Yes, sir. I didn't realize
7 that physical condition could be a deterrent. That's
8 why I didn't raise my card. I have a slipped disc and I
9 would definitely have a problem. It would affect me to
10 be a juror and concentrating on the facts.

11 MR. WHEELER: Thank you for bringing that
12 to my attention, and we need that sort of information.
13 Thank you.

14 Juror No. 65, Ms. Harrison, do you find
15 that you have a significant burden because of the length
16 of this trial?

17 VENIREPERSON: Yes.

18 MR. WHEELER: Is it a burden such that
19 would distract you?

20 VENIREPERSON: No.

21 MR. WHEELER: Could you focus on the
22 evidence and render an impartial verdict?

23 VENIREPERSON: Yes.

24 MR. WHEELER: Juror No. 67, Mr. Hosea --

25 VENIREPERSON: Yes, sir.

1 MR. WHEELER: -- would the length of this
2 trial pose a significant burden on you?

3 VENIREPERSON: Yes, sir.

4 MR. WHEELER: Is that burden such it will
5 distract you?

6 VENIREPERSON: Yes, sir.

7 MR. WHEELER: Would you be unable to focus
8 on the evidence because of whatever burden that you
9 have?

10 VENIREPERSON: Yes, sir.

11 MR. WHEELER: And do you find that you
12 wouldn't be able to be a fair and impartial juror
13 because you can't pay attention to the evidence in this
14 case?

15 VENIREPERSON: You could say that, sir.

16 MR. WHEELER: Actually, I've got to get you
17 to say.

18 VENIREPERSON: In my position with the
19 State, just to deal with stuff very quickly to get the
20 statements from both sides of the party, you deal with
21 it.

22 MR. WHEELER: What is your position with
23 the State?

24 VENIREPERSON: I'm a sergeant with the
25 Texas Department of Criminal Justice.

1 MR. WHEELER: As a result, do you have a
2 bias for or against either of the parties in this case?

3 VENIREPERSON: No, sir, I don't.

4 MR. WHEELER: Have you prejudged the facts
5 in this case?

6 VENIREPERSON: I haven't heard the facts,
7 sir.

8 MR. WHEELER: Does anybody start out in a
9 better position because of your job?

10 VENIREPERSON: No, sir.

11 MR. WHEELER: Then strictly speaking,
12 you'll be focused only on your job and the distractions
13 associated with that job; is that right?

14 VENIREPERSON: Yes, sir.

15 MR. WHEELER: And you will not be able to
16 listen to and pay attention to the evidence in this case
17 because of those distractions?

18 VENIREPERSON: Yes, sir.

19 MR. WHEELER: And that would affect your
20 deliberations?

21 VENIREPERSON: Yes, sir.

22 MR. WHEELER: And for that reason, you
23 couldn't be fair to both sides in this case?

24 VENIREPERSON: Yes, sir.

25 MR. WHEELER: Okay. Thank you. Appreciate

1 it, Mr. Hosea.

2 And Juror No. 75, Mr. Young, the length of
3 the trial, will that pose a significant burden to you?

4 VENIREPERSON: Yes, sir, it will.

5 MR. WHEELER: As a result, will you be
6 distracted?

7 VENIREPERSON: I'm afraid I probably would
8 be.

9 MR. WHEELER: And if you can't pay
10 attention to the evidence, do you find you wouldn't be
11 able to focus on the evidence as you should?

12 VENIREPERSON: If I have to sit here for 10
13 days, I'm afraid it might affect that, yes, sir.

14 MR. WHEELER: Now, I've got to have more
15 than "might".

16 VENIREPERSON: Okay. It will affect it.

17 MR. WHEELER: It will affect it?

18 VENIREPERSON: The amount of money it would
19 cost me to sit here for 10 days, it will affect it, yes,
20 sir.

21 MR. WHEELER: So your problem is one of
22 finances?

23 VENIREPERSON: Sir?

24 MR. WHEELER: Is your problem financial?

25 VENIREPERSON: Yes, sir.

1 MR. WHEELER: Okay. Thank you.

2 THE COURT: Let me ask counsel to approach,
3 if you would.

4 (Bench.)

5 THE COURT: I'm wanting to know when we got
6 to expecting a minimum of 10 days of trial. We talked
7 about the rest of this week which is three days and may
8 be two days next week which is five days.

9 MR. WHEELER: I'm expecting all of this
10 week and all of next week. We've got in the
11 neighborhood of, what, 30 witnesses, 25 or so?

12 MR. WHITLEY: We've got a lot of them.

13 THE COURT: That's not what we were talking
14 about last week, but at any rate, let's move on.

15 (Open court.)

16 MR. WHEELER: In this case, of course,
17 because it's a jury trial, there will be a conflict in
18 testimony. It's a trial, and in trial there's going to
19 be one side and potentially another side. A conflict in
20 testimony does not equal a reasonable doubt. Just
21 because you've got two people getting up and saying two
22 different things is not a reasonable doubt, it's a
23 conflict.

24 How does it affect you? A jury's job is to
25 resolve conflict based on the witnesses you see and the

1 evidence. If you have a disagreement about testimony,
2 something you hear as a juror, you write a note through
3 your foreman to the judge and you state to him
4 specifically what piece of testimony you disagree about
5 and you get the piece of testimony read back to you.
6 That's how you resolve disagreements when there's a
7 conflict in testimony.

8 It is not reasonable doubt if a State's
9 witness says "X" happened and a defense witness says "Y"
10 happened. If everybody agreed, we wouldn't have a
11 trial. I can assure you that the State's witnesses -- I
12 promise you that the State's witnesses and the Defense
13 witnesses will disagree. It's your job to judge the
14 credibility of the witnesses. That's your job. It's
15 your job to judge the credibility of the witnesses and
16 determine who is truthful, and it's something you do
17 everyday.

18 Now, people at times don't feel comfortable
19 making those kinds of judgments; don't like doing it.
20 Is there anyone here who believes that he or she cannot
21 judge the credibility of another after hearing what I
22 just said? Raise your card.

23 (No response.)

24 MR. WHEELER: I see no cards.

25 Is there anyone here who for religious or

1 morale reasons cannot sit in judgment of another? Raise
2 your card.

3 No. 41. Thank you, Ma'am.

4 Anybody else?

5 No. 15.

6 When we talk about the religious, morale,
7 and ethical reasons you cannot sit in judgment of
8 another, we have to talk about punishment, their
9 responsibility for a person's actions. There must be
10 responsibility for a person's actions and that involves
11 punishment under Texas law.

12 In Texas and in most other jurisdictions,
13 there are four theories involving punishment. Now, this
14 is a capital murder case. In this case, should the jury
15 return a verdict of guilty, the punishment is life
16 without parole. Do you understand?

17 In Texas, the four theories of punishment
18 are: One, to rehabilitate; two, to proscribe conduct
19 and punish as a general deterrence in society; you in
20 society don't do this behavior. The third theory is
21 specific deterrence; you don't behave this way. And the
22 fourth theory involving punishment is retribution.

23 Now, here's my question, first: Number one
24 is rehabilitation, two is general deterrence for
25 society, three is specific deterrence, and number four

1 is retribution.

2 I'm going to ask you individually,
3 beginning with you Mr. Havens: Of those four, which two
4 do you believe fit your theory of why a person should be
5 punished?

6 VENIREPERSON: 1 and 3.

7 MR. WHEELER: Rehabilitation and specific
8 deterrence?

9 VENIREPERSON: Yes.

10 MR. WHEELER: Ms. Rhodes?

11 VENIREPERSON: Could I get you --

12 MR. WHEELER: First is rehabilitation,
13 second is general deterrence for society; we don't want
14 this; the third is specific deterrence; don't want that
15 from you; and the fourth is retribution.

16 VENIREPERSON: 2 and 3.

17 MR. WHEELER: 2 and 3.

18 Mr. Gould?

19 VENIREPERSON: I believe it would be 2 and
20 3.

21 MR. WHEELER: Deterrence for society
22 generally and deterrence the individual specifically?

23 VENIREPERSON: (Moving head up and down).

24 MR. WHEELER: Ms. Askins?

25 VENIREPERSON: Read me that once again.

1 MR. WHEELER: One is rehabilitation; we're
2 going to fix you.

3 VENIREPERSON: Judging it by this case?

4 MR. WHEELER: No, just in general, what
5 your -- your particular philosophy about why we punish.
6 Of those four, which is most important to you and which
7 is second?

8 VENIREPERSON: 2 and 3.

9 MR. WHEELER: Mr. Altman?

10 VENIREPERSON: 2 and 3.

11 MR. WHEELER: 2 and 3.

12 Mr. Vallance?

13 VENIREPERSON: 2 and 3.

14 MR. WHEELER: The same.

15 What about you, Ms. Jackson?

16 VENIREPERSON: 1.

17 MR. WHEELER: 1, rehabilitation.

18 Mr. Morgan?

19 VENIREPERSON: 2 and 3.

20 MR. WHEELER: 2 and 3, deter society and
21 then deter the individual; don't do this?

22 VENIREPERSON: (Moving head up and down).

23 MR. WHEELER: Mr. Everett.

24 VENIREPERSON: [Inaudible].

25 MR. PARKS: I'm sorry, what?

1 MR. WHEELER: He says rehabilitation.
2 Ms. Judkins?
3 VENIREPERSON: 2 and 3.
4 MR. WHEELER: 2 and 3.
5 Ms. Hooks?
6 VENIREPERSON: 2 and 3.
7 MR. WHEELER: Mr. Reynolds?
8 VENIREPERSON: 2 and 3.
9 MR. WHEELER: Mr. Wilson, why do we punish?
10 VENIREPERSON: Three.
11 MR. WHEELER: 3, deter the individual.
12 Ms. Ferguson?
13 VENIREPERSON: 3 and 4.
14 MR. WHEELER: 3 and 4.
15 Ms. Greer?
16 VENIREPERSON: 3.
17 MR. WHEELER: 3.
18 Ms. Terrell?
19 VENIREPERSON: My first choice is 3 and the
20 second is 1.
21 MR. WHEELER: Ms. Cummings?
22 VENIREPERSON: 2 and 3.
23 MR. WHEELER: 2 and 3.
24 What about you, Mr. Johnson?
25 VENIREPERSON: 2 and 3.

1 MR. WHEELER: You believe we deter society
2 first and the individual second?

3 VENIREPERSON: Yes.

4 MR. WHEELER: Mr. Vanderschaaf, do you
5 agree with that?

6 VENIREPERSON: 1 and 3.

7 MR. WHEELER: You believe we rehabilitate
8 and then we deter the individual; that's why we punish?

9 VENIREPERSON: Yes.

10 MR. WHEELER: Ms. Reimers?

11 VENIREPERSON: Same, 1 and 3.

12 MR. WHEELER: Okay. Ms. Thompson, you said
13 2 and 3?

14 VENIREPERSON: 2 and 3.

15 MR. WHEELER: What about you, Mr. Young?

16 VENIREPERSON: 2 and 3.

17 MR. WHEELER: The same.

18 Mr. Jones, what do you believe in regard to
19 punishment?

20 VENIREPERSON: 3 and 4.

21 MR. WHEELER: You believe we deter the
22 individual and retribution?

23 VENIREPERSON: Yes, sir.

24 MR. WHEELER: Mr. Hamrick?

25 VENIREPERSON: 3 and 2.

1 MR. WHEELER: Deter the individual and then
2 deter society?

3 VENIREPERSON: Yes, sir.

4 MR. WHEELER: I see.

5 Mr. Taylor?

6 VENIREPERSON: 1 and 3.

7 MR. WHEELER: We rehabilitate the
8 individual and then we deter the individual?

9 VENIREPERSON: (Moving head up and down).

10 MR. WHEELER: Okay.

11 Mr. Bazzoon?

12 VENIREPERSON: I'd say 1 and 3.

13 MR. WHEELER: Did you get your name, right?

14 VENIREPERSON: Close enough.

15 MR. WHEELER: How do you pronounce it?

16 VENIREPERSON: I pronounce it Bazzoon.

17 MR. WHEELER: Bazzoon?

18 VENIREPERSON: Uh-huh.

19 MR. WHEELER: Okay. Thank you.

20 Ms. Mize?

21 VENIREPERSON: 1 and 3.

22 MR. WHEELER: We rehabilitate first and
23 then deter the individual next?

24 VENIREPERSON: Uh-huh.

25 MR. WHEELER: Ms. Clark?

1 VENIREPERSON: 3.

2 MR. WHEELER: Deter the individual.

3 Ms. Rhodes?

4 VENIREPERSON: 1 and 3.

5 MR. WHEELER: 1 and 3, we rehabilitate and

6 then we deter the individual?

7 VENIREPERSON: Uh-huh.

8 MR. WHEELER: Dr. Cathey?

9 VENIREPERSON: 3 and 2.

10 MR. WHEELER: Deter the individual first

11 and then deter society as a whole?

12 VENIREPERSON: Yes, sir.

13 MR. WHEELER: Mr. Helping?

14 VENIREPERSON: 2 and 3.

15 MR. WHEELER: Mr. Young?

16 VENIREPERSON: 2 and 4.

17 MR. WHEELER: Deter society and then

18 punish.

19 Mr. Bow [sic]?

20 VENIREPERSON: Bean.

21 MR. WHEELER: Mr. Bean, I'm sorry. My "N"

22 looks like a "U".

23 VENIREPERSON: 2 and 3.

24 MR. WHEELER: 2 and 3?

25 VENIREPERSON: Uh-huh.

1 MR. WHEELER: Mr. Hall?
2 VENIREPERSON: 2 and 3.
3 MR. WHEELER: Thank you.
4 Mr. Jackson?
5 VENIREPERSON: 3 and 4.
6 MR. WHEELER: Deter the individual and then
7 punishment?
8 VENIREPERSON: Yes, sir.
9 MR. WHEELER: Ms. Raulston?
10 VENIREPERSON: I would say 2 and 3.
11 MR. WHEELER: Ms. Carrigan?
12 VENIREPERSON: Carrigan.
13 MR. WHEELER: Ms. Carrigan?
14 VENIREPERSON: 1.
15 MR. WHEELER: Rehabilitation.
16 You agree with her, Mr. Lindley?
17 VENIREPERSON: I don't know. I think it's
18 a case-by-case on all of them.
19 MR. WHEELER: Sure.
20 VENIREPERSON: I guess 3 and 2.
21 MR. WHEELER: Your personal theory is you
22 deter the individual first and then deter society next?
23 VENIREPERSON: Yes, sir.
24 MR. WHEELER: But each case is different?
25 VENIREPERSON: Yes.

1 the individual.

2 VENIREPERSON: Yes, sir.

3 MR. WHEELER: Ms. Johnson? Go ahead.

4 VENIREPERSON: 3 and 1.

5 MR. WHEELER: 3 and 1, deter the individual
6 and rehabilitation.

7 Mr. Frosch?

8 VENIREPERSON: 2 and 3.

9 MR. WHEELER: 2 and 3, thank you, sir.

10 Ms. Miranda?

11 VENIREPERSON: 2 and 3.

12 MR. WHEELER: Ms. Williams?

13 VENIREPERSON: 2 and 3.

14 MR. WHEELER: Ms. Thomas, why do you punish
15 or what's your theory?

16 VENIREPERSON: I think all four would
17 apply. It depends on the circumstance. So I've sat
18 here all this time trying to figure out which would it
19 be, 2, 3 -- I would have to say 1, 2, 3, and 4.

20 MR. WHEELER: Rehabilitation followed by
21 specific deterrence?

22 VENIREPERSON: Probably 2, 3, 1, and 4, if
23 you want it that way.

24 MR. WHEELER: Thank you.

25 Mr. White?

1 VENIREPERSON: 2 and 3.

2 MR. WHEELER: Deter society first and then

3 the individual next?

4 VENIREPERSON: Yeah.

5 MR. WHEELER: Mr. Stripling?

6 VENIREPERSON: 1 and 3.

7 MR. WHEELER: Rehabilitation first followed

8 by deterring the individual?

9 VENIREPERSON: Uh-huh.

10 MR. WHEELER: Ms. Wetzork?

11 VENIREPERSON: 4 and 2, I believe.

12 MR. WHEELER: Punishment then general

13 deterrence?

14 VENIREPERSON: For society, right?

15 MR. WHEELER: Yes.

16 VENIREPERSON: Okay.

17 MR. WHEELER: Ms. White.

18 VENIREPERSON: 2 and 3.

19 MR. WHEELER: 2 and 3.

20 Ms. Strickland?

21 VENIREPERSON: 1 and 3.

22 MR. WHEELER: Rehabilitation first and then

23 deter the individual.

24 Mr. Young?

25 VENIREPERSON: 2 and 3.

1 MR. WHEELER: Ms. Phifer?
2 VENIREPERSON: 3.
3 MR. WHEELER: 3, deter the individual.
4 Ms. Reeves?
5 VENIREPERSON: 4 and 3.
6 MR. WHEELER: Punish and then specifically
7 deter the individual.
8 Mr. Clark?
9 VENIREPERSON: 3, 2, 1.
10 MR. WHEELER: Specific deterrence followed
11 by general deterrence and then rehabilitation.
12 Mr. Byrd?
13 VENIREPERSON: 2 and 3.
14 MR. WHEELER: Ms. Allen?
15 VENIREPERSON: 2 and 3.
16 MR. WHEELER: Mr. Harris?
17 VENIREPERSON: 2 and 3.
18 MR. WHEELER: 2 and 3.
19 Ms. Roling?
20 VENIREPERSON: 1 and 3.
21 MR. WHEELER: Rehabilitation first
22 following by deterrence.
23 Ms. Hernandez?
24 VENIREPERSON: 2 and 3.
25 MR. WHEELER: Ms. Bridges?

1 VENIREPERSON: 2 and 3.

2 MR. WHEELER: Ms. Smith, with regard to
3 punishment, what do you believe?

4 VENIREPERSON: I'd say 2 and 3.

5 MR. WHEELER: Do you believe that we ought
6 to deter society first and then the individual next;
7 tell society don't do this and tell the individual you
8 don't do that particularly? Is that what you believe?

9 VENIREPERSON: Yes, sir.

10 MR. WHEELER: Ms. Swann?

11 VENIREPERSON: 1 and 3.

12 MR. WHEELER: Rehabilitation first then
13 deter the individual.

14 Ms. Caraway?

15 VENIREPERSON: 1 and 3.

16 MR. WHEELER: Mr. Humphreys?

17 VENIREPERSON: 3 and 4.

18 MR. WHEELER: Deter the individual and
19 punish?

20 VENIREPERSON: Yes.

21 MR. WHEELER: Ms. Cue?

22 VENIREPERSON: 3 and 4.

23 MR. WHEELER: Mr. Ferguson?

24 VENIREPERSON: 4 and 2.

25 MR. WHEELER: Punishment first and then

1 deter society.

2 Ms. Scogin?

3 VENIREPERSON: 3 and 4.

4 MR. WHEELER: Deter the individual and

5 punish.

6 And Mr. --

7 VENIREPERSON: Kuiken.

8 MR. WHEELER: -- Kuiken?

9 VENIREPERSON: 4 and 2.

10 MR. WHEELER: Punish first and then as a

11 general deterrence to society.

12 Mr. Davis?

13 VENIREPERSON: 3 and 4.

14 MR. WHEELER: Specific deterrence to the

15 individual and then punish.

16 Ms. Ballard?

17 VENIREPERSON: 1 and 2.

18 MR. WHEELER: Rehabilitation first and

19 deter society.

20 Ms. Harrison?

21 VENIREPERSON: 2 and 3.

22 MR. WHEELER: Mr. Capps?

23 VENIREPERSON: 1 and 3.

24 MR. WHEELER: Mr. Hosea.

25 VENIREPERSON: 3 and 4.

1 MR. WHEELER: Thank you.

2 And Ms. Jackson?

3 VENIREPERSON: 3 and 2.

4 MR. WHEELER: Deter society and then deter
5 the individual. No, I got that backwards. Deter the
6 individual and then deter society.

7 Okay. Is there anybody on the panel who
8 cannot consider life without parole on a conviction of
9 capital murder?

10 (No response.)

11 MR. WHEELER: I see no cards.

12 Let me ask you this question: With regard
13 to a murder case, I want to talk to you a little bit
14 about punishment and probation. One of the things you
15 have to be able to do is consider the full range of
16 punishment in a cause, and in a murder case, the
17 punishment is five years to 99 years or life, and
18 probation is available if a person meets the statutory
19 criteria after conviction. So I have questions about
20 considering full range of punishment in a murder case
21 and that includes probation.

22 I want to start with Juror No. 1,
23 Mr. Havens: Can you consider the full range of
24 punishment in a regular murder case, five to 99 years or
25 life, and under the right set of circumstances,

1 probation?

2 VENIREPERSON: Yes.

3 MR. WHEELER: Ms. Rhodes?

4 VENIREPERSON: No.

5 MR. PARKS: Judge, may we approach?

6 THE COURT: Yes, you may.

7 (Bench.)

8 MR. PARKS: I guess my position is if the
9 purpose here is for disqualification, then we need to
10 ask the question right. I mean, we're not going to
11 disqualify anybody with this question, or are we?

12 MR. WHEELER: Under the right set of
13 circumstances.

14 MR. PARKS: They don't know what that
15 means.

16 MR. WHEELER: I'd like for you to clarify
17 your objection because I don't understand the legal
18 basis for it.

19 MR. PARKS: The legal basis, Mr. Wheeler,
20 is there any basis, evidentiary basis to think that the
21 evidence is going to show that he murdered one but not
22 both?

23 MR. WHEELER: We have in the file, had
24 filed an application for probation and an election for
25 the jury to assess punishment with the including of the

1 lesser included asked for. I think we have a voir dire
2 on probation or we run a --

3 MR. PARKS: Well --

4 MR. WHEELER: -- substantial risk of --

5 MR. PARKS: -- we file that in every case
6 because you never know for sure what the evidence is
7 going to be. Do we expect that to be asking for an
8 included offense? I don't expect the evidence is going
9 to show that, but I can't read the future. We had to
10 file that.

11 I don't object to you asking, except what
12 I'm going to have to do now is go back to every one of
13 those people to tell -- we would all expect them to be
14 able to return a verdict if they thought it was proper
15 under the circumstances. If they heard the evidence and
16 believed that probation was the right and proper thing
17 to do under that set of circumstances, would and
18 could -- could and would they vote for it, not just see
19 if -- the problem with other proper circumstances
20 doesn't mean a thing. They don't know what the proper
21 circumstances are. They've got -- it's got to be
22 explained to them on both ends. They've heard the
23 evidence. They've determined what they think the right
24 thing is to do. Now, are they going to do it or
25 disregard it?

1 MR. WHEELER: So the question, then, is one
2 of the precise -- I don't mind rephrasing the question.
3 I hate getting into it, but I've got to because the
4 application got filed.

5 MR. PARKS: Well, we have to file the
6 application.

7 MR. WHEELER: Well, I know.

8 MR. PARKS: With incompetence of counsel,
9 that's one way to --

10 MR. WHITLEY: We don't like to do it
11 either, Judge, but it's filed. I hate to do it, but --

12 MR. PARKS: Okay.

13 (Open court.)

14 (Interruption in the proceedings.)

15 MR. WHEELER: In the interim, we have had a
16 loud siren blowing. It's a horn running by the
17 courtroom. And you'll find, if you're selected to this
18 jury, that many times you'll be here listening to a very
19 important piece of evidence that be accompanied by the
20 sound of loud sirens and blowing horns and you have to
21 focus in spite of that sort of distraction.

22 Now, what we're talking about right now
23 with regard to punishment has to do with your
24 willingness under appropriate circumstances to be able
25 to consider and then have the ability to assess all the

1 punishment options that are available under Texas law.

2 So how do you get there from capital
3 murder, is the first thing? And quite simply, if you
4 receive a charge where there's a lesser included offense
5 of murder upon conviction, you will be asked to consider
6 not life without parole because that's an issue for the
7 judge, but if a lesser included is in your charge and
8 you vote guilty on murder, you have to be able to
9 consider probation a minimum of five years up to 99
10 years or life.

11 And when we talk about a fair trial, a fair
12 trial means this: Can you consider all of the
13 punishment options that are available under the law in
14 Texas? The State has a right to have somebody who can
15 consider everything including the maximum sentence. The
16 Defense has the right to expect a jury where every
17 member can consider all the punishment options including
18 the minimum sentence.

19 Okay. Don't be confused by the law. If
20 you get the charge and it includes the lesser offense of
21 murder and you come back guilty, then you need to be
22 able to consider the entire gamut of punishment options.

23 Is that clear? Is there anybody who didn't
24 understand what I just said? Please raise your card.

25 VENIREPERSON: I understood, but my

1 question is life. Is it life in prison, not the death
2 penalty?

3 MR. WHEELER: This is not a death penalty
4 case. Now, under --

5 MR. PARKS: No. 60, Jim.

6 VENIREPERSON: I have a question.

7 MR. WHEELER: Yes, Ms. Roling.

8 VENIREPERSON: Probation could be
9 considered for murder?

10 MR. WHEELER: For murder, but not for
11 capital murder. So the scenario that we're talking
12 about is if the jury returns a verdict of guilty for
13 capital murder, then the judge assesses punishment at
14 life without parole, okay? If a lesser included charge
15 of murder is included, then the jury gets to consider
16 the full range of punishment, probation or a minimum of
17 five years to a maximum of 99 years or life in the Texas
18 Department of Criminal Justice, the institutional
19 division, okay?

20 So understanding that, with regard to a
21 murder case, if evidence is presented to you and that
22 evidence supports -- and it's reliable evidence, you
23 find that the evidence supports probation under the
24 appropriate circumstances, is it just a foregone
25 conclusion that you won't even consider probation or can

1 you consider it even if you've just convicted him of
2 murder? Now, you get how significant a question that
3 is, because the Defense is entitled if murder is what's
4 returned to have jurors that can consider the full range
5 of punishment.

6 So I go back to you, Mr. Havens, having
7 described all the punishment scenarios before you and
8 having told you there may be a situation where
9 appropriate evidence is given to you, evidence that's
10 reliable, that supports a finding of probation, can you
11 go into that jury room and consider the full range of
12 punishment including probation?

13 VENIREPERSON: Yes.

14 MR. WHEELER: Can you consider the maximum
15 of life?

16 VENIREPERSON: Yes.

17 MR. WHEELER: Do you have any problem with
18 life without parole?

19 VENIREPERSON: No, I have no problem.

20 MR. WHEELER: Thank you.

21 Ms. Rhodes, same question: Appropriate
22 evidence is presented to you, reliable evidence that
23 supports probation. You've convicted him for murder.
24 Can you consider the full range of punishment including
25 probation?

1 VENIREPERSON: No.

2 MR. WHEELER: Thank you.

3 Mr. Gould?

4 VENIREPERSON: No.

5 MR. WHEELER: Can't consider probation.

6 Ms. Askins?

7 VENIREPERSON: No.

8 MR. WHEELER: Mr. Altman?

9 VENIREPERSON: No.

10 MR. WHEELER: You cannot consider the full
11 range of punishment even if appropriate evidence is
12 given to you, evidence that would support a finding for
13 probation?

14 VENIREPERSON: No.

15 MR. WHEELER: Thank you, sir.

16 Mr. Vallance?

17 VENIREPERSON: No, sir.

18 MR. WHEELER: Ms. Terrell?

19 VENIREPERSON: Depending on the
20 circumstances, yes, I think I could.

21 VENIREPERSON: No.

22 MR. WHEELER: Ms. Cummings, No. 8, you
23 cannot consider the full range of punishment?

24 VENIREPERSON: No.

25 MR. WHEELER: That's taking into account

1 what I've said to you about punishment?

2 VENIREPERSON: [Inaudible response.]

3 MR. WHEELER: Mr. Reynolds?

4 VENIREPERSON: Yes.

5 MR. WHEELER: Mr. Wilson?

6 VENIREPERSON: Yes.

7 THE COURT: Sorry, what was Mr. Wilson's
8 answer?

9 MR. WHEELER: He said "yes".

10 VENIREPERSON: Yes.

11 MR. WHEELER: Yes.

12 Ms. Ferguson, you can?

13 VENIREPERSON: Uh-huh.

14 MR. WHEELER: Ms. Greer.

15 VENIREPERSON: I have no problem.

16 MR. PARKS: Jim, I'm not hearing them at
17 all. Please ask them to speak up.

18 MR. WHEELER: Will be glad to do that.

19 MR. PARKS: What did 10 say?

20 MR. WHEELER: Mr. Wilson said he could
21 consider the full range of punishment.

22 MR. PARKS: Ms. Ferguson?

23 MR. WHEELER: She said she could.

24 Ms. Greer?

25 VENIREPERSON: Yes, yes.

1 MR. WHEELER: Ms. Hooks?

2 VENIREPERSON: No.

3 MR. WHEELER: That's No. 13.

4 MR. PARKS: That a "no"?

5 MR. WHEELER: That's a "no".

6 Now, all the attorneys and the judge have
7 to hear your answer, so please speak up to this
8 question. This is an important question about your
9 service.

10 VENIREPERSON: I have a question.

11 MR. WHEELER: Yes, Dr. Cathey.

12 VENIREPERSON: I don't understand the
13 difference between murder and capital murder.

14 MR. WHEELER: Well, in this case, capital
15 murder is two people murdered during the same criminal
16 transaction. That's 19.03 of the Penal Code. Parties
17 in a criminal case can request a lesser included
18 offense. If that's granted and that's in the charge,
19 then you would have to be able to consider the entire
20 range of punishment.

21 Earlier I said I don't have to prove how or
22 why. I will hear the defense at the same time you do,
23 but in the unlikely event or in the event that that
24 lesser included comes, you have to be able to consider
25 the entire range of punishment if you convict him for

1 murder.

2 VENIREPERSON: And why is death penalty not
3 considered?

4 MR. WHEELER: Why the death penalty is not
5 going to be considered?

6 VENIREPERSON: Yes.

7 MR. WHEELER: That's an election that was
8 not made and there are several factors that go into
9 that, and I really can't get into all the factors during
10 voir dire as much as I would love to and talk to you
11 about it, but this is not a death penalty case for a
12 variety of reasons. It has nothing do with the merits
13 of case. It has do with the decision that was made.

14 Anything else along those lines? Gee,
15 doesn't that sound evasive and lawyerly and vague and
16 confusing and just about everything you can think of?

17 The fact is -- the fact is that murder
18 could come to the jury, and you have to be able to
19 consider the entire range of punishment.

20 Do you understand that?

21 VENIREPERSON: Yes, sir.

22 MR. WHEELER: Pardon me, just one second.

23 (Pause in the proceedings.)

24 MR. WHEELER: Henry wrote me a note and I
25 need to clarify and it's in response to your question,

1 Dr. Cathey. Capital murder is proving two deaths beyond
2 a reasonable doubt. If the evidence only supports one
3 murder, proving one beyond a reasonable doubt, that gets
4 you to straight murder. Is that clear enough?

5 VENIREPERSON: Yes, sir.

6 MR. WHEELER: Okay. All right.

7 Ms. Greer, I finished with you and I was
8 moving down to Ms. Hooks, and she's answered my
9 question.

10 VENIREPERSON: No. Right.

11 MR. WHEELER: And now I have to move to
12 Ms. Judkins. Now, we're talking about the murder case.
13 You've heard all the prefatory comments I've made with
14 regard with appropriate evidence. It is factually
15 sufficient evidence that supports a finding of probation
16 from the jury. Can you consider the full range of
17 punishment including probation after conviction for
18 murder?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Okay.

21 Mr. Everett?

22 VENIREPERSON: No.

23 MR. WHEELER: Mr. Morgan?

24 VENIREPERSON: Nope.

25 MR. WHEELER: You cannot consider the full

1 range of punishment?

2 VENIREPERSON: Probation for murder, no.

3 MR. WHEELER: Okay. Thank you.

4 Ms. Jackson?

5 VENIREPERSON: No.

6 MR. WHEELER: Having to make my notes as we
7 go.

8 Yes, sir?

9 VENIREPERSON: Probation from the outset or
10 probation after a certain period of serving time?

11 MR. WHEELER: There isn't a mixed
12 punishment that I'm aware of where you can give jail
13 time.

14 VENIREPERSON: Eligible for probation after
15 a certain period of time.

16 MR. WHEELER: If a person is eligible for
17 probation and the jury elects for probation, then you're
18 on probation. If they elect for the penitentiary, then
19 they go to the penitentiary.

20 VENIREPERSON: This is right from the
21 outside you're talking about?

22 MR. WHEELER: Yes, yes.

23 Mr. Johnson?

24 VENIREPERSON: No.

25 MR. WHEELER: Mr. Vanderschaaf, you heard

1 my prefatory comments. You understand in the
2 hypothetical we're talking about appropriate evidence
3 has been given to you, reliable evidence that supports a
4 finding of probation, and you're being asked to consider
5 probation after conviction for murder. Can you consider
6 probation?

7 VENIREPERSON: Yes.

8 MR. WHEELER: Can you, Ms. Roberts?

9 VENIREPERSON: Yes.

10 MR. WHEELER: Can you, Ms. Thompson?

11 VENIREPERSON: No.

12 MR. WHEELER: Mr. Young?

13 VENIREPERSON: No.

14 MR. WHEELER: Mr. Bazzoon?

15 VENIREPERSON: Yes.

16 MR. WHEELER: Mr. Taylor?

17 VENIREPERSON: No.

18 MR. WHEELER: Mr. Hamrick?

19 VENIREPERSON: Yes.

20 MR. WHEELER: Thank you.

21 Ms. Cue, No. 56.

22 VENIREPERSON: Can I ask you a question?

23 Does this person have already served time for his
24 punishment --

25 MR. WHEELER: Well --

1 VENIREPERSON: -- or can we know that?

2 MR. WHEELER: -- I can't get into the
3 specifics of any case. In punishment, the type of
4 evidence that's introduced or brought to you, well, it
5 works like the guilt/innocence phase. Each side has the
6 ability to call witnesses and you determine that
7 yourself and make your finding in regard to punishment.

8 VENIREPERSON: Oh, I'm talking about
9 previous to this trial. Has the person already served
10 time?

11 MR. WHEELER: The question you're asking,
12 I'm not allowed to answer. I don't want you to draw
13 any inferences from that. I can't answer questions
14 about specific facts related to any case when I'm
15 conducting voir dire. Whether a person has or not or
16 put into evidence, it's just a subject I can't go into.
17 Thank you, Ms. Cue.

18 Mr. Jones, I have to ask you about
19 punishment and considering full range of punishment:
20 You've heard all the prefatory comments I've made. Did
21 you understand those?

22 VENIREPERSON: Yes, sir.

23 MR. WHEELER: And understanding those, can
24 you consider the full range of punishment?

25 VENIREPERSON: Yes, sir.

1 MR. WHEELER: Okay. Ms. Clark?

2 VENIREPERSON: No.

3 MR. WHEELER: And do you understand the law
4 allows probation to be given in these cases?

5 VENIREPERSON: Yes.

6 MR. WHEELER: Our Legislature has said so.
7 And you also understand there are supporting facts
8 supporting probation. Under those circumstances, you
9 can't --

10 VENIREPERSON: No, sir.

11 MR. WHEELER: Ms. Mize?

12 VENIREPERSON: Yes, sir.

13 MR. WHEELER: Yes.

14 Ms. Rhodes?

15 VENIREPERSON: Yes, sir.

16 MR. WHEELER: Dr. Cathey?

17 VENIREPERSON: Yes.

18 MR. WHEELER: Can you, Mr. Hall?

19 VENIREPERSON: No.

20 MR. WHEELER: And as I asked just
21 previously, you do understand the law allows for it?

22 VENIREPERSON: I understand.

23 MR. WHEELER: Even if the law allows it,
24 you can't consider it?

25 VENIREPERSON: No.

1 MR. WHEELER: Mr. Bean?
2 VENIREPERSON: Yes.
3 MR. WHEELER: Mr. Young?
4 VENIREPERSON: Yes.
5 MR. WHEELER: Mr. Helping?
6 VENIREPERSON: Yes, sir.
7 MR. WHEELER: Ms. Carrigan?
8 VENIREPERSON: Yes.
9 MR. WHEELER: Mr. Lindley?
10 VENIREPERSON: Yes, sir.
11 MR. WHEELER: Can you, Mr. Gary?
12 VENIREPERSON: Yes, 'sir'.
13 MR. WHEELER: Mr. Stevenson?
14 VENIREPERSON: Yes.
15 MR. WHEELER: Mr. Byrd?
16 VENIREPERSON: Yes.
17 MR. WHEELER: Mr. Askins?
18 VENIREPERSON: Yes.
19 MR. WHEELER: Ms. Johnson, can you consider
20 that full range of punishment?
21 VENIREPERSON: Probation, for murder?
22 MR. WHEELER: Yes.
23 VENIREPERSON: No.
24 MR. WHEELER: No? Is that a "no"?
25 VENIREPERSON: No.

1 MR. WHEELER: Ms. Raulston?
2 VENIREPERSON: Yes.
3 MR. WHEELER: Mr. Jackson?
4 VENIREPERSON: No, sir.
5 MR. WHEELER: Ms. Williams?
6 VENIREPERSON: Yes.
7 MR. WHEELER: Ms. Miranda?
8 VENIREPERSON: Yes.
9 MR. WHEELER: Mr. Frosch?
10 VENIREPERSON: No, sir.
11 MR. WHEELER: Even though the law allows it
12 and the evidence would support it?
13 VENIREPERSON: If I was on there and I
14 convicted him of -- if I said he was guilty of murder?
15 MR. WHEELER: Yes, sir.
16 VENIREPERSON: I couldn't give him
17 probation.
18 MR. WHEELER: Not at all?
19 VENIREPERSON: No.
20 MR. WHEELER: Under no circumstances?
21 VENIREPERSON: That's right.
22 MR. WHEELER: Thank you, sir.
23 Ms. Thomas?
24 VENIREPERSON: Yes.
25 MR. WHEELER: Mr. White?

1 VENIREPERSON: Yes.

2 MR. WHEELER: Ms. White?

3 VENIREPERSON: [Inaudible response].

4 MR. WHEELER: Did you say, "no," Ms. White?

5 VENIREPERSON: Correct.

6 MR. WHEELER: You could not consider

7 probation?

8 VENIREPERSON: No.

9 MR. WHEELER: Mr. and Ms. White, you're

10 sitting right next to each other. Are y'all related to

11 each other?

12 VENIREPERSON: No relation.

13 VENIREPERSON: No relation.

14 MR. WHEELER: Mr. White said he could and

15 Ms. White said she couldn't; is that right?

16 VENIREPERSON: [Inaudible response].

17 VENIREPERSON: [Inaudible response].

18 MR. WHEELER: Okay. Ms. Wetzork?

19 VENIREPERSON: No.

20 MR. WHEELER: Mr. Stripling?

21 VENIREPERSON: Yes.

22 MR. WHEELER: Ms. Caraway?

23 VENIREPERSON: No.

24 MR. WHEELER: Ms. Swann?

25 VENIREPERSON: Yes.

1 MR. WHEELER: Ms. Smith?

2 VENIREPERSON: Yes.

3 MR. WHEELER: Mr. Humphreys?

4 VENIREPERSON: No.

5 MR. PARKS: Sorry, what number?

6 MR. WHEELER: No. 55 said "no".

7 MR. PARKS: 54?

8 MR. WHEELER: No. 54 said "yes". Gets a
9 little harder to hear as we get to these back two rows ,
10 so I need you to speak up.

11 Mr. Humphreys, you do understand the law
12 allows that, and we're talking about the scenario where
13 appropriate evidence has been brought to you that
14 supports a finding of probation? You couldn't even
15 consider it; is that correct?

16 VENIREPERSON: I don't think so, no.

17 MR. WHEELER: Okay.

18 Ms. Cue?

19 VENIREPERSON: Yes.

20 MR. WHEELER: She said "yes," No. 56.

21 Mr. Ferguson?

22 VENIREPERSON: No.

23 MR. WHEELER: Juror No. 57.

24 58, Ms. Bridges?

25 VENIREPERSON: No.

1 MR. WHEELER: Juror No. 59, Ms. Hernandez?
2 VENIREPERSON: No.
3 MR. WHEELER: You could not consider the
4 full range of punishment?
5 VENIREPERSON: No.
6 MR. WHEELER: All right.
7 Ms. Roling?
8 VENIREPERSON: No.
9 MR. WHEELER: Thank you.
10 Ms. Scogin?
11 VENIREPERSON: No.
12 MR. WHEELER: Mr. Kuiken?
13 VENIREPERSON: Yes.
14 MR. WHEELER: You could, okay.
15 Mr. Davis?
16 VENIREPERSON: No.
17 MR. WHEELER: Ms. Ballard?
18 VENIREPERSON: Yes.
19 MR. WHEELER: Ms. Harrison?
20 VENIREPERSON: Yes.
21 MR. WHEELER: Mr. Capps?
22 VENIREPERSON: I don't know.
23 MR. WHEELER: Is that a "no"?
24 VENIREPERSON: I don't know.
25 MR. WHEELER: You don't know?

1 VENIREPERSON: I can't see a scenario where
2 somebody convicted of murder you could give me enough
3 evidence to tell me they're eligible for probation.

4 MR. WHEELER: And that is the very scenario
5 I'm putting in front of you. That there's the scenario
6 the one of scenario out of a million where you say,
7 okay, there's evidence to support --

8 VENIREPERSON: If there's a scenario where
9 I could actually do that, I say, yes, I could.

10 MR. WHEELER: No. 67, Mr. Hosea?

11 VENIREPERSON: No.

12 MR. WHEELER: Ms. Jackson?

13 VENIREPERSON: Yes.

14 MR. WHEELER: Could you, Mr. Harris?

15 VENIREPERSON: No, sir.

16 MR. WHEELER: Ms. Allen?

17 VENIREPERSON: No.

18 THE COURT: I'm sorry, what was her answer?

19 MR. WHEELER: His answer was "no".

20 THE COURT: What was hers?

21 MR. WHEELER: Hers was, "no".

22 No. 70, Ms. Reeves?

23 VENIREPERSON: No.

24 MR. WHEELER: No. 71, Mr. Clark?

25 VENIREPERSON: Yes.

1 MR. WHEELER: Thank you.

2 Ms. Byrd?

3 VENIREPERSON: Yes.

4 MR. WHEELER: Ms. Phifer?

5 VENIREPERSON: No.

6 MR. WHEELER: Even though Texas law allows
7 you to consider that full range of punishment?

8 VENIREPERSON: No.

9 MR. WHEELER: Ms. Phifer said, "No".

10 VENIREPERSON: Yes.

11 MR. WHEELER: Mr. Young, you could?

12 VENIREPERSON: Yes.

13 MR. WHEELER: Ms. Strickland?

14 VENIREPERSON: Yes.

15 MR. WHEELER: Okay. Thank you.

16 Laborious, but we have to ask the
17 questions.

18 Next question has to do with -- well, let's
19 put it this way: Raise your card if you believe the
20 police are doing a good job in your neighborhood.

21 (Response from venire panel.)

22 MR. WHEELER: I see most of the cards.

23 That's good.

24 Is there anyone here who thinks the police
25 really are not doing a good job for you and your

1 community? Raise your card.

2 (No response.)

3 MR. WHEELER: Is there anybody here who
4 believes the police are not doing a good job?

5 (No response.)

6 MR. WHEELER: Raise your hand if you liked
7 getting your last speeding ticket.

8 (Laughter.)

9 VENIREPERSON: I didn't hear you. What did
10 you say?

11 MR. WHEELER: Raise your hand if you liked
12 getting your last speeding ticket, the last one.

13 (Laughter.)

14 MR. WHEELER: This leads to this question.
15 It's an important question: If anyone on the panel had
16 a problem with the police that would result in a poor
17 opinion of police officers, please raise your cards.

18 (Response from venire panel.)

19 MR. WHEELER: Nos. 52 and 64.

20 Is there anybody else?

21 (No response.)

22 MR. WHEELER: I see no other cards. Thank
23 you.

24 Now, I said the traffic ticket thing and
25 I'm going to ask this question: With regard to arrests,

1 is there anybody on the panel who has been arrested for
2 any offense above the level of a traffic offense? Raise
3 your card.

4 (Response from venire panel.)

5 MR. WHEELER: Thank you.

6 VENIREPERSON: Is that convicted of a crime
7 or --

8 MR. WHEELER: Arrested, just arrested.

9 VENIREPERSON: Just arrested?

10 MR. WHEELER: Yes, sir.

11 I don't want to pry into those. Those of
12 you who raised your cards, would you raise your card and
13 approach if you'd like to talk to the judge about it.

14 MR. WHEELER: 50 and 52.

15 No. 37, is there any reason that would
16 affect your ability to be a fair and impartial juror?

17 VENIREPERSON: No.

18 MR. WHEELER: Mr. Vallance?

19 VENIREPERSON: No.

20 MR. WHEELER: And the next thing I'm going
21 to talk to you about, as we move to the conclusion of
22 this voir dire, has to do with witnesses. It is not
23 pleasant to be in the middle of a trial and call a
24 witness on the stand and have a juror look at that
25 witness and know that that juror hates that witness and

1 will never believe a word they say. We don't want to
2 get into that situation. It's not fair to the parties.

3 So I'm going to walk through some witnesses
4 here and talk to you. I do not want to get into this
5 kind of comment. This is my last jury trial I had here:
6 "I wouldn't believe that person if they were the last
7 person on Earth." That just threw a skunk into this
8 jury. You're saying, "Okay, I'm testifying; I want you
9 to know how bad this person is." That's inappropriate.

10 So if you have a comment to make about a
11 particular witness, good or bad, because sometimes the
12 response is, "I believe every word out of that person's
13 mouth," then ask to approach either way and we'll deal
14 with that up here at the stand. It affects the fairness
15 of trial.

16 First: Former deputy -- now with the
17 Quitman Police Department -- Miles Tucker, if you know,
18 know of, or related to him, I need to see your card,
19 please.

20 (Response from venire panel.)

21 MR. WHEELER: Nos. 3, 8, and 28, and 71.

22 Mr. Gould, do you need to approach on that
23 or can you be fair and impartial?

24 VENIREPERSON: I can be fair and impartial.

25 MR. WHEELER: Juror No. 8, Ms. Cummings,

1 you raised your card.

2 Juror No. 28, Ms. Mize --

3 VENIREPERSON: Yes, sir.

4 MR. WHEELER: -- is there a matter we need
5 to approach and talk about?

6 VENIREPERSON: No, sir.

7 MR. WHEELER: Can you be a fair and
8 impartial juror?

9 VENIREPERSON: Yes, sir.

10 MR. WHEELER: And Juror No. 71?

11 VENIREPERSON: Yes.

12 MR. WHEELER: Thank you.

13 Next: Richard Ernst from Fort Worth,
14 Texas, anybody know, know of, or related to him?

15 (No response.)

16 MR. WHEELER: Tom Bevel of Oklahoma, does
17 anybody on the panel know, know of, or related to Tom
18 Bevel?

19 (No response.)

20 MR. WHEELER: I see no hands.

21 Randall Lain, Sr.?

22 No. 71. Thank you.

23 Todd Wages, do you know, know of, or
24 related to Todd Wages?

25 (No response.)

1 MR. WHEELER: I might as well ask about
2 Nichole Payne: Anybody know, know of, or related to
3 her?

4 (No response.)

5 MR. WHEELER: Or Austin Wages, anybody
6 know, know of, or related to him?

7 (No response.)

8 MR. WHEELER: I see no hands.
9 Melissa Valadez of the Texas Department of
10 Criminal Justice?

11 (No response.)

12 MR. WHEELER: I see no hands.
13 Amy Rogers, Cellmark in Fort Worth?

14 (No response.)

15 MR. WHEELER: I see no hands.
16 Cindy Robinson, a real estate agent here
17 locally?

18 (Response from venire panel.)

19 MR. WHEELER: Okay. That's No. 9, 47, 58,
20 62, 68, and 19.

21 With regard to Cindy Robinson,
22 Mr. Reynolds, do you have any feelings one way or the
23 other about her?

24 VENIREPERSON: No, sir.

25 MR. WHEELER: Can you be a fair and

1 impartial juror --

2 VENIREPERSON: Yes, sir.

3 MR. WHEELER: -- in regard to that
4 testimony?

5 Let's see, Mr. Kuiken, knowing or knowing
6 of Cindy Robinson, would that affect your ability to be
7 a fair and impartial juror in this case?

8 VENIREPERSON: No, sir.

9 MR. WHEELER: Would you listen to her
10 testimony the same as any other witness?

11 VENIREPERSON: Yes, sir.

12 MR. WHEELER: Start out on equal footing?

13 VENIREPERSON: Yes, sir.

14 MR. WHEELER: Thank you.

15 Mr. Vanderschaaf, same question.

16 VENIREPERSON: No, sir, it would not affect
17 it.

18 MR. WHEELER: Thank you.

19 Dr. Aaron Polk of Nacogdoches?

20 (No response.)

21 MR. WHEELER: Dr. Pinckard from
22 southwestern institute of forensic sciences?

23 (No response.)

24 MR. WHEELER: I see no cards.

25 Samantha Pennington of Port Authur?

1 (No response.)

2 MR. WHEELER: I see no cards.

3 Dmitri Nobles?

4 (No response.)

5 MR. WHEELER: Jacob Montalvo?

6 (No response.)

7 MR. WHEELER: I see no cards. He's in

8 Quitman.

9 (No response.)

10 MR. WHEELER: Mark Miller of the Wood

11 County Sheriff's Office?

12 Dr. Cathey -- it's okay. We'll take a

13 break and I'll write down these cards. Hold up your

14 cards while she gets that.

15 No. 30, 36, No. 71.

16 Dr. Cathey, with regard to Mark Miller, is

17 there anything we need to approach and talk about?

18 VENIREPERSON: No, sir.

19 MR. WHEELER: Can you be fair and

20 impartial?

21 VENIREPERSON: Yes.

22 MR. WHEELER: Mr. Lindley, do you know Mark

23 Miller?

24 VENIREPERSON: Yes, sir.

25 MR. WHEELER: Would that affect your

1 ability to be a fair and impartial juror?

2 VENIREPERSON: No, sir.

3 MR. WHEELER: Okay. And No. 71?

4 VENIREPERSON: No.

5 MR. WHEELER: Thank you.

6 Steve McCombs, a State Farm insurance

7 agent?

8 (No response.)

9 MR. WHEELER: I see no cards.

10 Alex Hoggard of Quitman, Texas?

11 (No response.)

12 MR. WHEELER: I see no cards.

13 Walter Henson of the Department of Public

14 Safety.

15 (No response.)

16 MR. WHEELER: Ken Heitman of Quitman?

17 (No response.)

18 MR. WHEELER: I see no cards.

19 Sarah Hawthorne of Nacogdoches?

20 (No response.)

21 MR. WHEELER: Does anybody know, know of,

22 or related to Richard Hawthorne of Nacogdoches?

23 (No response.)

24 MR. WHEELER: Coach Hayland Hardy of

25 Quitman?

1 (Response from venire panel.)

2 MR. WHEELER: Okay. Let me write these
3 down: No. 7 and 9. Nos. 19, 21, 27, 30, 46, and 47, 58
4 and 68.

5 Ms. Terrell, knowing, knowing of, or being
6 related to Coach Hardy, would that affect your ability
7 to be fair and impartial?

8 VENIREPERSON: No, sir.

9 MR. WHEELER: Mr. Vanderschaaf?

10 VENIREPERSON: No.

11 MR. WHEELER: Dr. Cathey?

12 VENIREPERSON: No.

13 MR. WHEELER: Dana Hamrick, counselor at
14 Quitman High School?

15 (Response from venire panel.)

16 MR. WHEELER: 9, 21, 18, 46, 47, 58, and
17 68.

18 MR. WHEELER: Mr. Reynolds --

19 VENIREPERSON: Yes, sir.

20 MR. WHEELER: -- knowing, knowing of, or
21 being related to Dana Hamrick, would that affect your
22 ability to be a fair and impartial juror?

23 VENIREPERSON: No, sir.

24 MR. WHEELER: Mr. Hamrick, you are related
25 to Ms. Hamrick?

1 VENIREPERSON: Probably way back. Not that
2 I'm aware of.

3 MR. WHEELER: Okay.

4 Vickie Hall of the Southwestern Institute
5 of Forensic Sciences.

6 (No response.)

7 MR. WHEELER: I see no cards.

8 Debbie Foster of the Quitman Police
9 Department?

10 (Response from venire panel.)

11 MR. WHEELER: Okay. I need for y'all to
12 keep those cards up, please. 9, 21, 30, 36, 45, and 71.

13 Same question as before: Mr. Reynolds,
14 would it affect your ability to be fair and impartial?

15 VENIREPERSON: No, sir.

16 MR. WHEELER: Dr. Cathey?

17 VENIREPERSON: No.

18 MR. WHEELER: Mr. Lindley?

19 VENIREPERSON: No, sir.

20 MR. WHEELER: Okay. Lee Elmore of the Wood
21 County Sheriff's Office? Lee Elmore?

22 (Response from venire panel.)

23 MR. WHEELER: No. 3.

24 Who else?

25 68, 70 and 71, and 61.

1 MR. WHEELER: Okay. Mr. Gould, knowing or
2 knowing of him, would that affect your ability to be
3 fair and impartial?

4 VENIREPERSON: No, sir.

5 MR. WHEELER: Okay. Casey Dupont of Orchid
6 Cellmark in Fort Worth?

7 (No response.)

8 MR. WHEELER: Todd Chance of Hainesville?

9 (Response from venire panel.)

10 MR. WHEELER: 9, 30, 47, 68 and 58. Thank
11 you.

12 Misty Burns of the Wood County Sheriff's
13 Office, Deputy Burns.

14 (No response.)

15 MR. WHEELER: I see no cards.

16 William Burge of the Wood County Sheriff's
17 Office?

18 (Response from venire panel.)

19 MR. WHEELER: Nos. 3, 8, 28, 61, 70 and 71.

20 Ms. Mize, knowing, knowing of, or being
21 related to William Burge, would that affect your ability
22 to be a fair and impartial juror?

23 VENIREPERSON: No, sir.

24 MR. WHEELER: Preston Bridges?

25 (Response from venire panel.)

1 MR. WHEELER: Okay. Y'all need to keep
2 your cards up here. 11, 14, 15, 30, 19, 46, 47, 48, 58,
3 and 73.

4 THE COURT: And 68.

5 MR. WHEELER: 68, Ms. Ferguson.

6 VENIREPERSON: Yes. I only know him
7 because he was a banker and I liked him, so --

8 MR. WHEELER: You liked him as a banker.

9 VENIREPERSON: Well, that's all I know
10 personally. I don't know him at all, but the answer is
11 I have no problem.

12 MR. WHEELER: You have no problem?

13 VENIREPERSON: No.

14 MR. WHEELER: And let's see. Next is
15 Ms. Judkins.

16 VENIREPERSON: No.

17 MR. WHEELER: You don't have any problem
18 with him whatsoever?

19 VENIREPERSON: [Inaudible response].

20 MR. WHEELER: No. 19, Mr. Vanderschaaf?

21 VENIREPERSON: Don't have any problem.

22 MR. WHEELER: Okay. Mr. White?

23 VENIREPERSON: [Inaudible response].

24 MR. WHEELER: No problem whatsoever?

25 VENIREPERSON: [Inaudible response].

1 MR. WHEELER: No. 48, you've got to speak
2 loudly. Knowing, knowing of, or being related to
3 Preston Bridges, would that cause you any problems?

4 VENIREPERSON: No.

5 MR. WHEELER: Thank you. And No. 73,
6 Ms. Byrd?

7 VENIREPERSON: No.

8 MR. WHEELER: Okay. Kyle Bridges?

9 (Response from venire panel.)

10 MR. WHEELER: Nos. 47, 58, 68, 9, and 19.

11 Mr. Vanderschaaf, knowing Kyle Bridges
12 cause you any problems?

13 VENIREPERSON: [Inaudible response].

14 MR. WHEELER: Michelle Bonnette of the
15 Department of Public Safety in Austin?

16 (No response.)

17 MR. WHEELER: Emma Becker of the Department
18 of Public Safety in Austin.

19 (No response.)

20 MR. WHEELER: I see no hands.

21 Jeff Badders, an attorney in Nacogdoches?

22 (No response.)

23 MR. WHEELER: I see no hands.

24 Emma Becker of the Department of Public
25 Safety in Austin?

1 (No response.)

2 MR. WHEELER: I see no hands.

3 Frequently, you have heard that the
4 Defendant has a right to a fair trial. And it's easy to
5 remember to give the Defendant a fair trial. It's easy
6 to give the Defendant a fair trial when our judicial
7 system is geared to protect his rights, and when the
8 Defendant is the only witness who is in the courtroom
9 during the entire trial -- the victim or victims, the
10 officer or officers, and the other witnesses are only in
11 the courtroom during their testimony, that's it, and if
12 we're not careful, it's easy to forget and think only of
13 the Defendant.

14 And I ask this panel if you can promise me,
15 each of you, that each time you think of the Defendant
16 and of being fair to him, that you'll also think of the
17 victims and be certain to --

18 MR. PARKS: Judge, we'd object to that as
19 being improper. It's argument.

20 THE COURT: Ask you to approach.

21 (Bench.)

22 THE COURT: Yes, sir.

23 MR. PARKS: Improper voir dire. It's
24 argument asking them to think of the victims every
25 time --

1 MR. WHEELER: And the other witnesses with
2 regard to a right to a fair trial. I've been using that
3 voir dire for 10 years. I've never been objected to it.
4 I have my own objection of the sidebar without a legal
5 basis to --

6 THE COURT: I'm going to sustain the
7 objection. Certainly, you've got the right to ask for a
8 fair trial, but I think it stops there.

9 (Open court.)

10 MR. WHEELER: Ultimately, it comes to this:
11 Can you promise to give a fair trial after this voir
12 dire? If that's your promise and your word and your
13 oath, please raise your card.

14 (Response from venire panel.)

15 MR. WHEELER: I see every card.

16 I know it's been long. I appreciate your
17 attention. An attentive panel is a key for justice in
18 the United States justice system. Thank you for your
19 time and your answers. I'm glad to talk to each one of
20 you and look forward to working with you. Thank you.

21 THE COURT: And thank you, Mr. Wheeler.

22 Ladies and gentlemen, usually after lunch,
23 I take a quicker break than I do at other times, so I
24 think before we start the Defense's voir dire, let's go
25 ahead and take a 15-minutes recess.

1 I'm going to need to remind you of your
2 prior instructions: Don't talk to one another or to
3 anyone else. If you leave your cards there in the seats
4 and then if you'll be back here at, I guess we'll say
5 2:50, we'll start then. I've underestimated our time
6 we're going to need. We're going to need a little
7 longer than I advised. We'll be in recess at this time.

8 (Break taken from 2:33 p.m. to 2:50 p.m.)

9 THE COURT: Back on the record in
10 20,529-2008, State vs. Jason Thad Payne. Let the record
11 reflect, counsel for the State, counsel for the
12 Defendant, and the Defendant is present.

13 Ladies and gentlemen, let me ask you to do
14 the same thing you did last time and look around, and if
15 you've got any vacancies that weren't there before you
16 took your break, please bring that to my attention.
17 It's kind of hard to tell when you've got a big group.

18 (No response.)

19 THE COURT: Not seeing any indication that
20 someone's not here, I do certify the panel is complete.

21 Mr. Parks, if you're ready to proceed, you
22 may do so.

23 VOIR DIRE EXAMINATION

24 BY MR. PARKS:

25 Thank you, Your Honor. May it please the

1 court, Mr. Wheeler.

2 Ladies and gentlemen, I know what you're
3 thinking. You're thinking, what in the world could that
4 lawyer talk to us about that either the judge or Mr.
5 Wheeler hadn't already covered? Again, and perhaps the
6 second time or third time, I'm going to tell you the
7 answer to that question is basically nothing.

8 As the judge told you earlier, my name is
9 Doug Parks. I'm here in Wood County. I used to
10 practice in Dallas County. Live out at Holly Lake
11 Ranch. I am going to spend a little time with you for a
12 couple of reasons: One, I'm a lawyer, and given an
13 opportunity to talk, lawyers always talk. The second
14 thing is I want to make sure that we're all on the same
15 page with respect to how criminal trials are supposed to
16 be conducted under the law.

17 And I know you've had a very thorough voir
18 dire from Mr. Wheeler and I appreciate that and I can
19 promise you that he has cut down on the time I will
20 spend considerably, so if you think I'm going to be as
21 long, I will not be. And that's not a criticism of
22 Mr. Wheeler. That's a compliment to Mr. Wheeler because
23 there are things on my outline that I've marked through
24 because they've been covered.

25 Now, I'm going to get into the foundation

1 of cases to some extent even though Judge Boswell has
2 explained that to you very well. I just want to, kind
3 of, put my take on some of that, but before I do that, I
4 want to talk to you a minute about one of the last
5 subjects that we talked about because I don't want you
6 to have any misunderstanding about what's going on here
7 and that was the issue of the range of punishment.

8 And it kind of goes back to that concept
9 that Judge Boswell told you. You haven't heard any
10 evidence in this case. There's not been one syllable of
11 evidence uttered in this case. So as defense lawyers,
12 the law kind of places something of a burden on us.
13 We're not mind readers. Certainly, we have a very good
14 idea how the evidence is going to go in this case. If
15 we didn't, we wouldn't have been doing our job, but
16 still, you can never predict exactly what will happen in
17 a trial.

18 So if the law says if the defendant in a
19 criminal case is eligible for probation, whether or not
20 he's entitled for probation is something for the jury to
21 determine, but the law determines eligibility, and all
22 persons are eligible for probation in the State of Texas
23 except those people who are convicted of capital murder.
24 All others are eligible for probation if they have never
25 before been convicted of a felony in this state or any

1 other state or under the laws of the United States.

2 And the law says that if an accused citizen
3 is eligible for probation, his lawyers have an
4 obligation to file an application for probation in every
5 case before voir dire starts. So if we had not filed an
6 application for probation in this case, Mr. King and I
7 would have been derelict in our duty.

8 Now, whether or not that ever comes into
9 play, depends upon the evidence and the verdict of the
10 jury, but the law requires us to file it ahead of time.
11 So here's where we are with respect to that: The fact
12 that we have filed an application for probation in this
13 case is no evidence of any concession of guilt
14 whatsoever. The same would be in any other case.

15 The reason the law requires us to file it
16 before voir dire is so that we can talk about it. This
17 is something of a unique situation. Anyone charged with
18 and convicted of capital murder will not be subject to a
19 probation hearing by a jury. What typically happens is
20 this: We have a bifurcated trial system in the State of
21 Texas. In all cases, except capital murder cases, a
22 jury hears the evidence at the guilty/innocence trial.
23 I call it the merits stage.

24 As Judge Boswell has told you, this isn't
25 about guilt or innocence. It's about whether or not the

1 State can prove what they've alleged, but at the first
2 stage of trial, the determination is made as to whether
3 or not the State has proven their case. If they have
4 not, the verdict is not guilty, then everybody goes
5 home. We all understand that.

6 If, however, the jury finds a defendant
7 guilty, then you move into a punish phase where you can
8 hear additional evidence and ultimately make a decision
9 about what you believe the right and proper punishment
10 is based upon the offense the defendant is convicted of
11 and any other thing that you have heard that you believe
12 is relevant to that issue, okay?

13 That's not so in a capital murder case
14 where the defendant is convicted of capital murder. If
15 the state has elected not to seek death and if the
16 defendant is convicted of capital murder, the trial is
17 over. There's no punishment phase because the law says
18 the automatic punishment for capital murder is life in a
19 Texas penitentiary without the possibility of parole,
20 and that is set by law and is essentially imposed along
21 with a guilty verdict. The judge cannot do anything
22 different. A jury cannot do anything different. The
23 trial is over. That's how it's different from a regular
24 trial.

25 Now, I believe it was Dr. Cathy who asked

1 what the difference is between murder and capital
2 murder, and basically to answer that question is that
3 capital murder is murder plus something else. Very
4 often it's murder plus the commission of some other
5 felony like robbery, aggravated sexual assault,
6 burglary. It can be murder of a police officer or a
7 fireman on duty, murder of a child under the age of six.

8 There's a lot of things that can be capital
9 murder, but it's typically -- it's always murder plus
10 something else. In this particular case, they've
11 alleged murder of two persons in the same criminal
12 transaction, so that's murder plus something else. And
13 that's what they've got to prove, okay? Everybody with
14 me so far?

15 Anybody hold it against Mr. Payne that his
16 lawyers filed an application for probation in this case?
17 Anybody take that as any kind of omission of guilt on
18 his part?

19 (No response.)

20 MR. PARKS: I see no hands. I assume that
21 you will not, and that's what the law would expect of
22 you. Wait until you hear everything.

23 Now, you know from what Judge Boswell told
24 you that the State of Texas has the burden of proof in
25 the case. Mr. Payne is presumed to be innocent where he

1 sits here in court this afternoon. That's what the law
2 presumes. Not everyone does that. It's fine if someone
3 decides that they don't presume an accused citizen
4 guilty -- I mean, to be innocent, they presume them to
5 be guilty. We're American citizens. We have a right to
6 our own thoughts and beliefs about that.

7 And I've had past -- I tell this same story
8 to every jury panel I talk to because it scares me to
9 death: Some years ago now I was trying a murder case in
10 Dallas, pretty much the same situation we had today. We
11 talked with the jury panel about the same things we
12 talked to you today; Judge Boswell did, Mr. Wheeler did;
13 presumption of innocence, beyond a reasonable doubt, all
14 of those things.

15 Finished and selected the jury. I went
16 back to my office and got a phone call from a friend who
17 had a friend on that panel and she had called him and
18 said, "I was on that jury panel but I didn't get
19 selected, but I could tell that the defendant was guilty
20 by the way that he looked." That's scary, folks.
21 That's scary, but what it tells us is is that there are
22 those among us who make decisions based on just those
23 kinds of things; did the police arrest him, did the
24 grand jury indict him, then he's guilty; does he look
25 kind of shifty, whatever it is.

1 What the law calls upon us to do as
2 citizens is, one, if you have thoughts or feelings along
3 those lines, honestly be able to set them aside, and if
4 you cannot, tell us. See, I tell jurors there's nothing
5 wrong with any of your feelings about these matters.
6 You don't have to like the laws. You don't have to
7 abide by what you're told the law is going to be as long
8 as you tell us that you're not going to because this
9 system works.

10 It's the best system that's ever been
11 devised in the history of civilization and it depends
12 upon basically four things: It depends upon judges who
13 understand and enforce the law, and I have no reason to
14 believe Judge Boswell won't do that. I've tried cases
15 in his court before. It depends upon a prosecution who
16 will forcefully and emphatically prosecute the case
17 against the accused within the bounds of the laws and
18 the rules that are set out for that, and it depends upon
19 a defense team that will defend their client vigorously
20 within the rules that the law sets out, and finally, it
21 depends upon a jury who will follow their oath.

22 And the 12 of you who sit over here in the
23 jury box will take an oath additional to the one you've
24 already taken. So far you've promised by your oath that
25 you will tell us the truth. The 12 of you that sit over

1 here will take an oath to a true verdict render
2 according to the law and the evidence, so help you God,
3 and if you do that, the system almost always works
4 right. It's only when one of the components falls down
5 that we get miscarriages of justice.

6 I can promise you that Judge Boswell will
7 do his job. Mr. Wheeler will do his. Mr. King and I
8 will do our very best to do ours. So that leaves the 12
9 of you on the jury to render a true verdict according to
10 the law and the evidence. Does that make sense to
11 everyone? Anyone here feels like they just could not do
12 that?

13 (No response.)

14 MR. PARKS: I take it by your silence that
15 you can.

16 THE COURT: No. 50.

17 VENIREPERSON: I didn't understand what you
18 said.

19 MR. PARKS: Okay. Yeah, we've talked to
20 you about an issue before?

21 VENIREPERSON: Yeah, what job --

22 MR. PARKS: That you -- yes, Ma'am. I
23 guess I should anyone that we haven't already talked to
24 about.

25 (No response.)

1 MR. PARKS: Okay. Thank you very much.

2 So we all know where the burden of proof
3 lies. We know what has to be proven, what has to be
4 proven, or maybe we don't know, they are the elements
5 contained in the indictment. You've seen the statute
6 for capital murder. Well, the indictment basically
7 tracks that statute. And the law puts the obligation on
8 the State of Texas to prove everything they have alleged
9 in the indictment. They get to choose what they put in
10 the indictment. They have to prove what they put in the
11 indictment. Does that make sense to you?

12 (Response from venire panel.)

13 MR. PARKS: I won't spend a lot of time on
14 that. I don't believe there's any reason for it. We've
15 covered that the indictment is no evidence of guilt.

16 There's an old saying among lawyers that
17 grand juries can indict a ham sandwich if they wanted
18 to. They are completely autonomous. They can true bill
19 or no bill nobody for any reason they want to. It's not
20 a trial, you've been told. The defendant's lawyers are
21 not involved any at all. They're not entitled to be
22 there. No defense is ever put up.

23 For your purposes, it's really no
24 different -- how many of you have gotten a traffic
25 ticket for anything?

1 (Response from venire panel.)

2 MR. PARKS: This officer wrote you a ticket
3 and gave it to you. That's essentially what an
4 indictment is. It's an allegation that you did
5 something wrong. Now, you may have been speeding if it
6 were a speed ticket or you may not have been speeding,
7 but the fact that he gave you the ticket doesn't mean
8 that you were. Same thing with an indictment. It's
9 just a charging instrument that has to be proven.
10 Everybody with me on that?

11 (Response from venire panel.)

12 MR. PARKS: Okay. Now, we've got into a
13 little bit of squabble earlier when Mr. Wheeler was
14 talking about reasonable doubt. This is not a criticism
15 of Mr. Wheeler, but I get into this same discussion with
16 every prosecutor in every case I've ever tried. There
17 is no definition in the State of Texas of beyond a
18 reasonable doubt. That has kind of flip flopped.

19 When I first started practicing law about a
20 hundred years ago, we did not have a definition of
21 beyond a reasonable doubt. Then the Legislature decided
22 we needed to have one and they gave us one, and so we
23 tried cases for a number of years when the jury was told
24 a definition of beyond a reasonable doubt, and then it
25 was decided they really didn't need a definition of

1 beyond a reasonable doubt, so we're back where we
2 started without one. So what that really leaves us
3 with, beyond a reasonable doubt basically depends upon
4 what you as individual jurors believe it means to you.
5 We know what it's not.

6 We know it's not the preponderance of the
7 evidence that Mr. Wheeler talked about, which is the
8 standard we use in civil cases if we were fighting over
9 money. There was an intermediate standard called clear
10 and convincing evidence. That's the standard that's
11 used generally when the State steps in and takes or
12 tries to take someone's children away from them; the
13 theory that children are more precious and important to
14 us than money and they should not be taken away from us
15 by merely a preponderance of the evidence like a car
16 accident, but must be by clear and convincing evidence,
17 and above that is beyond a reasonable doubt.

18 Now, we always get into a bit of a fuss
19 over this 100-percent business, that you're not -- that
20 the State doesn't have to prove their case 100 percent.
21 The way I resolve that typically is this: How many of
22 you ever served on a criminal jury before? Any of you?

23 (Response from venire panel.)

24 MR. PARKS: Okay. There is a document
25 called the Court's Charge. Remember the oath that you

1 will -- a true verdict you will render according to the
2 law and evidence? The evidence is just what Mr. Wheeler
3 told you, it comes through the witness stand or through
4 documents or whatever that are admitted into evidence.

5 The law that you have sworn to uphold will
6 be given to you by Judge Boswell in a written document
7 called the Court's Charge and it will tell you all the
8 law you need to know in order to reach your verdict, and
9 that's the law that you have sworn to follow, okay? So
10 I like to fall back on the Court's Charge when it
11 becomes necessary.

12 I expect Judge Boswell will tell you in
13 that Court's Charge that the State is not bound to prove
14 their case beyond all possible doubt, but that they are
15 bound to prove their case beyond all reasonable doubt,
16 okay? And typically, prosecutors leave out that word
17 "possible". It never crosses their lips because there
18 is a difference between what is possible and what is
19 reasonable, and the law recognizes that.

20 It's possible that if I bought a lottery
21 ticket, I would win the lottery, but just by buying it
22 doesn't mean it's reasonable to believe that I will so I
23 go out this afternoon and buy a new car. I'll give you
24 the example I typically use is this: Let's say you're a
25 juror in a robbery case. Someone has alleged that a

1 person put a gun in their face, robbed them of their
2 money, and ran away, and they're called to testify, and
3 they say, "I'm so-and-so, I was robbed at gunpoint, and
4 that's the fellow that did it right there, the
5 defendant," okay? And it doesn't matter what else
6 you've heard as evidence for this example.

7 You go back to the jury room to deliberate
8 your verdict and one of the jurors says, "Well, wait a
9 minute, what if the defendant had an identical twin
10 brother?" Possible. Now, you haven't heard anything
11 about an identical twin brother in the evidence.
12 There's been no suggestion from anything that you heard
13 in the courtroom that he did have an identical twin
14 brother, but I think most of us would concede that it's
15 possible that a person would have an identical twin
16 brother that he may or may not know about. Might have
17 been separated at birth. Who knows? It's possible.

18 Is it reasonable to except that he does
19 have one just because it's possible? I think most of us
20 would agree that that's an awful far stretch to go and
21 no reasonable person would just invent an identical twin
22 brother even though it's possible that that would
23 happen.

24 Now, it's a whole different story if, in
25 fact, you had heard evidence that the defendant had an

1 identical twin brother. Here comes a woman to say, "I'm
2 the defendant's mother, and when he was born, I had
3 twins and they were identical and I kept one and his
4 father kept one and I haven't seen them since."

5 Well then, you know, it might be reasonable
6 for you to have a reasonable doubt about whether or not
7 they had the right brother in the courtroom because you
8 heard evidence of it, it's not something that was popped
9 out of the clear blue sky. See what I'm talking about?

10 (Response from venire panel.)

11 MR. PARKS: The law recognizes that there
12 could be doubt that's just totally unreasonable, but it
13 expects that a jury will require the State to prove to
14 them what they have alleged beyond all reasonable doubt
15 and that means 100 percent of it. Does that make sense
16 to all of you?

17 (Response from venire panel.)

18 MR. PARKS: Okay. Can all of you promise
19 me that wherever you set that standard for yourself,
20 that you will at least make them prove to you beyond all
21 reasonable what they have alleged before you can
22 consider a guilty verdict in this case? Because that's
23 what the law expects? Not me. It's what the law
24 expects.

25 (Response from venire panel.)

1 MR. PARKS: Okay. Thank you. Let me talk
2 to you a minute about evidence and witnesses and I want
3 to make sure we've covered the issue of police
4 testimony, and this kind of goes both ways. Mr. Wheeler
5 told you that all witnesses ought to be started off on a
6 level playing field and that you shouldn't
7 automatically, before you ever heard them, believe or
8 disbelieve any category of witnesses simply because they
9 are what they are.

10 But sometimes we have very strong feeling
11 about police officers one way or the other. There are
12 people who say when a police officer takes the stand and
13 takes the oath, "I'm going to believe whatever comes out
14 of his mouth because I respect police officers, I trust
15 police officers, and I don't believe that a police
16 officer would lie, and that's the God's honest truth."
17 On the other side, there are people who have said to me,
18 "I've had run-ins with the police and I wouldn't believe
19 a word they say when they hit the stand." Well, neither
20 side there is qualified, frankly, to be a juror because
21 they've already made up their minds and they're going to
22 either believe or disbelieve before they've heard
23 anything.

24 Any one of you have any issues like that or
25 can you -- anybody believe that police officer couldn't

1 or wouldn't tell a lie?

2 (No response.)

3 MR. PARKS: Couldn't be mistaken? They're
4 human beings just like the rest of us, right?

5 You have to weigh and listen to their
6 testimony and make your judgments based upon what you
7 heard using your common sense. Does that make sense?
8 Can we all do that?

9 (Response from venire panel.)

10 MR. PARKS: The same is true for accused
11 citizens if they testify. Start them the same you do
12 anyone else or any of theirs witnesses, same as anyone
13 else. Judge their credibility after you've heard their
14 testimony and whether or not it makes sense to you.
15 Fair enough?

16 (Response from venire panel.)

17 MR. PARKS: Okay. Now, there is a category
18 of witnesses we have not talked about that I would fully
19 expect that you would hear from in this case.
20 Typically, we call witnesses to testify to facts, what
21 they know about any issue that needs to be decided in
22 the case that's relevant to the decision to be made.
23 Sometimes the law allows people to express their
24 opinions, not their facts, but their opinions.
25 Typically, that comes from expert witnesses, okay? And

1 generally, those are issues that would not be within the
2 common knowledge of the normal layperson.

3 And just because someone might be an expert
4 in some area, does not mean that they're an expert in
5 all areas. Here's the best example more than I can tell
6 you that happens in every capital murder cases tried in
7 the State of Texas: The medical examiner comes to
8 testify and they testify as to the cause and manner of
9 death.

10 They're experts. They weren't there when
11 it happened. They weren't witnesses to anything, but
12 they're here to tell us what they found in the autopsy
13 and what the cause and matter of death is, and that's
14 not something that anyone I've ever run across has any
15 difficulty with at all. It's perfectly natural for us
16 to hear that kind of evidence.

17 Sometimes you will hear experts with
18 respect to -- say, for instance, ballistics firearms
19 examiners come to testify whether or not bullets or
20 shell casings did or didn't come from a particular
21 weapon or you might hear about trace evidence, DNA,
22 fingerprint. There's a whole smorgasbord, I guess, of
23 potential witnesses.

24 And the reason I bring this up is this:
25 It's not uncommon for you to hear expert witnesses on

1 the same subject in disagreement with each other, and it
2 would be your job to make a determination, based upon
3 the qualifications, what make sense to you. Whatever it
4 is you've used to judge the credibility of witnesses,
5 you would apply to experts also.

6 Even though you might not be an expert in
7 that field, we trust jurors to make a determination if
8 there are experts who testify and are not consistent
9 with each other which way they believe is the correct
10 way. Does that, kind of, make sense?

11 (Response from venire panel.)

12 MR. PARKS: And you can do it. You don't
13 have to be expert in their field. You can judge from
14 their experience, their background, their education,
15 what they say makes sense or doesn't make sense to you,
16 those sorts of things, but occasionally, we'll have
17 prospective jurors who say, "Whatever an expert say, I
18 just think they're hired guns. They say anything
19 anybody wants them to say. I don't pay a bit of
20 attention to them." Anybody feel like that? You're
21 entitled to feel that way, but you're obligated to tell
22 us.

23 (No response.)

24 MR. PARKS: I see no fans in the air, so
25 I'm going to assume that, by your silence, all of you

1 are saying to me that you'll listen to experts and give
2 them your full attention. If they are in disagreement
3 about matters, then you will judge their credibility and
4 make a determination as you feel is right and proper.
5 Everybody with me? Can you do that?

6 (Response from venire panel.)

7 MR. PARKS: Okay. Now, I do want to
8 mention -- I have here circled -- you have a duty to
9 resolve conflicts in evidence. Well, yeah, Mr. Wheeler
10 touched on that. I believe the way he put it is, simply
11 because there is a conflict in evidence doesn't mean
12 that it's a reasonable doubt.

13 Well, it might be. That's for you to
14 determine, but if you can resolve conflicts, well then,
15 that's one of the jobs you have to do in judging the
16 credibility of the witnesses, but if you cannot resolve
17 conflicts, then what the law says is you resolve these
18 issues that can't be resolved in favor of Mr. Payne and
19 not in favor of the State, because, you see, they have
20 the burden of proving to you beyond a reasonable doubt
21 what they have to prove, and if you can't make that
22 resolution that they have proven it to you beyond a
23 reasonable doubt because you can't make a determination
24 from a conflict in the evidence, then the proper verdict
25 in that case is not guilty. It's as simple as that.

1 Does that make sense to everybody?

2 (Response from venire panel.)

3 MR. PARKS: A couple of procedures and I'm
4 going to sit down. Oh, I want to mention one other
5 thing and that's the business about subpoena power.

6 Mr. Wheeler talked to you about the defense having the
7 right to subpoena witnesses, and that's true. We have a
8 right to call witnesses if we wish to. That's true.

9 The defendant has the right to testify if he wants to.
10 That's true. Let me tell you that that's a personal
11 decision that an accused makes.

12 The judge told you exactly what the law is
13 about that, that if the accused does testify, then he
14 has the right to have his testimony judged like
15 everybody else's. He's a truth teller, but he's not
16 presumed to be a liar, either. He's starting like
17 everybody else.

18 If an accused decides not to
19 testify -- it's a hard way of putting it, but it's kind
20 of true -- it's not any evidence. That's a hard way of
21 putting it, but as Judge Boswell said in many ways, if
22 an accused does not testify, he will give you an
23 instruction that you cannot not only consider that as a
24 circumstance against the defendant. It's not even a fit
25 subject to talk about in the jury room because the

1 charge says you are not to discuss or allude to the fact
2 that the accused did not testify. It's just not a
3 subject of conversation.

4 And I know that there's some of you out
5 there who are probably thinking, if I were accused of a
6 serious criminal offense and I didn't do it, wild horses
7 would not keep me off of that stand, and if a defendant
8 doesn't testify, he must be guilty of something. And if
9 you feel that way, you need to let us know about that
10 because there are a lot of things that you would not be
11 expected to know about such matters, okay?

12 I'll just give you a couple of examples.
13 I'm not suggesting that's the case in this case, but
14 just to give you an idea: I have a client that stutters
15 so bad, that he has to carry a pad around with him so
16 when he gets hung up on something, he can write word. I
17 have couple or three clients who are so mentally
18 challenged that it would be a travesty if they got up
19 and testified on their own behalf.

20 It may be that their lawyers say, "The
21 State didn't prove their case, there's no reason for you
22 to get up and testify, didn't get it over the hump, why
23 do it?" It might be that a client is just terrified of
24 being cross examined even if they are innocent. They'll
25 be up against an experience, hard-nosed prosecutor, and

1 we can go on and on.

2 So the law solves that problem for us by
3 simply saying it is not your concern why if an accused
4 doesn't testify. It's not your concern why he didn't
5 because you took an oath to render a verdict based on
6 the evidence you heard and not what you didn't hear.
7 Make sense? You can't go back and try to imagine what
8 he would have said or wouldn't say or why or anything.
9 Just let it go, okay? You've all said you would follow
10 that law, and I believe you on that.

11 A couple things and then I'm going to go
12 away: I've talked to you about the Court's Charge and
13 what that is. Yes, there will be objections during the
14 course of the trial. It's rare that you wouldn't have
15 objections from both sides. Those are things that you
16 ought not to concern yourself with.

17 All an objection is is a shorthand way of
18 saying to the judge, "Judge, we believe the other side
19 is -- and I call it not playing fair. That's not really
20 what it is. It's that what they want to do is outside
21 the rules. They may not be trying to sneaky about it or
22 do something, it's just there could be some genuine
23 issue about whether that is or is not something that's
24 allowed. That's what the judge is for. He's the
25 referee in these matters.

1 So whichever side thinks the other side has
2 gone out of bounds says, "I object to that." Typically,
3 we have to say what rule it is we say is being violated
4 and the judge is called upon to make a decision about
5 that. And if he thinks that the person who is objecting
6 to it is right, he'll say, "Sustained," and if he thinks
7 the person objecting is wrong, he'll say, "Overruled,"
8 and we move on. Not something for y'all to factor in
9 into your decision-making process.

10 Now, where that can sometimes lead to a
11 problem -- and the judge has alluded to it -- is if
12 someone says something -- for instance, if I say,
13 "Mr. Witness, what time was it when you got to the
14 scene," and the witness said, "I saw the car go through
15 the intersection and it was the green one that ran the
16 redlight, and I say, "I object to that; it's
17 nonresponsive."

18 I didn't ask him that question. I asked
19 him what time it was and he said something totally
20 different. Judge sustains that objection and I ask that
21 the jury be instructed to disregard the answer and the
22 judge would tell you to disregard what you just heard,
23 okay?

24 That's sometimes hard, but that's what the
25 law would expect you to do. If the object's overruled,

1 then you can consider what you heard. It's as simple as
2 that, but you ought to not go back there and say, "Oh,
3 my God, the defense objected once, the Tate once, they
4 must be hiding something. We just call on the judge to
5 be the referee. Make since? Everybody follow that?

6 (Response from venire panel.)

7 MR. PARKS: Okay. Now finally, last time I
8 picked a jury, it was down in Nacogdoches. It was a
9 death penalty case, and in those kinds of cases, we
10 select jurors one at a time. Took five and a half weeks
11 to pick that jury. So if you think this is a long
12 trial, just be glad that you're not one close to that.

13 I said to that particular juror
14 finally -- I asked him a question, then I said,
15 "Finally," and I asked a question and a third time I ask
16 him, "Finally...", and he said, "You've said 'finally'
17 three times now. When is it really going to be
18 finally?" So I try not do that too much.

19 Let me look at my notes before I say
20 "finally" again.

21 (Pause in the proceedings.)

22 MR. PARKS: Okay. Once you have heard all
23 the evidence that you're going to hear, both sides rest
24 and close and the judge drafts the charge, reads it to
25 you both, sides get an opportunity to argue what the

1 evidence is. What they say is not evidence, you've been
2 told that. Then you retire to the jury room to
3 deliberate your verdict. Once the case has been given
4 to you, it is yours, and the judge will instruct you
5 that you can't talk to anyone about your case except the
6 bailiff who has you in charge, and you're left to
7 deliberate.

8 Now, the law doesn't tell you what
9 deliberations mean. In my definition, it means to
10 carefully consider. The reason I bring this up is this:
11 Once you get back in that jury room, each of you have a
12 duty and obligation to return your verdict into open
13 court and no one else's. You're essentially 12 separate
14 juries. It is not a majority vote wins. It's not the
15 loudest debater wins.

16 You have rights as jurors. We talk a lot
17 about rights in these cases, but we often forget about
18 the jurors' rights, but you have some. You have the
19 right as a juror to be respected by all the members of
20 the court, by the Court, the lawyers, every one of us on
21 this side the bar. You have the right to be respected
22 by your fellow jurors.

23 There's nothing wrong with you discussing
24 the evidence. In fact, the law would contemplate you
25 would discuss the evidence you heard and, you know, go

1 over whatever issues need to be gone over so that you
2 can try to resolve, in your own mind, what the answer to
3 that oath that you took is, but ultimately, it is your
4 obligation and duty to return your verdict and not have
5 your verdict overridden by someone else.

6 Now, I know that -- you know, movies are
7 not real life, but, you know, many of us at least have
8 probably seen Twelve Angry Men or movies like that
9 where, you know, whoever is in the minority is just
10 finally beaten down by the majority and give up to go
11 home. That's just a movie. I don't believe jurors
12 typically treat each other in that fashion, but just
13 know that if you feel like you are being mistreated by
14 like that fellow jurors, you can let the bailiff know
15 that you're being mistreated.

16 I don't know that's going to happen.
17 You're not so isolated back in the jury room with no
18 provisions for anything other than you're there until
19 you come out no matter what. So be respectful of each
20 other. Respect each other's judgment. Respect each
21 other's argument and ultimately respect the individual
22 moral judgment that each of you will be called upon to
23 come to. Does that make sense to everyone?

24 (Response from venire panel.)

25 MR. PARKS: I appreciate very much y'all's

1 attention. Thank you.

2 THE COURT: Thank you, Mr. Parks.

3 And ladies and gentlemen, what I'm going to
4 need to do is visit with counsel briefly here at the
5 bench and then we may need to visit with a handful of
6 you here at the bench. And I know you're ready to get
7 up and have a stretch. If you can without making any
8 noise stand right where you are and stretch, that's just
9 find, but the court reporter's out closer to you. She's
10 got a microphone up here, but she needs to hear what's
11 being said, so it really is important that there not be
12 any noise.

13 Yes, sir.

14 MR. PARKS: Your Honor, can I ask Juror 1 a
15 question?

16 THE COURT: Any objection?

17 MR. WHEELER: State has no objection.

18 MR. PARKS: It's something I forgot to do.
19 There was a disagreement.

20 Mr. Havens, do you remember that question
21 about considering the full range of punishment?

22 VENIREPERSON: Yes.

23 MR. PARKS: There's a disagreement among us
24 what you said. Did you say that you could or could not
25 consider the full range of punishment?

1 VENIREPERSON: I can.

2 MR. PARKS: That's exactly what I thought
3 you said.

4 MR. KING: He said what?

5 MR. PARKS: He would.

6 VENIREPERSON: I can, yes.

7 MR. PARKS: Thank you, sir.

8 (Bench.)

9 THE COURT: All right. Let me have you
10 where I can see. Okay. That's fine.

11 Mr. Wheeler, did you want without going
12 into -- I guess, unless there's an objection, I don't
13 know it's necessary to go into the grounds who you think
14 is disqualified.

15 MR. WHITLEY: Judge, could you talk just a
16 little bit louder?

17 MR. WHEELER: Now, comes now, the State of
18 Texas, by and through her criminal district attorney,
19 makes the following strikes for cause: No. 2.

20 THE COURT: Any objection?

21 MR. PARKS: No.

22 MR. WHEELER: Juror No. 3.

23 MR. PARKS: No.

24 THE COURT: No. 3 is gone.

25 MR. WHEELER: Juror No. 4.

1 MR. PARKS: No objection.
2 THE COURT: No. 4 is gone.
3 MR. WHEELER: No. 5.
4 MR. PARKS: No objection.
5 THE COURT: No. 5 is gone.
6 MR. WHEELER: No. 6.
7 MR. KING: I don't remember him.
8 MR. PARKS: No objection.
9 THE COURT: No. 6 is gone.
10 MR. WHEELER: No. 8.
11 MR. PARKS: No objection.
12 THE COURT: No. 8 is gone.
13 MR. WHEELER: No. 13.
14 MR. PARKS: No objection.
15 THE COURT: No. 13 is gone.
16 MR. WHEELER: No. 15.
17 MR. PARKS: No objection.
18 THE COURT: 15 is gone.
19 MR. WHEELER: No. 16.
20 MR. PARKS: No objection.
21 THE COURT: Y'all have no objection to
22 No. 16?
23 MR. PARKS: No probation.
24 THE COURT: Okay. I missed that one.
25 No. 16 is gone.

1 MR. WHEELER: No. 17.
2 MR. PARKS: No objection.
3 THE COURT: No. 17 is gone.
4 MR. WHEELER: No. 18.
5 MR. PARKS: No objection.
6 THE COURT: 18 is gone.
7 MR. WHEELER: No. 21.
8 MR. PARKS: No objection.
9 THE COURT: 21 is gone.
10 MR. WHEELER: No. 22.
11 MR. PARKS: No objection.
12 THE COURT: 22 is gone.
13 MR. WHEELER: No. 24.
14 MR. PARKS: No objection.
15 THE COURT: No. 24 is gone.
16 MR. WHEELER: No. 27.
17 MR. PARKS: No objection.
18 THE COURT: No. 27 is gone.
19 MR. WHEELER: No. 31.
20 MR. PARKS: No objection.
21 THE COURT: No. 30 or 31?
22 MR. WHEELER: 31.
23 THE COURT: 31 is gone.
24 MR. WHEELER: No. 38.
25 MR. PARKS: No objection.

1 THE COURT: No. 28 is gone.
2 MR. WHEELER: No. 41.
3 MR. PARKS: No objection.
4 THE COURT: 41 is gone.
5 MR. WHEELER: No. 43.
6 MR. PARKS: No objection.
7 THE COURT: No. 43 is gone.
8 MR. WHEELER: No. 45.
9 MR. PARKS: No objection.
10 THE COURT: 45 is gone.
11 MR. WHEELER: 46.
12 MR. PARKS: No objection.
13 THE COURT: 46 is gone.
14 MR. WHEELER: No. 47.
15 MR. PARKS: No objection.
16 THE COURT: No. 47 is gone.
17 MR. WHEELER: No. 49.
18 MR. PARKS: No objection.
19 THE COURT: 49 is gone.
20 MR. WHEELER: No. 50.
21 MR. PARKS: No objection.
22 THE COURT: 50 is gone.
23 MR. WHEELER: No. 52.
24 MR. PARKS: No objection.
25 THE COURT: 52 is gone.

1 MR. WHEELER: No. 55.
2 MR. PARKS: No objection.
3 THE COURT: 55 is gone.
4 MR. WHEELER: No. 56.
5 MR. PARKS: No objection.
6 THE COURT: No. 56 is gone.
7 MR. WHEELER: No. 57.
8 MR. PARKS: No objection.
9 THE COURT: No. 57 is gone.
10 MR. WHEELER: No. 58.
11 MR. PARKS: No objection.
12 THE COURT: No. 58 is gone.
13 MR. WHEELER: No. 60.
14 MR. PARKS: What about No. 59; no
15 probation?
16 MR. WHITLEY: I got no probation, also.
17 MR. WHEELER: No. 59.
18 THE COURT: No. 59 is gone.
19 MR. WHEELER: One moment, please.
20 (Pause in the proceedings.)
21 MR. WHEELER: No. 60.
22 MR. PARKS: No objection.
23 THE COURT: No. 60 is gone.
24 MR. WHEELER: No. 61.
25 MR. PARKS: No objection.

1 THE COURT: 61 is gone.
2 MR. WHEELER: No. 63.
3 MR. PARKS: No objection.
4 THE COURT: No. 63 is gone.
5 MR. WHEELER: No. 64.
6 MR. PARKS: I didn't have anything on 64.
7 MR. WHEELER: Not all the witnesses start
8 equal.
9 MR. PARKS: No objection.
10 THE COURT: No. 64 is gone.
11 MR. WHEELER: No. 66.
12 MR. PARKS: No objection.
13 THE COURT: 66 is gone.
14 MR. WHEELER: No. 67.
15 MR. PARKS: No objection.
16 THE COURT: No. 67 is gone.
17 MR. WHEELER: What about 65?
18 MR. PARKS: Nothing on 65.
19 THE COURT: I don't have anything on 65.
20 MR. WHEELER: No. 65 is Harrison; had a
21 financial problem with regard to the length of trial. I
22 have --
23 MR. PARKS: She didn't disqualify herself.
24 MR. WHEELER: That's right, didn't
25 disqualify. Okay.

1 THE COURT: 67 was the last one we struck.
2 MR. WHEELER: 68.
3 MR. PARKS: No objection.
4 THE COURT: 68 is gone.
5 MR. WHEELER: No. 69.
6 MR. PARKS: No objection.
7 THE COURT: 69 is gone.
8 MR. WHEELER: No. 70.
9 MR. PARKS: No objection.
10 THE COURT: 70 is gone.
11 MR. WHEELER: No. 71.
12 MR. PARKS: No objection.
13 THE COURT: 71 is gone.
14 MR. WHEELER: No. 74.
15 MR. PARKS: No objection.
16 THE COURT: 74 is gone.
17 MR. PARKS: 75 said he would be distracted,
18 I believe.
19 MR. WHEELER: But when he went into the
20 basis of the opinion, it was financial in nature.
21 MR. PARKS: Okay. But he said he would be
22 distracted and it would influence his decision.
23 MR. WHEELER: But it's financial.
24 MR. PARKS: Okay.
25 MR. WHEELER: State moves to strike No. 75

1 for cause.

2 MR. PARKS: No objection.

3 THE COURT: 75 is gone.

4 All right. Now, let's see, we had No. 20
5 to approach.

6 MR. WHEELER: 20, 39 and 37.

7 THE COURT: I think that's all, 20, 39 --

8 MR. WHEELER: And 37.

9 THE COURT: I have a bunch of others I
10 struck off because -- but I didn't have 39 or 37.

11 MR. WHEELER: No. 39 was a victim of a
12 violent crime. No. 20 was a victim of a violent crime.
13 No. 37 had an experience with the police, I believe;
14 wanted to discuss that at the bench.

15 THE COURT: We'll find out. We'll talk to
16 them. All right.

17 MR. PARKS: I've got 33 left.

18 THE COURT: That's probably not right
19 because there's a couple there that I wasn't expecting
20 to go but did go, so -- well, let's see. We are -- we
21 only need 32.

22 So, Teresa Reimers.

23 (Venireperson No. 20 approaches bench.)

24 THE COURT: Ms. Reimers, you had indicated
25 that you wanted to approach the bench.

1 VENIREPERSON: Yes, sir.

2 THE COURT: So that's why you're here.

3 VENIREPERSON: I was the victim of an
4 aggravated sexual assault.

5 THE COURT: And would that be something
6 that would cause you to lean toward one side or the
7 other in a case like this?

8 VENIREPERSON: No. It was 20-something
9 years ago.

10 THE COURT: So you think that wouldn't be a
11 problem for you?

12 VENIREPERSON: I don't think so.

13 THE COURT: All right. Anything from the
14 State?

15 MR. WHEELER: I do have some questions,
16 Your Honor.

17 VENIREPERSON: Yes, sir.

18 MR. WHEELER: May I proceed?

19 THE COURT: Yes, sir.

20 MR. WHEELER: With regard to that event,
21 the first thing I have to ask is: Was the defendant
22 prosecuted?

23 VENIREPERSON: Yes, sir.

24 MR. WHEELER: With regard to that case, did
25 you have any contacts with the police that you found

1 negative or any unprofessional stuff?

2 VENIREPERSON: No, sir.

3 MR. WHEELER: In any way was that case
4 handled in the manner that disappointed you displeased
5 pleased you?

6 VENIREPERSON: No, sir.

7 MR. WHEELER: The district attorney that
8 handled that, was that Wood County? Was it here?

9 VENIREPERSON: It was in Osceola County in
10 Florida.

11 MR. WHEELER: In Florida. Did that cause
12 you to have any bad taste with regard to prosecutors?

13 VENIREPERSON: No, sir.

14 MR. WHEELER: And after having understood
15 this is a murder case and very violent --

16 VENIREPERSON: Yes, sir.

17 MR. WHEELER: -- is it something from your
18 experience you can put out of your mind or would you
19 carry it into the jury room with you?

20 VENIREPERSON: I think I can put it out of
21 my mind.

22 MR. WHEELER: Does it cause you to be
23 biased for or against the State?

24 VENIREPERSON: No.

25 MR. WHEELER: Is it something that would

1 affect your deliberations at any point?

2 VENIREPERSON: No.

3 MR. WHEELER: Thank you, Ma'am.

4 THE COURT: Thank you, Ma'am.

5 All right. Randall Gary.

6 (Venireperson No. 37 approaches bench.)

7 THE COURT: It No. 37 and 39?

8 MR. WHEELER: Okay. No. 37. I'm looking
9 at a different list, sorry.

10 THE COURT: Mr. Gary, there may be a little
11 confusion on it, but did you indicate you wanted to
12 approach the bench?

13 VENIREPERSON: No, I didn't.

14 THE COURT: All right.

15 VENIREPERSON: But I will answer a
16 question, if you want.

17 THE COURT: Well, I think probably if you
18 didn't ask, that's fine.

19 MR. WHEELER: I do have one question: With
20 regard to this, you are currently being prosecuted in
21 this county?

22 VENIREPERSON: I got a DWI about 10 years
23 ago.

24 MR. WHEELER: I understand. Did that case
25 have any effect --

1 VENIREPERSON: Not at all.

2 MR. WHEELER: -- negative toward the State
3 or the State's witnesses?

4 VENIREPERSON: Not at all.

5 MR. WHEELER: You can be a fair and
6 impartial juror?

7 VENIREPERSON: Yes.

8 MR. WHEELER: Thank you.

9 THE COURT: Mr. Byrd.

10 (Venireperson No. 39 approaches bench.)

11 THE COURT: Mr. Byrd, I may mistaken, but I
12 was thinking you might have indicated you wanted to
13 approach the bench. Did you say you did?

14 VENIREPERSON: Yes.

15 THE COURT: All right.

16 VENIREPERSON: You asked if I had been a
17 victim of a violent attack. There was two different
18 times. I've been assaulted by more than three people.

19 THE COURT: I guess the question is whether
20 that's going to be something you can put aside or
21 whether that's something that's going to affect your
22 feelings such that you're going to likely carry that
23 into --

24 VENIREPERSON: I probably could get past
25 that. I didn't think it was going to be an issue, but I

1 had neck surgery and it is excruciating. I can't sit
2 there anymore.

3 THE COURT: All right. Is that something
4 that's going to make it impossible for you to listen to
5 the evidence?

6 VENIREPERSON: For 14 days, yeah.

7 THE COURT: We're not probably talking
8 about that long. It could be well on into next week.

9 VENIREPERSON: Okay. I can try it, but --

10 THE COURT: I mean, the concern is whether
11 or not that could be something that could keep you from
12 being able to listen to the evidence and pay attention
13 to it.

14 VENIREPERSON: Just can't honestly answer
15 if I can devote hundred percent attention to it.

16 THE COURT: Anybody have any questions?

17 MR. KING: That might affect your ability
18 to listen?

19 VENIREPERSON: Yes. My head is splitting
20 right now. I can't --

21 MR. WHEELER: Does that mean that you will
22 be unable to sit and listen to the evidence seriously
23 when you're in that kind of pain?

24 VENIREPERSON: Yes.

25 MR. WHEELER: As a result, you can't be

1 fair to the parties and listen to the evidence?

2 VENIREPERSON: Correct.

3 THE COURT: Mr. Byrd, I know that you're in
4 pain right now. I'm not holding you here, but we're
5 almost finished here today. If you had chance -- after
6 you had a chance to go home and take whatever steps you
7 would need, would you expect this to be a problem
8 tomorrow, the next day, and the day after that?

9 VENIREPERSON: It might be.

10 THE COURT: All right. Thank you, sir.

11 Are y'all in agreement --

12 MR. WHEELER: State moves to strike for
13 cause Juror 39.

14 MR. PARKS: We're in agreement.

15 THE COURT: Mr. Byrd is gone. We might
16 have an alternate, so it's just -- let's run over the
17 numbers to make sure we are all on the same page. All
18 right. Let me do that to make sure we got it together.

19 MR. PARKS: Tell us the ones --

20 MR. WHEELER: If you don't mind, come
21 around so you can see.

22 MR. WHITLEY: Let me get a little closer.

23 Okay.

24 THE COURT: No. Two --

25 MR. WHEELER: Are we going to --

1 THE COURT: The ones that are gone -- it
2 might be quicker to do it the other way. The ones that
3 I have remaining are: No. 1; No. 6; No. 9, Joe
4 Reynolds; No. 10, Sammy Wilson; No. 11, Annie Ferguson;
5 No. 12, Patricia Greer; No. 14, Cynthia Judkins; No. 19,
6 Arron Vanderschaaf; No. 20, Teresa Reimers; No. 23, Ray
7 Bazzoon; No. 25, Joseph Hamrick; No. 26, Brian Jones;
8 No. 28, Brenda Mize; No. 29, Barbara Rhodes; No. 30,
9 George Cathey; No. 32, Gerald Bean; No. 33, Roger Young;
10 No. 34, Keith Helping; No. 35, Jessica Carrigan; No. 36,
11 Kevin Lindley; No. 37, Randall Gary; No. 40, David
12 Askins; No. 42, Tara Raulston; No. 44, Carol Williams;
13 No. 48, Brian White; No. 51, Kevin Stripling; No. 53,
14 Patricia Swann; No. 54, Lauren Smith; No. 62, Jason
15 Kuiken; No. 65, Pamela Harrison; No. 72, Keith Wayne
16 Clark; No. 73, Anita Byrd; and No. 76, Judy Strickland.
17 Does that agree with y'all?

18 MR. PARKS: Yes.

19 MR. WHEELER: Yes.

20 THE COURT: How long do y'all need?

21 MR. PARKS: 20 minutes.

22 MR. WHEELER: 20 minutes.

23 THE COURT: All right. Then if you will be
24 available in the clerk's office at 10 after, you're free
25 to go.

1 MR. WHEELER: Thank you, Your Honor.

2 (Open court.)

3 THE COURT: Ladies and gentlemen, the
4 attorneys are going to go ahead and separate to consider
5 their strikes at this point. I just need to
6 remind -- we're going to take a break here in a minute.
7 I need you to remind you of your prior instructions.

8 Again, don't talk about the case, don't let
9 anybody talk to you about it. If anyone attempts to do
10 that, report it to the bailiff or me at once. And
11 remember where you're seated and be back at 10 minutes
12 after 4:00. At that time, we should be ready to select
13 the remaining members of the jury and thank everybody
14 else for their service. We'll be in recess at this
15 time.

16 (Recess from 3:50 to 4:24.)

17 THE COURT: Back on the record in
18 Cause 20,529-2008, State vs. Jason Thad Payne. Let the
19 record reflect that counsel for the State, counsel for
20 the Defendant, and the Defendant is present.

21 Ladies and gentlemen, again, let me ask you
22 to look to your left and your right and if are there any
23 vacancies, please let that me known. Seeing no hands, I
24 certify the panel is complete.

25 Let me ask counsel to approach.

1 (Bench.)

2 THE COURT: I just -- I think I misspoke in
3 there and I just wanted to clarify things. I thought we
4 had 32. We had 33, so the result would be if we gave up
5 the next juror, the next person who wasn't struck as the
6 alternate, that would Ms. Byrd, not Judy Strickland.
7 Does anybody have any objection with going --

8 MR. PARKS: We have no objection.

9 MR. WHEELER: State has no objection.

10 THE COURT: Very well.

11 (Open court.)

12 THE COURT: Ladies and gentlemen, let me
13 just ask you to listen for your name, and if your name is
14 called, leave those hard benches out there and come and
15 have one of these comfortable seats over here in the
16 jury box. And let me ask this: If you would please,
17 leave your fans when you proceed or when you leave later
18 out there in your pews and the bailiffs can pick them up
19 there. If I don't say that, you might think you've got
20 a souvenir for such a wonderful day. Then the bailiffs
21 will have to make another one at the taxpayers' expense,
22 so bear in mind that it's public property and leave it
23 in the pews.

24 Then at this time, I ask Jenica to call the
25 names of the lucky winners of this straw poll.

DISTRICT CLERK: No. 7, Ms. Regina Terrell;
9, Mr. Joe Wayne Reynolds; 14, Ms. Cynthia Judkins; 28,
Ms. Brenda Mize; 29, Ms. Barbara Rhodes; 34, Mr. Keith
Helping; 36, Mr. Kevin Lindley; 37, Mr. Randall Gary;
42, Ms. Tara Raulston; 44, Ms. Carol Williams; No. 53,
Ms. Patricia Swann; No. 72, Mr. Keith Clark; and No. 73,
Ms. Anita Byrd.

8 THE COURT: Ladies and gentlemen, before
9 you get too comfortable, let me ask you, if you would,
10 to go with the bailiff to the jury room, and I'll bring
11 you back here in just a minute.

12 (Jury exits courtroom.)

13 THE COURT: All right. Let the record
14 reflect that the jury's left the courtroom.

15 (Remaining venire panel released.)

16 ORAL MOTION IN LIMINE

17 THE COURT: What is it that --

18 MR. WHITLEY: There are some friends of
19 Austin Wages and teachers that -- can we not treat it
20 like a motion in limine to --

21 MR. PARKS: I can't imagine what relevance
22 the -- it's perfectly clear there are no fact witnesses
23 aside from the police officers who went to the scene and
24 whatever.

25 MR. WHITLEY: I don't see the State doing

1 that, judge. If we can just treat is it as a motion in
2 limine and I'll be happy to approach the bench.

3 MR. PARKS: It's not calling -- there's a
4 relevance issue. Maybe I haven't said that clear
5 enough. What in the world is the relevance of students
6 and teachers unless they're just plain reputation?

7 MR. WHITLEY: I've got to give you their
8 names, but I don't have to give you what their testimony
9 is.

10 THE COURT: I'll treat it as an oral motion
11 in limine and grant the motion in limine, you know, if
12 you're going to go into any of these things and deal
13 with it as we deal it. I think with my jury -- I'm just
14 going to, as late as it is, basically give them the
15 basic instructions. I'll swear them in in the morning.

16 MR. PARKS: Probably what that's going to
17 do is have us in front of the jury objecting to most of
18 the State's witnesses looking like a bunch of fools and
19 idiots, but I guess that's what we're going to do.

20 THE COURT: Well, if anybody's got any
21 other ideas on how to deal with it --

22 MR. PARKS: That's fine.

23 MR. WHITLEY: Of course, there's another
24 idea which is if we draw the objection initially on some
25 witness and it looks like we're going to have a series

1 of witnesses on the same issue, we can handle them all
2 at once and deal them at that time and see if the
3 issue --

4 MR. PARKS: The issue is -- we've all done
5 this before. We're not right out of law school, and I
6 guess what I'm saying is I'm trusting you're not putting
7 witnesses up knowing their testimony is irrelevant just
8 to draw objections to foul up the jury.

9 MR. WHEELER: No, no.

10 MR. WHITLEY: No.

11 MR. WHEELER: No, of course. We're not
12 doing that.

13 THE COURT: All right. Then let's ask the
14 ladies and gentlemen of the jury to come back in.

15 (Jury enters courtroom.)

16 THE COURT: Let the record reflect that
17 counsel for the State, counsel for the Defendant, and
18 the Defendant is present. Jury has returned to the
19 courtroom.

20 Ladies and gentlemen, I'm just going to
21 over some real basic instructions today before we break.
22 I know everyone's been here a long time and is tired. I
23 will just tell you that tomorrow I'll be asking you to
24 report to the jury room at 9:00. We should be able to
25 get started pretty much at that time.

1 Typically, we will run until 10:30, take a
2 15-minute break, go to noon, take an hour off for lunch,
3 go until -- usually, I try to come back starting at
4 1:00, try to take a break about an hour, hour and
5 quarter after lunch just to show proper appreciation for
6 ice tea, and then about a 10-minute break there, and
7 some time in the afternoon, take another 10-minute
8 break.

9 If at any time you can't hear or you need
10 to take a break before then, you know, you're not locked
11 up, chained, or something like that, raise your hand and
12 let your problem be known, and we'll try to address it.'
13 We will typically run until somewhere in the vicinity of
14 5:00 o'clock and go home.

15 It sounds a little bit relaxed, but the
16 truth is -- again, you're charged with making your
17 decision based on the evidence, and if you hear too
18 much, the mind tends to glaze over and you suddenly
19 realize 15 minutes has passed and you didn't hear a word
20 that was said. I try not to push people more than your
21 concentration can handle and give you reasonable break
22 along the way.

23 I know you can read and you already had
24 these in your possession, but I'll go over them and
25 elaborate just a little bit on some of these points.

1 I'll tell you the first part is not going to make sense.
2 It's assuming I've sworn you in already, but I'll wait
3 to swear you in until morning.

4 "Ladies and gentlemen, by the oath you've
5 just taken as jurors, you become officials of this court
6 and active participants in the public administration of
7 justice. If at any time you cannot clearly hear the
8 proceedings, please do not hesitate to let that be known
9 to me or any member of the Court's staff.

10 No one may discuss this case with you
11 during your service as a juror. Likewise, do not feel
12 offended if the lawyers in this case do not communicate
13 with you. To maintain the integrity of the jury system,
14 the law prohibits them from speaking with you until
15 you're released from duty on this case. If someone
16 contacts you or tries to contact you, report that fact
17 to the bailiff at once.

18 Do not discuss the evidence in this case
19 with your fellow jurors until you're instructed to
20 deliberate or with your spouse, friends, or others until
21 you've been discharged from jury service. You're not
22 permitted to read any newspaper articles about this
23 trial or watch any television or listen to any radio
24 reports that discuss this trial."

25 Let me just pause for a moment and emphasis

1 a few points. First place, one of the most difficult
2 instructions I'm going to give you is that you can't
3 talk about the case to one another until after you've
4 heard all the evidence. That's what's bringing you
5 together.

6 You will probably hear things that you find
7 interesting along the way or whatever and you're going
8 to want to return to the jury room and talk about it.
9 That's the most common temptation in the world. That's
10 precisely what you're instructed not to do. The whole
11 idea is to wait until you hear all the evidence then you
12 can start talking together about it.

13 The second part of that is that any time
14 you're talking, it's going to be a whole lot like
15 deliberating. You'll be considering your verdict and
16 you won't -- not only will you have not heard all the
17 evidence, but you won't have all 12 of you together.
18 You'll have just a couple of you having a conversation
19 or three of you or something like that. That's not the
20 way it's supposed to work.

21 So don't talk about anything that has
22 anything do with case until it's all over, you've heard
23 the evidence, you've heard the Court's Charge, and
24 you've heard the argument of counsel. Then when all 12
25 of you are together in the jury room, that's when you

1 talk about it. And even then, you're not supposed to
2 talk about until all 12 of you are gathered together.

3 The second part of that has to do with
4 information from the outside. Most of your trials don't
5 have much publicity. Murder trials sometimes do. I
6 expect KMOO will be covering it. The weekly will not be
7 coming out before the trial's over. Normally, our
8 trials are over with before they've had a chance to
9 cover it. There could be some coverage -- might have a
10 little television coverage, I don't know.

11 This is one of those things you just kind
12 of got to be on your honor, and there are a lot of other
13 temptations now. People can get information Twittered
14 to them and all kinds of things. I don't have all those
15 instructions in there. It's the same idea. Doesn't
16 take any genius to realize you're not supposed to be
17 listening about this case on the radio or television or
18 reading them in the newspaper, but you're not supposed
19 to have anybody Twittering you or you looking stuff up
20 on Google or whatever.

21 You're supposed to get your information
22 here. That's so I can do my part of the job which is to
23 see to it the case is tried in accordance with the law.
24 Don't get any information, and if anybody is attempting
25 to feed you information, do let the Court know about it

1 immediately.

2 The next part I want to elaborate on, also,
3 and some of you might be wanting to take notes because
4 of the anticipated length of the trial. Let me just
5 read it: "You may take notes if you wish. If you
6 choose to take notes, those notes are for your purposes
7 only. You may not show them to your fellow jurors or
8 mention in the jury room that your notes are indicative
9 of some matter. They may be used only to refresh your
10 own personal memory of what you recorded."

11 Let me start with saying that traditional
12 jurors were not allowed to take notes. Some
13 courts -- and this is one of those experiments with
14 notes. It scares me every time I do it. I instituted
15 this years ago because of the fact I'm convinced that if
16 you take notes close to the time you hear something and
17 you review it promptly, it increases your recall of what
18 you heard; not just what you took down, it helps you to
19 remember things you didn't take down that you heard in
20 context of what you wrote down, so it can be very useful
21 to you in many of your basic responsibilities which is
22 to make your decision upon the evidence in recall.

23 All the information you need is right there
24 if you want to reread that carefully, but I kind of like
25 to elaborate on that: One is you can't become the court

1 reporter. The court reporter has to be certified and
2 there are a lot of restrictions and regulations on court
3 reporters. That is the record of what was said and your
4 notes are not. They are to help you remember what was
5 said.

6 The more serious concern is that when
7 juries consider to deliberate, it's not unusual for them
8 to have different recollections of what somebody said.
9 And if it's something that's important to you and one
10 remembers Mr. Smith saying "A" and one remembers
11 Mr. Smith saying "B" and you have notes, well, you wrote
12 them down. It's going to be tempting to say, after the
13 fourth time you go through this, "I know I'm right
14 because I've got it right here. Here, you want me to
15 show it to you want. Read it yourself."

16 If you're not sure you can resist that
17 temptation, because that will absolutely be in violation
18 of the Court's instruction, unless you can resist that
19 temptation, don't take the notes in the first place or
20 don't take them in the jury room. If you're satisfied
21 you can use those notes and not use them as a club or
22 weapon with anybody else on this jury who has a
23 different opinion as to what was said, then if you can
24 avoid doing wrong on that, then take the notes. If you
25 can't, then don't.

1 All right. Similar to what I said earlier
2 is: "Don't go to any of the locations referred to by
3 witnesses in the case or perform any kind of individual
4 investigation about the facts in this case."

5 You're going to get the evidence here in
6 the courtroom. "Don't look any books, encyclopedias,
7 dictionaries" -- or use Google or anything like that --
8 "don't go to the library or review courthouse records in
9 order to obtain information over and above what's
10 presented to you during the trial. Listen carefully to
11 the testimony. No testimony will be read back to you
12 unless you disagree about a specific statement made by a
13 witness during the trial."

14 Does anybody have any questions?

15 (No response.)

16 THE COURT: A couple of other housekeeping
17 matters just to elaborate on: Most people have
18 cellphones these days. Obviously, when you're here in
19 court, they should be turned off and you shouldn't be
20 using them. In the old days, it wasn't unusual for
21 jurors to outside the courthouse to the pay phone, and
22 hopefully, it wasn't raining.

23 There's no problem in you using cellphones
24 during breaks while you're serving as a juror provided
25 that you bear in mind you're not calling anybody seeking

1 any information about the case or letting anybody talk
2 to you about the case, but your normal communications,
3 that's fine.

4 When you go to consider your verdict, we
5 get into a different situation and there -- really, you
6 should only be using a phone or let somebody call out or
7 let somebody call you in an emergency. In that
8 situation, I'm going to ask that whoever is selected as
9 the presiding juror to be the person you run those
10 requests through.

11 And if you do have an emergency and you
12 need to make a call and your presiding juror agrees and
13 you do that, everybody needs to quit deliberating until
14 that person's call is through and you've got all 12
15 people gathered back together again. And, again, that
16 should be something that's only in an emergency and
17 something that can't be put off.

18 Do we have anybody who's a smoker?

19 (Response from jury members.)

20 THE COURT: Okay. We've got a couple.

21 Occasionally, we run into a jury that
22 doesn't have any, but it's still unusual. Of course, 25
23 years ago, there would be 10 smokers and two nonsmokers
24 locked up in the jury room with the two smokers
25 breathing in a lot of secondhand smoke.

1 The shoe is completely on the other foot
2 now. The commissioners have made the courthouse a
3 nonsmoking area. There's one designated smoking
4 location that is outside. That's at the west entrance
5 where you can get under a roof and -- so you don't have
6 to stand in the rain, but it's whatever the temperature
7 is there.

8 I try not to have my smokers feel like that
9 they're being locked up and punished and I certainly
10 don't want any verdicts reached on the basis of nicotine
11 withdraw symptoms. The way I try to deal with this is
12 when -- and you're not going to be able to smoke as
13 often as you want to, but that whenever we're taking a
14 break, I will try, unless it's just going to go out
15 because we need to clarify something and come right
16 back, I'll say be available in the jury room in
17 such-and-such a time.

18 What that means is the bailiff will come to
19 the jury room to escort the smokers and anybody else who
20 wants to go with them to that designated smoking place
21 and stay with you. It's not that they don't trust you,
22 it's just so we can verify no one is messing with the
23 jury and gets us into a downward spiral. The other
24 jurors need to stay in the jury room where it's
25 immediately right in there in that area [indicating].

1 So anyone who wants to not stay in there is welcomed to
2 go with the smokers, but you have to stay pretty close
3 to them. So that's sort of the situation we're in.

4 The other thing is that from this point
5 forward, whenever you're leaving the courtroom or coming
6 back into the courtroom, it should be from the jury room
7 escorted by a bailiff. You should never be in the
8 courtroom itself unless you are coming here from the
9 jury room escorted by the bailiff. So when you leave in
10 the evening or for lunch or during any breaks or
11 anything like that, don't come through the courtroom.

12 When you come in in the morning to go to
13 the jury room, don't come through the courtroom to get
14 there. We may very well be taking up some matter or
15 conducting hearings or other things while the trial goes
16 on. I don't always know when these things are going to
17 happen, but we're often having to do trial things that
18 has to be outside the jury's presence during these break
19 times or before trial or after the jury's released, so
20 you should just don't be coming through the courtroom.

21 Now, that creates a little bit of a problem
22 because the parking is -- normally, most of the parking
23 is on the north. The jury room is on the south. The
24 most typical way of getting here is people come all the
25 way to the third floor and realize, I've got to get to

1 the jury room and it's on the other side. You can do
2 that by going behind the bench and going down the stairs
3 up the other stairs, but that's kind of awkward.

4 I just recommend to get to the jury room is
5 either go to the elevator, take it up to Floor 3, which
6 put you out next to the jury room, or to come up these
7 stairs that are underneath here where I'm sitting right
8 now and take a left-hand turn. It will put you by the
9 District Attorney's Office which is where the State
10 tends to have their witnesses, but the D.A.'s office
11 usually keeps all their people inside and out of the
12 way, so you're less likely to have any contact between
13 jurors and potential witnesses. Best way is to use the
14 elevator.

15 Anything anybody needs to ask me before we
16 get started?

17 (No response.)

18 THE COURT: I still anticipate this trial
19 is going to run into next week some time. Not quite
20 sure how far.

21 JURY MEMBER: Some of us are needing
22 something for work. I know you said just for today,
23 but --

24 THE COURT: Usually, that's provided at the
25 end.

1 JURY MEMBER: Yes, sir.

2 THE COURT: If you need to get something
3 for your employer before that, you can do that. That's
4 all in the clerk's office over here on this floor on the
5 northwest corner.

6 JURY MEMBER: Today?

7 THE COURT: Usually, you pick that up after
8 the trial is over, but if you need to let them know
9 ahead of time something saying that you're on the jury
10 and we'll be tied up for a trial, you can get that.

11 And if you have any problems with your
12 employer, please don't hesitate to get in touch with me.
13 I can't represent you, but I can at least let them know
14 that you were serving. And there are -- you know,
15 there's legal protection for people who serve as jurors.

16 All right. I've never had any problems on
17 that since I've been on the bench. I did have one
18 person that came to me as an attorney in private
19 practice years ago that had had some problems, but
20 that's the only incident in Wood County.

21 If you don't have any questions, then have
22 a good rest tonight. I'll see you at 9:00 a.m. in the
23 morning. Report directly to the jury room, and
24 hopefully, we'll get started after 9:00 a.m. Thank you.
25 Please go with the bailiff at this time.

1 (Jury exits courtroom.)

2 THE COURT: Let the record reflect the jury
3 has left the courtroom.

4 Anything else we need to take up?

5 MR. PARKS: We have one more potential
6 issue. I don't think it's going to be too much concern
7 necessarily for the State. This morning, I filed a
8 motion entitled, Motion For Adequate Visitation
9 Facilities during the trial. The problem we have is the
10 sheriff, for whatever reason, decided to restrict
11 visitation in the jail to a one-man booth with a
12 telephone --

13 THE COURT: Yes, sir.

14 MR. PARKS: -- and that's totally
15 inadequate for our purposes.

16 THE COURT: And I can understand that would
17 be during a trial, that that's not really adequate, so
18 we need to have some additional space.

19 THE BAILIFF: Judge, we've got a room
20 outside. They've just got to let the jail
21 administration know.

22 MR. PARKS: I have talked to Kevin about
23 that earlier and I never heard from him, so I didn't
24 know that was available.

25 THE COURT: And if there is any problems,

1 just report back to the Court immediately, but that
2 is -- I would -- I've been told by the jail that isn't a
3 problem, but if it is, just -- but during a trial,
4 clearly you need much greater access.

5 MR. PARKS: Fair.

6 THE COURT: You're satisfied that Kevin is
7 aware --

8 THE BAILIFF: Kevin and all the sergeants
9 are aware.

10 You're going to need a visit tonight?

11 MR. PARKS: I don't think so tonight,
12 but --

13 MR. KING: Tomorrow is fine.

14 THE BAILIFF: Mr. Clayton is gone today, so
15 we'll need to make arrangements.

16 MR. PARKS: That's fine. I need to show
17 him some stuff.

18 THE COURT: Very well. Anything else we
19 need to take up?

20 MR. WHEELER: Not from the State.

21 MR. PARKS: No, sir, I believe not.

22 THE COURT: So we'll be in recess this
23 time.

24 (Proceedings recessed.)

25

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 5 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE	)	402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 1

On the 20th day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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

2 THE COURT: On the record in cause
3 20,529-2008, State vs. Jason Tad Payne. Let the record
4 reflect that counsel for the State, counsel for the
5 Defendant, and the Defendant is present. The jury is
6 not present.

7 I have had a juror visit with me in
8 chambers; that is Regina Terrell, who is our No. 7
9 member in the panel. And if anyone has any objection,
10 I'll state on the record and state what she told me or I
11 can bring her up and you can approach and take it up
12 with her.

13 MR. PARKS: I have no objection to the
14 Court stating it.

15 MR. WHEELER: State has no objection.

16 THE COURT: She indicated that she was
17 concerned about her answer to a question yesterday when
18 she was asked whether she knew, knew of, or related to
19 the district attorney, and she said she didn't hold up
20 her card on that because she knew him in the same sense
21 as she knew who the president was.

22 She knew who the district attorney was.
23 Never met him. First time she saw him, on thinking
24 about it, she thought probably she should have raised it
25 just to get it out, that she has a stepdaughter who had

1 a relationship with the district attorney's stepson
2 which resulted in the birth of child a couple of years
3 ago, and we needed to bring that out and be put on the
4 record. What is the State's position?

5 MR. WHEELER: Had the State known that
6 information at the time and had we had the answer to the
7 question given, that should have been given, the State
8 would have exercised a preparatory strike on this juror.

9 THE COURT: And the Defendant's position on
10 that?

11 MR. PARKS: We have no reason to challenge
12 the assertion of the district attorney.

13 THE COURT: All right. Then what I'm going
14 to do is go ahead and remove her from the jury. We do
15 have an alternate. However, it's my
16 understanding -- just to put this on record -- in
17 visiting with counsel, we did have one other person who
18 could have potentially served. We actually were going
19 to have to be using an alternate, but no one had an
20 objection at that time.

21 It's my understanding that if we can get
22 her here, counsel can ask her briefly whether she has
23 acquired information about the case that would create a
24 problem at this point that -- subject to that, that
25 y'all are not opposed, in theory at any rate, to her

1 being seated as our new alternate.

2 MR. WHEELER: That is correct, Your Honor.

3 MR. PARKS: True.

4 THE COURT: I will say I have spoken to the
5 Clerk and the reason she's not here at her normal post
6 is she's trying to get ahold of her right now. What I'm
7 going to do is go ahead -- I think what I'll probably
8 do, to avoid trying to embarrass her, is to talk to her
9 in chambers and release her there, so we'll be in recess
10 when I do that. And as soon as we are ready to proceed
11 with Ms. Strickland, we'll get back on the record.
12 We'll be in recess at this time.

13 And if you will, ask Ms. Terrell to come on
14 over to chambers, then.

15 (Recess taken from 9:21 to 9:28.)

16 THE COURT: 20,529-2008, State vs. Payne.

17 Let everybody know where we are.

18 Let the record reflect that counsel for the
19 State, counsel for the Defendant, and the Defendant is
20 present.

21 I have visited with Ms. Terrell and
22 released her, and then the clerk advises me that she has
23 gotten ahold of Ms. Strickland and that she is dressing
24 and indicated that she would get here as quickly as she
25 can. Based on what she said, I think that we will need

1 be in recess until 10:00 or probably a little bit beyond
2 that, but if everybody wants to be at ease at least
3 until 10:00.

4 And would you give your smokers a smoke
5 break there in the jury and let them know that we won't
6 be proceeding until at least after 10:00?

7 THE BAILIFF: Yes, sir.

8 THE COURT: We'll be in recess at this
9 time.

10 (Recess taken from 9:29 to 10:07.)

11 THE COURT: Let me ask counsel to approach
12 if you would?

13 (Bench.)

14 THE COURT: Let the record reflect that
15 counsel for the State, counsel for the Defendant, and
16 the Defendant is present. Jury is not present.

17 This is a Judy Strickland. I know y'all
18 wanted to ask some questions of her.

19 And, Ms. Strickland, you were placed under
20 oath before and you remain under -- well, let me
21 re-swear you in.

22 JUROR JUDY STRICKLAND: Okay.

23 (Juror sworn.)

24 THE COURT: All right.

25 Yes, sir.

1 MR. WHEELER: Good morning.

2 JUROR STRICKLAND: Good morning.

3 MR. WHEELER: Now, we talked yesterday, and
4 after voir dire, you went home.

5 JUROR STRICKLAND: Uh-huh.

6 MR. WHEELER: When you went home, at any
7 time since you left this courtroom, have you done any
8 investigation of the facts of this case?

9 JUROR STRICKLAND: Huh-uh.

10 MR. WHEELER: Have you heard any news
11 reports?

12 JUROR STRICKLAND: I always watch Fox 41.

13 MR. WHEELER: So you didn't hear anything
14 about the case?

15 JUROR STRICKLAND: No.

16 MR. WHEELER: Did you discuss the matter
17 when you were here before?

18 JUROR STRICKLAND: No.

19 MR. WHEELER: With anyone?

20 JUROR STRICKLAND: No.

21 MR. WHEELER: Okay. Pass the witness.

22 THE COURT: Yes, sir.

23 MR. PARKS: If we asked you all the same
24 questions that we did yesterday, would your answers
25 still be the same?

1 JUROR STRICKLAND: The same.

2 MR. PARKS: Thank you, Ma'am.

3 That's all I have.

4 THE COURT: And the jury has not been
5 sworn. I do need to give Ms. Strickland a blue copy of
6 the instructions.

7 And, Ms. Strickland, I read over these
8 instructions to everyone yesterday. I'm going to go
9 ahead and do it with you, but they'll be in your
10 possession.

11 JUROR STRICKLAND: Okay.

12 THE COURT: It doesn't quite make sense
13 because I hadn't administered the oath yet, but I will
14 here in just a minute. It says:

15 "By the oath you've just taken as jurors,
16 you have become officials of this court and participants
17 in the public administration of justice. If at any time
18 you cannot clearly hear the proceedings, please do not
19 hesitate to let it be known to me or any member of the
20 Court's staff.

21 No one may discuss this case with you
22 during your service as a juror. Likewise, do not feel
23 offended if the lawyers in this case do not communicate
24 with you. To maintain the integrity of the jury system,
25 the law prohibits you from speaking to them -- from

1 speaking with you until you are released from duty in
2 this case. If someone does contact you or tries to
3 contact you, report that fact to the Court at once.

4 Do not discuss the evidence in this case
5 with your fellow jurors until you're instructed to
6 deliberate" --

7 In other words, at the end of the trial.

8 JUROR STRICKLAND: Right.

9 THE COURT: -- "or with your spouse,
10 friends, or others until you have been discharge from
11 jury service.

12 You're not permitted to read any newspaper
13 articles about the trial or watch any television or
14 listen to any radio reports that discuss this trial.

15 You may take notes if you wish. If you
16 choose to take notes, those notes are for your purposes
17 only. You may not show them to your fellow jurors or
18 mention in the jury room that your notes are indicative
19 of some matter. They may be used only to refresh your
20 own personal memory of what you recorded."

21 You are planning on taking notes?

22 JUROR STRICKLAND: I didn't bring anything
23 to take notes.

24 THE COURT: If you decide to do that, I'll
25 probably want to speak with you a little more

1 elaborately about that, but --

2 JUROR STRICKLAND: No.

3 THE COURT: -- all the instructions are
4 there.

5 JUROR STRICKLAND: Okay.

6 THE COURT: "Do not go to any of the
7 locations referred to by witnesses in this case or
8 perform any type of individual investigation of the
9 facts in this case. You will receive all the evidence
10 here in the courtroom.

11 Do not look inside of books, encyclopedias,
12 or dictionaries or go to the library or review
13 courthouse records in order to obtain information over
14 and above what is presented to you during the trial.

15 Please listen carefully to the testimony.
16 No testimony will be read back to you unless you
17 disagree about a specific statement made by a witness in
18 the trial."

19 And if you have any questions, this is a
20 good time to ask.

21 JUROR STRICKLAND: I don't have any.

22 THE COURT: Keep those that card with you.
23 I think you'll find it helpful, and I'll encourage you
24 to review it from time to time.

25 JUROR STRICKLAND: Okay.

1 THE COURT: So let me let you, at this
2 time, go join the company of the jury in the jury room.

3 (Juror Strickland exits courtroom.)

4 MR. WHEELER: State invokes the Rule.

5 THE COURT: All right. The Rule has been
6 invoked, and let me ask everybody who is a
7 witness -- well, first, I charge the attorneys to
8 understand that the Rule has been invoked and make sure
9 that anyone you expect to be testifying knows about that
10 and has taken appropriate -- has been appropriately
11 informed about the provisions of the Rule.

12 If you have any witnesses, bring them into
13 the courtroom so I can go ahead and swear them in and
14 place them -- and inform them of the provisions of the
15 Rule.

16 (Witnesses enter courtroom.)

17 THE COURT: All right. This is for
18 everyone who expects to testify as a witness in this
19 case, I need for you to come on forward right behind the
20 bar and -- just behind the bar.

21 MR. WHEELER: We have more coming.

22 THE COURT: Got more coming, all right.

23 While we're waiting for those other
24 witnesses --

25 MR. PARKS: Can Mr. Wheeler and I approach

1 right quick?

2 THE COURT: Yes, sir.

3 (Bench.)

4 MR. WHEELER: I don't know if these people
5 are going to be witnesses or -- well, would like Sherry
6 Hawthorne and Richard Hawthorne to be placed under the
7 Rule, also.

8 MR. WHEELER: Absolutely.

9 MR. PARKS: Okay. If we are to have them
10 sworn -- all right.

11 THE COURT: Those are persons who should be
12 known to the State.

13 MR. PARKS: Yes.

14 THE COURT: You have everybody here?

15 MR. WHEELER: We're checking.

16 THE COURT: While that checking is going
17 on, let me just tell -- you can go ahead and have a seat
18 if you wish.

19 (Witnesses comply.)

20 THE COURT: What I'm going to be doing is
21 swearing everybody in as witnesses and explaining to you
22 what the provisions are.

23 We think we have everybody at this time?

24 MR. WHEELER: Yes, Your Honor.

25 THE COURT: Let me ask all of you who

1 expect to testify and who is standing here to raise your
2 right hand.

3 (Witnesses sworn.)

4 THE COURT: All right. Now, what I'm going
5 to have to do here now is this is -- I'll be explaining
6 the provisions here in just a minute, but the first
7 thing is the court reporter needs to get the name of
8 everyone of you who was sworn. And the typical problem
9 we have, is people stating their names quickly or
10 stating very quietly. I need for everyone to speak up
11 and to speak slowly so the court reporter can you get
12 those names down correctly. Let's start with --

13 THE WITNESS: Philip, P-h-i-l-i-p, Kemp,
14 K-e-m-p.

15 THE WITNESS: Debbie Foster.

16 THE WITNESS: Mark Miller.

17 THE WITNESS: Lee Elmore, E-l-m-o-r-e.

18 THE WITNESS: Dana Hamrick, H-a-m-r-i-c-k.

19 THE WITNESS: Randall Lain, L-a-i-n.

20 THE WITNESS: Richard Hawthorne.

21 THE WITNESS: Misty Burns.

22 THE WITNESS: Todd Wages.

23 THE WITNESS: William Burge.

24 THE WITNESS: Miles Tucker.

25 THE WITNESS: Jacob Montalvo,

1 M-o-n-t-a-v-o.

2 THE WITNESS: Alex Hoggard.

3 THE WITNESS: Jerry Blalock.

4 THE WITNESS: Todd Chance.

5 THE WITNESS: Michelle Thickston.

6 THE WITNESS: Faye Payne.

7 THE WITNESS: Daniel Ashworth.

8 THE WITNESS: Kim Henderson.

9 THE COURT: All right. Let me just go
10 through the rule: What the Rule is is a basic rule of
11 procedure and that provides that anyone who is expected
12 to testify in a case, once the Rule has been invoked,
13 that that person must remain outside of the presence of
14 the courtroom and outside the hearing of the courtroom
15 except when they're called in here to testify. So the
16 only time you should be in here is while you're
17 testifying.

18 Now, in addition to that, you may not talk
19 to one another or to anyone else or let anybody else
20 talk to you about anything that has to do with this case
21 however distantly that might reflect on the case. So
22 don't let anybody talk to you about the case and don't
23 talk to anyone else including one another, and if
24 anybody attempts to do that, you need to report that to
25 the bailiff or to me immediately.

1 The Rule is enforceable by competent. It
2 is enforceable by disallowing somebody from testifying
3 who violated the rule, so following it is important.
4 And you will remain under the Rule until this trial is
5 over with or until you're released as a potential
6 witness or as a witness, whichever comes first.

7 Does anybody have any questions about the
8 provisions of the Rule?

9 MR. PARKS: Judge, exception for the
10 lawyers?

11 THE COURT: Are any of the lawyers planning
12 on testifying?

13 MR. PARKS: No, but we can talk to the
14 witnesses.

15 THE COURT: Oh, yes. I'm sorry. I'm
16 sorry. That's part of the explanations I give, but I
17 didn't realize I hadn't give it. Yes, sir.

18 One of the exceptions is you may talk to
19 the lawyers. You're free to talk to any of the lawyers
20 you wish to or not to if you wish, but if you do that,
21 you must do that outside the presence of anyone else who
22 is under the Rule; otherwise, you will be violating the
23 Rule as to whoever is hearing what you're saying in
24 talking to the attorney.

25 Any other questions?

1 (No response.)

2 THE COURT: Very well. Then let me ask all
3 of you to go ahead and step out of the courtroom at this
4 time.

5 (Witnesses exit courtroom.)

6 THE COURT: And I assume everyone's ready
7 to proceed at this time?

8 MR. WHEELER: Mr. Whitley is delivering the
9 opening statement, so I'll need him back in the
10 courtroom.

11 THE COURT: All right. I'm -- of course, I
12 have to swear in the jury and arraign the Defendant
13 first.

14 MR. WHEELER: Yes, sir.

15 THE COURT: If the hallway is clear, then
16 let's bring our jurors in.

17 (Jury enters courtroom.)

18 THE COURT: All right. Ladies and
19 gentlemen, before you get too comfort, I believe I do
20 need to go ahead and swear you in. Let me ask you to
21 stand again, if you would, and raise your right hands.

22 (Jury panel sworn.)

23 THE COURT: Please have a seat.

24 All right. Then let me ask the State's
25 attorney to approach and I ask the Defendant to stand.

1 (Indictment read.)

2 THE COURT: All right. Mr. Payne, to those
3 charges how do you plead, guilty or not guilty?

4 MR. PARKS: Not guilty, Your Honor.

5 THE COURT: And that plea is received.

6 And, Mr. Payne, you may have a seat.

7 And if the State is ready to proceed at
8 this time with opening statements, you may do so.

9 MR. WHITLEY: Where we are ready.

10 OPENING STATEMENT

11 BY MR. WHITLEY:

12 As Mr. Wheeler told you, I'm Henry Whitely.
13 I've been an assistant district attorney for Wood County
14 since 1985. I don't work full time, but Jim has asked
15 me to help out in this case. So Mr. Wheeler, your
16 elected district attorney, and I will be presenting the
17 State's case to you.

18 Now, the opening statement, which is what
19 we're doing right now, is to give the jury an overview
20 of what the State's case is; in other words, a roadmap
21 to follow.

22 On or about, December the 11th, 2007, Wood
23 County Sheriff's Office receives a 911 call reporting
24 the death of two individuals located on Highway 37 just
25 north of Quitman. You will hear from the officers who


1 investigated the scene; Miles Tucker, Sergeant William
2 Burge, and two other patrol officers that were out
3 there. You'll hear from each of those officers what
4 they did, what they saw, what they did when they got
5 there, and how they investigated the case.

6 You'll also see pictures that will take you
7 back so you can observe what the scene looked like.
8 It's graphic, but the State feels that it is necessary
9 for the jury to comprehend and understand the gravity of
10 the offense, so we'll have to go to the picture as they
11 reflect the scene.

12 You will also hear from some people from
13 the Department of Public Safety Crime Lab in Austin,
14 Texas, the results of those examinations where you can
15 tie that into what you see at the scene. You will hear
16 from people from what is referred to as SWIFS, Southwest
17 Institute of Forensic Science in Dallas, Texas, what the
18 cause of death was from their reports.

19 You will also hear testimony from some
20 forensic scientists from Cellmark which is a DNA
21 laboratory located in Fort Worth, Texas, and you will
22 hear what their results are from the evidence that was
23 submitted to them and what they examined.

24 You will also here at some point in time
25 that the financial condition of the Paynes -- he and his

1 wife, Nichole, what their financial condition was. You
2 will also hear that the Defendant and his wife took out
3 one \$100,000 insurance policy on her life. It
4 originally was taken out on his life also, but he
5 refused the policy according to what insurance agent
6 will tell you. 

7 Now, I'm going to be up front you with. I
8 anticipate the Defense is going to say that Austin
9 Taylor Wages, a 16-year-old boy, shot his mother and
10 then killed himself. They're going to say it's a
11 murder-suicide case. The State does not put it there.
12 The State says it's a double murder. That's what the
13 State's theory is, that this Defendant killed both his
14 son and his wife.

15 You're going to hear testimony from lay
16 people, friends of the boy, relatives of the boy,
17 relatives of Nichole, that he was a well-adjusted, happy
18 young man who loved his mother dearly.

19 At the end of all the State's testimony, I
20 will submit to you that you will be able to return a
21 verdict, beyond a reasonable doubt, that this Defendant
22 shot and killed his wife and his 16-year-old stepson,
23 and you'll return a verdict of guilty.

24 Thank you.

25 THE COURT: Thank you, Mr. Whitley.

1 Did the Defense wish to present opening
2 statement or reserve?

3 MR. PARKS: We will present at this time.

4 THE COURT: Very well. You may proceed.

5 OPENING STATEMENT

6 BY MR. PARKS:

7 If it please the Court, Mr. Whitley,
8 Mr. Wheeler, ladies and gentlemen of the jury.

9 December 11th, 2007, was on a Tuesday.
10 When the sun rose that morning, there were five people
11 in the house; Jason Tad Payne, his wife Nichole,
12 Nichole's 16-year-old son Austin Taylor Wages, whom they
13 called Taylor, Jason and Nichole's children Remington,
14 their daughter, age two, and Jackson, their son, age
15 five.

16 I can tell you that on that morning, Jason
17 Payne thought he was prepared for that Tuesday. He
18 thought he was prepared when he got his children out of
19 bed and got them ready for school. He was prepared when
20 the teenager was acting up, to leave him behind if that
21 was Taylor's choice to do, and, in fact, that's what
22 happened.

23 And he took Jackson and Remington with him
24 and drove Jackson to school and left him off that
25 morning. Then he and Remington spent some time together

1 and they returned home. Remington stayed outside and
2 Jason went in the house and was totally unprepared for
3 what he found there. He found Nichole, still in bed as
4 she was when he left that morning, dead with a massive
5 gunshot wound to her head. He then went into the
6 bedroom where Taylor was and found Taylor slumped over
7 on his bed, a .30-30 rifle resting on his right leg and
8 a gunshot wound to his face. Jason then called 911 and
9 waited for the authorities.

10 Deputy Miles Tucker, I believe he was
11 Lieutenant Miles Tucker at the time with the Wood County
12 Sheriff's Department came to the scene and other
13 officers responded to the scene, and a decision was made
14 by Lieutenant Tucker that they needed an expert in crime
15 scene reconstruction, so he called Deputy Noel Martin
16 from the Smith County Sheriff's Office to come to the
17 scene.

18 Noel Martin was someone he knew, an expert,
19 a person that had been used by the Wood County Sheriff's
20 Office and the District Attorney's Office to help
21 prosecute. Deputy Martin did a thorough analysis at the
22 scene, and at some point thereafter, advised Lieutenant
23 Tucker that -- in the District Attorney's Office, that
24 in his expert opinion, based upon the evidence, the
25 scientific evidence, that Austin Taylor Wages had shot

1 his mother and turned the gun on himself.

2 And so time passed, approximately nine
3 months. Then on September 25, 2008, Lieutenant Tucker,
4 Miles Tucker swore out an affidavit for Jason Payne's
5 arrest. And I can tell you that Jason Payne was not
6 prepared for that event at all. He was trying to get on
7 with his life. And in that affidavit for the warrant,
8 the evidence will show that -- well, let me say that the
9 evidence that is relied upon by the State in arresting
10 Mr. Payne and obtaining an indictment in this case is
11 contrary to common sense. It is contrary to scientific
12 facts.

13 MR. WHEELER: I'll object as to argument.

14 THE COURT: And I'll sustain as to
15 argument.

16 MR. PARKS: You will hear from Deputy Noel
17 Martin and he will tell you what his opinion was -- is
18 and why he reached that opinion. And furthermore, you
19 will hear from represented experienced crime scene
20 investigator, Professor Ed Hueske that will tell you
21 that this was a murder-suicide, period. You will learn
22 that Professor Hueske's report was peer reviewed by Max
23 Courtney, another --

24 MR. WHEELER: Judge, I object to any
25 hearsay that Mr. Courtney might inject in this case.

1 THE COURT: Overruled.

2 MR. PARKS: -- another respected forensic
3 scientist who works for a police department.

4 We are confident that you will agree with
5 the Defense and return a verdict of not guilty.

6 THE COURT: Thank you.

7 The State may call its first witness.

8 MR. WHITLEY: Call Lee Elmore.

9 (Witness enters courtroom.)

10 THE COURT: Mr. Elmore, come on over here
11 to the witness stand.

12 And let the record reflect the witness was
13 previously sworn.

14 LEE ELMORE,
15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. WHITLEY:

18 Q. Good morning.

19 A. Good morning.

20 Q. Tell the ladies and gentlemen of the jury your
21 name.

22 A. My name is Lee Elmore.

23 Q. And how are you employed?

24 A. Wood County Sheriff's Department.

25 Q. And how long have you held that position?

1 A. About 10 years.

2 Q. And what do you do for the Wood County
3 Sheriff's Department?

4 A. I'm a communications supervisor.

5 Q. Will you tell the jury what that position
6 entails?

7 A. Just, we have dispatch running seven days a
8 week, 24 hours a day, and it's maintaining all the
9 records, we need to operate warrants, taking 911 calls,
10 answering phone calls.

11 Q. What does a dispatcher do?

12 A. Answers the phone, 911, regular phone calls,
13 dispatches deputies out, confirms on warrants, enters
14 warrants.

15 Q. Let me ask you to direct your attention to
16 December 11th of 2007 and ask if you were on duty that
17 day?

18 A. I was.

19 Q. And in what capacity?

20 A. I was dispatching.

21 Q. And did you receive a 911 call regarding a
22 shooting?

23 A. I did.

24 Q. Do you recall what that 911 call reported?

25 A. Reported that his wife and son had been shot.

1 Q. Okay. Now, how are 911 calls recorded there at
2 the Sheriff's Department?

3 A. In our IT room, we have a recorder and
4 everything is recording on hard drive.

5 Q. And is it possible to copy and -- make a copy
6 of that 911 call from the hard drive?

7 A. Yes.

8 Q. And is that a record that's normally maintained
9 in the Wood County Sheriff's Department?

10 A. Yes.

11 Q. And is it -- okay. On that particular day,
12 December 11th, was the computer recording and operating
13 properly?

14 A. Yes, sir.

15 Q. Let me show you what's been marked for
16 identification purposes as State's Exhibit 57. Do you
17 recognize that particular exhibit?

18 A. Yes, sir.

19 Q. What is that exhibit, please, sir?

20 A. That was pulled off the hard drive, a copy of
21 the call on December the 11th, 2007, 9:09 a.m. in the
22 morning.

23 Q. Is that a record that's maintained -- a true
24 and exact copy of the record maintained in the Sheriff's
25 Department?

1 A. It is.

2 Q. Or the conversation as it occurred on that
3 date?

4 A. Yes, sir.

5 MR. WHITLEY: All right. We offer State's
6 Exhibit 57?

7 (State's Exhibit 57, offered.)

8 MR. PARKS: No objection.

9 THE COURT: State's Exhibit 57 is admitted.

10 (State's Exhibit 57, admitted.)

11 MR. WHITLEY: If we have the means to, may
12 I publish it to the jury, Judge?

13 THE COURT: Yes, sir.

14 (CD playing.)

15 Q. (BY MR. WHITLEY) Is that your voice on the
16 recording?

17 A. It is.

18 Q. At the time, did you know who the person was
19 that reported that?

20 A. No, sir.

21 MR. WHITLEY: Pass the witness.

22 MR. PARKS: No questions, Your Honor.

23 THE COURT: Thank you, sir. You may step
24 down.

25 Call your next witness.

1 MR. WHITLEY: William Burge.

2 (Witness enters courtroom.)

3 THE COURT: Come on around and have a seat.

4 And let the record reflect the witness
5 previously was sworn.

6 Yes, sir.

7 DEPUTY SERGEANT WILLIAM BURGE,
8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WHITLEY:

11 Q. Would you identify yourself for the court and
12 the jury?

13 A. William Burge.

14 Q. How you are employed?

15 A. Wood County Sheriff's Department.

16 Q. How long have you held that position?

17 A. A year.

18 Q. What is your official duty with the Wood County
19 Sheriff's Department?

20 A. I'm in the Criminal Investigations Division.

21 Q. How long have you been in the criminal
22 Investigations Division?

23 A. A total of going on four years.

24 Q. What is your training and/or experience that
25 qualifies you to hold that position?

1 A. I have several years of practical patrol
2 experience. I've been to numerous investigative
3 training courses.

4 Q. And who sponsored those courses?

5 A. Several different agencies; Wood County,
6 Kilgore Police Academy.

7 Q. Any others?

8 A. Texas Sheriffs Association. I went to the
9 Texas HIT, Homicide Investigators of Texas, which is a
10 homicide investigative training.

11 Q. Approximately how many homicides have you
12 worked in your career?

13 A. This particular case is the second.

14 Q. Okay. Now, let me direct your attention to
15 December 11th, 2007, and ask if you were on duty that
16 day?

17 A. Yes, sir.

18 Q. Did you receive a dispatch call to a location
19 just north of Quitman, Texas, on Highway 37?

20 A. Yes, sir.

21 Q. On arrival, what did you observe?

22 A. On arrival, I was -- I was not the first one to
23 get there. EMS was already on the scene at the location
24 as well as one state trooper. A patrol deputy was out
25 front. The gentleman -- the Defendant was out front and

1 my lieutenant at the time was inside the residence.

2 Q. What did you do first when you arrived there?

3 A. I entered the residence, went to the location
4 where my lieutenant was. At the time, that was
5 Lieutenant Miles Tucker. At that time, he instructed me
6 on what he wanted me to do.

7 Q. What duties were given at the scene?

8 A. I was instructed to start photographing the
9 scene.

10 Q. And when you went into the residence, tell us
11 what the lay of the residence was.

12 A. It's a fairly large house. Immediately upon
13 entering the front door, directly in front of you, there
14 is a closet which is -- which would be the stairwell
15 closet in its relation to the stairwell, and there is,
16 to your immediate right, what appeared to be a formal
17 dining room, and to the left was a large living room
18 area.

19 Q. Did you, as a part of your duties there, make
20 any type of a diagram of the scene?

21 A. I did, yes, sir.

22 Q. Let me show you what's been marked for
23 identification purposes as State's Exhibit No. 1 and ask
24 you: Do you recognize State's Exhibit No. 1?

25 A. I do, yes, sir.

1 Q. Did you prepare it?

2 A. I did, yes, sir.

3 Q. And with the exception of being to scale, does
4 it accurately reflect the general layout floor plan of
5 that residence?

6 A. Yes, sir.

7 MR. WHITLEY: We offer State's Exhibit 1.

8 (State's Exhibit 1, offered.)

9 MR. PARKS: No objection.

10 THE COURT: State's Exhibit 1 is admitted.

11 (State's Exhibit 1, admitted.)

12 Q. (BY MR. WHITLEY) If you would, Sergeant Burge,
13 just step down there and walk the jury through -- walk
14 through a tour of the residence.

15 A. Okay. This would be the front of the residence
16 as you approach it from the roadway, this being the
17 entry front door. Right here directly in this -- this
18 is the staircase that I mentioned, and to get access to
19 the staircase, you have to come here and go up the
20 stairs. This would be the closet I just mentioned.
21 This is a large living area that I mentioned to the
22 left, and over here to the right would be the formal
23 dining.

24 This would be another dining area, more of
25 an informal dining, and, of course, the kitchen. And

1 then you have a small area here which was the washroom
2 and I would say utility room and then a small stairs
3 there which would be the garage which was converted into
4 a bedroom. And then over here, this is both -- forgive
5 my drawing. I'm not an artist. Both of these areas are
6 like -- they're a boy type of room. This one -- this is
7 all one large room. Fireplace being here, of course.
8 You have your furniture here. And this was another
9 bedroom with two closets and then a bath area
10 [indicating].

11 Q. What did you observe in the living room of
12 interest?

13 A. In the living room area, there was a Christmas
14 tree, television, coffee table, sofa, just your regular
15 living room furniture.


16 Q. Now, as you go into the bedroom, what, if
17 anything, did you observe in there?

18 A. When I photograph, I start inward and left to
19 right. When I began to work the left side, I obviously
20 photographed as much as I could of the living room area.
21 Working inward, upon getting in this line of sight
22 straight into the bed, I observed a bed with the
23 apparent victim laying on the bed.

24 Q. All right. Now, from that bedroom, where did
25 you go?

1 A. From the bedroom, I worked around -- I
2 photographed the area of the closets, the restroom area,
3 then I came back to this location to the front door and
4 then began to work my way around into the rest of the
5 residence to the right [indicating].

6 Q. And what of interest did you find in other
7 parts of the residence?

8 A. After working around and photographing all this
9 area right here, of course, we photographed -- we come
10 down here and we found a white teenage -- an apparent
11 white teenage male laying across the bed tilted slightly
12 to his right with the apparent gunshot to the head 
13 [indicating].

14 Q. Okay. Let me show you what has been marked for
15 identification purposes as State's Exhibit is 2 through
16 10 and ask if you -- you can have a seat.

17 A. Yes, sir.

18 Q. Ask if you recognize Exhibits 2 through 10?

19 A. I do, yes, sir.

20 Q. And what are they?

21 A. Those are the photographs of the residence.

22 Q. Did you take these photographs?

23 A. I did, yes, sir.

24 Q. And do they accurately represent the residence
25 as they appeared on December 11th, 2007?

1 A. Yes, sir.

2 MR. WHITLEY: Judge, we offer 2 through 10.

3 (State's Exhibits 2 through and including
4 10, offered.)

5 MR. PARKS: No objection.

6 THE COURT: State's Exhibit 2 through 10
7 are admitted.

8 (State's Exhibits 2 through and including
9 10, admitted.)

10 Q. (BY MR. WHITLEY) Okay. Sergeant Burge, if you
11 would just step down here again and inform the jury, if
12 you would, picture by picture of what that represents?

13 A. Okay. Again, this is the front of the
14 residence, which is a representation of what I mentioned
15 earlier. The front door being here; the front door,
16 left to right photograph. This was -- my attempt here
17 was to get as much as the residence in field of view as
18 I could on the front. Then working left to right, this
19 being the left of the front door, this being further
20 left, the front door.

21 This room right here that's pictured, this
22 is where the female victim was found in her bed. This
23 is the general overall area of the left of the front
24 door. Upon entering, this is the front door framework
25 of the residence. This is the closet that's under the

1 staircase that I mentioned earlier. This area right
2 here would be entering into that large living room area.

3 This is basically doing an about-face
4 standing right here photographing outwards of the front
5 door to try to get a representation of where I was
6 standing when I took this photograph. This is turning
7 immediately to the right. This is a formal dinning area
8 or what I perceived to be the formal dinning area. This
9 is to the left.

10 This is beginning into this bay area
11 working left to right in that large living area which
12 would be standing here photographing this area of the
13 residence. And then working from right to left, as you
14 can see, some of the fireplace is in view and more of it
15 is in view and then essentially walking toward where you
16 have a line of sight into the bedroom where the white
17 female was found deceased [indicating].

18 Q. Let me next show you what's been marked for
19 identification purposes as State's Exhibit 11 through 19
20 and ask if you recognize Exhibits 11 through 19?

21 A. Yes, sir.

22 Q. And what are those?

23 A. Those are photographs of the bedroom, entry
24 into the bedroom and of the bedroom and the victim.

25 Q. And do they accurately show the residence as it

1 existed December 11th, 2007?

2 A. Yes, sir.

3 MR. WHITLEY: Offer 11 through 19.

4 (State's Exhibits 11 through and including
5 19, offered.)

6 MR. PARKS: No objection.

7 THE COURT: 11 through 19 are admitted.

8 (State's Exhibits 11 through and including
9 19, admitted.)

10 Q. (BY MR. WHITLEY) Again, if you would step
11 down --

12 A. Yes, sir.

13 Q. -- and give the jury a visual tour of what
14 those represent?

15 A. This is just a closer view of the entry into
16 this bedroom again which is this bedroom here standing
17 approximately in this area here. Starting out working
18 inward stepping inside the door, just starting to
19 photograph the room and get as far as I could in a
20 single frame.

21 This is the victim being here on the far
22 left of this photograph. She's not in this field of
23 view. This is not the objective of this photograph. It
24 was just trying to photograph the contents of the room,
25 this being the closet, one of the two closets in the

1 room.

2 Obviously, her bed working even further
3 right. It's pretty self explanatory, this thing follows
4 it here. Turning standing at this -- looking back over
5 the shoulder -- back of the victim, you can obviously
6 see her laying on her -- what appears to be her right
7 side facing the wall, and, of course, the tissue and
8 whatnot on the wall.

9 These are photographs of the victim,
10 obviously of the injuries photographed here. At this
11 point, she hasn't been disrupted to the best of my
12 knowledge. Obviously, this is pretty self explanatory.
13 It's just photographs of her injury [indicating].

14 Q. Okay. Again, let me show you what's been
15 marked for identification purposes as State's Exhibit 20
16 through 25. Do you recognize Exhibits 20 through 25?

17 A. Yes, sir, I do.

18 Q. And what are they?

19 A. Photographs.

20 Q. Did you take the photographs?

21 A. Yes, sir.

22 Q. And do they accurately represent what they
23 purport to show --

24 A. Yes, sir.

25 Q. -- on or about December 11th, 2007?

1 A. Yes, sir.

2 MR. PARKS: No objection.

3 THE COURT: You are tendering those?

4 MR. WHITLEY: I'm sorry, Judge?

5 THE COURT: You are tendering those?

6 MR. WHEELER: Yes, we offer --

7 (State's Exhibits 20 through and including
8 25, offered.)

9 THE COURT: State's Exhibits 20 through 25
10 are admitted.

11 (State's Exhibits 20 through and including
12 25, admitted.)

13 Q. (BY MR. WHITLEY) Again, if you would, give the
14 jury a visual tour of what's represented in State's
15 Exhibit 20 through 25?

16 A. Yes, sir. This -- this is going back to build
17 off of this photograph. It is a wide angle overall view
18 of the area in which the victim was lying. Obviously,
19 you can clearly see the victim here laying with blood
20 and body matter on the wall. This is just working up
21 the wall showing how high up the wall that the matter
22 tissue was projected.

23 This was trying to get an idea of the
24 direction and the force of the high velocity splatter.
25 Again, this is blood and tissue. Same thing here, this

1 is some of the victim's hair. They're all -- of course,
2 this is the brain of the victim. It was laying on the
3 floor which was ejected out of the cavity [indicating].

4 Q. Let me show you what's been marked for
5 identification purposes as State's Exhibit 26 through
6 34. Again, ask you: Do you recognize those exhibits?

7 A. Yes, sir, I do.

8 Q. And did you take these photographs?

9 A. Yes, sir.

10 Q. Do they accurately represent what they purport
11 to show there in that residence on or about December
12 11th, 2007?

13 A. Yes, sir.

14 MR. WHITLEY: Offer 26 through 34.

15 (State's Exhibits 26 through and including
16 34, offered.)

17 MR. PARKS: No objection.

18 THE COURT: State's Exhibit 26 through 34
19 are admitted.

20 (State's Exhibits 26 through and including
21 34, admitted.)

22 Q. (BY MR. WHITLEY) And again, if you would, give
23 the jury a visual tour through the residence, through
24 those photographs, and explain what they represent and
25 what they show.

1 A. Yes, sir. First photograph here, you'll notice
2 the staircase again. That's the staircase here that
3 will be standing here looking up the stairway. At the
4 top of the staircase, you can see this octangular
5 window. That's going to be this window here.

6 There is a landing at the top of the
7 staircase. To the right of that landing is a bedroom,
8 and in that bedroom, we start -- I stepped in the
9 doorway and photographed -- this is a sleeping area for
10 the occupants of the residence. And again, we're just
11 photographing the contents and how the residence was
12 found upon my arrival.

13 This is a small shelf or desk that was
14 found immediately inside the door, which would have been
15 immediately against this wall when you walk in
16 immediately to the right. In the shelves depicted
17 there, I noticed there was a large caliber handgun. We
18 knew that the two victims had been shot, so I went ahead
19 and photographed this, and here it is on the shelf in
20 the holster. This was out on the table from the
21 holster. This is the revolver. You can see there's
22 rounds in there and all the rounds are still live
23 [indicating].

24 Q. And again, I'll show you what's been marked for
25 identification purpose as State's Exhibit 35 through 38

1 and ask if you recognize 35 through 38?

2 A. Yes, sir.

3 Q. And are those photographs?

4 A. Yes, sir.

5 Q. Did you take those photographs?

6 A. I did, yes, sir.

7 Q. And again, do they accurately show the
8 residence there on December 11th, 2007?

9 A. Yes, sir.

10 MR. WHEELER: Offer 35 through 38.

11 (State's Exhibits 35 through and including
12 38, offered.)

13 MR. PARKS: No objection.

14 THE COURT: State's Exhibit 35 through 38
15 are admitted.

16 (State's Exhibits 35 through and including
17 38, admitted.)

18 MR. WHITLEY: Grab that for me, would you?

19 I have a tight working space here, Judge.

20 THE COURT: Yes, sir.

21 Q. (BY MR. WHITLEY) Again, if you would, give the
22 jury a visual tour of what those photographs represent?

23 A. Yes, sir. This is going to be the laundry
24 room, which, again, is right here in this area of the
25 residence, just beyond the other dining room area at the

1 base of the staircase. This would be a small room here.

2 This is -- as you walk in the room to your
3 left and against the back wall, you have your standard
4 washing room; washer and drier. On the drier, you have
5 your standard cleaning chemicals; detergent, bleach,
6 whatnot, fabric softer. This is the drier, and on the
7 washer, there had been clothes that were washed and
8 dried. I photographed it. It may or may not have been
9 useful, but I photographed it because -- because it was
10 there [indicating].

11 Q. Now, which one is the washer and which one is
12 the drier?

13 A. The drier is here on what would be your left
14 [indicating].

15 Q. Okay. And --

16 A. The washer is on the right.

17 Q. Did you find anything unusual about these
18 clothes?

19 A. They were freshly done. The drier linens were
20 still warm.

21 Q. Again, let me show you what has been marked for
22 identification purposes as State's Exhibit 39 through
23 47. Do you recognize 39 through 47?

24 A. Yes, sir.

25 Q. And again, are those photographs?

1 A. Yes, sir.

2 Q. And did you take those photographs?

3 A. Yes, sir.

4 Q. And again, do they accurately show the
5 residence there on December 11, 2007?

6 A. Yes, sir.

7 MR. WHITLEY: Offer 39 through 47.

8 (State's Exhibits 39 through and including
9 47, offered.)

10 MR. PARKS: No objection.

11 THE COURT: State's Exhibit 39 through 47
12 are admitted.

13 (State's Exhibits 39 through and including
14 47, admitted.)

15 Q. (BY MR. WHITLEY) And once again, if you would,
16 give the jury a visual tour of what those photographs
17 represent?

18 A. Yes, sir. That is the garage area that I
19 stated earlier that was converted into a bedroom, which
20 is going to be down this small flight of stairs which
21 you can see in this photograph here, basically two
22 steps. And again, when you come down the stairs, it
23 opens up into this rather large garage/bedroom.

24 Coming down, I just done an about-face
25 photograph to try to get the entry -- entry to the room.

1 As you see, there's no door, just a curtain separating
2 that from the utility room/laundry room.

3 Photograph of the landing bottom contents
4 that were in there at the time. Working my way from
5 left to right, it's clear you can see the progression
6 just working around the contents of the bedroom, and
7 here we can see the young man deceased on the bed.

8 Stepping in front working from left to
9 right on the -- to the right of the victim, we're just
10 photographing what he has in his room at that time;
11 weight bench and other things you would typically find
12 in a teenager's room. This here is T.V., Playstation
13 games and whatnot, Xbox video games, I guess.

14 And here, this depicts -- this particular
15 photograph is a wide angle. My goal in this photograph
16 was here, you can barely see, is a spent rifle round.
17 That's why this picture was taken. And again, working
18 at the end, you know, we're just photographing the
19 contents of the bedroom.

20 Q. And again, what's marked for identification
21 purposes as State's Exhibit 58. Do you recognize 58?

22 THE COURT: Let me interrupt you for a
23 minute.

24 (Discussion held off the record.)

25 Q. (BY MR. WHITLEY) And again, does that

1 photograph accurately show what it purports to represent
2 on or about December 11, 2007?

3 A. Yes, sir.

4 MR. WHITLEY: We'd offer --

5 (State's Exhibit 58, offered.)

6 MR. PARKS: No objection.

7 THE COURT: State's Exhibit 58 is admitted.

8 (State's Exhibit 58, admitted.)

9 Q. (BY MR. WHITLEY) And if you would, just
10 publish that out, just hold that out and show the
11 jury -- describe what they're viewing.

12 A. This is a spent projectile bullet. It's just a
13 bullet from a fired weapon [indicating].

14 Q. And where was that located?

15 A. It was located in this area right here on the
16 carpet, right about here [indicating].

17 Q. Okay. And again, let me show you what's been
18 marked for identification purposes as 48 through 56?

19 A. Yes, sir.

20 Q. Are those photographs?

21 A. Yes.

22 Q. And did you take those photographs?

23 A. Yes, sir.

24 Q. And again, do they accurately represent what
25 they purport to show on or about December 11, 2007?

1 A. Yes, sir.

2 MR. WHITLEY: Offer State's Exhibits 48
3 through 56.

4 (State's Exhibits 48 through and including
5 56, offered.)

6 MR. PARKS: No objection.

7 THE COURT: State's Exhibits 48 through 56
8 are admitted.

9 (State's Exhibits 48 through and including
10 56, admitted.)

11 Q. (BY MR. WHITLEY) And again, Sergeant Burge, if
12 you would, just give the jury a visual description or
13 description of what they're visually looking at here in
14 those exhibits?

15 A. Yes, sir. First photograph, we get an
16 orientation. That's standing here in this dining area
17 looking into the washroom. The first room that you see
18 in this photograph, the doorway is going into that
19 washroom area.

20 And we've seen the washroom. This is
21 standing in the doorway that you can barely see here
22 looking into that, what I call, a utility closet. I
23 really don't know what else to call it. And beyond
24 that, obviously was the garage. It didn't have a
25 doorway, just a curtain, which is here a step down.

1 This, again, is a photograph of just the
2 contents, what is in the floor, what is around -- what
3 is around the victim, and some of our victim. This is
4 the photograph of our victim itself which displays, you
5 know, how he was found upon my arrival. And again,
6 another photograph of the victim from a different angle.
7 Same thing here showing the relationship where the
8 victim's laying and where the gun is.

9 This photograph here was the blood trail,
10 is what I was photographing here, which you can clearly
11 see. Photographed the victim, which, believed to me,
12 was the point of the entry of the bullet. And again,
13 right here, photographed here is a photograph of
14 stippling, also, and the entry wound.

15 Q. Okay. What is stippling?

16 A. Stippling is gases and hot gunpowder that's
17 spent from the firearm.

18 Q. Now, after you photographed the residence as
19 you were directed to do by Lieutenant Tucker, what did
20 you do next?

21 A. After I photographed the inside of the
22 residence, excuse me, I went outside. I left -- exited
23 the residence. When I'm there, as soon as I got there,
24 you know, I was advised by my supervisor to photograph
25 the scene. I hadn't spoken to anyone at that scene to

1 the best of my memory.

2 At that point, when we go outside --

3 MR. PARKS: We would object to the
4 narrative.

5 THE COURT: Sustained.

6 Q. (BY MR. WHITLEY) Okay. After you photographed
7 the inside, did you then go outside and photograph some
8 of the objects on the outside?

9 A. Yes, sir. Yes, sir.

10 Q. Let me show you what's been marked for
11 identification purposes as State's Exhibit 61 and ask if
12 you recognize it?

13 A. Yes, sir.

14 Q. Is that a photograph?

15 A. Yes, sir.

16 Q. And does it accurately show what it purports to
17 portray on December 11, 2007?

18 A. Yes, sir.

19 MR. WHITLEY: We'd offer State's Exhibit
20 No. 61.

21 (State's Exhibit 61, offered.)

22 MR. PARKS: No objection.

23 THE COURT: State's Exhibit 61 is admitted.

24 (State's Exhibit 61, admitted.)

25 Q. (BY MR. WHITLEY) Again, if you would, hold

1 that up and describe to the jury what that represents?

2 A. This is a white dodge pickup at the location
3 outside on the property [indicating].

4 Q. Did you later learn who that pickup belonged
5 to?

6 A. I'm sorry, I didn't hear the question.

7 Q. Did you later learn who that pickup belonged
8 to?

9 A. Yes, sir.

10 Q. Who was that?

11 A. That would be Mr. Payne.

12 Q. Would point to him and describe an article of
13 clothing he's wearing?

14 A. He's right there in the dark-colored jacket
15 [indicating].

16 MR. WHITLEY: Let the record reflect that
17 the witness has identified the Defendant.

18 THE COURT: That request is granted.

19 Q. (BY MR. WHITLEY) Did you have occasion to look
20 inside the vehicle?

21 A. Yes, sir.

22 Q. And why did you do that?

23 A. Well, when I go outside, I see the door open on
24 the vehicle. You can clearly see here that, at least,
25 it appears to be open. Again, I don't know. All I know

1 at this point is we have two victims that are shot. I
2 see this door --

3 MR. PARKS: We object to that as being
4 nonresponsive.

5 THE COURT: Sustained.

6 THE WITNESS: For my safety, I see this, so
7 I go up --

8 MR. PARKS: Your Honor, we renew the
9 objection.

10 THE COURT: You need to wait until you get
11 another question.

12 THE WITNESS: Okay. Oh, I'm sorry.

13 Q. (BY MR. WHITLEY) Why did you go into the
14 vehicle?

15 A. Again, I see the door open. For my safety, I
16 cleared the vehicle to make sure no one is hiding in
17 this vehicle.

18 Q. In doing that, did you observe anything inside
19 the vehicle?

20 A. I did, yes, sir.

21 Q. Did you later seize it?

22 A. Yes, sir.

23 Q. What was that?

24 A. It was a rag, excuse me, a rag that had what I
25 believed to be blood on it.

1 Q. Let me show you State's Exhibit No. 60 and ask
2 if you recognize State's Exhibit No. 60?

3 A. Yes, sir, I do.

4 Q. And did you take that photograph?

5 A. Yes, sir.

6 Q. And does it accurately reflect what it
7 portrays?

8 A. Yes, sir.

9 MR. WHITLEY: Offer State's Exhibit 60.

10 (State's Exhibit 60, offered.)

11 MR. PARKS: No objection.

12 THE COURT: State's Exhibit 60 is admitted.

13 (State's Exhibit 60, admitted.)

14 Q. (BY MR. WHITLEY) Again, show the jury what is
15 shown in that exhibit?

16 A. Upon looking inside the vehicle, I can clearly
17 see this being right behind the passenger's seat. It's
18 an extended cab pickup, as you can see, so it would be
19 right -- just right here. Anyway, upon seeing that, I
20 photographed it [indicating].

21 Q. And what was that?

22 A. This is a white rag with what appears to be
23 blood on it.

24 Q. Is that bright red?

25 A. Yes, sir.

1 Q. It wasn't dry brown red?

2 A. No, sir.

3 Q. In your judgment, it would be fresh blood?

4 A. Yes, sir.

5 MR. PARKS: Objection to that; conclusion
6 with no proper foundation.

7 THE COURT: Sustained.

8 Q. (BY MR. WHITLEY) What did you observe?

9 A. I observed a white rag.

10 Q. Bright red blood?

11 A. Yes, sir.

12 Q. Did you do anything else there at the scene,
13 Officer Burge?

14 A. I took a swab off of the door posts of the
15 pickup.

16 Q. Let me show you State's Exhibit 59 and ask you:
17 Do you recognize 59?

18 A. Yes, sir, I do.

19 Q. Is that a photograph?

20 A. Yes, sir.

21 Q. And did you take that photograph?

22 A. Yes, sir.

23 Q. And does it accurately show what it purports to
24 represent?

25 A. Yes, sir.

1 MR. WHITLEY: Offer State's Exhibit 59.

2 (State's Exhibit 59, offered.)

3 MR. PARKS: No objection.

4 THE COURT: State's Exhibit 59 is admitted.

5 (State's Exhibit 59, admitted.)

6 Q. (BY MR. WHITLEY) If you would, again, Officer,
7 I'll ask you to point out to the jury what State's
8 Exhibit 59 represents and what it shows?

9 A. May I stand again? This -- most everyone knows
10 what this probably is, but this is -- again, it's an
11 extended cab. You can see the extended cab. It opens
12 up like a door. What I call the posts is the structural
13 part of the door. That's photographed with the
14 doorhandle there.

15 When I photographed the rag, I could see
16 right here -- I apologize for the photograph, it's
17 blurry, but this is what I believe to be a smear of
18 blood, so that's why I photographed it, and took a swab
19 of this area [indicating].

20 Q. And after you took the swab, what did you do
21 with the swab?

22 A. I then placed it into evidence.

23 Q. What do you mean when you placed it into
24 evidence?

25 A. We take it and we put it in a special cardboard

1 box that's for biological evidence, DNA, and we seal it
2 up, we mark it, and I turned it over -- gave it to my
3 supervisor and entered it into the evidence locker.

4 Q. And who did you give it to?

5 A. I believe it was Miles Tucker.

6 Q. Okay. What did you do with the rag after you
7 seized it?

8 A. Same thing.

9 Q. You gave that over to Lieutenant Tucker?

10 A. Yes, sir.

11 Q. Did you mark it, package it, or anything?

12 A. Yes, sir, on the scene.

13 Q. How did you package it?

14 A. Again, the swab went into a special cardboard
15 box that comes with it. The rag, it was -- it was
16 placed in a paper sack and sealed with crime scene tape
17 or evidence tape.

18 THE COURT: Mr. Burge, just go ahead and
19 have a seat.

20 THE WITNESS: Yes, sir.

21 MR. PARKS: Judge, may we approach?

22 THE COURT: Yes, sir.

23 (Bench.)

24 MR. PARKS: We're going to object to those
25 exhibits being a barrier between us and the jury. They

1 can display them, but they can't put them so we can't
2 even see the jury.

3 THE COURT: Very well.

4 MR. WHITLEY: Sort of short on space.

5 THE COURT: I understand, but if you'll
6 move them before we move on.

7 (Pause in the proceedings.)

8 THE COURT: If we could have that back some
9 so we can access to the door?

10 MR. WHEELER: Yes, Your Honor.

11 MR. PARKS: I'm not sure the jurors can see
12 the witness.

13 Q. (BY MR. WHITLEY) Officer, let me show you what
14 has been marked State's Exhibit No. --

15 COURT REPORTER: 62.

16 Q. (BY MR. WHITLEY) -- 62 and let me ask you: Do
17 you recognize that?

18 A. Yes, sir.

19 Q. Do you recognize what's in the bag?

20 A. Yes, sir, I do.

21 Q. How do you recognize it?

22 A. I recognize it because I photographed it and I
23 collected it, and this is my signature on the bag, yes,
24 sir.

25 MR. WHITLEY: Offer State's Exhibit No. 62.

1 (State's Exhibit 62, offered.)

2 MR. PARKS: No objection.

3 THE COURT: State's Exhibit 62 is admitted.

4 (State's Exhibit 62, admitted.)

5 Q. (BY MR. WHITLEY) Is this the rag that you
6 collected from the pickup truck?

7 A. Yes, sir, it is.

8 Q. And can you tell from -- okay. And after you
9 collected it and packaged it, what did you do with it?

10 A. When I collected it, I placed it in the paper
11 sack, labeled it. I then released it to my supervisor.

12 MR. WHITLEY: Okay. Let me get this
13 marked.

14 (Exhibit marked.)

15 Q. (BY MR. WHITLEY) Next, let me show you what's
16 been marked for identification purpose as Exhibit 63.
17 Have you looked at State's Exhibit 63?

18 A. Yes, sir.

19 Q. This is the carton that contains the swab that
20 was taken from the rear door of the dodge pickup?

21 A. Yes, sir.

22 Q. Did you personally put that in that container?

23 A. Yes, sir.

24 Q. And labelled it?

25 A. Labelled it, yes, sir.

1 Q. And that's how you identify it?

2 A. Yes, sir.

3 MR. WHITLEY: I'll pass the witness.

4 CROSS-EXAMINATION

5 BY MR. PARKS:

6 Q. Sergeant Burge --

7 A. Yes, sir.

8 Q. -- I'm Doug Parks. I've got a few questions
9 for you. If I ask you something you don't understand or
10 is confusing to you, let me know about it.

11 A. Yes, sir.

12 Q. You've been with the Wood County Sheriff's
13 Office how long now?

14 A. Since '98.

15 Q. And I believe you've had seven years on patrol?

16 A. I've had several years on patrol.

17 Q. Several years?

18 A. Yes.

19 Q. Okay. I don't hear as well I used to.

20 I believe I understood you to say that this
21 is only the second murder scene you have worked at that
22 time?

23 A. Yes, sir, that's correct.

24 Q. When you got to the scene, others had already
25 arrived including EMS?

1 A. That's correct.

2 Q. Was EMS waiting for you to come and make these
3 photographs before the bodies were transported?

4 A. Bodies were not disrupted prior. Is that the
5 question?

6 Q. No, that wasn't my question. The question was:
7 Were they waiting on y'all to document the scene?

8 A. That's unknown to me, sir.

9 Q. But they were there?

10 A. They were there.

11 Q. What were they doing?

12 A. Obviously checking the victims' life signs.

13 Q. Had that not been done before you got there?

14 A. I don't know what EMS had done. They were
15 already there, sir.

16 Q. I understand when you were there and EMS was
17 there, but what did EMS do -- what did you see them
18 doing?

19 A. I didn't see them doing anything.

20 Q. After you finished your photographing of the
21 scene, did EMS then take the bodies away?

22 A. No, sir.

23 Q. Did ultimately the funeral home come and take
24 the bodies away?

25 A. Yes, sir.

1 Q. Were you still there when that happened?

2 A. Yes, sir.

3 Q. About how long after you finished your
4 documenting the scene did that happen?

5 A. I'm not aware, sir.

6 Q. Okay.

7 A. I didn't -- I didn't have -- I didn't keep
8 track of the time.

9 Q. Okay. Now, one of the photographs that we have
10 seen admitted into evidence is a photograph of that
11 revolver?

12 A. Yes, sir.

13 Q. You noted there that the revolver there can be
14 seen. Was that the only firearm you found there?

15 A. No, sir.

16 Q. There were several?

17 A. There was only one or two that I found.

18 Q. That revolver had not been fired?

19 A. That's correct.

20 Q. Would it be fair to say, Sergeant, it's been
21 determined that that revolver has no relevance to this
22 case particularly?

23 A. Yes, sir.

24 Q. Mrs. Payne was shot with a .30-30?

25 A. That's my understanding.

1 Q. The very same .30-30 that was found lying on
2 Taylor's leg?

3 A. Yes, sir, that's my understanding.

4 Q. Now, I believe we have seen a photograph of an
5 ejected shell casing. That .30-30 was a lever action,
6 was it not?

7 A. Yes, sir.

8 Q. That's the type of weapon where in order to get
9 a cartridge into the chamber, the lever has to be worked
10 and that process puts a cartridge in the chamber. Once
11 that's fired, in order to put another cartridge in the
12 chamber, the lever has to be operated again which would
13 then eject the shell casing and put a fresh cartridge,
14 assuming that's not the last bullet?

15 A. That's the correct operation of the gun.

16 Q. It would appear -- let me just say: Did the
17 scene reflect that there was an empty shell casing from
18 that .30-30 rifle in Taylor's room?

19 A. Yes, sir.

20 Q. Do you know whether or not there was a fired
21 shell casings still in the chamber of that .30-30?

22 A. Yes, sir, there was.

23 Q. Okay. So there appeared, from the scene, to
24 have been two shots fired from the .30-30?

25 A. Yes, sir.

1 Q. Okay. Now, we also see photographs of the
2 utility area, and I believe you indicated that it
3 appeared to you that the clothes or drier -- or the
4 clothes in the drier were still warm?

5 A. Yes, sir.

6 Q. Did y'all ever run that washer cycle to see how
7 long it took to do a load of clothes?

8 A. No, sir.

9 Q. Do you have any idea when the washing was done?

10 A. No, sir.

11 Q. Or who did it?

12 A. No, sir.

13 Q. Those clothes were taken, were they not?

14 A. Yes, sir, I believe they were.

15 Q. Are you aware if they were ever sent off for
16 testing?

17 A. I'm not aware of that.

18 Q. Sergeant, I couldn't tell for sure from my
19 vantage point over there, was Taylor in his sock feet?

20 A. Did he have his socks on?

21 Q. Yes, sir.

22 A. Yes, sir.

23 Q. No shoes?

24 A. No shoes.

25 Q. Now, the white pickup truck that we've seen a

1 photograph of, that was outside on the property; is that
2 correct?

3 A. That's correct.

4 Q. There was a door opened, did I understand you
5 to say?

6 A. It appeared to me it was open.

7 Q. Was it open when you got over there to it?

8 A. It was ajar.

9 Q. Which door was that?

10 A. Sir?

11 Q. Which door?

12 A. Passenger's.

13 Q. This was a two-door pickup truck with an
14 extended cab or did you have doors on the extension?

15 A. It had the doors on the extended part.

16 Q. So there would be a total of four doors?

17 A. Yes, sir.

18 Q. Okay. And it appeared that the front passenger
19 door was open to you?

20 A. Yes, sir.

21 Q. Now, you've told the jury -- and we've seen
22 this rag that you recovered out there, State's Exhibit
23 No. 62. Can you tell the members of the jury when that
24 rag was put in that pickup truck?

25 A. No, sir, I cannot.

1 Q. Can you tell the jurors who put it there?

2 A. No, sir, I cannot.

3 Q. The swab that was taken in the photo that we
4 see of what appears to be a swab, where did that come
5 from, which door?

6 A. The passenger's. I guess it would be the back
7 door which makes the post of -- the catch of the thing
8 that the front door locks against. I don't know what
9 they call it. I call it the post.

10 Q. That would be the passenger side of the rear
11 extended cab door?

12 A. That would be correct.

13 Q. And the rag was found where?

14 A. It had just -- right behind in the -- it would
15 be the back floorboard behind and right next -- if you
16 were sitting behind it, it would be your right bottom
17 corner on the floorboard in the seat.

18 Q. Behind the passenger seat?

19 A. Yes, sir.

20 Q. Near where the smear was?

21 A. Pretty close, yes, sir.

22 Q. And, of course, you can't tell the members of
23 the jury when that smear got on there?

24 A. No, sir.

25 Q. Or the circumstances of it being there?

1 A. No, sir.

2 Q. Sergeant Burge did it appear to you that
3 Nichole Payne was killed right where she was found?

4 A. Yes, sir.

5 Q. And did it appear to you that Taylor Wages died
6 right where he was found?

7 A. Yes, sir.

8 Q. I guess, did you see any evidence that Taylor
9 would have been killed anywhere else on the property and
10 dragged into that position that he was found in?

11 A. Killed anywhere other than his room?

12 Q. Yes, sir.

13 A. No, sir, I didn't find any evidence of that.

14 MR. PARKS: I'll pass the witness.

15 REDIRECT EXAMINATION

16 BY MR. WHITLEY:

17 Q. Sergeant Burge, Defense counsel asked you about
18 the operation of the .30-30 rifle?

19 A. Yes, sir.

20 Q. And in the course of those questions, he asked
21 you if it appeared there were two shots fired?

22 A. Yes, sir.

23 Q. Isn't it just as consistent that a shell was
24 ejected -- if the casing was ejected from the rifle,
25 another live round would be chambered and then that

1 round was ultimately fired?

2 A. Yes, sir.

3 Q. So what you observed was just as consistent
4 with only one shot being fired?

5 A. I'm sorry, I barely can hear you.

6 Q. In order to fire the weapon, it's necessary to
7 chamber a live round?

8 A. Yes, sir.

9 Q. Now, if there's a spent cartridge in the
10 chamber, in order to chamber a new live round, the lever
11 has to be worked, ejected the spent cartridge out of the
12 chamber, and chambering a new live round; is that
13 correct?

14 A. That's correct.

15 Q. So it's just as consistent with the evidence at
16 the scene that a spent round was ejected, a live round
17 was chambered, and that live round was ultimately fired?

18 A. That's correct.

19 Q. So it doesn't necessarily mean there were two
20 shots fired in that room, does it?

21 A. No, sir.

22 Q. You testified also that you couldn't tell when
23 the rag was placed in the truck or how it got there?

24 A. That's correct.

25 Q. Now, but the rag that you identified and the

1 jury has seen, at the time it was found, it did have
2 what appeared to be bright red blood on it; is that
3 correct?

4 A. Yes, sir.

5 Q. As opposed to old dried blood?

6 A. Yes, sir.

7 Q. Your conclusion was because of the color of the
8 blood that it was fresh blood?

9 A. Yes, sir, that was my conclusion.

10 MR. WHITLEY: I pass the witness, Judge.

11 THE COURT: Let's go ahead and get that
12 turned off, then.

13 Yes, sir.

14 MR. PARKS: May I proceed, Your Honor?

15 THE COURT: Yes, sir, you may.

16 RECROSS-EXAMINATION

17 BY MR. PARKS:

18 Q. Sergeant Burge, the scene as you found, there
19 were two empty shell casings, no questions about that?

20 A. No questions.

21 Q. One was on the floor in Taylor's room and one
22 was still in the .30-30 rifle?

23 A. Yes, sir.

24 Q. That would be consistent with Taylor, would it
25 not, having shot his mother, walked into his room, put a

1 fresh round in the weapon, and shooting himself?

2 A. That would be consistent.

3 Q. I don't mean to be dating blood --

4 A. No, sir. No, sir.

5 Q. -- but -- so it was your perception it was
6 fresh blood?

7 A. That's correct.

8 Q. But you couldn't -- as an expert, you couldn't
9 tell this jury in all honest today how old that blood
10 was, could you?

11 A. No, sir.

12 MR. PARKS: That's all I have, Judge.

13 REDIRECT EXAMINATION

14 BY MR. WHITLEY:

15 Q. But you can tell that it was bright red?

16 A. I can, yes, sir.

17 Q. What you observed on the scene was just as
18 consistent with this Defendant killing Nichole first,
19 going into Taylor Wage's bedroom, ejecting a shell,
20 chambering a new round, and killing Austin Taylor Wages?
21 It's just as consistent?

22 A. Yes, sir, that scenario is consistent as well.

23 MR. WHITLEY: That's all I have, Judge.

24 Pass the witness.

25 MR. PARKS: Last question, I believe, Your

1 Honor:

2 RECROSS-EXAMINATION

3 BY MR. PARKS:

4 Q. Sergeant, do you know if there was any fluff
5 cycle in that drier?

6 A. No, sir, I don't. I'm sorry.

7 MR. PARKS: Okay. Thank you. That's all I
8 have.

9 THE COURT: All right. Thank you, sir.

10 MR. WHITLEY: That's all I have, Judge.

11 THE COURT: Let me ask you to approach.

12 (Bench.)

13 THE COURT: We've kind of got off our
14 normal time. I'm just trying to figure out how long
15 your next witness will be.

16 MR. WHITLEY: It will be lengthy.

17 THE COURT: Better probably take an early
18 lunch.

19 MR. WHEELER: Take an lunch and come back
20 at 1:00?

21 THE COURT: Well, yeah, okay. Maybe a
22 little earlier than that.

23 (Open court.)

24 THE COURT: We got started a little late
25 this morning, so instead of taking a break at 10:30,

1 we're starting much before 10:30, I think we're going to
2 take our lunch break a little early and ask you to come
3 back a little early.

4 Let me ask you to remember all your prior
5 instructions and be available in the jury room at 12:50
6 and, hopefully, we can get started then or pretty close.
7 Please go -- let me add this instruction: If you're
8 going out to eat, as you've heard, there are a lot of
9 potential witnesses.

10 I don't know where they're going to be, so
11 let me ask you to wear your juror badges when you go out
12 to eat. That way, if anybody associated with the trial
13 is around, they ought to be able to see that you all are
14 jurors and know not to be talking about the trial in any
15 way in your presence. If you think that's happening, be
16 sure to point out that you're a juror. If anybody asks
17 you how the trial is going, they should understand when
18 you tell them you can't talk about. So please go with
19 the bailiff at this time.

20 (Jury exits courtroom.)

21 THE COURT: All right. Let the record
22 reflect that the jury has left the courtroom.

23 Unless anybody has any matter we need to
24 take up before we depart, we'll be in recess until
25 12:50.

1 (Luncheon recess taken at 11:39 to 12:50.)

2 THE COURT: On the record in State vs.
3 Payne. Ask the record to reflect that the counsel for
4 the State, counsel for the Defendant, and the defendant
5 is present. The jury is not present.

6 Is the State ready to proceed?

7 MR. WHEELER: State's ready.

8 THE COURT: Is the Defendant ready to
9 proceed?

10 MR. PARKS: We are, Your Honor. We have a
11 matter outside the presence of the jury, just take a few
12 minutes.

13 THE COURT: Very well.

14 RULE 403 & 404 OBJECTIONS

15 BY MR. PARKS:

16 Judge, based upon the opening statement of
17 Mr. Whitley that the State would be calling witnesses
18 during the course of the trial to testify that Taylor
19 Wages was, quote, well adjusted, happy, and that he
20 loved his mother dearly, this is a continuation of our
21 objection to that kind of testimony that we tried to get
22 the State to profer pretrial so it can be thrashed out.

23 We object to that. The reason is for, one,
24 that we believe it is irrelevant. To the extent that it
25 might be relevant, it's inadmissible under Rule 403

1 because the prejudicial effect clearly outweighs the
2 probative value it might have. But mostly, Your Honor,
3 we find it to be inadmissible under 404(A); that is,
4 it's the intent by the State to show a character trait
5 of the victim to show he acted in accordance with that
6 character trait, and that type of evidence is strictly
7 prohibited by 404(A).

8 MR. WHEELER: If that's a motion in limine,
9 then I understand, but we're in the middle of our
10 witnesses. If we need a motion in limine hearing on
11 each of our witnesses, I'll understand that, but we've
12 done our research and we're prepared to do it at the
13 appropriate time. Do we need to have a recess and have
14 a full-blown hearing on all of our evidence?

15 THE COURT: Well -- and I guess -- I think
16 we're going to need to have that hearing. I tried to
17 work that in that's the least inconvenient to the jury.
18 We're getting ready call another fact witness that no
19 one has any questions about and I've been told he's
20 going to be lengthy witness.

21 MR. WHEELER: I want to make sure that I
22 got the matter on the record correctly and heard the
23 objection correctly. Counsel for the Defense has stated
24 to this court that during opening statement, Mr. Whitley
25 made clear that evidence would be proffered to show that

1 the child victim was well adjusted, et cetera.

2 He is objecting to any of this testimony
3 about the victim based on 401, relevance; 403, the
4 prejudicial effect; and the 404 character trait, and we
5 need to meet that objection at a time that's appropriate
6 for the court, like when we call that witness. Do I
7 understand correctly.

8 THE COURT: Ideally prior to the time you
9 call them so that we can set some time aside and let the
10 jury be out instead of just breaking in the middle of
11 the trial so that we can address that issue that we were
12 planning to address yesterday afternoon but ran out of
13 time.

14 MR. WHEELER: Our understanding yesterday
15 afternoon was state of mind of the Defendant which is a
16 wholly different issue than relevance, prejudicial
17 effect, characteristic of the decedents, and fact
18 witnesses to the case as to how they can testify to the
19 decedents.

20 MR. PARKS: Well, that is what we've been
21 left to guess. I will quote the prosecution yesterday:
22 "We have to tell you who our witnesses are, but we don't
23 have to tell you what they've got to say." So that was
24 our best guess at the time. Now we've heard opening
25 statement. We see what it is. All we're asking for is

1 before -- is before we start those witnesses out, that
2 we have a review of that testimony so we can make
3 appropriate objections.

4 THE COURT: And what the Court's trying to
5 get a sense of is when's the appropriate time to do
6 that.

7 MR. PARKS: Yeah.

8 THE COURT: And in other words, your best
9 guess as to how long you're going to be going this
10 afternoon before you get to any of those witnesses,
11 whether we can do it this afternoon, whether we need to
12 set some time in the morning and let the jury come in
13 later while we go ahead and address it.

14 MR. WHEELER: I don't believe we're going
15 to get into any of these witnesses until Tuesday of next
16 week, Tuesday morning. That's when we'll get into them.
17 We'll have experts all day Friday. We just started to
18 get into the crime scene work.

19 THE COURT: Well, that's fine. You've
20 certainly got a much better sense of where the order is
21 going to go than anybody else, but I'm just trying to
22 see, before we get there, at a time that's least
23 burdensome on the jury and we can take -- set a
24 reasonable time aside to take it up and not have them
25 sitting in the jury room wondering. Have them come in

1 late or leave early either in the afternoon or morning
2 is the best way to deal with those things. And if
3 everybody has a better understanding of that, then --

4 MR. WHEELER: As far as that, we'll be in a
5 better position as the trial goes.

6 THE COURT: That will be fine. If you're
7 ready -- everybody ready?

8 MR. WHEELER: State's ready.

9 MR. PARKS: Yes, sir.

10 THE COURT: Let's bring the ladies and
11 gentlemen of the jury in.

12 (Jury enters courtroom.)

13 THE COURT: Let the record reflect that the
14 jury has returned to the courtroom.

15 State may call its next witness.

16 MR. WHEELER: State calls Misty Burns.

17 (Witness enters courtroom.)

18 THE COURT: Yes, ma'am. You were sworn
19 earlier, were you not?

20 THE WITNESS: Yes, sir.

21 THE COURT: Go ahead and have a seat.

22 And let the record so reflect.

23 MISTY BURNS,

24 having been first duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. WHEELER:

2 Q. Good afternoon.

3 A. Good afternoon.

4 Q. Would you please state your name for the jury
5 and for the record?

6 A. Misty Burns.

7 Q. How are you currently employed?

8 A. I work at Bradshaw State Jail.

9 MR. KING: I'm sorry, I can't --

10 THE WITNESS: Bradshaw State Jail.

11 Q. (BY MR. WHEELER) And what is your job title at
12 the Bradshaw State Jail?

13 A. Correctional officer.

14 Q. Prior to your employment at the Bradshaw State
15 Jail, were you employed by the Wood County Sheriff's
16 Office?

17 A. Yes, sir.

18 Q. Were you employed with the Wood County
19 Sheriff's Office on or about December 11th, 2007?

20 A. Yes, sir.

21 Q. What was your position with the Wood County
22 Sheriff's Office, then?

23 A. Patrol deputy.

24 Q. And at that time, were you a TCLOSE certified
25 peace officer?

1 A. Yes, sir.

2 Q. So you were certified by the State of Texas?

3 A. Yes, sir.

4 Q. Do you recall the events of December 11, 2007?

5 A. Yes, sir.

6 Q. What were your duties as a patrol officer on or
7 about December 11, 2007 with the Wood County Sheriff's
8 Office?

9 A. I arrived at the scene --

10 Q. Maybe I need to stop you there.

11 A. Okay.

12 Q. My question is: What were your duties as a
13 patrol officer? What was your job description?

14 A. Oh, excuse me. Basically, patrol the city,
15 enforce state and local laws, assist around the
16 counties, stuff like that.

17 Q. Could you describe for the jury your education
18 and experience to become a certified peace officer in
19 the State of Texas?

20 A. Like, academy wise?

21 Q. Yes. Would you describe your training and
22 experience you have?

23 A. Yes. I had four months training at the East
24 Texas Police Academy. Before that -- after that, I
25 worked for Big Sandy Police Department for

1 two-and-a-half years, then come to Wood County.

2 Q. On December 11th, 2007, what shift did you
3 work?

4 A. I do believe it was 6:00 a.m. to 6:00 p.m.

5 Q. Were you in uniform?

6 A. Yes, sir.

7 Q. Were you in a marked patrol unit?

8 A. Yes, sir.

9 Q. Do you recall what first drew your attention to
10 the events on Highway 37?

11 A. It was a call that came over the radio. I was
12 working a call at the hospital and I was told by my
13 sergeant to go to Highway 37 in reference to the call.

14 Q. What was the exact call that you received?

15 A. That there had been two people that had been
16 shot on Highway 37.

17 Q. And what did you do in response?

18 A. I went to the scene.

19 Q. Approximately, how long did it take you to get
20 there?

21 A. I can't tell you. I left from Quitman Hospital
22 and it was approximately a mile down the road.

23 Q. When you arrived, who did you see at the scene?

24 A. I don't recall.

25 Q. Do you recall seeing other officers?

1 A. Yes, sir.

2 Q. And did you write a report in this case?

3 A. Yes, sir.

4 Q. Have you had an opportunity to review that
5 report?

6 A. Yes, sir.

7 Q. Now, who was your immediate supervisor when you
8 rolled up on the scene?

9 A. My supervisor for the day was Mark Miller, but
10 Miles Tucker was the one in charge of the scene.

11 Q. When you arrived on the scene, did you receive
12 instructions from Tucker?

13 A. Yes, sir.

14 Q. What were the instructions that you received?

15 A. We were -- I was instructed to go stand by the
16 unidentified male at the time which also had a small
17 female child.

18 Q. At this location where the unidentified male
19 and a small female child were, that was location in Wood
20 County?

21 A. Yes, sir.

22 Q. Okay. And the unidentified male that you're
23 talking about, do you see him in the courtroom today?

24 A. Yes, sir.

25 Q. Point to him and identify an article of

1 clothing he's wearing?

2 A. He's wearing the black tuxedo with a green
3 shirt.

4 MR. WHEELER: Your Honor, let the record
5 reflect that she's identified Defendant.

6 THE COURT: We get some odd descriptions
7 sometimes. I will say that the Defendant is wearing a
8 black coat and green shirt and probably she has
9 identified him, yes, sir.

10 MR. WHEELER: Thank you, Your Honor.

11 Q. (BY MR. WHEELER) Now, when you saw at the
12 scene Jason Tad Payne and this child, could you describe
13 the emotional condition of Jason Tad Payne?

14 MR. PARKS: Judge, we're going to object to
15 that. That's calling for an opinion. If she wants to
16 describe what she saw --

17 THE COURT: I'll sustain that objection.

18 Q. (BY MR. WHEELER) Would you describe what you
19 saw, please?

20 A. I don't recall.

21 Q. Now, when you had the two together, what were
22 you supposed to do with those two?

23 A. Keep an eye on them until Miles Tucker could
24 come down there and talk to them.

25 MR. WHEELER: May I approach, Your Honor?

1 THE COURT: Yes, sir.

2 MR. WHEELER: Thank you.

3 Q. (BY MR. WHEELER) I've got a drawing here of
4 the house. It's State's Exhibit 1. This being the
5 front of the house here; this being the garage that was
6 off to the right and the back bedroom [indicating].

7 In terms of that drawing of the
8 house -- come on down.

9 A. Yes, sir.

10 Q. Could you give the jury an idea of where you
11 were watching Jason Payne and this child?

12 A. Well, it's going to be out of view of the
13 picture because it's going to be more or less towards
14 the end of the driveway. Yeah, it's got [indicating] --

15 Q. So a good piece away from the front entry?

16 A. Yes, sir.

17 Q. The white vehicle, did you see a white vehicle?

18 A. A white truck.

19 Q. In terms of where --

20 A. To the right, to the side of the house
21 [indicating].

22 Q. So over here, you saw a white pickup truck
23 [indicating]?

24 A. Yes, sir.

25 Q. Which direction was the front of that pickup

1 truck --

2 A. I don't recall.

3 Q. -- do you recall?

4 Were there any other outbuildings on this
5 side of the house that you saw?

6 A. Yes, sir.

7 Q. What did you see?

8 A. It was like a storage building, a garage. I
9 don't know how to explain it.

10 Q. And where did you see it --

11 A. It was --

12 Q. -- in terms of this --

13 A. It was to the right of the white truck.

14 Q. So you had the truck here and you had another
15 outbuilding over here [indicating]?

16 A. Yes, sir.

17 Q. And you had Jason Tad Payne and his daughter, I
18 assume, in front of the --

19 A. Yes, sir.

20 Q. -- is that correct?

21 Okay. Go ahead and resume your seat.

22 (Witness complies.)

23 Q. (BY MR. WHEELER) Did you give Jason Tad Payne
24 any instructions?

25 A. No, sir.

1 Q. Okay. Did you talk to him?

2 A. No, sir.

3 Q. While you were watching him in that location,
4 were you supposed to keep him in that location where you
5 had him?

6 A. Yes, sir.

7 Q. By whose instructions?

8 A. Miles Tucker's.

9 Q. What happened?

10 A. The Defendant started walking towards the house
11 in that direction to where the white pickup truck is.

12 Q. And then what happened?

13 A. I don't recall whether it was me or DPS Trooper
14 Owens that called him back down to come stand there.

15 Q. When you told him to come back to your location
16 away from that direction of the outbuilding and the
17 white truck, did he respond?

18 A. Yes.

19 Q. What did he do?

20 A. He came walking back down.

21 Q. Did he say anything?

22 A. No, sir.

23 Q. When he went walking off in that direction, did
24 he take his daughter with him?

25 A. No, sir.

1 Q. He walked off on his own?

2 A. Yes, sir.

3 MR. WHEELER: Pass the witness.

4 CROSS-EXAMINATION

5 BY MR. PARKS:

6 Q. Just a couple of things, Ms. Burns: When
7 Mr. Payne was walking in the direction of the pickup
8 truck, did it appear to you he was trying to leave the
9 scene?

10 A. No, sir. If he was going to leave the scene,
11 he would have walked towards the highway.

12 Q. Do you remember, were there doors to that
13 pickup truck standing open when you saw it?

14 A. Yes, sir, the driver and the passenger.

15 Q. The driver and the passenger?

16 A. Yes, sir.

17 MR. PARKS: Thank you. That's all the
18 questions we have.

19 MR. WHEELER: Nothing further, Your Honor.

20 THE COURT: Thank you, Ma'am. You may step
21 down.

22 MR. WHEELER: May this witness be excused?

23 MR. PARKS: No objection.

24 THE COURT: You may be excused.

25 THE WITNESS: Thank you.

1 THE COURT: Call your next witness.

2 MR. WHEELER: State calls Officer Miles
3 Tucker.

4 (Witness enters courtroom.)

5 THE COURT: Mr. Tucker, just come on over
6 to the witness stand and have a seat.

7 And let the record reflect the witness
8 previously was sworn.

9 OFFICER MILES TUCKER,
10 having been first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. WHEELER:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. Would you please state your name for the jury?

16 A. Miles Tucker.

17 Q. How are you currently employed?

18 A. I'm a captain with the City of Quitman Police
19 Department.

20 Q. Are you are a certified peace officer?

21 A. Yes, sir.

22 Q. How long have you been a certified peace
23 officer?

24 A. A little over 15 years.

25 Q. Could you describe for the jury your training

1 and the experience that you have that made you become a
2 certified peace officer?

3 A. I have a degree in criminal justice, I have a
4 Master Peace Officer's Certification, and the training
5 that goes along with regular certification.

6 Q. What are your current duties with the Quitman
7 Police Department?

8 A. Mainly administrative.

9 Q. In 2007, who was your employer?

10 A. Wood County Sheriff's Office.

11 Q. What was your rank at that time in 2007?

12 A. I was a lieutenant with the Criminal
13 Investigations Division.

14 Q. Could you describe for the jury what your
15 duties were as an investigator with the Wood County
16 Sheriff's Office?

17 A. Worked cases and usually took the -- my
18 responsibility was major crime investigation.

19 Q. Now, have you worked few or many death cases
20 involving gunshots?

21 A. I would categorize it as many.

22 Q. Could you estimate how many gunshot cases you
23 worked in your career?

24 A. I would say maybe a couple dozen, several
25 dozen.

1 Q. And on this occasion in December of 2007, were
2 you on duty with the Wood County Sheriff's Office?

3 A. Yes, sir.

4 Q. Were you working a particular shift?

5 A. I was there during the daytime at that time.

6 Q. And were you in uniform that day?

7 A. No, sir.

8 Q. You wear plain clothes?

9 A. Yes, sir.

10 Q. Were you in a marked patrol unit that day?

11 A. No, sir.

12 Q. That morning, did you receive a dispatch that
13 got your attention?

14 A. Yes, sir, I received a phone call in my office
15 from dispatch.

16 Q. What was the nature of the phone call you
17 received?

18 A. I was advised of a death on Highway 37, north
19 of town.

20 Q. When you received that call, about what time
21 was it?

22 A. Around 9:00.

23 Q. You wrote a report in this case, didn't you?

24 A. Yes, sir.

25 Q. On that report, it had a cover sheet indicating

1 a time of offense, didn't it?

2 A. It indicates a received time, dispatch time.

3 Q. And what was the dispatch time?

4 A. 9:18.

5 Q. So 9:18, you receive information from dispatch
6 involving a death?

7 A. Yes, sir.

8 Q. Okay. When you received that dispatch, what
9 did you do?

10 A. I advised the dispatcher to, of course, start
11 units in that direction. I didn't know how close
12 anybody was or anything to that effect, so I also
13 advised I would be en route to that location.

14 Q. Did you go to that location?

15 A. Yes, sir.

16 Q. Approximately, how long did it take you to
17 drive from the Wood County Sheriff's Office to the
18 location?

19 A. A matter of a couple of minutes. A very short
20 time.

21 Q. Do you know approximately how far that is from
22 the Wood County Sheriff's Office?

23 A. Approximately a couple of Miles.

24 Q. And do you know approximately how far that
25 location is from Quitman Elementary School?

1 A. Takes approximately five minutes driving there
2 a normal rate of speed.

3 Q. So when you arrived, what's the address of the
4 location to which you went?

5 A. 1146 Highway 37 North.

6 Q. That location, is it in Wood County?

7 A. Yes, sir.

8 Q. Who arrived on the scene along with you?

9 A. Deputy Misty Burns arrived a short time after.

10 Q. When you first arrived, what did you see?

11 A. I saw an individual walking down the drive with
12 a small child.

13 Q. Approximately, how far from the front of the
14 house was this individual you saw with this small child?

15 A. I really don't recall how far from the house it
16 was. It was probably more than halfway down the drive.

17 Q. Okay. Several feet?

18 A. Yes, sir.

19 Q. Several hundred feet?

20 A. I would -- I would say at least 100 feet.

21 Q. The person that you saw walking down the
22 driveway holding that small child, is that person in the
23 courtroom today?

24 A. Yes, sir.

25 Q. Could you point to that person and identify

1 that person by an article of clothing he's wearing?

2 A. The individual in the, appears to be, black
3 sports coat, light green shirt, tie; sitting third from
4 the right from Defense counsel's table [indicating].

5 MR. WHEELER: Your Honor, may the record
6 reflect that he's identified the Defendant, Jason Tad
7 Payne?

8 THE COURT: That request is granted.

9 Q. (BY MR. WHEELER) When you saw Jason Tad Payne
10 in that driveway, how did he appear?

11 A. He -- I had very little contact with Mr. Payne
12 at that time, but he pointed to the direction of the
13 house and --

14 Q. Did he say anything?

15 A. I don't recall him saying anything at that
16 time.

17 Q. How was he dressed on December 11th, 2007, at
18 9:00 in the morning?

19 A. A pair of light-colored kaki pants, a shirt. I
20 believe he may have had a baseball cap on.

21 Q. T-shirt?

22 A. I believe so, yes, sir.

23 Q. Was it cool that morning?

24 A. It was in the 60s.

25 Q. And you saw him in the driveway in his T-shirt,

1 and he directed you to the house, correct?

2 A. Yes, sir.

3 Q. Okay. The report that you received indicated
4 how many people had been killed?

5 A. The original report I received said that two
6 people had been killed.

7 Q. Do you have your report there with you?

8 A. Yes, sir, I do.

9 Q. Would it help you with your testimony to refer
10 to that report as you testify?

11 A. Yes, sir.

12 Q. Okay. You can go ahead and do that.

13 You were the first to arrive on scene and
14 you entered that house, correct?

15 A. Yes, sir.

16 Q. When you entered, what did you do?

17 A. I immediately started looking for victims and
18 possible suspects.

19 Q. Now, before you entered that house, did you say
20 anything to Jason Tad Payne, give him any instructions?

21 A. I advised him to stay where he was at.

22 Q. Then what did you do?

23 A. Well, I started inside the residence and I
24 looked behind me at some point and noticed that he was
25 still approaching the residence. So I noticed that

1 Deputy Burns had arrived on location at that point and I
2 had asked her to stay there with the subject and make
3 sure that he stayed outside the residence for everyone's
4 safety.

5 Q. At what pace did you approach and enter that
6 house?

7 A. Quickly.

8 Q. Why?

9 A. I had been advised of two victims that had,
10 from my understanding, been shot. I didn't know if
11 there was any other victims. I didn't know who the
12 perpetrator was. Didn't know if the actor was still on
13 location. It's my job as an officer to make sure
14 everybody there is safe, and if somebody is in need of
15 medical attention, to get that medical attention there
16 immediately. Our normal procedure, the dispatch will
17 call EMS --

18 MR. PARKS: I object. It exceeds the scope
19 of the question.

20 Q. (BY MR. WHEELER) Okay. Let's break this up
21 into parts: Did you seek assistance to provide medical
22 attention to people who might still be alive?

23 A. Yes, sir.

24 Q. Did you seek to secure that scene and make sure
25 there were no other perpetrators, no perpetrators?

1 A. Yes, sir.

2 Q. Was that to protect the people there?

3 A. Yes, sir.

4 Q. And did you want to assess that scene?

5 A. Yes, sir.

6 Q. Okay. Now, when you moved at this hurried pace
7 to the front door, did you see any signs of forced
8 entry?

9 A. No, sir.

10 Q. What did you do next?

11 A. I began checking the residence. I went and --

12 Q. Did you move left or right first?

13 A. I moved straight and to the left.

14 Q. And then what did you do?

15 A. Entered -- once I got to the bedroom, to the
16 left of my entry into the house, I noticed what I
17 believed to be a victim.

18 Q. In which room?

19 A. The room to the left, which would have been the
20 northwest, I believe, bedroom.

21 Q. When you arrived on the scene, had Jason Tad
22 Payne armed himself?

23 A. No, sir.

24 Q. He didn't have a firearm on his person, but he
25 did have his two-year-old daughter, right?

1 A. Yes, sir.

2 Q. And you went in and you went to the left into
3 which room?

4 A. The bedroom to the northwest, which I -- I
5 didn't know whether that was the master bedroom or what
6 kind of bedroom it was.

7 Q. Let's see. So when you entered the
8 house -- come on down with me, if you would.

9 (Witness complies.)

10 Q. (BY MR. WHEELER) Is this the door through
11 which you entered in State's Exhibit 6 [indicating]?

12 A. Yes, sir.

13 Q. And when you came in, you took a left. Now,
14 when you came into this location after hearing these
15 people had been shot, was this immediately in front of
16 you in State's Exhibit 8 [indicating]?

17 A. This would have been over to the -- to the left
18 of this door [indicating].

19 Q. Okay. To the left of the front door?

20 A. Yes, sir. This is the fireplace that the
21 television would have been by. You can see the corner
22 of the fireplace and the television here [indicating].

23 Q. Okay. So State's Exhibit 9 shows the
24 fireplace. You headed in the direction of that wall?

25 A. Yes, sir.

1 Q. In State's Exhibit 8, at 9:00 in the morning or
2 a little after, the T.V. had cartoons on, right --

3 A. It appears that way.

4 Q. -- in State's Exhibit 8?

5 And then you went to the right of the
6 fireplace and there's a --

7 A. Yes, sir, and you can see it in both of these
8 [indicating].

9 Q. What's in State's Exhibit 10? What does that
10 door lead to?

11 A. The bedroom where the female victim was
12 located.

13 Q. Okay. So you walk through that door, correct?

14 A. Yes, sir.

15 Q. Did you walk to the left or the right of the
16 bed?

17 A. I walked over to the right here at the
18 footboard and went up towards the right [indicating].

19 Q. Why did you walk into the room?

20 A. To check the status of the female victim.

21 Q. Okay. Now, let's take a look here at State's
22 Exhibit 20. You said, "...check the status." You
23 walked toward the end the bed in State's Exhibit 20; is
24 that right?

25 A. Yes, sir.

1 Q. And you proceeded where?

2 A. Over to the -- this side [indicating].

3 Q. And when you were to the right of the bed, as
4 you faced the footboard when you walked around to the
5 right, what did you see?

6 A. The -- when I walked around to the right, the
7 female victim had a massive head injury to the back part
8 of her skull.

9 Q. What did you smell?

10 A. Gunpowder.

11 Q. Was the smell pronounced or was it a small
12 smell?

13 A. It was a very pronounced smell.

14 Q. Did you touch the person that you saw there?

15 A. Yes.

16 Q. Why?

17 A. To ascertain whether or not -- you know, what
18 the body temperature was and stuff. I'm not sure that I
19 actually touched her at this beginning point where I
20 actually came into the house at the very first. It was
21 once I walked around to the backside and saw the injury,
22 and then this -- over into this point, I was confident
23 that the victim was deceased [indicating].

24 Q. Okay. Now, go ahead and resume your seat
25 there, Officer.

1 (Witness complies.)

2 Q. (BY MR. WHEELER) So you walked into that room,
3 and Nichole Payne is dead, right?

4 A. I believe she was, yes, sir.

5 Q. Were there any signs of a struggle in there?

6 A. Not that I determined at that time, no, sir.

7 Q. Now, let's talk about that room a little bit
8 that you looked in: Did you see any male clothing in
9 that room?

10 A. No, sir.

11 Q. Did the room have a bathroom attached to it?

12 A. Yes, sir.

13 Q. Would you describe for the jury the bathroom
14 that you saw?

15 A. The bathroom, I believe it had a walk-in
16 shower, commode, sink.

17 Q. Did you see any male toiletries in that
18 bathroom?

19 A. I don't recall seeing any, no, sir.

20 Q. Any deodorant?

21 A. I don't recall.

22 Q. Shaving cream?

23 A. I don't recall any, no, sir.

24 Q. Razor?

25 A. No, sir.

1 Q. Now, you see her asleep and then killed there.

2 Do I have that right? Did it look like the body had
3 been moved?

4 A. No, sir.

5 Q. What position was her body in?

6 A. It was in semi-fetal position.

7 Q. Okay. What did you do next?

8 A. Worked on clearing the rest of the residence,
9 checking for other victims, perpetrators.

10 Q. What does that mean?

11 A. Simply means we do a cursory search of the
12 residence to determine whether or not there's anybody
13 else inside the residence.

14 Q. Did you search every room in the house?

15 A. I believed that I did at that time.

16 Q. Did you search every closet?

17 A. Yes, sir, I believed that I did at that time.

18 Q. Did you search every bathroom?

19 A. Yes, sir.

20 Q. Did you search every utility room?

21 A. Yes, sir.

22 Q. Okay. Did you start first upstairs or
23 downstairs?

24 A. Downstairs.

25 Q. When you started downstairs, what's the first

1 room you went to after you left the master bedroom?

2 A. Living room, kitchen area, dining room. Those
3 areas were all downstairs. I don't recall which one I
4 went to first specifically after the bedroom.

5 Q. Did you proceed deliberately? Did you proceed
6 slowly? Did you -- how did you proceed?

7 A. Expediently.

8 Q. Did you have your sidearm drawn?

9 A. Yes, sir.

10 Q. Why?

11 A. Safety concerns.

12 Q. Were you certain, as you went through that
13 house, that there was no threat to you?

14 A. No, sir, I had no way of knowing that.

15 Q. So you proceeded to go through the entire house
16 considering there might be a threat to you?

17 A. Yes, sir.

18 Q. Now, what did you do next?

19 A. We searched the upstairs area of the residence.

20 Q. Who's "we"?

21 A. Myself and Sergeant Mark Miller.

22 Q. Who else had rolled up on the scene at that
23 time, do you know?

24 A. At that particular time, I have no idea. I
25 know that myself and Mark Miller were the ones inside

1 the residence. Mark arrived a few minutes after me.

2 Q. Did he join you in the house?

3 A. Yes, he did.

4 Q. How did he identify himself to you?

5 A. He called out that he was there. I made brief
6 contact with him and advised him that I had one victim
7 located and to assist me in clearing the rest of the
8 residence, doing the cursory search.

9 Q. As you and Deputy Miller were searching the
10 residence, how many times did Jason Tad Payne approach
11 that house before you could get him locked down with
12 Misty Burns?

13 A. He tried to come down to the house at least on
14 one occasion. Misty's arrival was fairly quick after
15 mine.

16 Q. As you went through the upstairs -- let's see,
17 go ahead and step down again here.

18 (Witness complies.)

19 Q. (BY MR. WHEELER) I take it, you went up these
20 stairs [indicating]?

21 A. Yes, sir.

22 Q. When you arrived at the landing at the top of
23 the stairs, did you proceed to your right or left?

24 A. To the left at that time.

25 Q. Which room did you enter first?

1 A. This one [indicating].

2 Q. Now, this room that you see here is State's
3 Exhibit 28 with the bear mattresses and pallet on the
4 floor. Is that the way that appeared when you entered
5 it [indicating]?

6 A. Yes, sir.

7 Q. The mattress and box springs on them, they had
8 no bedding on them, correct, at the time you arrived?

9 A. Yes, sir.

10 Q. So this bed was stripped, right [indicating]?

11 A. Yes, sir.

12 Q. We had a pallet on the floor to the right of
13 this mattress; is that correct?

14 A. Yes, sir.

15 Q. That's what you saw when you went in that room.

16 Where did you go next?

17 A. This room led to, I believe, a bathroom and
18 then there were two smaller rooms; one almost directly
19 across from this bedroom and one to the end of the hall,
20 which you come up and round the staircase [indicating].

21 Q. Now, was the house in this state of dissemble
22 when you went in there?

23 A. Yes, sir.

24 Q. Did you see any other mattresses or box springs
25 when you went upstairs?

1 A. I believe there were children beds.

2 Q. Were those beds stripped as well?

3 A. I don't recall.

4 Q. Now, did you see in this room, State's
5 Exhibit 28, any male clothing, adult male clothing
6 [indicating]?

7 A. Not that I can recall.

8 Q. In the bathroom, that was the only other
9 bathroom in the house?

10 A. I believe it was.

11 Q. Did you see any male toiletries in that
12 bathroom?

13 A. I never observed any male toiletries that I
14 remember.

15 Q. Anywhere in the house?

16 A. I believe in the -- in the male victim's room,
17 there was deodorant and such as that.

18 Q. After you had gone to the upstairs -- you're
19 talking about Taylor Wages? You saw deodorant and other
20 things in his room?

21 A. Yes, sir.

22 Q. But nowhere else in the house?

23 A. I don't recall seeing anywhere else in the
24 house.

25 Q. So you've gone through the downstairs and

1 you've gone through the upstairs. You haven't found
2 anybody else in the house. What did you do next?

3 A. I believed at that time that the house was
4 clear and safe and gave word that emergency services
5 could enter the residence.

6 Q. Wait now. You said you believed the house was
7 cleared and safe, but you had only found how many
8 victims?

9 A. Just one.

10 Q. That was the female in the master bedroom?

11 A. Yes, sir.

12 Q. What did you do then?

13 A. I had -- I knew I had been told of two victims,
14 so I had sent one of the officers outside. According to
15 my report, I believe it was Mark Miller that I sent to
16 make contact with the male subject, Mr. Payne.

17 Q. Did he return to you?

18 A. Yes.

19 Q. Did he indicate there were other victims in the
20 house?

21 A. He advised me that all were accounted for and
22 there was no one else in the residence.

23 Q. Now, what did you send Deputy Miller to do?

24 A. To check with Mr. Payne to see if there was
25 another victim in the residence.

1 Q. And he came back to you and said only the
2 mother?

3 MR. PARKS: That's a mischaracterization of
4 what the witness said.

5 THE WITNESS: Yes. Sergeant Miller came
6 back and told me that all had been accounted for. I had
7 asked Sergeant Miller to specifically check with
8 Mr. Payne because of the fact that I had been advised
9 there was two victims. Sergeant Miller came back and
10 advised me that Mr. Payne had stated that his son was at
11 school, he had another son, I believe, in Chicago, and
12 that all victims were accounted for.

13 Q. (BY MR. WHEELER) What did you do in response
14 to that information?

15 A. I took it that since I believed that we had
16 searched the residence, that -- and Mr. Payne was
17 confirming the information, that the residence was clear
18 and that we could go ahead and start doing what we
19 needed to do and I could revert my duties back to a
20 crime scene search.

21 Q. Now, who was on the scene at that time, what
22 officers?

23 A. William Burge had arrived on scene.

24 Q. Okay. Burge was there. Who else?

25 A. Mark Miller, myself, Misty Burns. I don't

1 really know who was on the parameter at that time. I
2 know shortly after that, Captain Joe Blair was on
3 location and was keeping the outside perimeter -- a log
4 of personnel and keeping anybody from coming inside the
5 scene that was not necessary.

6 Q. So we had Captain Joe Blair at the end of the
7 road, right?

8 A. Yes, sir.

9 Q. You and Miller in the house?

10 A. Yes, sir.

11 Q. Misty Burns with Jason Tad Payne and his
12 daughter -- what's her name?

13 A. Remington.

14 Q. Remington. And the others that were accounted
15 for were whom? After this initial contact with Jason
16 Payne through Miller, who were the others and where were
17 they?

18 A. Officers?

19 Q. No, people that were supposed to be in that
20 house.

21 A. Nichole Payne was the female victim.

22 Q. Okay.

23 A. And then Jason and Remington.

24 Q. Okay. So at that time, you believed you had
25 Nichole, Jason, and Remington there?

1 A. Yes, sir.

2 Q. You had the crime scene controlled at the
3 street with Blair?

4 A. Yes.

5 Q. Miller and Burns in the house. Any other
6 officers there?

7 A. William Burge had arrived.

8 Q. What did you order Burge to do?

9 A. Immediately start taking photographs so
10 emergency personnel can check the female victim,
11 Nichole.

12 Q. Did you ascertain who else lived in the house?

13 A. At that particular moment?

14 Q. At that particular time, yeah.

15 A. No, sir.

16 Q. Okay. After getting Burge orders to start
17 taking pictures, what did you do?

18 A. Waited for him to take photographs. And as
19 other personnel arrived on scene, I started to --

20 Q. Who arrived on the scene?

21 A. Randall Lain arrived at some point on the
22 scene.

23 Q. What did you order him to do?

24 A. To do a cursory search of the grounds and the
25 property around the house.

1 Q. Why?

2 A. To make sure there wasn't another victim or
3 perpetrator on the property.

4 Q. Okay. So you got your officers in place
5 working and you knew the nature of the dispatch. Had
6 you found another victim at that point?

7 A. Not at that point.

8 Q. So what did you decide to do?

9 A. I had asked Randall Lain to go out again and
10 ask Mr. Payne about the situation and to confirm the
11 fact once more whether or not there was another victim
12 in the residence.

13 Q. Did he follow your orders?

14 A. He did.

15 Q. Did he return to you?

16 A. He did.

17 Q. What did he tell you at that time?

18 A. He advised me that Taylor Austin, Taylor Wages
19 was in an attached garage, a sunken garage attached to
20 the house.

21 Q. Had you been in that garage prior to asking
22 Lain to make contact with Jason Payne?

23 A. I had not.

24 Q. After you received this information, what did
25 you do then?

1 A. Went to that location.

2 Q. Now, that location, how did you get into that
3 location?

4 A. Through a door that was near the washer or
5 the -- I believe through the kitchen or laundry room,
6 one. It went down some steps and into a garage.

7 Q. Okay. Was that garage room, it had a door?

8 A. Yes, sir.

9 Q. Was that door opened or closed?

10 A. It was closed.

11 Q. And when you saw this closed door, what did you
12 do?

13 A. Well, initially, I thought that was the door
14 that led to the exterior, but once I was given that
15 information, I opened the door and went through there
16 and found the male victim.

17 Q. Okay. Now, this is what we see depicted in
18 these pictures on the floor, correct [indicating]?

19 A. Yes, sir.

20 Q. All right. Now, when you walked into that
21 room, what did you see?

22 A. I saw a young man with a rifle leaning on his
23 leg in a what I believed was a twin bed, his head back,
24 blood.

25 Q. What did you smell?

1 A. I don't recall smelling anything at that time.

2 Q. How did you determine the nature and extent of
3 the injury to this young man?

4 A. I determined it was a gunshot wound to
5 the -- to the front of his face. The rifle being there
6 in plain view, the blood, and then the -- there was an
7 exit wound or a wound to the back of his head as well,
8 which was more than likely an exit wound.

9 Q. Did you touch him?

10 A. I did.

11 Q. How did he feel?

12 A. Cold.

13 Q. Did you move any part of him?

14 A. I did.

15 Q. What part did you move?

16 A. I slightly moved his arm.

17 Q. How did you -- describe what you felt when you
18 moved that arm.

19 A. It was stiff.

20 Q. He was cold to the touch and stiff when you
21 touched him, right?

22 A. Yes.

23 Q. Now, let's talk a little bit about that wound
24 that you saw when you entered the room: You've
25 testified you've seen quite a few gunshot wounds; is

1 that correct?

2 A. Yes, sir.

3 Q. Could you step down and take a look at this
4 one.

5 (Witness complies.)

6 Q. (BY MR. WHEELER) You've been an officer for
7 how many years?

8 A. 15 years.

9 Q. And over these years, you've seen a few or many
10 gunshot wounds?

11 A. I've seen several.

12 Q. When you saw this gunshot wound and you saw
13 these marks on his face, what is that?

14 A. It's described as stippling, which is normally
15 an indicator that a weapon is fired away from.

16 Q. In this particular case, how much of his face
17 was covered from this stippling?

18 A. Well, this general -- the left side of his face
19 and then towards the chin and forehead.

20 Q. On that day at that first moment when you saw
21 him, did you think this was normal for the kind of scene
22 we see in this photograph or was this an unusual wound
23 to you?

24 A. I thought it was odd.

25 Q. You thought it was odd. Why did you think it

1 was odd?

2 A. Simply because I had never seen -- I had never
3 seen a gunshot wound that somebody shot themselves in
4 the face or head that was not a contact wound.

5 Q. And this stippling that was on his face made
6 you say what?

7 A. That this was not a contact wound.

8 Q. What do you mean by that?

9 A. Well, the end of the barrel is actually
10 touching the skin.

11 Q. All right. Go ahead and have a seat.

12 (Witness complies.)

13 Q. (BY MR. WHEELER) So in this case, when you
14 walked in that room and you first saw that boy, you
15 thought something was odd about that wound?

16 A. I thought it was odd, yes, sir.

17 Q. Okay. The rifle that you saw when you first
18 came into that room, it was resting as you saw it there
19 in the photograph?

20 A. Yes, sir.

21 Q. And how did you determine who the young man
22 was?

23 A. I didn't really know at what point who the
24 young man was or how we determined that. It took a
25 little time to make that determination.

1 Q. You saw the pattern on the boy's face, okay.

2 What did you decide to do next?

3 A. We went through our -- what I feel like is
4 standard procedure, but we also made contact with the
5 Texas Rangers and at a later time. It was recommended
6 that we make contact with another crime scene
7 investigator. Photographed the scene, collected
8 evidence, had -- upon the ranger's arrival, he went
9 through the scene and assisted us with that.

10 Q. So you asked for ranger assistance. Did you
11 also ask for a crime scene reconstructionist?

12 A. Yes, sir.

13 Q. And who was that?

14 A. Noel Martin.

15 Q. And when you requested the assistant of the
16 Rangers and Noel Martin of the Smith County Sheriff's
17 Office, did you then proceed to process this crime
18 scene?

19 A. Yes.

20 Q. Who was in charge of the crime scene?

21 A. I was.

22 Q. Okay. I'm going to hand you what has been
23 marked as State's Exhibit 64. Can you take a look
24 inside of it and tell me if you can identify it?

25 A. This has been sealed.

1 Q. Go ahead and break the seal.

2 (Witness complies.)

3 THE WITNESS: You want me to remove the
4 rifle?

5 MR. WHEELER: No.

6 Q. (BY MR. WHEELER) Can you identify that?

7 A. It appears to be the rifle which was recovered
8 from that crime scene.

9 Q. Is it in the same or substantially same
10 condition as to what it was on December 11, 2007, when
11 you collected it on Highway 37 at the Payne residence?

12 A. It appears to be.

13 MR. WHEELER: State offers State's
14 Exhibit 64.

15 (State's Exhibit 64, offered.)

16 MR. PARKS: No objection.

17 THE COURT: State's Exhibit 64 admitted.

18 (State's Exhibit 64, admitted.)

19 MR. WHEELER: For purposes of the record,
20 I'm going to ask the bailiff to clear the weapon.

21 (Bailiff complies.)

22 Q. (BY MR. WHEELER) I'm going to hand you State's
23 Exhibit 64. Could you describe, for purposes of the
24 record and for the jury, what we're looking at there?

25 A. A .30-30 lever action rifle, Serial

1 No. 5016347, Winchester Model 94.

2 Q. What is on the butt of that weapon?

3 A. It's what I would describe as a buckskin cover.

4 Q. Approximately, how long is that barrel?

5 A. I -- I don't know. Probably maybe eight
6 inches.

7 Q. From the muzzle to the chamber is eight inches?
8 Looks more like 20.

9 A. From the chamber?

10 Q. Yeah.

11 A. I was going from here to here [indicating]. I
12 don't know. If you had a tape measure, I can tell you
13 exactly.

14 Q. Okay. I may have to get you one.

15 A. Yes, sir.

16 Q. This action on this gun, this lever, how does
17 that work?

18 A. When you open the lever, it opens its top part
19 for a round to go in. You come back and close the
20 lever. It puts the round in in a firing position.
21 Squeeze the lever, pull the trigger, and it fires.

22 Q. How does a spent cartridge exit out of that
23 gun?

24 A. You open the lever once again.

25 Q. Where does the spent cartridge come out from?

1 A. It appears it comes from the top side.

2 Q. Go ahead and close that gun.

3 (Witness complies.)

4 Q. (BY MR. WHEELER) When you fire that gun, what
5 do you have to do?

6 A. You have to pull -- hold this, this lever shut
7 and squeeze and then squeeze the trigger [indicating].

8 Q. It's a dual action. You have to squeeze the
9 lever in order to pull the trigger; is that correct?

10 A. Yes, sir.

11 Q. And the trigger won't pull unless you've got
12 the lever pressed against the stock of the gun; is that
13 correct?

14 A. I don't believe it will.

15 Q. As you continued working through this house,
16 did you investigate each room?

17 A. Yes, sir.

18 Q. Let's start in Taylor's room: Was the
19 television on?

20 A. I don't recall the television being on.

21 Q. Was the radio on?

22 A. I don't recall the radio being on.

23 Q. Was a video game system on?

24 A. I don't believe so.

25 Q. Were any of the electronics in the room of this

1 teenage boy on when you went in there?

2 A. No, sir.

3 Q. Did you inspect the walls of the room?

4 A. Yes, sir.

5 Q. Did you inspect the ceiling of the room?

6 A. Yes, sir.

7 Q. And did you inspect the floor of the room?

8 A. Yes, sir.

9 Q. Did anybody assist you in inspecting the walls
10 and ceiling of this room?

11 A. Yes, sir.

12 Q. Who?

13 A. William Burge, Randall electronics, then later,
14 Phil Kemp.

15 Q. So two officers and a ranger looked through the
16 room with you. Did you see any blood or biological
17 matter on the ceiling of that room?

18 A. No, sir.

19 Q. Did you see any bullet defect in the ceiling of
20 that room?

21 A. None that we could locate.

22 Q. And four of you looked, correct?

23 A. Yes, sir.

24 Q. Have you worked other crime scenes involving
25 rifle shots that are self inflicted?

1 A. Yes, sir.

2 Q. In your experience, did this crime scene look
3 like those?

4 A. No, sir.

5 Q. Did you look at the wall behind the young man?

6 A. Yes, sir.

7 Q. Did you see any bullet defect in the wall
8 behind him?

9 A. No, sir.

10 Q. At his feet, when you looked at the crime scene
11 and you took photographs, did you see any blood or
12 material on the floor in front of him?

13 A. I don't recall seeing that.

14 Q. Did you collect any from that location, any
15 blood?

16 A. No, sir.

17 Q. Okay. What else was odd about that room that
18 you recall?

19 A. I found it odd that there was no smell of
20 gunpowder in that room. I found it odd that there was
21 not more damage caused from the infliction of the
22 gunshot wound.

23 Q. In your experience of 15 years as a peace
24 officer, is it common for a person who uses a rifle to
25 commit suicide, without having that muzzle either in

1 their mouth or touching them?

2 MR. PARKS: Judge, I'm not sure that the
3 proper predicate was laid to him to express an opinion
4 of that kind. I object to that.

5 MR. WHEELER: His experience is the
6 predicate under 702, 703, 705. I'm not qualifying him
7 as an expert. I've based it on crime scenes that he's
8 seen.

9 THE COURT: I sustain the objection.

10 Q. (BY MR. WHEELER) Have you worked
11 self-inflicted gunshot wounds on several or few
12 occasions?

13 A. Several.

14 Q. And on those several occasions on
15 self-inflicted gunshot wounds in your experience, have
16 you seen gunshot wounds caused by rifles?

17 A. Yes, sir.

18 Q. And have you seen the damage that's caused by
19 those rifles?

20 A. Yes, sir.

21 Q. And have you been able to work these crime
22 scene and formulate how the wound was inflicted?

23 A. Yes, sir.

24 Q. And was what you saw on December 11th, 2007,
25 consistent with what you've seen in the past?

1 A. No, sir.

2 Q. So in your 15 years of experience in working
3 these scenes, that is not common what you saw, is it?

4 A. That's correct.

5 Q. Okay. Let's move from Taylor's room into the
6 laundry room.

7 THE COURT: And before we do that, we're
8 going to have to take a break. Let's do that at this
9 point.

10 Ladies and gentlemen, remember your prior
11 instructions and be available in the jury room at five
12 minutes after 2:00. Please go with the bailiff at this
13 time.

14 (Jury exits courtroom.)

15 THE COURT: Let the record reflect that the
16 jury has left the courtroom.

17 Just a little reminder, not -- I don't want
18 to overplay this, but a little point on, sort of,
19 traditional state courtroom decorum: Traditionally,
20 when the jury goes, everyone remains seated. The
21 lawyers typically want to have an exception. I'll allow
22 that exception. So anybody inside the bar, that's fine,
23 but I ask everybody else to remain seated.

24 We'll be in recess, then, until five after
25 2:00.

1 (Recess from 1:56 p.m. to 2:07 p.m.)

2 THE COURT: Back on the record in Cause
3 20,529-2008, State vs. Jason Tad Payne. Let the record
4 reflect the jury is not present.

5 And if you want to come on up and take
6 the -- that will be fine.

7 (Witness complies.)

8 THE COURT: Counsel for the State, counsel
9 for the Defendant, and the Defendant is present.

10 Is the State ready to proceed?

11 MR. WHEELER: Ready.

12 THE COURT: Okay. If you'll bring the
13 ladies and gentlemen of the jury in, please.

14 (Jury enters courtroom.)

15 THE COURT: All right. Let the record
16 reflect that the jury has returned to the courtroom.

17 Mr. Wheeler, whenever you're ready to
18 proceed, you may do so.

19 MR. WHEELER: Thank you, Your Honor.

20 Q. (BY MR. WHEELER) Now, you said that the wound
21 that you saw, that it was not common. What was not
22 common about it?

23 A. I had never seen one that was a noncontact
24 wound; in other words, the end of the barrel not
25 touching the skin, basically.

1 Q. That was what was uncommon to you?

2 A. Yes.

3 Q. Okay. Now, let's move to the laundry room
4 next: With regard to the laundry room, what appliances
5 were in that laundry room?

6 A. A washer and drier.

7 Q. Did you retrieve anything from that washer and
8 drier?

9 A. There were articles retrieved from the washer
10 and drier. I don't believe I did it personally.

11 Q. Okay. The articles in the drier -- I'm sorry
12 about that. I didn't realize I had done it.

13 Now, the articles that were in the drier,
14 did you touch those articles or was that another
15 officer?

16 A. It was another officer.

17 Q. And the articles in the washer, did you collect
18 the articles that were in the washer or was that another
19 officer?

20 A. Another officer.

21 Q. Did you learn some things about what was in
22 that? Without telling us what those were that you
23 learned, did you learn some things about the clothing
24 that was in the washer and drier?

25 A. The articles in the washer had been freshly

1 washed, and the ones that were in the drier, they were
2 still warm.

3 Q. That's at about what time? What time were
4 those clothes discovered in there, based on your
5 investigation?

6 A. Probably around -- somewhere around 9:30.

7 Q. So y'all respond -- you received the dispatch
8 at 9:18, and at 9:30, that's when those clothes were
9 found?

10 A. Probably later than that. It's probably a
11 little later than that.

12 Q. Now, what time does school start that morning
13 at the Quitman Elementary School?

14 A. 8:00.

15 MR. WHEELER: I ask the Court to take
16 judicial notice of the school records that have been
17 filed with the business records affidavit showing the
18 time that Jackson Payne arrived at school on
19 December 11th, 2007.

20 (Bench.)

21 MR. PARKS: Well, we're not trying this at
22 the bench. Why don't you just offer the darn records?
23 We're not trying the case to the Court.

24 MR. WHEELER: I don't have any problem
25 offering them.

1 MR. PARKS: I mean, I don't know how the
2 Court can take judicial notice --

3 MR. WHEELER: If you don't have any
4 problems with it, I'm going to ahead and do -- I just
5 didn't want him to scramble --

6 MR. PARKS: Well, somebody is going to
7 scramble through the file if the judge is going to take
8 judicial notice.

9 DISTRICT CLERK: This is Jackson.

10 MR. WHEELER: Oh, Jackson.

11 MR. PARKS: You've got --

12 MR. WHEELER: Let me just offer everything
13 that's in there.

14 (Open court.)

15 MR. WHEELER: In fact, Your Honor, we will
16 offer everything that's accompanied by business records
17 predicate in the Court's file.

18 MR. PARKS: Is that with regard to Jackson
19 or everything? I have no objection to it.

20 MR. WHEELER: With regard to everything.
21 We will get them numbered shortly.

22 MR. PARKS: Let's go one at a time.
23 Jackson, I have no problem with.

24 MR. WHEELER: Let's go with that, Jackson's
25 records.

1 (State's Exhibit 65, offered.)

2 THE COURT: Jackson's records in the
3 business records affidavit are admitted.

4 (State's Exhibit 65, admitted.)

5 MR. WHEELER: I'd like to have -- they've
6 been marked as State's Exhibit 65.

7 Q. (BY MR. WHEELER) And they reflect that on
8 December 11, 2007, Jackson was on time at school at
9 8:00, right?

10 A. Yes.

11 Q. So Jackson gets to school at 8:00, and the
12 clothes are discovered later than 9:30 in the morning,
13 right?

14 A. (Moving head up and down).

15 Q. Okay. Now, moving from this laundry room into
16 the master bedroom, in that master bedroom with regard
17 to the injury to Nichole Payne, was the bullet ever
18 recovered?

19 A. No, sir.

20 Q. Who looked for that bullet?

21 A. Myself, Ranger Kemp, Randall Lain, and I don't
22 know if anybody else did or not, but it was a rather
23 diligent effort to locate the round.

24 Q. Look in the yard?

25 A. Yes, sir.

1 Q. I mean, the bullet had gone through the wall,
2 hadn't it?

3 A. Yes, sir.

4 Q. And it was never recovered?

5 A. That's correct.

6 Q. So there's no way to prove that the same weapon
7 killed both Taylor and Nichole, is there?

8 A. Not to my knowledge.

9 Q. Okay. Now, the pattern you saw with regard to
10 her head injury, did you see blood on the ceiling?

11 A. There was -- there was a lot of blood. There
12 was -- I don't remember if there was blood on the
13 ceiling or not, but there was a massive amount of blood.

14 Q. And we do know that the bullet had enough force
15 to exit her and through the wall and out to the yard?

16 A. Yes.

17 Q. Now, having seen this room, seen Taylor's room,
18 discovering the oddities you described to the jury, did
19 you decide to interview Jason Payne?

20 A. Yes.

21 Q. Where did that interview take place?

22 A. At the Wood County Sheriff's Office.

23 Q. And he was not in custody at the time, was he?

24 A. No, sir.

25 Q. Did you explain to him he was not under arrest?

1 A. Yes, sir.

2 Q. Did you explain to him he was free to leave at
3 any time?

4 A. Yes, sir.

5 Q. If he had asked to leave, would he have been
6 allowed to?

7 A. Yes, sir.

8 Q. Did you tell him that he had the right to
9 remain silent?

10 A. Yes, sir.

11 Q. Did he understand if he gave up that right,
12 anything he said could and would be used against him?

13 A. Yes, sir.

14 Q. Did he understand he had the right to an
15 attorney?

16 A. Yes, sir.

17 Q. Was this interview that you had with Jason
18 Payne recorded?

19 A. I'm sorry?

20 Q. Was this interview with Jason Payne that you
21 and Ranger Kemp had recorded?

22 A. Yes, sir.

23 Q. Where did this interview take place?

24 A. At the Wood County Sheriff's Office in the
25 interview room.

1 Q. When did it take place?

2 A. The same date, December 11th, 2007.

3 Q. Okay. Now, when you conducted that interview,
4 who did Jason Payne say he carried to school that
5 morning?

6 A. He advised that he had taken Jackson to school
7 and that Remington had ridden with them.

8 Q. So he said he carried his two biological
9 children with him, Jackson and Remington?

10 A. Yes, sir.

11 Q. And according to the school records, he had
12 arrived on time?

13 A. Yes, sir.

14 Q. A little before because Jackson had to get in
15 the classroom, right?

16 A. Yes, sir.

17 Q. Now, he described the condition his wife was in
18 when he left the house during that interview, didn't he?

19 A. Yes, sir.

20 Q. Did he mention that she had ever gotten out of
21 bed?

22 A. He did not mention that fact.

23 Q. So there's nothing in the report to indicate
24 that she got out of bed at all. In fact, with regard to
25 Remington and with regard to Jackson and those two

1 getting ready, what did she do with regard to them
2 getting ready? What position was she in, according to
3 the interview?

4 A. It was my understanding she was asleep.

5 Q. And that's before the kids went to school and
6 got there about 8:00 in the morning, right?

7 A. Yeah.

8 Q. Now, in the interview, he says he arrived back
9 home at about what time?

10 A. He advised he arrived back home at 8:15.

11 Q. He leaves a little before 8:00 and gets back at
12 8:15?

13 A. Yes, sir.

14 Q. What time was dispatch, according to your
15 report?

16 A. Dispatch time was 9:15.

17 Q. So you received the call, the 911 call about an
18 hour and five minutes after he returns to that property
19 on Highway 37, right?

20 A. I believe the 911 call actually came at 9:09.
21 The dispatch time was at 9:18.

22 Q. So about an hour before he gets back on that
23 property, right?

24 A. Yes, sir.

25 Q. Am I right?

1 A. (Moving head up and down).

2 Q. That's a .30-30 rifle. Ever fire a .30-30
3 rifle like that?

4 A. I've fired a .30-30 rifle, yes, sir.

5 Q. Is it a loud weapon?

6 A. Yes, sir.

7 Q. Did Jason Payne explain what he was doing
8 between 8:00 and 8:15?

9 A. He had advised when they had left the school,
10 that there was a couple of occurrences: That he had
11 thought about turning around and getting birdseed
12 because he believed they were out of birdseed. He made
13 the decision not to turn around and get birdseed, so
14 it -- actually I believe he stated he physically turned
15 around and then turned around again. And Remington had
16 wanted to go to the park, so he was going to turn
17 around, but decided against that, to go back to the
18 house.

19 Q. Okay. Let me get this straight: He goes to
20 the school with Remington and Jackson, according to his
21 statement, right?

22 A. That's correct.

23 Q. Jackson is on time, and with Remington, he goes
24 back home. About how far a trip is that?

25 A. From the house to the school, approximately

1 five minutes.

2 Q. About a five-minute trip. He says he gets to
3 the house and then he has to go back to town to get
4 birdseed, right?

5 A. No, sir. He never advised that he actually got
6 to the house, that he -- he was -- he had left the
7 school, and while en route back to the house,
8 had -- these thoughts had occurred to him and considered
9 these different options.

10 Q. But didn't he at one point in that interview
11 make clear that he and his daughter were going to feed
12 the pigeons when they got back on the property?

13 A. Yes.

14 Q. Even though they were out of feed in this
15 statement?

16 A. Yes.

17 Q. After going to town and --

18 MR. PARKS: Judge, you know, the document
19 speaks for itself. The recording speaks for itself. He
20 never said they were out of food. And they're not
21 pigeons, they're doves. He's mischaracterizing the
22 evidence.

23 MR. WHEELER: I am wrong about the birds.
24 The rest is right on the money. They are doves. It's
25 pigeon feed.

1 Q. (BY MR. WHEELER) Now, after he says he's going
2 to town to get the pigeon feed, he decides not to do
3 that. And then what does he say he's going to do?

4 A. He had talked about the fact that Remington
5 wanted to go to the park --

6 Q. Okay.

7 A. -- but he felt that he needed to return to the
8 house and explain to Nichole what they would be doing.

9 Q. Instead of going to get the pigeon feed, it's
10 now to take Remington to the park in that --

11 A. Yes.

12 Q. Does he get to the park?

13 A. No.

14 Q. Did he have a reason for not getting to the
15 park?

16 A. He felt that he needed to let Nichole know what
17 they were going to be doing.

18 Q. Was there a phone in the house with Nichole?

19 A. Yes, sir.

20 Q. Did he have a phone with him?

21 A. Yes, sir.

22 Q. But he chose not to use that phone for what
23 reason?

24 A. He advised he didn't feel like Nichole would
25 answer the phone.

1 Q. So he goes back to the house to tell Nichole?

2 A. Yes.

3 Q. Does he tell Nichole, according to his
4 interview?

5 A. Not at that time.

6 Q. What does he do instead?

7 A. He and Remington go to the creek to throw
8 acorns in the creek, and after doing that for a little
9 while, they go up to the hill to where the birds are
10 located.

11 Q. And that's about 8:15 in the morning when they
12 arrive back, according to his statement, right?

13 A. Yes, sir.

14 Q. All right. Now -- all right. So 8:15, comes
15 back to the house. Now, that brings us back to State's
16 Exhibit 36, this drier we're looking at here. Why don't
17 you go ahead and step down.

18 (Witness complies.)

19 Q. (BY MR. WHEELER) And this is the drier that
20 had the warm clothes in it?

21 A. Yes, sir.

22 Q. Now, that timer is set to what position on that
23 drier? It's set to off, isn't it?

24 A. Yes, sir.

25 Q. And it's timed. It's got increments of 30, 20

1 and 10 crossed off, right?

2 A. Yes, sir.

3 Q. And the clothes that were in this drier were
4 found hot or warm to the touch after 9:30, right?

5 A. Yes, sir.

6 Q. Then in that washing machine, State's
7 Exhibit 38, is a man's coat, right?

8 A. Yes, sir.

9 Q. All right. Go ahead and have a seat.

10 (Witness complies.)

11 Q. (BY MR. WHEELER) And Nichole didn't get out of
12 bed, according to Jason's statement, right, Jason
13 Payne's statement?

14 A. I believe that's correct.

15 Q. That's not Taylor's laundry in the washer and
16 drier, is it?

17 MR. PARKS: Calls for a conclusion.

18 MR. WHEELER: Withdraw the question.

19 Q. (BY MR. WHEELER) Did you examine that laundry?

20 A. Yes, sir.

21 Q. Were there any child's clothing or not?

22 A. I don't recall there being any child's clothing
23 in there.

24 Q. Now, at 8:15, Jason Payne, in his statement,
25 his daughter Remington is outside, right?

1 A. I'm sorry, could you give that one more time?

2 Q. At 8:15, he says his daughter Remington is
3 outside?

4 A. Yes, sir.

5 Q. And he doesn't leave that property after 8:15,
6 right?

7 A. That's correct.

8 Q. And we remember that Nichole is hot to the
9 touch?

10 A. Right.

11 MR. PARKS: Mischaracterization of the
12 evidence. No one said she was hot.

13 THE COURT: Sustained.

14 Q. (BY MR. WHEELER) Hot to the touch?

15 A. Yes, sir.

16 Q. And you could smell the gunpowder in the room?

17 A. Yes, sir.

18 Q. And it was strong?

19 A. Yes, sir.

20 Q. And that was about 9:15 when you went in that
21 room?

22 A. Yes.

23 Q. Now --

24 A. I supposed it would be a little later than
25 9:15. The dispatch time was 9:18, so around 9:20, 9:21.

1 Q. On the 911 call, he said his wife and son were
2 both shot, right?

3 A. I believe that's correct.

4 Q. Miller contacts him and he says his wife is all
5 that's in the house or something to that effect, right?

6 A. Yes, sir.

7 Q. Through Lain, the son's in the garage, right?

8 A. Yes, sir.

9 Q. When you arrive, he's not armed and has his
10 two-year-old outside with him, right?

11 A. Yes, sir.

12 Q. Now, he sees his wife first in the house, and
13 you get the 911 call saying that both are shot. When
14 you arrived on the scene, you didn't know whether there
15 was somebody else on the property or not, right?

16 A. That's correct.

17 Q. But he hadn't armed himself, had he?

18 A. No, sir.

19 Q. In fact, he says in his statement he saw his
20 wife, and without regard for his two-year-old and
21 knowing she had been shot, according to the phone call,
22 he runs through the house to discover Taylor, right?

23 A. Yes, sir.

24 Q. He didn't get her out of the house, according
25 to his statement, did he? He didn't get Remington of

1 the house immediately after seeing Nichole, according to
2 his statement, did he?

3 A. No, sir.

4 Q. And he didn't arm himself, did he?

5 A. Not to my knowledge, no, sir.

6 Q. When he was interviewed, he was asked whether
7 the gun in the bedroom with Taylor was a .30 caliber or
8 .30-30, wasn't he?

9 A. Was he -- would you repeat that one more time?

10 Q. He was asked whether the gun in Taylor's room
11 was a .30 caliber or a .30-30?

12 A. I don't -- I don't recall whether he was or
13 not, but I can refer back to my notes.

14 Q. Do you know what this is [indicating]?

15 A. Yes, sir.

16 Q. Can you identify it?

17 A. Yes, sir.

18 Q. Was this recording -- what is it?

19 A. It's a recorded interview with Jason Payne.

20 Q. Was it made on a device that was able to
21 capture accurately both audio and video?

22 A. Yes, sir.

23 Q. This is true and correct?

24 MR. WHEELER: The State offers State's
25 Exhibit 66.

1 (State's Exhibit 66, offered.)

2 MR. PARKS: We have no objection.

3 THE COURT: State's Exhibit 66 is admitted.

4 (State's Exhibit 66, offered.)

5 MR. WHEELER: Permission to publish, Your
6 Honor.

7 THE COURT: Yes, sir.

8 (DVD playing from 2:35 to 3:09.)

9 (DVD paused.)

10 THE COURT: Do y'all want to approach?

11 (Bench.)

12 MR. PARKS: I can hardly hear this, but I
13 think we may be getting around to a part that has
14 nothing to do with the conversation with Jason Payne and
15 does involve inadmissible statements that the officers
16 are making to him that are hearsay and not admissible,
17 in the case they need to be redacted.

18 MR. WHEELER: I have no idea what they're
19 talking about. I haven't had any statements pointed
20 out. I hadn't heard the legal argument. We probably
21 need to recess for a couple hours so they can go through
22 it and we can go through them one by one.

23 MR. PARKS: I can tell you pretty simply.
24 We may want do it outside the presence of the jury.

25 MR. WHEELER: But as far as I'm concerned,

1 this is all. The objection is untimely.

2 THE COURT: It has been admitted, so --

3 Okay.

4 (Open court.)

5 THE COURT: Start it again.

6 (DVD playing from 3:10 to 4:05.)

7 (DVD paused.)

8 THE COURT: Let me ask counsel to approach.

9 (Bench.)

10 THE COURT: This is a time concern. I just

11 inquiring: Mr. King's best guess is we've got another

12 30 minutes. The jury's been here a long a time.

13 MR. PARKS: I'm about to wet my pants.

14 THE COURT: Let's take a ten minute recess.

15 (Open court.)

16 THE COURT: I didn't know how long the tape

17 was going to be. I'm -- I don't like interrupting in

18 the middle, but I think we need to take a recess. Let

19 me ask you to remember your prior instructions and be

20 available in the jury room at, let's say, 4:20. Please

21 go with the bailiff at this time.

22 (Jury exits courtroom.)

23 THE COURT: All right. Let the record

24 reflect that the jury has left the courtroom.

25 We'll be in recess until 4:20.

1 (Recess from 4:06 p.m. to 4:20 p.m.)

2 THE COURT: On the record in Cause
3 20,529-2008, State vs. Payne. Let the record reflect
4 that counsel for the State, counsel for the Defendant,
5 and the Defendant is present. The jury is not present.

6 Is the State ready to proceed?

7 MR. WHEELER: We're ready.

8 THE COURT: Defense ready to proceed?

9 MR. PARKS: Yes, sir.

10 THE COURT: Is it y'all's belief that we'll
11 be able to finish by 5:00?

12 MR. WHEELER: We will, but we --

13 THE COURT: Anybody have any objection to
14 going ahead and recessing at that point?

15 MR. PARKS: I think that would make sense.

16 THE COURT: Very well.

17 If you've got them all, let's bring them
18 in.

19 (Jury enters courtroom.)

20 THE COURT: Let the record reflect the jury
21 has returned to the courtroom.

22 So if you'll go ahead and restart the tape,
23 so -- and it's my understanding you're playing it at
24 maximum volume?

25 THE BAILIFF: Yes, sir.

1 THE COURT: Very well.

2 (Video playing from 4:22 to 4:53.)

3 THE COURT: Ladies and gentlemen, I think
4 given the lateness of the hour, there's not much point
5 in using the last five minutes to ask questions to
6 anybody. Let me ask you to remember your prior
7 instructions and don't talk to anyone about anything in
8 connection with the case and don't let anybody talk to
9 you. Don't even talk to one another. If anyone
10 attempts to do that, report that to the bailiff or to me
11 immediately.

12 We expect to start at 9:00 a.m., so
13 hopefully, we'll get off quicker in the morning than we
14 did this morning. So I ask you to report to the jury
15 room and be there by 9:00 a.m. and, hopefully, we'll get
16 started right then. Please go with the bailiff at this
17 time.

18 (Jury exits courtroom.)

19 THE COURT: All right. Let the record
20 reflect the jury has left the courtroom.

21 Any legal matters we need to take up prior
22 to that time?

23 MR. WHEELER: Not from the State?

24 MR. PARKS: No, sir.

25 THE COURT: Very well. Then as to that

1 time issue, we'll just see where we are about noon
2 tomorrow and see whether there's going to be any reason
3 to be thinking about it prior to next week.

4 Very well. We'll be in recess until
5 9:00 a.m.

6 (Proceedings recessed.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$ _____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 6 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
)
)
VS.) WOOD COUNTY, TEXAS
)
)
)
JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 2

On the 21st day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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7	PINCKARD, M.D.	121,148	140	--	6
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1 P R O C E E D I N G S

2 THE COURT: Cause 20,529-2008, State of
3 Texas versus Jason Thad Payne. Let the record reflect
4 that counsel for the State, counsel for the Defendant,
5 and the Defendant is present. Jury is not present.

6 I'm informed that all the jurors are not
7 present.

8 MR. PARKS: We have a matter to take up
9 outside the presence --

10 THE COURT: Yes, sir.

11 OBJECTION TO STATE'S EXHIBIT NO. 74

12 BY MR. PARKS:

13 I have been tendered State's Exhibit No. 74
14 which is apparently the transcript of the videotape
15 which we watched yesterday. The Defense had no idea of
16 its existence prior to this morning. We've never seen
17 it until about five minutes ago. We have not had the
18 opportunity to check it for accuracy. That is not any
19 criticism of our court reporter, but I think it's
20 incumbent upon us, at lease, to see if it's accurate.

21 If we have an opportunity do that, we're
22 going to object to its omission here outside the
23 presence of the jury would ask the Court to consider
24 this objection if it's offered in the performance.

25 MR. WHEELER: The State's response is that

1 this is certified by a licensed certified shorthand
2 reporter from the Supreme Court of Texas. It's a true
3 and accurate copy. This is an original. And the State
4 would be happy to agree to a brief recess so they can
5 consider it before the State offers it.

6 MR. PARKS: Well, a brief recess would
7 involve replaying the entire video with a copy of the
8 transcription to see if comports to what we believe was
9 actually said. We don't know how long --

10 MR. WHEELER: Our response is that that
11 video has been in the possession of the Defense for,
12 what, over a year and I don't think it would take very
13 long to compare this to that, plus the fact that it's
14 certified by somebody licensed by the State of Texas and
15 makes it clear that it is accurate.

16 MR. PARKS: Well, I don't want to make a
17 tempest in a teapot. It's not that I'm just mis
18 characterizing when I say that. It's been in existence
19 for months and months and prepared up to the time that
20 Mr. King and I were appointed in this case. We had no
21 way of knowing it was prepared. The State has had it
22 all the time. I see no reason why it should be sprung
23 on us during trial. I think it's not timely. It's not
24 in combination with the State's discovery order,
25 standing discovery order.

1 MR. WHEELER: The video itself has been in
2 evidence and provided in accordance with any exculpatory
3 evidence to the Defense. The fact we have the work
4 product is -- it's a piece of evidence that is
5 admissible. I believe it ought to be admitted. There
6 is no surprise involved here.

7 MR. PARKS: Well, let me see, I didn't do
8 it. Is not exculpatory. That's news to me, but aside
9 from that, I just renew my objection to it.

10 MR. WHEELER: Now, the fact is they've had
11 the video and --

12 THE COURT: I guess the Court's feeling,
13 number one, is I'm not at all anxious to stop and at
14 this point review something that could have been
15 reviewed earlier. Is the tape could have been made
16 available, it could have been made available -- should
17 have been made available. We're not going to stop the
18 trial and look at it. I have no reason to think it's
19 inaccurate, but the jury has heard the tape. I think
20 under the circumstances, the only appropriate thing is
21 to sustain the objection, so I sustain that objection.

22 MR. WHEELER: For clarification, Your
23 Honor, the ruling is that is's needless and accumulative
24 because it is an exact transcription of the video, if
25 that is the ruling.

1 THE COURT: Well, the court's ruling is
2 that we're not going to delay the trial to give time to
3 look at it. It should have been made available earlier
4 if it's going to be tendered here and I sustain the
5 objection.

6 MR. WHEELER: Okay. Then I want to make a
7 bill.

8 THE COURT: Yes, sir.

9 BILL OF EXCEPTION

10 BY MR. WHEELER:

11 For purposes of the bill, the State would
12 offer -- comes now the State of Texas by and through her
13 criminal district attorney and makes the following bill
14 of exception in regard to the exclusion of State's
15 Exhibit No. 74:

16 At this time, the State offers State's
17 Exhibit 74, a certified transcription of the interview
18 of Jason Tad Payne.

19 (State's Exhibit 74, offered.)

20 MR. PARKS: That's for the record?

21 THE COURT: It is admitted for record
22 purposes.

23 (State's Exhibit 74, admitted for record
24 purposes only.)

25 MR. WHEELER: This concludes the State's

1 Bill of Exception.

2 THE COURT: Yes, sir.

3 MR. WHEELER: Thank you.

4 THE COURT: Now, are we ready to proceed at
5 this time?

6 MR. WHEELER: State's ready, Your Honor.

7 THE COURT: Very well. Bring them on in.

8 (Jury enters courtroom.)

9 THE COURT: Let the record reflect that the
10 jury has returned to the courtroom.

11 You may proceed at this time.

12 MR. WHEELER: Yes, Your Honor.

13 At this time, pursuant to the business
14 records affidavit, the State offers State's Exhibit
15 No. 73, the Quitman I.S.D. records involving Austin
16 Taylor Wages.

17 (State's Exhibit 73, offered.)

18 MR. PARKS: No objection.

19 THE COURT: Admitted.

20 (State's Exhibit 73, admitted.)

21 MR. WHEELER: Next, the State offers
22 State's Exhibit No. 72, medical records from East Texas
23 Medical Center EMS involving Austin Wages. Those were
24 timely filed with the business records affidavit.

25 (State's Exhibit 72, offered.)

1 MR. PARKS: No objection.

2 THE COURT: Admitted.

3 (State's Exhibit 72, admitted.)

4 MR. WHEELER: Next, the State offers
5 State's Exhibit No. 67, the records from the Commercial
6 Bank of Texas, account of Nichole and Jason Payne, with
7 the appropriate business affidavit, timely filed with
8 notice.

9 (State's Exhibit 67, offered.)

10 MR. PARKS: Judge, we have no quarrel with
11 the fact that they were filed under proper affidavit as
12 business records and as such are exempted from the
13 hearsay rule. We do not waive, however, our objection
14 as to relevance under 401 evidence.

15 MR. WHEELER: May we approach?

16 THE COURT: Yes, sir.

17 (Bench.)

18 THE COURT: What are the records going to
19 show?

20 MR. WHEELER: First, I'm going to make sure
21 that the Defense hasn't backed out of its agreement with
22 regard to its own records that -- that --

23 MR. PARKS: I'm not backing out from an
24 agreement that they're properly filed and as an
25 exception to the hearsay rule, but I've never said I

1 wouldn't object to them on the basis of relevance.

2 That's a whole different thing.

3 MR. WHEELER: My understanding is that
4 everything that was filed was coming in with regard to
5 that affidavit. That was our agreement. I took my foot
6 off the gas with regard to untimely documents with my
7 documents coming in.

8 MR. PARKS: Jim, all we ever discussed was
9 whether or not there would be objections to the
10 timeliness of the business records affidavits. We
11 didn't discuss whether or not they were going to be
12 admissible or inadmissible under some other reason.

13 Now, I'm not disputing your understanding
14 of it, but there's been a misunderstanding about it.
15 All I ever spoke to was the -- was the filing dates.

16 MR. WHEELER: Here's what we've got: We've
17 got a jury in the box. I'm going to hold that offer for
18 the moment so we can continue, but we make that part and
19 parcel of the hearing we need to have on the 401, 403,
20 and 404(a) objections.

21 THE COURT: Yes, sir.

22 MR. WHEELER: I appreciate it.

23 (Open court.)

24 MR. WHEELER: And pursuant to our
25 discussion at the bench, I will offer those at a

1 different time so we don't delay the proceedings.

2 THE COURT: Thank you.

3 MR. WHEELER: We offer, pursuant to the
4 business records affidavit, timely filed and noticed to
5 Defense, State's Exhibit No. 69, medical records from
6 the East Texas Medical Center involving Nichole Payne.

7 (State's Exhibit 69, offered.)

8 MR. PARKS: No objection.

9 THE COURT: Admitted.

10 (State's Exhibit 69, admitted.)

11 MR. WHEELER: We offer pursuant to affidavit
12 as well and timely filed, with notice to the Defense,
13 State's Exhibit No. 71, which is the application for
14 life insurance and accompanying documents from State
15 Farm Life Insurance Company showing the application for
16 life insurance on Nichole Payne.

17 (State's Exhibit 71, offered.)

18 MR. PARKS: No objection.

19 THE COURT: Admitted.

20 (State's Exhibit 71, admitted.)

21 MR. WHEELER: Pursuant to our conference,
22 I'll hold off on No. 70 and No. 68. Your Honor, with
23 regard to the documents that's been offered and
24 admitted, I move the court to postpone publication.
25 We'll publish those at another time.

1 THE COURT: Yes, sir.

2 MR. WHEELER: Thank you.

3 OFFICER MILES TUCKER,
4 having been first duly sworn, testified as follows:

5 FURTHER DIRECT EXAMINATION

6 BY MR. WHEELER:

7 Q. We, yesterday, viewed a video recording of the
8 Defendant, Jason Tad Payne. Were you present in the
9 room at the time?

10 A. Yes, sir.

11 Q. Who was with you at the time in the room?

12 A. Ranger Philip Kemp.

13 Q. And during that interview, the first question
14 I've got is: Did you receive information from the
15 Defendant that he had no marital trouble?

16 A. Yes, sir.

17 Q. And did you receive information from the
18 Defendant that he had no financial trouble?

19 A. I believe that's correct.

20 Q. And did you receive information from the
21 Defendant that he had no trouble with Nichole's parents?

22 A. That's correct.

23 Q. Based on those assertions to you, did you
24 further investigate those assertions?

25 A. Yes, sir.

1 Q. And did you discover facts with regard to those
2 assertions?

3 A. Yes, sir.

4 Q. The assertions themselves that you discovered,
5 who was the source of the information with regard to
6 marital trouble that you talked to?

7 A. Nichole's family.

8 Q. And when you say, "Nichole's family," who
9 specifically did you speak with about the nature of the
10 relationship between Jason Payne and his wife, Nichole
11 Payne?

12 A. I had conversations with Nichole's
13 sister-in-law, her brother, her mother.

14 Q. Did you talk with her father?

15 A. I believe I did at some point, yes, sir.

16 Q. And so the jury will know who these people are,
17 the sister-in-law, is that Sarah Hawthorne?

18 A. Yes, sir.

19 Q. You spoke with Sarah Hawthorne about the nature
20 of the marriage and you talked with -- you say the
21 brother-in-law. What's his name?

22 A. The brother.

23 Q. The brother?

24 A. Yes.

25 Q. What's his name?

1 A. I believe his name was Jason Hawthorne.

2 Q. Jason Hawthorne. Is he still alive?

3 A. I believe he's deceased.

4 Q. You talked to her mother. Who is that?

5 A. Sherry Hawthorne.

6 Q. Sherry Hawthorne. And you talked with the
7 father. Who is that?

8 A. Richard Hawthorne.

9 Q. Richard Hawthorne, concerning money trouble and
10 the assertion that there were not any financial troubles
11 in that house. Did you, indeed, find out there were
12 financial troubles in that house?

13 MR. PARKS: Objection; hearsay.

14 THE COURT: Sustained.

15 Q. (BY MR. WHEELER) Did you speak with any
16 individuals about any money troubles in the house?

17 A. I spoke with the same individuals that were
18 listed previously.

19 Q. And did you discover facts about the financial
20 condition of that family?

21 A. I learned that --

22 MR. PARKS: Objection; calls for hearsay.

23 At least --

24 THE COURT: Yes, sir.

25 MR. WHEELER: And I phrased it

1 appropriately. I'll ask the witness to be responsive to
2 the question.

3 THE COURT: Yes, sir.

4 Q. (BY MR. WHEELER) Did you find out facts about
5 the financial condition of the family --

6 A. Yes, sir.

7 Q. -- Nichole Payne and Jason Payne?

8 A. Yes.

9 Q. At the time that you conducted the interview,
10 did you make a decision right then at nearly 4:00 on
11 December 11, 2007, that you had probable cause and were
12 going to make an arrest? Did you decide that on
13 December 11, 2007?

14 A. No, sir.

15 Q. So you had not discovered at that time,
16 according to the information you had, specific
17 articulable facts and more that would give you probable
18 cause --

19 A. That's correct.

20 Q. -- is that right?

21 Let's work now into the house and work
22 through the investigation, okay? First, would you tell
23 the jury what agencies were involved in the
24 investigation, initially?

25 A. Initially involved was the Wood County

1 Sheriff's Office.

2 Q. When you arrived on that scene and saw what you
3 saw, did you ask for the assistance of any other
4 agencies?

5 A. Yes, sir.

6 Q. What agencies did you ask to assist you?

7 A. Initially, it was the Texas Rangers, and then
8 the Smith County Sheriff's Office.

9 Q. So you looked at that scene and you asked other
10 agencies to come in and help you. In regard to the
11 decedents, in regard to Nichole Payne and Taylor, who
12 went by Austin here, who did you ask to assist you with
13 regard to the examination of their bodies after they
14 died?

15 A. The Southwest Institute of Forensic Science.

16 Q. What specifically did you ask the Southwest
17 Institute of Forensic Science to do?

18 A. An autopsy on the bodies as well as testing on
19 the bedding that was sent with the bodies. The hands
20 were bagged. They were asked to do gunshot residue
21 testing.

22 Q. In addition to the Southwestern Institute of
23 Forensic Science, who else did you ask or what other
24 agencies did you ask to help you analyze this scene?

25 A. At this particular time or during the course of

1 the investigation?

2 Q. During the course of the investigation. Let's
3 get all the players on the table.

4 A. Orchid Cellmark.

5 Q. What is Orchid Cellmark?

6 A. They're a DNA and blood testing entity,
7 laboratory.

8 Q. Where are they located?

9 A. They're located in the Metroplex area.

10 Q. And who else did you have assist you with
11 regard to your investigation?

12 A. Tom Bevel.

13 Q. Okay. Who is Tom Bevel?

14 A. He's a forensic crime scene expert.

15 Q. Who else?

16 A. Richard Ernest.

17 Q. And who is Richard Ernest?

18 A. He is a forensic expert who I believe deals
19 mostly with firearms.

20 Q. Did you ask the Department of Public Safety to
21 do anything?

22 A. Yes, their lab in Austin.

23 Q. So we also have the lab in Austin from the
24 Department of Public Safety. What did they do?

25 A. They did analysis on the firearm, prints, and

1 such as that.

2 Q. Okay. So in the investigation, then, you asked
3 six other entities to assist you in putting this case
4 together; is that correct?

5 A. Yes, sir.

6 Q. That's what you did?

7 A. Yes, sir.

8 Q. Now, let's start with in that house with regard
9 to the collection of evidence: Who was in charge of the
10 collection of the evidence at the crime scene?

11 A. I was.

12 Q. Who did the actual physical collecting of that
13 evidence?

14 A. Randall Lain, William Burge.

15 Q. When you saw this evidence being brought to you
16 by Deputy Lain and Deputy Burge, what did you do with
17 it?

18 A. I basically logged it in.

19 Q. And first, with regard to that evidence itself,
20 how did it indicate -- how did -- how is it indicated on
21 the evidence that was brought to you?

22 A. I'm sorry, I don't understand that question.

23 Q. The question is simply: Do you see the bags
24 over there [indicating]?

25 A. Yes, sir.

1 Q. They're on the front row on the far right of
2 the courtroom?

3 A. Yes, sir.

4 Q. When a bag was brought to you by Lain --

5 A. Yes, sir.

6 Q. -- or a bag that was brought to by Burge --

7 A. Yes, sir.

8 Q. -- and they were submitting them to you as
9 evidence in this case, how did you indicate receipt?

10 A. They would advise what they had collected and I
11 would write it down on the bag.

12 Q. So your signature will be on the bags that were
13 brought to you?

14 A. My handwriting will be on the bags.

15 Q. Okay. When the evidence was received, was it
16 logged in any way at the Wood County Sheriff's Office?

17 A. When it was finally packaged, it was logged
18 into evidence.

19 Q. Now, the jury needs to know exactly how you log
20 something into evidence. What does that mean?

21 A. It simply means, if you'll notice the red tape
22 on the packaging, the packages are sealed with that red
23 tape and initials are put on the tape to show who sealed
24 it. Normally, a date is put on there as well to show
25 the date it was sealed. It's given over to our property

1 officer who has the sole maintenance of the property in
2 most situations and locked up into a secure area of the
3 Sheriff's Office that only certain individuals have
4 access to.

5 Q. So the items that were collected at the scene
6 that were brought to you, they're logged in. Are they
7 logged in on a piece of paper or on a computer?

8 A. They're logged in on a computer.

9 Q. Who maintained this computer information? Who
10 actually did the typing of the information?

11 A. The chief deputy of the Sheriff's Office at
12 that time was doing all of the property as well as the
13 property inventory, property intake, and the log down on
14 a computer file of where that property was located, what
15 type of intake was done, and when it was taken out or
16 whatever circumstances it needed to be taken out for.

17 Q. Who is that person? What's her name?

18 A. Debbie Foster.

19 Q. So the evidence that was collected from the
20 scene went from Randall Lain and William Burge to you,
21 right?

22 A. Most of it, yes, sir.

23 Q. And then it went from you to Debbie Foster?

24 A. Yes, sir.

25 Q. And then Debbie Foster maintained it at the

1 Sheriff's Office --

2 A. Yes, sir.

3 Q. -- correct? Okay. So that's how the
4 evidence -- most of the evidence was handled. We'll
5 walk through the rest of it in a little bit.

6 Now, what was the Ranger's role at the
7 crime scene? First, could you identify for the jury who
8 the Texas register was that worked the crime scene?

9 A. Philip Kemp.

10 Q. And Ranger Philip Kemp, what did he do at the
11 crime scene?

12 A. He walked through the scene and gave, I suppose
13 for a lack of better word, direction, assistance.
14 Mainly, at that point, I wanted somebody to come in and
15 take a look at the crime scene and see what they
16 thought, so a second person to come in and say, okay, we
17 need to do this and we need to do this and this needs to
18 be done and it hadn't been done.

19 Q. So he was there to give that sort of guidance?

20 A. Yes, sir.

21 Q. Next, the Wood County Sheriff's Office
22 contacted the Smith County Sheriff's Office for what
23 purpose?

24 A. To see if we can get assistance with crime
25 scene reconstruction, basically.

1 Q. That contact that you made to ask for crime
2 scene assistance, how did the Smith County Sheriff's
3 Office respond?

4 A. They responded by sending a forensic
5 investigator.

6 Q. Who was the forensic investigator that they
7 sent?

8 A. Noel Martin.

9 Q. Were you familiar with Noel Martin when he was
10 sent to you?

11 A. I was.

12 Q. Had you worked with him before?

13 A. I had, yes, sir.

14 Q. On few or many occasions?

15 A. Noel had actually worked at Wood County
16 previously and I had worked with him there, and I was
17 semi-familiar with his work at Smith County.

18 Q. The contact that was made with the Wood
19 County -- by Wood County with the Texas Rangers and the
20 Smith County Sheriff's Office, was that contact made
21 before or after the interview with Jason Payne?

22 A. The contact would be -- with the Ranger was
23 definitely done before the contact with the
24 Ranger -- the contact with Smith County. I believe the
25 contact with Smith County was made fairly quickly after

1 the contact with the Ranger.

2 Q. So -- but the question was: Were they
3 contacted before the interview with Jason Payne?

4 A. Yes.

5 Q. Okay. So you're asking for assistance before
6 you interview Jason Payne?

7 A. Yes.

8 Q. Okay. In this time frame we're looking at, you
9 arrive on the scene a little after 9:00 in the morning,
10 and the interview with Jason Payne is what time,
11 approximately?

12 A. It was afternoon.

13 Q. About 3:00?

14 A. I believe so.

15 Q. We're looking at about a six-hour window that's
16 in there where you're out on Highway 37, right?

17 A. Yes, sir, at least that.

18 Q. At least that. In this time frame that we're
19 looking at, when were the bodies of Nichole Payne and
20 Taylor Wages removed?

21 A. They were removed a couple of hours after the
22 initial call. I don't remember exactly.

23 Q. But they were removed before noon?

24 A. I would guess that, yes, sir.

25 Q. That's your estimate, then?

1 A. That would be my estimate.

2 Q. So your estimate of the removal of the bodies
3 was before noon. Okay. When did the crime scene
4 investigator from the Smith County Sheriff's Office,
5 Noel Martin, arrive on the scene?

6 A. Later that evening.

7 Q. So he arrived well after the bodies had been
8 removed, right?

9 A. Yes, sir.

10 Q. And we say well after the bodies had been
11 removed. There had been more that had been removed from
12 the scene, hadn't there?

13 A. The bedding had been removed as well.

14 Q. What bedding?

15 A. The bedding that was in Taylor Wages' room and
16 I believe the bedding in Nichole's room as well.

17 Q. Who removed it?

18 A. The funeral home did.

19 Q. Was that standard operating procedure?

20 A. Yes, sir.

21 Q. What did they do with this bedding they
22 collected along with the bodies that were collected and
23 the clothing?

24 A. It was transported to Southwest Institute of
25 Forensic Science.

1 Q. And is that something in the normal course of
2 your business and standard operating procedure in your
3 business?

4 A. Yes, sir.

5 Q. Now, you had the bodies up at the Southwestern
6 Institute of Forensic Science to perform the autopsy.
7 Did you wait on the results from that autopsy before
8 making an arrest in this case?

9 A. Yes.

10 Q. In fact, you had those results long before you
11 made an arrest in this case, didn't you?

12 A. Yes, sir.

13 Q. Let's see now. The clothing that was taken up
14 there that was on Nichole and Taylor, the clothing on
15 the boy was examined, right?

16 A. At SWIFS?

17 Q. Or anywhere else?

18 A. Yes, sir.

19 Q. And you waited on the results from that; is
20 that correct?

21 A. Yes, sir.

22 Q. And let's see, who did the testing on the boy's
23 clothes, do you remember?

24 A. I believe it was Orchid that did the testing on
25 the boy's clothing.

1 Q. Do you remember what the boy's clothes were
2 tested for?

3 A. It was the blood analysis.

4 Q. Okay. And what was the nature of your request
5 in regard to those boy's clothes?

6 A. I wanted to see whose blood was on the
7 clothing, if Nichole's blood was on the clothing.

8 Q. And you waited on those results?

9 A. I did.

10 Q. Let's see, the gun that was found in Taylor's
11 room -- let's get this clear on Taylor: What was
12 Taylor's legal relationship to Jason Payne?

13 A. Stepson.

14 Q. So he hadn't been adopted, right?

15 A. That's correct.

16 Q. And he had no court order that gave any
17 possession, custody, or control?

18 A. Not to my knowledge.

19 Q. Okay. So that's Nichole's boy?

20 A. Yes, sir.

21 Q. The other two children that were in the house
22 were the biological children of Jason Payne; is that
23 right?

24 A. That's correct.

25 Q. This gun, who collected the gun?

1 A. The gun was collected and then sent with Philip
2 Kemp, handed over to Philip Kemp.

3 Q. And where was Kemp taking the gun?

4 A. To Austin.

5 Q. So the gun goes to Austin to whom?

6 A. DPS Crime Lab in Austin.

7 Q. And Nichole and Taylor go to Dallas to SWIFS?

8 A. Yes, sir.

9 Q. And Taylor's clothes go to Orchid Cellmark,
10 right?

11 A. Yes, sir.

12 Q. Now, the cartridges, the one on the floor in
13 the photographs we looked at, the one that was on the
14 floor, and the one that was in the gun, where did they
15 go?

16 A. I believe they went to Austin as well.

17 Q. Who collected those?

18 A. Philip Kemp was the one that took those to
19 Austin.

20 Q. Okay. With regard to this firearm, the firearm
21 was carried to Austin by Philip Kemp --

22 A. Yes, sir.

23 Q. -- and all the testing and things associated
24 with it?

25 A. Yes, sir.

1 Q. What specifically was asked of Austin with
2 regard to this firearm? What kind of testing did you
3 want?

4 A. I wanted fingerprints, blood analysis, and I
5 believe at that time I requested DNA analysis.

6 Q. Did you ask for the gun to be swept for fibers?

7 A. I think -- I believe I did.

8 Q. So you did a fiber analysis, did a fingerprint
9 analysis, wanted the blood done on the gun, and what
10 else? DNA --

11 A. Yes, sir.

12 Q. -- did you say that? Okay. That's the gun.

13 The clothing that was in that washer, was
14 it tested?

15 A. I don't recall whether it was or not.

16 Q. Okay. Did you personally ask, I want the
17 clothing that's in the washer and drier tested for
18 anything?

19 A. There were articles of clothing that was sent
20 to Orchid that had come out of the washer or drier, one
21 or the other. I don't remember the specifics on that.

22 Q. But Orchid had the clothing?

23 A. Yes.

24 Q. And then let's see, what evidence did you
25 actually collect in the case? What did you collect?

1 A. What did I physically collect?

2 Q. Yes.

3 A. Very little, if anything.

4 Q. Is there anything you recall that you actually
5 did and put into evidence yourself or submitted to any
6 of the labs?

7 A. I did physically take evidence to Orchid. I'd
8 have to look at the lab receipts to be able to tell
9 exactly what evidence I took to Orchid. It was a very
10 small amount.

11 Q. Okay. So when we talk to the Orchid folks in
12 regard to their submission, they'll be able to talk
13 about what you took out there?

14 A. Yes, sir.

15 Q. Okay. Now, we've got this Smith -- we've got
16 the Ranger. We know what he did. He collects the gun
17 and carries it down to Austin. You've got your two
18 officers working at the scene collecting evidence to
19 submit. You've got somebody down at the gate who's
20 monitoring traffic in and out. Who was interviewed at
21 the time the bodies were discovered or shortly
22 thereafter?

23 A. The children were taken to the Child Advocacy
24 Center, Remington and Jackson Payne.

25 Q. Okay. They were very young. How old was

1 Remington?

2 A. I believe at that time Remington was two and
3 Jackson was four or five. I believe he was five.

4 Q. Okay. Then Jason was interviewed --

5 A. Yes, sir.

6 Q. -- Jason Payne? And he was interviewed at the
7 Wood County Justice Center?

8 A. Yes, sir.

9 Q. And Smith County comes out to the scene, and
10 that's Noel Martin. Where did he set up first when he
11 got there?

12 A. He set his equipment up in the living area of
13 the residence, living room, and then concentrated on
14 Nichole's room -- or let me rephrase: Started in
15 Nichole's room.

16 Q. Approximately, how long did he spend in
17 Nichole's room reconstructing her injuries?

18 A. Probably over two hours. Probably longer than
19 that.

20 Q. And then he can tell us what he did. Then did
21 he go into Taylor's room next?

22 A. He did.

23 Q. How long did he spend in there?

24 A. I would say less than an hour.

25 Q. So substantially a shorter amount of time in

1 his room?

2 A. Yes, sir.

3 Q. And the bodies had already been removed and the
4 bedding had already been removed?

5 A. They had.

6 Q. Okay. Now, Noel Martin, when he did this
7 analysis, you ultimately received a report, didn't you,
8 from him?

9 A. Eventually, yes, sir.

10 Q. And that was many, many months later, wasn't
11 it?

12 A. Yes, sir.

13 Q. When he delivered his findings, he delivered
14 those findings to whom?

15 A. When he originally delivered his findings, it
16 was to myself, the District Attorney's Office -- well,
17 members of the District Attorney's Office and myself.

18 Q. Sure. He delivered his findings?

19 A. Yes.

20 Q. And his findings were what? Tell the jury.

21 A. That Taylor had committed suicide and shot
22 himself and that probably he had shot Nichole.

23 Q. Now, when you received this report of
24 murder/suicide and when it was delivered to the District
25 Attorney's Office and to you, were you personally

1 comfortable with those findings?

2 A. No, sir.

3 Q. This was your case, wasn't it?

4 A. Yeah.

5 Q. And you expressed your discomfort to others,
6 didn't you?

7 A. (Moving head up and down).

8 Q. Including the District Attorney's Office,
9 didn't you?

10 A. Yes, sir.

11 Q. And you made a decision, didn't you?

12 A. Yeah.

13 Q. With the support of the District Attorney's
14 Office, didn't you?

15 A. Yes, sir.

16 Q. And what was your decision after you heard that
17 report that it was a murder/suicide?

18 A. I wanted to get another opinion. I wanted to
19 continue with the case.

20 Q. I want you to look at the jury and I want you
21 to tell them why you made that decision, specifically.

22 A. Several things led me to that decision: One --

23 MR. PARKS: Judge, you know, it calls for a
24 narrative that may call for hearsay. I have no idea
25 what this is going to be. I'm going to object to the

1 narrative nature of it because I have no idea what's
2 going to come out of his mouth.

3 THE COURT: Okay. Can you break this --

4 MR. WHEELER: I -- I really can't disclose
5 what the truthful answers are to the jury. He made a
6 decision and it was based on facts --

7 THE COURT: Let me -- let me ask y'all to
8 approach.

9 (Bench.)

10 THE COURT: All right. I think it does
11 call for a narrative answer. I think it needs to be
12 broken down somewhere.

13 MR. WHEELER: Well, I can have --

14 THE COURT: I mean, this has got a wide
15 open -- I mean, what the Court's here to do is dealing
16 with objections. If we've got something that's
17 not -- it goes to the heart of the case, and I
18 don't -- you know, no one knows what we're dealing with
19 the hearsay, what's going to go into the jury box. I
20 mean, it's just --

21 MR. WHEELER: I think.

22 THE COURT: The question is not really a
23 question in that sense other than just, you know, tell
24 them whatever you think will help.

25 MR. WHEELER: I'll do a workaround.

1 THE COURT: All right. Thank you, sir.

2 (Open court.)

3 Q. (BY MR. WHEELER) What was the first most
4 obvious problem that you saw with regard to the findings
5 that Noel Martin had?

6 A. His response to why.

7 MR. PARKS: I'm sorry. I didn't understand
8 that.

9 THE COURT: Could you repeat your answer?

10 THE WITNESS: I asked why and his response
11 was a problem for me.

12 Q. (BY MR. WHEELER) Noel's response was a problem
13 for you?

14 A. Yes, sir.

15 Q. What did he say?

16 MR. PARKS: Calls for -- I'll withdraw it.

17 Q. (BY MR. WHEELER) What did he say that
18 concerned you?

19 A. That he had seen it many, many times.

20 Q. At the time that report was delivered, there
21 were other officers in the room, weren't there?

22 A. I believe there was.

23 Q. And you have how many years of experience?

24 A. A little over 15 years experience in law
25 enforcement.

1 Q. And you've worked violent crimes?

2 A. Yes, sir.

3 Q. And you've seen gunshots?

4 A. Yes, sir.

5 Q. And had you ever in your entire career, in your
6 life seen a wound like that on somebody and had it
7 called a suicide?

8 A. No, sir.

9 Q. That's your whole career?

10 A. Yes, sir.

11 Q. That gave you pause, didn't it?

12 A. Yes, sir.

13 Q. What else gave you pause? What specifically
14 gave you pause, the next fact?

15 A. I didn't see how a 16-year-old boy with the
16 investigation I had had no issues.

17 MR. PARKS: Object to hearsay.

18 MR. WHEELER: The response on that is we're
19 talking about the specific facts not only for reasonable
20 suspicion to conduct the investigation, but also
21 probable cause that could factor in here.

22 MR. PARKS: Doesn't trump the hearsay rule.

23 THE COURT: I'll --

24 MR. WHEELER: It's admissible for his
25 consideration for what led to probable cause in this

1 case.

2 THE COURT: Let me ask y'all to approach.

3 (Bench.)

4 THE COURT: Explain to me further what
5 your -- obviously, it is calling for hearsay.

6 MR. WHEELER: We have a fundamental
7 problem. We have a lie out of this Defendant with
8 regard to the state of his marriage and we have
9 discovered specific facts that led to the determination
10 that he was covering up a horrible marital life.

11 THE COURT: But how does this witness
12 testify to that without testifying as to what other
13 people told him?

14 MR. WHEELER: Oh, you can say that he
15 talked to other people --

16 THE COURT: Yes, sir --

17 MR. WHEELER: -- and --

18 THE COURT: -- yes, sir, he's already said
19 he talked --

20 MR. WHEELER: But the fact that comes next
21 is the -- to work around is the state of mind of -- the
22 state of mind of the decedents. We've got plenty of
23 caselaw in regard to fear of the decedents and the
24 marital relationship and we've also got the financial
25 stuff which goes to motive and intent. We don't have an

1 evidentiary problem with any of these. We've got a
2 covering up a crime scene and a lying Defendant.

3 MR. PARKS: None of that trumps the rule of
4 evidence, Jim.

5 MR. WHEELER: I understand the rule of law
6 and I also understand 403, Subpart (A), and I'm prepared
7 to present all the caselaw in regard to state of mind
8 evidence and its admissible. Now, if the question is
9 can --

10 THE COURT: I'm not even getting to that
11 point. I'm just talking about the foundation for it in
12 terms of what you're asking here, is this witness is
13 going to be testifying about something somebody else
14 told him, that that's the basis for his opinion.

15 MR. WHEELER: Well, if we don't --

16 THE COURT: Don't have you to lay that out
17 first before you can go ahead and talk about it? That's
18 not before the jury at this point. The other evidence
19 isn't here, yet.

20 MR. WHEELER: Right, which is why he's
21 going to be subject to recall and getting put on more
22 than once --

23 MR. PARKS: When the evidence comes on --

24 MR. WHEELER: -- and I'll have to work
25 around it, but I understand the Court's ruling.

1 THE COURT: Okay. I sustain at this time.

2 (Open court.)

3 Q. (BY MR. WHEELER) Okay. I want to remind you
4 that can't repeat what other people said to you, okay,
5 no hearsay?

6 A. Okay.

7 Q. You had asked a question of Jason Payne that we
8 heard yesterday with regard to his marital relationship.
9 Do you recall what the answer was?

10 A. There were no problems.

11 Q. Did you speak to his family members?

12 A. I did.

13 Q. And you still had concerns about the case after
14 the Smith County Sheriff's Office representative, Noel
15 Martin, made his report, after those conversations?

16 A. I did.

17 Q. You heard the answer in regard to his financial
18 problems; is that correct?

19 A. That's correct.

20 Q. And when you heard that, did that give you
21 pause, further conversations later?

22 A. Yes.

23 Q. So we've got those things and we've got the
24 nature of the wound itself. Is there anything else that
25 caused you to say, I'm going to look at this further?

1 A. The time window.

2 Q. Could you tell the jury what the problem is
3 with the time window on that day, December 11, 2007?

4 A. Jason Payne, by his own omission, was only gone
5 from the house a short amount of time, and with
6 Mr. Martin's theory, a 16-year-old boy would have had,
7 within about a 15-minute time span, gone from not being
8 angry to killing his mother and himself.

9 Q. Did that make sense to you?

10 A. It made absolutely no sense to me.

11 Q. Okay. Now, you had also discovered something
12 else.

13 MR. WHEELER: May I approach, Your Honor?

14 THE COURT: Yes, sir.

15 Q. (BY MR. WHEELER) You had discovered another
16 fact, hadn't you? I'm going to hand you what's been
17 marked State's Exhibit 75. Can you identify that
18 without showing it to the jury?

19 A. It's a hole.

20 Q. And is that a fair and accurate depiction of
21 the scene as it appeared when you discovered it?

22 A. Yes, sir.

23 Q. I'm going to hand you what's been marked as
24 State's Exhibit 76. Can you identify it?

25 A. Yes, sir. It's a hole.

1 Q. Is it a fair and accurate depiction of the
2 scene as it appeared when you discovered it?

3 A. Yes, sir.

4 Q. I'm going to hand you 77, 78, 79, 80, 81, 82,
5 and 83. Can you also identify those photos?

6 A. Yes, sir.

7 Q. Okay. In the days following the discovery of
8 the two bodies on Highway 37, did you continue to
9 investigate that property and its surroundings?

10 A. I had an occasion to, yes, sir.

11 Q. When you received -- what information did you
12 receive that you acted upon?

13 A. We had received information from a landowner,
14 Preston Bridges, that his grandson had located two large
15 holes on the property directly behind the Payne
16 residence.

17 Q. In response to the information that you
18 received, what did you do?

19 A. We obtained permission from Mr. Bridges to go
20 onto his property and take a look at these holes.

21 Q. Was this prior to the receipt of Noel Martin's
22 report?

23 A. Yes.

24 Q. And when you went out there onto this piece of
25 property; that is, adjoining the property of Jason Tad

1 Payne, what did you observe?

2 A. Holes which appeared to be --

3 MR. PARKS: Your Honor --

4 Q. (BY MR. WHEELER) Would you describe the size
5 of the holes by their length and width?

6 A. One was approximately six by six by four.

7 Q. And the other?

8 A. Shallower.

9 Q. About the same length and width?

10 A. Yes.

11 MR. WHEELER: State offers at this time
12 State's Exhibit 76, 77, 78, 79, 80, 81, 82, and 75.

13 (State's Exhibits 75 through 83, offered.)

14 MR. PARKS: No objection.

15 THE COURT: State's Exhibit 75 through 83
16 are admitted.

17 (State's Exhibits 75 through 83, admitted.)

18 MR. WHEELER: Permission to publish, Your
19 Honor.

20 THE COURT: Yes, sir.

21 (Exhibits published to jury.)

22 Q. (BY MR. WHEELER) Now, those holes were found
23 in what kind of an area?

24 A. In the center of a thicket of trees.

25 Q. Were there some sort of access to that area

1 from the Payne residence?

2 A. Yes, sir.

3 Q. What kind of access?

4 A. A driven path.

5 Q. And did it appear to you that these holes were
6 a natural occurrence?

7 A. No, sir.

8 Q. Now, at the time you discovered those, you
9 really didn't know what they were or who made them, did
10 you?

11 A. That's correct.

12 Q. You just -- you didn't know anything about
13 those, but you did know that those holes existed, didn't
14 you --

15 A. Yes, sir.

16 Q. -- at the time Noel Martin delivered his
17 report?

18 A. Yes, sir.

19 Q. Did the fact that those holes were there,
20 coupled with the other things you told this jury, make
21 you think, maybe I ought to get a little more help on
22 this case?

23 A. Yes, sir.

24 Q. All right. So the first person you sought out
25 was Tom Bevel. How did you find him?

1 A. I was referred to him. I don't recall who
2 referred me to him, but it may have been the District
3 Attorney's Office. It may have been someone else.

4 Q. Who is he? Why him?

5 A. He -- I got information he was one of Noel
6 Martin's instructors.

7 MR. PARKS: Objection -- I'll withdraw it.

8 THE WITNESS: And --

9 Q. (BY MR. WHEELER) Based on that information and
10 whatever other basis you had, did you decide to ask
11 Mr. Bevel to do something?

12 A. Yes.

13 Q. What did you ask him to do?

14 A. Reconstruct.

15 Q. Reconstruct what?

16 A. The crime scene.

17 Q. And did he do that?

18 A. He did.

19 Q. And did that take a significant period of time?

20 A. It did.

21 Q. Now, did Tom Bevel request that you do a little
22 further work with regard to that gun? Did he suggest
23 somebody else look at it?

24 A. Somebody else did look at the gun.

25 Q. And who was that?

1 A. Richard Ernest.

2 Q. And was the firearm delivered to him?

3 A. Yes, sir.

4 Q. And did he look at that?

5 A. Yes, sir.

6 Q. And did that take some time?

7 A. Yes, sir.

8 Q. Who was Richard Ernest? Why is he significant?

9 A. He was a firearms forensic expert.

10 Q. So he and Tom Bevel took a second look after

11 you disagreed with Noel Martin, right?

12 A. Yes, sir.

13 Q. And you waited on their reports, didn't you?

14 A. Yes, sir.

15 Q. And you waited a significant length of time,

16 didn't you?

17 A. Yes, sir.

18 Q. And then their reports came in, didn't they?

19 A. Yes, sir.

20 Q. In this case, you prepared an affidavit in

21 support of securing an arrest warrant, didn't you?

22 A. Yes, sir.

23 Q. And you held off executing or seeking -- you

24 held off on seeking that arrest warrant for a

25 significant period of time until you had those reports

1 back, didn't you?

2 A. Yes, sir.

3 Q. Let me ask you this question so the jury will
4 know: Did you tell Tom Bevel and Richard Ernest what
5 they needed to put in their reports?

6 A. No, sir.

7 Q. Did you instruct them that you wanted a
8 specific finding in this case?

9 A. No, sir.

10 Q. Did you tamper with their results whatsoever?

11 A. No, sir.

12 Q. You just asked for their opinion, didn't you?

13 A. Yes, sir.

14 Q. In that affidavit, you made clear that on
15 December 11, 2007, you responded to a call in Wood
16 County, Texas, didn't you?

17 A. Yes, sir.

18 Q. And you made clear what the contents of the 911
19 call were, didn't you?

20 A. Yes, sir.

21 Q. When you arrived at that residence, what did
22 you see? Is it described in the affidavit?

23 A. Yes, sir.

24 Q. You saw Jason Tad Payne and Remington, didn't
25 you?

1 A. Yes, sir.

2 Q. And you discovered who they were, didn't you?

3 A. Yes, sir.

4 Q. In that affidavit, you made clear what you
5 smelled, didn't you?

6 A. Yes, sir.

7 Q. What did you smell when you walked in?

8 A. Gunpowder.

9 Q. And that was at what time?

10 A. Somewhere around 9:18.

11 Q. And then you went in the bedroom, correct?

12 A. That's correct.

13 Q. Who did you see there?

14 A. Nichole Payne.

15 Q. And what specifically did you see?

16 A. A large wound to the back of Nichole's head.

17 Q. What did you see on the walls and the floor?

18 A. Blood and brain matter.

19 Q. What did you see in that wall leading outside?

20 A. A hole.

21 Q. So that bullet traversed her head with enough
22 force to go through the wall and out into the yard?

23 A. Yes, sir.

24 Q. That's not what happened in Taylor's room,
25 isn't it?

1 A. Yes, sir.

2 Q. In fact, there was no bloody matter on the
3 ceiling or no defect in the ceiling, was there?

4 A. That's correct.

5 Q. And you believe that was a gunshot wound based
6 on what you saw, right?

7 A. Yes, sir.

8 Q. Can you describe what she was wearing?

9 A. She had on some sort of gray sweat suit.

10 Q. Then what did you do, according to your
11 affidavit?

12 A. I went through the rest of the residence and
13 checked rooms.

14 Q. Did you see a door that you thought led
15 outside?

16 A. I did.

17 Q. Did you go through that door?

18 A. I did not.

19 Q. How many people did you find when you first
20 searched?

21 A. One.

22 Q. But that's not what was said on the 911 call,
23 was it?

24 A. No, sir.

25 Q. Then we've talked about what was relayed to you

1 by Deputies Lain and Miller. That's in your affidavit.
2 I direct your attention to the first page of the
3 affidavit, about two-thirds of the way down. Did you
4 write in the affidavit that the Defendant responded at
5 the time that his son was at school and there wasn't
6 another victim?

7 A. Yes, sir.

8 Q. That differed from the 911 call, doesn't it?

9 A. Yes, sir.

10 Q. And that's information you received from other
11 officers; is that correct?

12 A. That's correct.

13 Q. And searching the house again, did you go
14 through that door you thought led outside?

15 A. Yes, sir.

16 Q. What did you find?

17 A. Austin Taylor Wages.

18 Q. Had that been renovated into a bedroom, that
19 garage?

20 A. Yes, sir.

21 Q. Did you smell anything in that room?

22 A. No, sir.

23 Q. Did you see his wounds?

24 A. Yes, sir.

25 Q. Did you describe the position of his body in

1 your affidavit?

2 A. Yes, sir.

3 Q. What did you do with him?

4 A. Photographed him.

5 Q. Did you touch him?

6 A. I did.

7 Q. And he felt?

8 A. Cold.

9 Q. And compared to Nichole?

10 A. Nichole was warm.

11 Q. And did that seem odd to you?

12 A. It seemed odd to me, yes, sir.

13 Q. Why?

14 A. Because if he would have shot her and then shot
15 himself, then it would have made more sense for him to
16 be warm and her to be cold or for both bodies to be
17 warm.

18 Q. With regard to this young man, according to
19 your affidavit, how did it appear he met his end?

20 A. A gunshot wound.

21 Q. How did Nichole appear to you, according to
22 your affidavit?

23 A. Asleep.

24 Q. Why? Why do you think she was asleep?

25 A. She was in a semi-fetal position laying on her

1 side. No signs of any kind of struggle that I could
2 determine.

3 Q. In fact, there wasn't any sign of any struggle
4 anywhere in that house, was there?

5 A. No, sir.

6 Q. In your experience, what is that indicative of?

7 A. Either someone being asleep or not knowing
8 what's coming to them, something to that effect; not
9 expecting the action.

10 Q. Now, you went back and looked at Taylor's face,
11 didn't you?

12 A. Yes, sir.

13 Q. What did you see?

14 A. Stippling.

15 Q. And in your experience, that was consistent
16 from what?

17 A. A gun being fired from a distance away from the
18 body.

19 Q. What's your basis for a sentence like that?
20 Why would you write something like that in the
21 affidavit?

22 A. I had never seen a suicide where a gun was away
23 from the face or head to where someone had shot
24 themselves.

25 Q. And at the time of the arrest much later of

1 Jason Tad Payne, had your suspicions been confirmed?

2 A. Yes, sir.

3 Q. You yourself didn't know how far away that gun
4 was from his mouth, did you?

5 A. No, sir.

6 Q. Others do, don't they?

7 A. Yes, sir.

8 Q. What did you know specifically about that
9 distance from the stippling that you saw personally?

10 A. I knew that the gun was not touching his face
11 or head. It was a noncontact wound. That's -- and that
12 there was stippling located there.

13 Q. Now, when you talk about this stippling in your
14 affidavit, you do make some estimates in regard to that
15 distance based on your personal knowledge, don't you?

16 A. I make an estimate of several inches.

17 Q. Why do you make that estimate?

18 A. It appeared to be a fairly wide dispersal.

19 Q. You ever fire a gun before?

20 A. Yes, sir.

21 Q. On few or many occasions?

22 A. Many occasions.

23 Q. Have you seen other people fire weapons before?

24 A. Yes, sir..

25 Q. On few or many occasions?

1 A. Many occasions.

2 Q. Have you seen people fire long rifles before?

3 A. Yes, sir.

4 Q. .30-30s?

5 A. Yes, sir.

6 Q. Have you seen what comes out the end of that
7 barrel yourself with your own eyes?

8 A. Yes, sir.

9 Q. What comes out of the end of a rifle barrel?

10 A. Fire.

11 Q. Flames come out the end of it?

12 A. Sometimes.

13 Q. That's your personal experience, right?

14 A. Yes, sir.

15 Q. Is that the basis of your opinion that's in
16 this affidavit, what you've seen before?

17 A. My opinion, yes, sir.

18 Q. Then you get into Taylor's clothing in your
19 affidavit. What was significant about his clothing that
20 you saw?

21 A. That there was no blood on the front of his
22 sweatshirt.

23 Q. Was there blood anywhere on that sweatshirt?

24 A. There was blood on the right side of the
25 sweatshirt, which appeared to be his blood.

1 Q. And you saw that, right?

2 A. Yes, sir.

3 Q. Did you see the left hand?

4 A. Yes, sir.

5 Q. Did you see the main part of his clothing?

6 A. Yes, sir.

7 Q. What did you see on that?

8 A. Nothing.

9 Q. Now, that was a pretty bloody scene in
10 Nichole's room, wasn't it?

11 A. Yes, sir.

12 Q. And it was a pretty bloody scene in his room,
13 too, wasn't it?

14 A. There was blood in his room, yes, sir.

15 Q. But there was no blood on his left hand or the
16 left side of his clothing; is that right?

17 A. That's correct.

18 Q. The next sentence in your affidavit you write
19 what your opinion is with regard to Nichole's wound,
20 don't you?

21 A. Yes, sir.

22 Q. What did you believe at that time?

23 A. At that time, I believed that whoever would
24 have shot Nichole would have gotten blood on their
25 clothing, a large amount of blood on their clothing.

1 Q. What was the basis of your opinion, writing
2 that in your arrest warrant affidavit?

3 A. Simply the fact of how bloody Nichole's scene
4 was.

5 Q. And you figured just based on what you saw,
6 what?

7 A. That there would have been blowback from the
8 from the gunshot wound.

9 Q. Better tell the jury what blowback means. What
10 does blowback mean?

11 A. Blowback is if you fire a weapon with a round,
12 once the round makes contact, then blood comes back from
13 that wound. Kind of like throwing a large rock in a
14 puddle of water, you're going to have stuff come back.
15 If you throw a glass of water too quick in a sink, water
16 will come back. That's blowback.

17 Q. Had you seen that before in a crime scene?

18 A. I had seen blowback before, yes, sir.

19 Q. And you assumed there would be some here?

20 A. I assumed there would be, yes, sir.

21 Q. Okay. You also put what you saw on the walls
22 and ceiling in Taylor's room. What did you see?

23 A. I didn't observe any blood splatter on the
24 walls or ceiling in Taylor's room.

25 Q. Now, you had seen that rifle shot in the other

1 room and what it did, but you didn't see the same sort
2 of thing in Taylor's room, did you?

3 A. That's correct.

4 Q. This next sentence says, in your experience,
5 that what you saw in Taylor's room is not consistent
6 with someone shooting themselves. What was your
7 thinking with regard to that sentence? What about
8 Taylor's room is not consistent with someone shooting
9 themselves?

10 A. Normally, when somebody shoots themselves in
11 the head, mouth, chin, whatever location you're talking
12 about with that regard, there's usually going to be
13 blood and brain matter on the ceilings or on the wall.

14 Q. You didn't have that here?

15 A. No, sir.

16 Q. Is that based on your experience, that
17 sentence?

18 A. Yes, sir.

19 Q. But you had to seek out expert opinion before
20 you made the decision to arrest in this case --

21 A. Absolutely.

22 Q. -- right?

23 So the decision to arrest isn't based on
24 your surmise here. It's based on something else, isn't
25 it?

1 A. Yes, sir.

2 Q. Next, did you see that white dodge pickup?

3 A. Yes, sir.

4 Q. Where was it in relation to the house?

5 A. It was located on the hill near where the bird
6 cages were located.

7 Q. What did you notice about the truck when you
8 saw it?

9 A. The doors on the truck were open.

10 Q. And that's in your affidavit that you swore to,
11 right?

12 A. Yes, sir.

13 Q. What did you ask Sergeant Burge to do in regard
14 to that truck?

15 A. To go check the truck for anything that could
16 be relevant.

17 Q. Was anything relevant found in that truck?

18 A. He recovered a white wash rag, which appeared
19 to have blood on it, from the rear passenger side of the
20 pickup.

21 Q. And did Burge photograph that?

22 A. He did.

23 Q. Next, there is this business about blood
24 splatter marks on the door frame of the pickup. Did you
25 see those?

- 1 A. Yes, sir.
- 2 Q. And was the rag sent off for testing?
- 3 A. It was.
- 4 Q. Did you take it yourself?
- 5 A. I believe I did take the rag.
- 6 Q. And did that rag get tested for DNA?
- 7 A. It did.
- 8 Q. And did you get the results back?
- 9 A. Yes, sir.
- 10 Q. Next, you refer to the autopsy on Nichole
- 11 Payne. Did she have any injuries other than the
- 12 gunshot?
- 13 A. No, sir.
- 14 Q. The gun itself, it was sealed, as is indicated
- 15 in your affidavit?
- 16 A. Yes.
- 17 Q. Was it sent to Austin?
- 18 A. Yes.
- 19 Q. Did you talk to Ranger Vance?
- 20 A. I did.
- 21 Q. Is that information that's in your affidavit,
- 22 that hearsay information, did you rely on that as a part
- 23 of your decision to make an arrest?
- 24 A. I did.
- 25 Q. That came from the Ranger, correct?

1 A. That's correct, Ranger John Vance.

2 Q. Okay. You received a report from the DPS lab
3 with regard to fingerprints, didn't you?

4 A. Through Ranger Vance, I did.

5 Q. And did you find that that was a specific fact
6 that gave you reason to believe this was a double
7 homicide?

8 A. Yes, sir.

9 Q. After talking with Ranger Vance and talking to
10 him about this DPS lab report, did you talk to the lab
11 technician?

12 A. I did not personally, no, sir.

13 Q. Okay. So that information comes through the
14 Texas Rangers, right?

15 A. That's correct.

16 Q. The information that you received from the
17 Rangers had some evidentiary value to you, didn't it?

18 A. Yes, sir.

19 Q. You relied on what the Rangers said to you,
20 didn't you?

21 A. Yes, sir.

22 Q. That's why you called them in in the first
23 place, isn't it?

24 A. Yes, sir.

25 Q. With regard to the clothes that were in the

1 washer and drier, the clothes, in fact, were still warm
2 in that drier, weren't they?

3 A. Yes, sir.

4 Q. You saw the sleeping arrangements in the house
5 as well, didn't you?

6 A. Yes, sir.

7 Q. Did you find those odd?

8 A. I did.

9 Q. Why? Why were the sleeping arrangements in the
10 house odd?

11 A. There were no actual adult beds in the master
12 bedroom or -- which Nichole was actually found in the
13 only adult bed in the house, which Mr. Payne had advised
14 actually belonged to his mother.

15 Q. So Mr. Payne told you that the adult bed in the
16 house belonged to his mother. What were the sleeping
17 arrangements for the adults upstairs there?

18 A. There were two small beds stacked on top of
19 each other, but had no bedding on them, and a pallet on
20 the floor.

21 Q. So you got bear mattresses, somebody sleeping
22 on the floor with some bedding, and her alone downstairs
23 in a bed that didn't belong to her. That was strange?

24 A. I thought it was strange.

25 Q. Did you find any shaving material or men's

1 grooming supplies of any kind in that house whatsoever?

2 A. I didn't, no, sir.

3 Q. Did anybody else?

4 A. Not that I'm aware of.

5 Q. Did y'all go through that house?

6 A. Yes, sir.

7 Q. Anybody say, hey, here's his clothes?

8 A. No, sir.

9 Q. Anybody say, hey, here's his shaving stuff?

10 A. No, sir.

11 Q. Was there any evidence that he lived in the
12 house?

13 A. Not that I can see.

14 Q. Family pictures?

15 A. Not that I recall.

16 Q. Personal effects?

17 A. Not that I recall.

18 Q. The explanation for her sleeping in that bed
19 from Jason Payne's video, that's in your affidavit,
20 isn't it, what he said?

21 A. Yes.

22 Q. That's one of the facts in there, and that's
23 true, isn't it?

24 A. Yes.

25 Q. The explanation about his mother and her plans,

1 that's in this affidavit, isn't it?

2 A. Yes.

3 Q. What we heard about the children and what they
4 say is in here as well, correct?

5 A. Yes, sir.

6 Q. The information from the interview about the
7 cellphone, that's in there, isn't it?

8 A. Yes, sir.

9 Q. Did you have an opportunity to talk with school
10 officials in this case about Austin?

11 A. Yes, sir.

12 Q. Did you find it unusual --

13 MR. PARKS: Your Honor, calls for hearsay.

14 THE COURT: Your objection is premature.

15 Q. (BY MR. WHEELER) Did you find the fact that
16 Jason Payne told you about him not getting into the
17 truck odd?

18 A. Yes.

19 Q. That fact Taylor didn't get in the truck and go
20 to school was odd?

21 A. Yes.

22 Q. The story about not having seed to feed the
23 birds, going to town to get seed and coming back to the
24 house, but deciding to go to the park and then coming to
25 the house to tell Nichole that they're going to the

1 park, even though he had a phone and she had a phone,
2 did you find all that odd?

3 A. Yes.

4 Q. What time did he say she normally got up?

5 A. I believe he said 10:30 or 11:00.

6 Q. And he's talking about going to tell her where
7 they're going, talking about waking her up, about
8 birdseed, even though she never got out of bed, and the
9 laundry's warm --

10 A. Yes, sir.

11 Q. -- in December --

12 A. Yes, sir.

13 Q. -- in that drier?

14 In fact, he said he didn't think she would
15 answer because she was asleep, didn't he?

16 A. Yes, sir.

17 Q. The information about throwing acorns in the
18 creek, that came from Jason Payne, didn't it?

19 A. Yes, sir.

20 Q. Information about checking on the doves, that
21 came from Jason Tad Payne, didn't it?

22 A. Yes, sir.

23 Q. Information that he found Nichole, and without
24 arming himself and without taking any consideration of
25 his two-year-old daughter, ran through the house

1 directly in Taylor's room, that came from Jason Payne,
2 didn't it?

3 A. Yes, sir.

4 Q. He advised that he didn't look closely at them,
5 that came from Jason Payne, didn't it?

6 A. Yes, sir.

7 Q. He said they had been shot, that came Jason
8 Payne, didn't it?

9 A. Yes, sir.

10 Q. And even though he didn't look closely at them
11 and asked if it was a .30 caliber or a .30-30
12 lever-action Winchester, he picked out the gun that was
13 on Taylor, didn't he?

14 A. I believe I did.

15 Q. Even though later in the interview, it took him
16 a long time to figure out it was the one with the
17 leather stock on it?

18 A. Yes, sir.

19 Q. On the 911 call, you put in your affidavit that
20 he's very concerned about his little girl and getting
21 her out of the house, didn't he?

22 A. Yes, sir.

23 Q. And what he did when he went to check on his
24 house -- [inaudible]?

25 A. I'm sorry?

1 MR. PARKS: Objection to leading.

2 MR. WHEELER: I'll withdraw the question.

3 THE COURT: Very well.

4 Q. (BY MR. WHEELER) And as a part of your basis
5 for the arrest, you make clear in your affidavit that
6 the child got to school on time, right --

7 A. Yes, sir.

8 Q. -- 8:00?

9 It takes about five minutes to get from his
10 home on Highway 37 to Quitman Elementary --

11 A. Yes, sir.

12 Q. -- that's in your affidavit?

13 He says that he was back home by 8:15;
14 isn't that correct?

15 A. Yes, sir.

16 Q. Turned around twice?

17 A. Yes, sir.

18 Q. And got back on the property, right?

19 A. Yes, sir.

20 Q. What time was the 911 call made?

21 A. 9:09.

22 Q. And he was back on the property at?

23 A.. 8:15.

24 Q. He didn't hear any gunfire?

25 A. No, sir.

1 Q. Could you have heard gunfire anywhere on that
2 property?

3 A. I believe you could have.

4 Q. What is your basis for that opinion?

5 A. It's not a huge piece of property.

6 Q. Have you ever heard a .30-30 rifle fired
7 before, in your personal experience?

8 A. Yes, sir.

9 Q. An unmuzzled .30-30 rifle fired in that house,
10 based on your experience, could it have been heard over
11 that property?

12 A. Yes, sir.

13 Q. Now, you put in this affidavit as well that
14 Taylor was not angry that morning. That was confirmed
15 by Jason Payne in his interview, wasn't it?

16 A. Yes, sir.

17 Q. Did you talk with Taylor's family members about
18 Taylor?

19 A. I did.

20 Q. And did you make decisions based on that
21 information?

22 A. Yes.

23 Q. You understood the relationship between Taylor
24 and his mother?

25 A. Yes.

1 Q. You repeated -- well, you put a sentence in
2 here that's interesting: "It is not" --

3 MR. PARKS: Judge, we're going to object to
4 reading from the document. You can ask him about it.

5 THE COURT: Yes, sir.

6 MR. WHEELER: All right.

7 THE COURT: Since we've got a break, let's
8 go ahead and take the break. Ladies and gentlemen, let
9 me ask you to remember your prior instructions and be
10 available in the jury room at 10:45. Please go with the
11 bailiff at this time.

12 (Jury exits courtroom.)

13 MR. WHITLEY: Judge, I've got a
14 housekeeping matter.

15 THE COURT: Okay. Let the record reflect
16 the jury has left the courtroom.

17 Yes, Counsel. Do you want to approach?

18 MR. WHITLEY: We've got Jerry Blalock under
19 the Rule. We've got sworn evidence. I would like him
20 to be excused from the Rule so he can sit in here and
21 point us to the proper sack at the proper time. He's
22 not going to be a witness.

23 MR. PARKS: That's fine.

24 THE COURT: Very well.

25 (Recess from 10:30 a.m. to 10:47 a.m.)

1 THE COURT: Back on the record in Cause
2 20,529, State vs. Jason Tad Payne. Let the record
3 reflect counsel for the State, counsel for the
4 Defendant, and the Defendant is present. The jury is
5 not present.

6 MR. WHEELER: State's ready.

7 THE COURT: Is Defendant is ready to
8 proceed?

9 MR. PARKS: Yes, Your Honor.

10 THE COURT: Very well. Bring them in.

11 (Jury enters courtroom.)

12 THE COURT: Let the record reflect the jury
13 has returned to the courtroom.

14 Mr. Wheeler, you may proceed.

15 MR. WHEELER: May I approach, Your Honor?

16 THE COURT: Yes, sir.

17 Q. (BY MR. WHEELER) Officer, I'm going to hand
18 you what's been marked as State's Exhibit 62. Can you
19 identify that?

20 A. Yes, sir.

21 Q. What is it?

22 A. It's a white washcloth.

23 Q. That white washcloth, is it in the same or
24 substantially similar condition to what it was in on
25 December 11, 2007?

1 A. It appears to be.

2 Q. Has it been altered in any way?

3 A. Not that I can tell.

4 Q. And is that the same white washcloth that was
5 put into evidence at the Wood County Sheriff's Office?

6 A. Yes, sir.

7 Q. With regard to this white washcloth, after it
8 had been placed into evidence with you, what did you do
9 with it?

10 A. It was taken to Orchid Cellmark.

11 Q. Did you take it personally?

12 A. I believe I did take that article personally.

13 THE COURT: Let me ask counsel to approach,
14 if I could.

15 (Bench.)

16 THE COURT: I may be mistaken, but I think
17 that there was no objection when it was tendered. I
18 don't think there was ever any --

19 MR. WHEELER: I'm still anticipating --
20 we're going to have some chain-of-custody issue.

21 THE COURT: It's admitted. There wasn't
22 any objection to chain of custody.

23 MR. WHEELER: Well, it goes to the weight.
24 We're just anticipating --

25 THE COURT: That's fine. I just wanted to

1 make sure you understood that I have it as --

2 MR. WHEELER: Well, I hadn't been down that
3 road before. That's why I'm --

4 THE COURT: Yes, sir.

5 (Open court.)

6 MR. WHEELER: And just for purposes of the
7 record, with regard to State's Exhibit No. 63, the swabs
8 from the rear door of the dodge pickup, State offers
9 State's Exhibit 63.

10 (State's Exhibit 63, offered.)

11 MR. PARKS: No objection.

12 THE COURT: Admitted.

13 (State's Exhibit 63, admitted.)

14 Q. (BY MR. WHEELER) With regard to this swab, did
15 you carry this to Orchid Cellmark?

16 A. Yes, sir.

17 Q. Let's get back on this work that you did prior
18 to the arrest. Did you also do a financial workup in
19 this case? Did you look at the finances of the family?

20 A. Yes.

21 Q. Did you look at the life insurance?

22 A. I did.

23 Q. Did you discover facts associated with the life
24 insurance?

25 A. Yes, sir.

1 Q. And did that -- did -- what you discovered --
2 well, did you discover that there was a \$100,000 life
3 insurance policy on the life of Nichole Payne?

4 A. Yes, sir.

5 Q. And that Jason Payne had rejected his life
6 insurance policy?

7 A. Yes, sir.

8 MR. PARKS: That's a misstatement. He
9 hadn't rejected anything. The insurance company
10 rejected it.

11 MR. WHEELER: I will respond to that. The
12 witness is here and we'll address that.

13 THE COURT: Let's get to it, then.

14 Q. (BY MR. WHEELER) And there was a life
15 insurance policy on Taylor, wasn't there?

16 A. I don't recall whether there was or not.

17 Q. Okay. Now -- but Nichole's life insurance
18 policy figured into your decision?

19 A. Yes.

20 Q. Did you discover anything about other
21 relationships Nichole Payne was involved in?

22 MR. PARKS: Objection; calls for hearsay.

23 THE COURT: Overruled at this time.

24 Q. (BY MR. WHEELER) Did you discover anything
25 about other relationships that Nichole Payne was

1 involved in?

2 A. Yes, sir.

3 Q. And you discovered those holes?

4 A. Yes, sir.

5 Q. You also had the reports from Bevel and Ernest,
6 correct?

7 A. Yes, sir.

8 Q. Now, at the request of the Rangers, did you
9 take was is known as a buccal swab from the mouth of
10 Jason Payne?

11 A. Yes.

12 Q. And did you secure that and place it into
13 evidence?

14 A. Yes.

15 Q. And was it was transported in any way?

16 A. Not by me, no, sir.

17 Q. It was placed into evidence at the Sheriff's
18 Office?

19 A. Yes, sir.

20 Q. Who was the primary beneficiary on Nichole
21 Payne's life insurance policy?

22 A. Jason Payne.

23 Q. Who was the secondary?

24 A. I don't recall if there was a secondary.

25 MR. WHEELER: Pass the witness, Your Honor.

1 THE COURT: Yes, sir.

2 MR. PARKS: May it please the Court?

3 THE COURT: Yes, sir.

4 CROSS-EXAMINATION

5 BY MR. PARKS:

6 Q. Captain Tucker, let's start, I guess, with your
7 background in law enforcement. When was the first time
8 you got a job in law enforcement?

9 A. 1994, at the Wood County Sheriff's Office.

10 Q. Wood County Sheriff's Office?

11 A. Yes.

12 Q. What was your position?

13 A. Reserve deputy.

14 Q. That was 1994?

15 A. I believe that's correct, yes, sir.

16 Q. Okay. And you were a reserve deputy. Now,
17 explain to me a little bit about that. Does that mean
18 you're on duty all the time or just when they call you
19 up? How does being a reserve deputy work?

20 A. When you're called up or decide to work?

21 Q. Did you have a full-time job?

22 A. I was going to school at that time, going to
23 college, and working miscellaneous jobs, yes, sir.

24 Q. And you were a reserve deputy until about when?

25 A. Less than a year later.

1 Q. So some time in 1994, did you go to work for
2 the Wood County Sheriff's Office?

3 A. Yes, sir.

4 Q. And what was your position?

5 A. Patrol deputy.

6 Q. And how long were you a patrol deputy, please?

7 A. Until -- I don't recall exactly how long I was
8 a patrol deputy. At some point in there, I had gone to
9 work in investigations, then was a sergeant, lieutenant,
10 chief deputy, and then back into investigations.

11 Q. We'll get into all of that. I'm just trying
12 to figure out was it --

13 A. I -- I don't know, sir.

14 Q. -- a year, two years, five years?

15 A. Four or five years, probably.

16 Q. So that would have probably been around 1999 or
17 2000 when you went into another position?

18 A. Yes, sir.

19 Q. From patrol deputy, what position did you go
20 to?

21 A. Investigator.

22 Q. Was there ever a break in your employment with
23 the Wood County Sheriff's Office --

24 A. Yes.

25 Q. -- or have you worked -- when was that?

1 A. Somewhere around that same time, I went to work
2 for the Mineola Police Department.

3 Q. And what was your position for them?

4 A. Sergeant.

5 Q. Was that after you were an investigator for the
6 Wood County Sheriff's Office?

7 A. Yes, sir.

8 Q. When you were an investigator for the Wood
9 County Sheriff's Office, was there any particular source
10 of offenses or crimes that you investigated or was it
11 just whatever came through the door?

12 A. Whatever came through the door.

13 Q. And when you went to Mineola P.D. and was a
14 sergeant, was that a patrol sergeant?

15 A. Yes, sir.

16 Q. Just so the jury's clear about this: If I
17 understand correctly, if you're a patrol deputy or a
18 patrol sergeant, your primary duties involve what would
19 sort of be first-contact sort of issues in
20 investigations and then more involved investigations
21 that would result in people whose duties were dedicated
22 to that? Does that make any sense to you? I mean, if
23 you're a patrol guy, you're looking for speeders or
24 traffic offenders, or if you're dispatched to a scene,
25 you're typically the first person to a scene of a

1 burglary of some kind?

2 A. If you would -- like, the job duties in
3 Mineola, per se, when I started there, I had gone into
4 investigations. They had manpower issues. I worked
5 there for a very short time. Then I was a sergeant on
6 patrol which was a combination of administration and
7 patrol duties and supervision.

8 Q. And you were in that position about how long?

9 A. A few months.

10 Q. And from there, where did you go?

11 A. Back to the Wood County Sheriff's Office.

12 Q. That would have been about 2001, 2002? Do you
13 have any recollection when it was?

14 A. About that, yes, sir. It --

15 Q. You came back to the Wood County Sheriff's
16 Office as patrol or investigator --

17 A. As a patrolman.

18 Q. -- what?

19 You would have been a patrol deputy, then,
20 about how long?

21 A. As a patrolman, a few months. A few months.

22 Q. Then back to an investigator?

23 A. No, sir, sergeant.

24 Q. Sergeant. And I believe you were a lieutenant
25 at the time on December 11, 2007; is that right?

1 A. Yes, sir.

2 Q. How long, roughly, had you been a lieutenant?

3 A. 2000 -- a year, probably, may be.

4 Q. Was that more -- did you have more
5 administrative responsibilities as a lieutenant than you
6 had as a sergeant or patrol or --

7 A. Not in this particular position, no, sir.

8 Q. Okay. Then you left the Wood County Sheriff's
9 Office about when?

10 A. January 1st of 2009.

11 Q. Okay. And you're captain in the Quitman Police
12 Department?

13 A. Yes, sir.

14 Q. Now, Captain Tucker, do you consider yourself
15 to be an expert on crime scene reconstruction?

16 A. No, sir.

17 Q. Have you had any formal training in crime scene
18 reconstruction?

19 A. No, sir.

20 Q. What about blood splatter?

21 A. Very little training.

22 Q. I believe you told the jury that you had about
23 15 years of experience as a law enforcement officer in
24 total; is that about right?

25 A. I approximated that, yes, sir.

1 Q. And during that period of time, if I understood
2 you correctly, you had been involved one way or another
3 in about two dozen, give or take, gunshot wound cases.
4 Isn't that what you testified to yesterday?

5 A. I don't recall if I said two dozen, but I
6 probably said several. Several, maybe several dozen,
7 maybe a couple of dozen. I don't know the exact number.

8 Q. Would that include all homicides, all
9 accidental shootings, and all suicides?

10 A. Yes, sir.

11 Q. Okay. And of that approximately two dozen, I
12 understood you to say yesterday, how many of those would
13 have been suicides?

14 A. I don't know.

15 Q. How many of them would have been suicides with
16 a rifle?

17 A. I do not know.

18 Q. Any?

19 A. Yes, sir.

20 Q. More than one?

21 A. Yes, sir.

22 Q. Less than five?

23 A. I would say more than five.

24 Q. More than five suicides with a rifle?

25 A. I believe so, yes, sir.

1 Q. Less than ten?

2 A. I don't know an exact number, sir.

3 Q. Would they all have been in Wood County?

4 A. It's possible. Some of them could have been in
5 Mineola.

6 Q. Well, Mineola is in Wood County?

7 A. Yes, sir. I apologize, I thought you were
8 asking me about Wood County.

9 Q. This would have been wherever it was, in the
10 county or in Mineola. Something more than five and less
11 than ten suicides with a rifle, best you can recall?

12 A. I would say I've seen several gunshot wounds.
13 I'm not really clear on what you're asking me.

14 Q. Have you seen more of those kinds of cases than
15 Noel Martin?

16 A. No, sir.

17 Q. Captain Tucker, I want to go at this point to
18 December 11, 2007. You were on duty that morning; is
19 that correct?

20 A. Yes, sir.

21 Q. Do you recall what shift you were working?

22 A. I was there during the daytime, so my standard
23 time of working, I would get in around 7:00 or 7:30 in
24 the morning.

25 Q. Okay. So you were there and on duty, but you

1 were not in uniform because your job didn't call for you
2 to be in uniform; is that correct?

3 A. Yes, sir.

4 Q. And you received communication from dispatch
5 about two persons who had possibly been shot at a
6 particular location and you went there?

7 A. Yes, sir.

8 Q. You note in your report the date, but you
9 didn't note the time. Is it usual for you to not note
10 the time when you arrive at a location?

11 A. I believe that on the cover of the report, the
12 arrival time is noted, which is 9:18, according to the
13 report.

14 Q. Okay. That was not something I had seen.
15 9:18, on the cover?

16 A. Which is part of the report, incident offense
17 report, yes, sir.

18 Q. Now with respect to the interview with
19 Mr. Payne, did you note the exact time that that
20 started?

21 A. Yes, sir.

22 Q. What time was that?

23 A. I don't recall. Are you asking me if I noted
24 it in my report?

25 Q. Yes.

1 A. No, sir, I did not.

2 Q. I believe we've established it was something
3 roughly 3:00 or something thereafter. Is that your
4 recollection?

5 A. That's my recollection. I gave a time at the
6 beginning of the interview, but I don't recall what time
7 that was.

8 Q. Some roughly six hours after you first came
9 into contact with Mr. Payne?

10 A. Okay.

11 Q. Is that fair?

12 A. Yes, sir.

13 Q. So you had information when you left the Wood
14 County Sheriff's Office to go to the scene that -- or at
15 least a report of two people having been shot --

16 A. Yes, sir.

17 Q. -- right?

18 A. Yes, sir.

19 Q. Okay. And so you went there. And did you
20 arrange for backup? How did other people know to come
21 to that location?

22 A. I don't -- I don't remember if I arranged for
23 backup, per se, but personnel normally know their jobs.
24 The dispatcher would have -- would have automatically
25 sent other personnel to that location.

1 Q. So you would have known there would have been
2 people on their way even if you arrived there first?

3 A. Yes, sir.

4 Q. Did you wait for backup before you went into
5 the house?

6 A. No, sir.

7 Q. That would typically be standard procedure,
8 wouldn't it, especially if there were allegations of
9 gunshots?

10 A. I suppose. It depends on the particular
11 situation.

12 Q. Judgment call?

13 A. Judgment call, yes, sir.

14 Q. And it was your judgment at the time to go on
15 into the house without waiting for backup. I believe
16 you testified you had your weapon drawn; is that
17 correct?

18 A. Yes, sir.

19 Q. About how long was it, as best you can estimate
20 it, from the time you first went into the house to the
21 time you found Austin Taylor Wages' body?

22 A. Possibly 10 to 15 minutes.

23 Q. During that period of time, Jason Payne was
24 outside with his daughter, Remington; is that your
25 understanding?

1 A. That's my understanding, yes, sir.

2 Q. You were in the house?

3 A. Yes, sir.

4 Q. Misty Burns had arrived at some point in time,
5 and you put her in charge of Mr. Payne and the child?

6 A. Yes, sir.

7 Q. And you went on about your business of clearing
8 the house?

9 A. Yes, sir.

10 Q. Now, first, when you entered the bedroom where
11 Nichole's body was found, did you see her immediately?

12 A. Yes, sir.

13 Q. Okay. Did you approach the bed after you saw
14 her there?

15 A. Yes, sir.

16 Q. About how close do you think you came? You
17 touched her?

18 A. I was obviously pretty close.

19 Q. Close enough to touch her?

20 A. Yes.

21 Q. Okay. And you say in your affidavit, and
22 you've told members of the jury, that you smelled what
23 you perceived to be the odor of gunpowder?

24 A. Yes, sir.

25 Q. Do you know whether or not there are any tests

1 that can be run, atmospheric type of tests, to detective
2 the presence of gunpowder?

3 A. I don't know, sir.

4 Q. Certainly, nothing was done in that regard?

5 A. Yes, sir.

6 Q. Have you been -- were you ever at a scene
7 remotely like this one where a person -- where the
8 damage was so devastating?

9 A. With Nichole?

10 Q. Yeah.

11 A. Probably not.

12 Q. Are you aware, Captain, that a quantity of
13 blood, and particularly with brain matter, can give off
14 a metallic odor that could smell like gunpowder?

15 MR. WHEELER: I object to that objection.
16 Assumes facts not in evidence.

17 Q. (BY MR. PARKS) Do you know whether or not a
18 large amount of blood and brain matter gives off a
19 metallic odor much like gunpowder?

20 MR. WHEELER: Objection. The question
21 assumes facts not in evidence. He's not qualified to
22 answer --

23 THE COURT: If he knows, he knows.
24 Overruled.

25 THE WITNESS: I don't know.

1 Q. (BY MR. PARKS) Okay. Now, the room in which
2 you found Nichole was part of the house, was it not?

3 A. Yes, sir.

4 Q. The door was shut when you first came?

5 A. In Nichole's room?

6 Q. Yes, sir.

7 A. It was open.

8 Q. It was open. Could you smell the odor of
9 gunpowder in the living room when you came into the
10 house?

11 A. Yes, sir.

12 Q. So you smelled it all the way through to the
13 bedroom?

14 A. Yes, sir.

15 Q. Was it warm in the bedroom?

16 A. It wasn't cold.

17 Q. Was it about the same temperature as the rest
18 of the living room and the part of the house you had
19 been in?

20 A. I would say so, yes, sir.

21 Q. This was December, fairly early morning
22 December. Do you know how what the temperature was the
23 night of the 10th and leading into the 11th? How cold
24 did it get into that night?

25 A. I know what it was that morning. I don't know

1 what it was that night.

2 Q. Do you recall what sort of heat was in that
3 house? Was it a space heater, central heat?

4 A. I believe it was central heat.

5 Q. Did you check the thermostat to see what it was
6 set at that morning?

7 A. No, sir, I did not.

8 Q. Would you describe it as being comfortable from
9 a temperature standpoint?

10 A. When I went in there, I couldn't tell you
11 exactly what the temperature was at that particular
12 time.

13 Q. But you were in the house a while?

14 A. Yes.

15 Q. Did you ever get the feeling -- an
16 uncomfortable feeling like we have in the courtroom here
17 this morning, pretty cold?

18 A. No, sir, I don't recall that.

19 Q. Okay. Now, when you found Nichole, she was in
20 bed. She had on a sweat suit or clothing --

21 A. Yes, sir.

22 Q. -- other than bed clothing?

23 A. Yes, sir.

24 Q. And she felt warm to the touch?

25 A. Yes, sir.

1 Q. Have you factored in -- well, let me go at it
2 this way: At some point in time, you made a decision,
3 for yourself at least, that Jason Payne was guilty of
4 this offense, didn't you?

5 A. Yes, sir.

6 Q. Okay. Did you do that on December 11, 2007?

7 A. No, sir.

8 Q. Are you telling the members of the jury at the
9 end of that conversation or interrogation that you had
10 with Jason Payne, you had not decided he was guilty of
11 this offense?

12 A. That's correct.

13 Q. Had not made that judgment?

14 A. That's correct.

15 Q. So nothing that you had seen up until that
16 point in time led you to believe he was guilty of this
17 offense; is that fair?

18 A. Had odd circumstances.

19 Q. You had some odd circumstances kind of rattling
20 around in your head?

21 A. Yes.

22 Q. Certainly, they were not taken together even
23 such that you had made a determination for yourself that
24 he was guilty of the offense?

25 A. That's correct.

1 Q. And that included the fact that when you
2 touched Nichole, she was warm, right?

3 A. Yes, sir.

4 Q. Now, I'm going to skip ahead a little bit,
5 Captain. Later on, you touched Taylor and he was cold.
6 You told the jury that?

7 A. Yes, sir.

8 Q. What conclusion did you draw from the fact that
9 Taylor was cold and Nichole was warm?

10 A. I thought it was an odd fact and that there was
11 a probability that Taylor's time of death could have
12 been before Nichole's.

13 Q. Did you make a determination that he was?

14 A. No.

15 Q. But your investigator, Tom Bevel, had come to
16 that conclusion, hadn't he, that his scenario is more
17 likely that Austin was killed before Nichole?

18 MR. WHEELER: I'm going to object to
19 hearsay.

20 THE COURT: Sustained.

21 Q. (BY MR. PARKS) Well, there's been quite a bit
22 of testimony. What importance -- what did -- the fact
23 that when you touched Austin and his body was colder
24 than that of Nichole's, how does that factor in your
25 determination that you had probable cause that Jason was

1 guilty?

2 A. Can you repeat that one more time?

3 Q. Yeah. What's the importance of that? What
4 conclusion you are asking the jury to draw from that?

5 A. I simply thought it was an odd fact that
6 Taylor -- that his body was cold and that she was warm.
7 It was an odd fact.

8 Q. Let's talk about the room that Taylor was found
9 in. That was a garage, wasn't it?

10 A. It was.

11 Q. It wasn't a part of the house. What heated
12 source did it have?

13 A. Space heaters.

14 Q. Where?

15 A. I believe it was inside the room. I don't
16 think it was on.

17 Q. Was it on?

18 A. I don't believe so, no, sir.

19 Q. Did you take pictures of it?

20 A. I don't recall if pictures were taken or not.
21 I didn't take any of the photographs.

22 Q. Now, was that a converted a garage that had
23 been converted into a bedroom or was it a garage that
24 Taylor had moved into?

25 A. Could you explain what the difference would be?

1 Q. Well, one wall was a metal garage door with a
2 gap out of it that you could see daylight out of it?

3 A. It was a metal garage door, yes, sir.

4 Q. And I suppose you've testified that you didn't
5 smell what you perceived the odor of gunpowder in his
6 room and he was colder than Nichole. Did you take into
7 consideration when you considered that those were odd
8 facts the difference in the environment between the
9 house where she was found under covers in clothes and
10 where he was found lying on top of the bed in a garage
11 with no heat?

12 A. I considered that, yes, sir.

13 Q. Do you still find it to be odd?

14 A. Yes, sir.

15 Q. Is it your theory, captain, that Austin Taylor
16 Wages was killed before Nichole?

17 A. Not necessarily.

18 Q. Would it make a difference to you if it was or
19 are you saying, I don't know, it's just odd?

20 MR. WHEELER: Objection; argumentive.

21 THE COURT: Overruled.

22 THE WITNESS: I found it an odd fact that
23 there was a difference in the body temperatures. I
24 don't have the experience to measure the difference in
25 the body temperatures.

1 Q. (BY MR. PARKS) And you used that odd fact in
2 your affidavit to get an arrest warrant for Mr. Payne?

3 A. I did.

4 Q. So I'm assuming you considered that evidence of
5 some kind of his guilt?

6 A. I considered that it was an odd fact, yes, sir.

7 Q. Have you taken any training, Captain, IN the
8 proper way to determine time of death?

9 A. No, sir.

10 Q. Did anybody take a liver temperature of Nichole
11 or Austin at the scene out there?

12 A. Not that I'm aware, sir.

13 Q. Did you call anybody so they could take the
14 liver temperature so that could be determined?

15 A. I didn't know who I could call.

16 Q. You've sent bodies to SWIFS?

17 A. Yes, sir.

18 Q. Do you ever -- do you know whether or not if
19 SWIFS has agents that can be sent out to scenes where
20 bodies are found?

21 A. I do not know if they do that.

22 Q. Didn't know that?

23 A. No, sir.

24 Q. You've told us that the bodies were removed
25 before Noel Martin came to the scene?

1 A. Yes, sir.

2 Q. Do you feel that in some way compromises Noel
3 Martin's ability to --

4 A. I don't know if it does or not.

5 Q. If you thought there was any probability it
6 would compromise his abilities, why didn't you leave the
7 bodies there?

8 A. I don't know. I can't answer that.

9 Q. Do you think Mr. Martin would have an opinion
10 as to whether or not it compromised his --

11 MR. WHEELER: Objection; speculation.

12 THE COURT: Yes, sir.

13 MR. PARKS: I'll withdraw it.

14 Q. (BY MR. PARKS) Let's take about Noel Martin a
15 little while. How long have you known Noel Martin?

16 A. Quite some time.

17 Q. Ten years?

18 A. Probably longer.

19 Q. Do you have any idea if you know about how long
20 he's been with the Smith County Sheriff's Department?

21 A. I have no idea.

22 Q. Was it Ranger Kemp's idea to call a crime scene
23 reconstructionist out there?

24 A. I'm not really sure whose idea it was to call
25 Noel. It was either Ranger Kemp, myself, or advice from

1 the District Attorney's Office.

2 Q. That's not unusual at all? You weren't shocked
3 to have Noel Martin's name brought up in an
4 investigation of this kind? He's done that a lot of
5 times before, has he not?

6 A. That's my understanding he has, yes, sir.

7 Q. Had he done work for the Wood County Sheriff's
8 Office while you were employed there, that you're aware
9 of?

10 A. Yes, sir.

11 Q. On one or more occasions?

12 A. At least one that I know of, but there may have
13 been more.

14 Q. And were you aware of whether or not he had
15 worked for the Wood County District Attorney's Office on
16 different occasions?

17 A. I was not aware.

18 Q. But you were aware that from wherever source,
19 it was recommended that Noel Martin be brought to the
20 scene?

21 A. Yes, sir.

22 Q. He came with equipment, you told the jurors
23 that?

24 A. Yes, sir.

25 Q. What sort of equipment did he have?

1 A. A lot of equipment.

2 Q. Have some lasers?

3 A. Yes, sir.

4 Q. Used those lasers to track the trajectory of
5 the bullet or what, if you know?

6 MR. WHEELER: Objection; no personal
7 knowledge.

8 THE COURT: If he knows. If he doesn't,
9 then --

10 THE WITNESS: I'm not really sure how Noel
11 uses his equipment.

12 Q. (BY MR. PARKS) Would it be fair to say that he
13 was there for a few hours, anyway?

14 A. Yes.

15 Q. Now, Captain, you've indicated that it's -- it
16 was, like, two years or something before you got a
17 written report from Deputy Martin. How long was it
18 before you got a written report from Deputy Martin?

19 A. I don't know how long it was before I got a
20 written report from Noel Martin, but it wasn't two
21 years.

22 Q. But it was several months, I believe the
23 testimony was?

24 A. I believe that's correct.

25 Q. Are you telling the members of the jury you had

1 no communication with Noel Martin during that period of
2 time before you got his written report?

3 MR. WHEELER: Objection. That question
4 assumes facts not in evidence. There hasn't --

5 THE COURT: Overruled.

6 THE WITNESS: I don't recall any
7 conversation with Noel Martin from the time of him
8 actually coming to the location before the time that we
9 had a meeting with him at the District Attorney's
10 Office.

11 Q. (BY MR. PARKS) But that's not when you got the
12 written report. That was when you got an oral report
13 from him?

14 A. That's correct, yes, sir.

15 Q. And about how long was it after he did the
16 reconstruction work before y'all had this sit-down with
17 the District Attorney's Office and Noel Martin?

18 A. I don't remember how long it was.

19 Q. Would it be fair to say it was weeks rather
20 than months?

21 A. I would think it was longer than weeks, to my
22 memory.

23 Q. Were you preparing to file a case against Jason
24 Payne at the time you had that meeting with the District
25 Attorney's Office and Noel Martin?

1 A. I was.

2 Q. And after you had that meeting, did you abandon
3 those plans at that time?

4 A. I did.

5 Q. And when you swore out your affidavit to get an
6 arrest warrant and took that to a magistrate, an
7 independent magistrate with your probable cause to get
8 an arrest warrant, did you tell the magistrate that Noel
9 Martin said this was a suicide?

10 MR. WHEELER: I'm going to object to
11 anything outside the four corners of the affidavit as
12 hearsay.

13 THE COURT: Overruled.

14 THE WITNESS: If you would like me to
15 reread my affidavit --

16 MR. PARKS: No.

17 THE WITNESS: If it's not in my affidavit,
18 no, I did not tell the magistrate that. If it is in my
19 affidavit, I did.

20 Q. (BY MR. PARKS) Would it be fair to
21 characterize it, Captain, when you go to a magistrate
22 and ask him -- and give him what you believe is probable
23 cause and ask for a citizen to be arrested on charges,
24 do you think it's fair to give him a complete and fair
25 record?

1 A. Yes, sir.

2 Q. And that you did not indicate to the magistrate
3 what Noel Martin's opinion was, then that would not have
4 been done in this case?

5 MR. WHEELER: That mischaracterizes.
6 That's the law of probable cause for one.

7 THE COURT: Yes, sir. And the other?

8 MR. WHEELER: The other legal objection is
9 that it's calling him to give a legal opinion.

10 THE COURT: And I'll sustain.

11 Q. (BY MR. PARKS) Let's go back to the scene for
12 right now, Captain. You testified to the jury that you
13 did not see any signs of forced entry into the house?

14 A. That's correct.

15 Q. Okay. Not when you first got there, nor later
16 for that matter?

17 A. That's correct.

18 Q. Okay. And so, of course, I suppose it would
19 have been impossible for Jason Payne to see signs of
20 that if it didn't exist?

21 A. I know I didn't see it.

22 Q. You were there long enough to have found it if
23 it was there?

24 A. I would think so.

25 Q. So it would be fair to say there was no forced

1 entry into the house --

2 A. That's correct.

3 Q. -- for anybody to see, not you and not

4 Mr. Payne?

5 A. I did not see any signs of forced entry.

6 Q. You found it odd he would not have armed

7 himself; is that right?

8 A. I don't believe I ever stated that.

9 Q. Well, you've made -- the district attorney made

10 it a point two or three times asking whether or not

11 Jason Payne had armed himself?

12 A. That's correct.

13 Q. Did you draw any inferences for making a

14 determination to seek an arrest warrant against him that

15 he had not armed himself by the time you got there?

16 A. I personally did not, no, sir.

17 Q. Didn't consider that to be an important fact at

18 all; is that fair to say?

19 A. I didn't use that in my probable cause.

20 Q. Did you -- did I understand you to say that you

21 found it odd that Mr. Payne would have gone to check on

22 Taylor after he found his wife shot?

23 A. I don't believe I ever said that, no, sir.

24 Q. Would it be fair to say, Captain, it's hard to

25 know what anybody's reaction would be faced with a

1 situation like that and maybe no two people would react
2 in the same way?

3 A. Yes, sir.

4 Q. Can I assume, then, from your testimony, that
5 you drew no inferences whatsoever against Mr. Payne that
6 he went to check on Taylor?

7 A. That's correct.

8 Q. Is it your intention, Captain, to give the jury
9 the impression that Mr. Payne was not living at that
10 residence on December 11, 2007?

11 A. I'm sorry?

12 Q. Is it your contention he was not -- that
13 Mr. Payne was not living at that residence on December
14 11, 2007?

15 A. I don't know whether he was living there or
16 not.

17 Q. You investigated the case?

18 A. I didn't see signs he was living there, but I
19 don't know for sure one way or the other.

20 Q. Did you ever ask anybody in your investigation
21 was Jason Payne living there?

22 A. I -- I don't recall if I did or not. I'm sure
23 I did at some point.

24 Q. Do you dispute he took Jackson to school that
25 morning?

1 A. No, sir.

2 Q. Do you dispute Jackson was living there?

3 A. No, sir.

4 Q. So the suggestion that he might not have been
5 living there is an inference from the fact that he
6 didn't have that many clothes and you didn't find a
7 razor blade?

8 A. I believe I stated that it was odd that there
9 was hardly any clothes there and I didn't observe any
10 shaving material.

11 Q. And did you consider that to be evidence that
12 would indicate he committed this offense?

13 A. I considered that to be an odd fact.

14 Q. Were you specifically looking for shaving
15 items? I mean, is that something that you typically do
16 on a scene where people are dead; let's look around and
17 see how many clothes people have and whether or not they
18 have shaving equipment?

19 A. No, sir.

20 Q. And the sleeping arrangements, the fact that
21 they chose to sleep upstairs on bear mattresses, if
22 that's what they did, do you consider that an inference
23 that points towards guilt in this case?

24 A. I consider that to be a very odd fact. Not a
25 inference, an odd fact.

1 Q. Not just an usual living arrangement?

2 A. Yes.

3 Q. Did that factor in at all in your decision to
4 seek an arrest warrant on Mr. Payne?

5 A. I considered it to be an oddity and I did list
6 it in my probable cause affidavit.

7 Q. So you indicate you took that as an indication
8 of guilt of a double murder, that they had odd sleeping
9 arrangements?

10 A. I took that as an indication of possibly not
11 being completely honest about the sleeping arrangements
12 or the marital situation in the household.

13 Q. Let me ask you, Captain: Did you consider for
14 even a second that you were interrogating a man --
15 within six hours of what he found that day, did it ever
16 occur to you that a person might not be in any condition
17 to be interrogated at that point in time?

18 A. I didn't feel like that was an interrogation.

19 Q. Would it be fair to say that you and Ranger
20 Kemp led, intentionally led Mr. Payne to believe that
21 this was just a routine little visit that y'all were
22 having with him and that, you know, he had these rights
23 to remain silent and a right to a lawyer, but you just
24 read that to everybody that you put back there and it
25 was, kind of, no big deal and this was just a little

1 visit y'all were having? That was the impression y'all
2 left, wasn't it, to begin with?

3 A. I don't understand the question exactly. Could
4 you repeat it one more time?

5 Q. Well, I characterize it as an interrogation.
6 You said it wasn't an interrogation. You started off by
7 telling him this was basically a little visit y'all were
8 having with him trying to learn a little bit about what
9 went on, right?

10 A. Yes, sir.

11 Q. And you gave his Miranda Warnings because it
12 was no big deal, but y'all gave everybody Miranda
13 Warnings to have a little visit or words to that effect?

14 A. Yes, sir.

15 Q. And you wound up accusing him because he was
16 reluctant to tell you about the scene when you know --
17 you had that information. You didn't have to know what
18 he saw. You saw it with your own eyes what he saw.
19 That was an interrogation, wasn't it?

20 MR. WHEELER: Objection; argumentative.

21 THE COURT: Overruled.

22 MR. WHEELER: Objection; repetitious, asked
23 and answered.

24 THE COURT: Overruled.

25 THE WITNESS: You're going to have ask me

1 that again.

2 Q. (BY MR. PARKS) At some point in time, Captain,
3 during whether you want to call it an interview,
4 interrogation, whatever you want to call it, what we saw
5 late yesterday afternoon, at some point during the
6 course of that, did you decide that Jason Payne had
7 killed his family?

8 A. No.

9 Q. Then can you tell us why you were insistent
10 upon him describing the scene to you?

11 A. Because I felt like it would help us understand
12 what was going on.

13 Q. You had seen the scene yourself?

14 A. Right.

15 Q. I mean, this wasn't new information for you?

16 A. I didn't know what Jason had seen.

17 Q. Did you think he had seen something different
18 from what you saw?

19 A. He was there before we were there.

20 MR. WHEELER: I'm going to object to what's
21 in the Defendant's mind. That calls for speculation.

22 THE COURT: Overruled.

23 Q. (BY MR. PARKS) Do you have reason to believe
24 that anything in Nichole's bedroom was any different
25 than when you saw it?

1 A. I don't know.

2 Q. You, in your affidavit, say that you believed
3 the scene as you found it in Taylor's bedroom had been
4 staged. Is that true?

5 A. I believe that's correct.

6 Q. And by "staged," you mean it was set up that
7 way?

8 A. Yes, sir.

9 Q. Do you believe that he was posed?

10 A. Are you talking about the body?

11 Q. Yes.

12 A. Posed as in?

13 Q. Sit there, put there, put in the position he
14 was found in.

15 A. I didn't know. I felt like it was made to look
16 like a suicide.

17 Q. Okay. Let me ask you this: Do you believe
18 that Nichole Payne was killed where she was found?

19 A. Yes.

20 Q. Do you believe that she was killed with that
21 .30-30 rifle?

22 A. I don't know.

23 Q. Did you find any other weapon that would have
24 been consistent with having caused her death at the
25 scene?

1 A. No.

2 Q. Did you find any such weapon in your
3 investigation after that day?

4 A. No.

5 Q. Okay. Now, do you believe that Austin Taylor
6 Wages was killed where he was found?

7 A. I don't know.

8 Q. Do you believe he was killed with that .30-30
9 rifle that has been introduced into evidence?

10 A. I believe he probably was.

11 Q. Do you believe that Nichole and Taylor were
12 killed with different weapons?

13 A. I don't know.

14 Q. Is there any evidence whatsoever that would
15 lead a reasonable person to believe they were killed
16 with different weapons?

17 A. Not that I'm aware of.

18 Q. As a matter of fact, there were two spent
19 cartridges found on the scene; one on the floor and one
20 in the gun, right, .30-30 cartridges?

21 A. I believe that's correct.

22 Q. One in Taylor's room, one in the floor, and one
23 in the gun?

24 A. Yes, sir.

25 Q. Have you had any training in taking DNA

1 evidence?

2 A. Some, yes, sir.

3 Q. That would be involving a buccal swab?

4 A. Yes, sir.

5 Q. That's taken by a warrant or consent. You took
6 it by consent in this case, didn't you?

7 A. Yes, sir.

8 Q. You asked Jason Payne if he would give you a
9 buccal swab. Did you take it yourself or did you have
10 someone else do it?

11 A. I believe I took it.

12 Q. That involves taking a swab and running it
13 around the inside of his mouth?

14 A. Yes, sir.

15 Q. Putting it in a sealed envelope and sending it
16 off to whoever's going to do the DNA testing?

17 A. Yes, sir.

18 Q. Somebody took that rifle, that .30-30 rifle off
19 of Taylor, handled it, ejected the cartridge before it
20 was ever sealed as evidence; isn't that true?

21 A. I would say that's probably correct.

22 Q. Do you know who did that?

23 A. No, sir.

24 Q. You sent the rifle and the cartridges off for
25 DNA and fingerprint and fiber analysis, I believe you

1 told us this morning; is that correct?

2 A. I believe that's correct.

3 Q. Sent it to the DPS laboratory?

4 A. Yes, sir.

5 Q. At some point in time before the DNA testing
6 had been done, you re-called that and asked them not do
7 the DNA testing, didn't you?

8 A. I --

9 Q. Either you did or you didn't.

10 A. I collected the gun.

11 Q. Did you communicate -- after you sent the rifle
12 and the cartridges to the DPS lab asking for DNA
13 analysis, did you resend that in writing later before it
14 was ever done? Either you did or you didn't.

15 A. No, I don't believe I did.

16 MR. PARKS: May I approach, Your Honor?

17 THE COURT: Yes, sir.

18 Q. (BY MR. PARKS) Captain, let me ask if you
19 remember whether or not you've seen that document
20 before?

21 A. Yes, sir.

22 Q. Does that refresh your memory about that
23 matter?

24 A. Yes, sir. It doesn't change my answer.

25 Q. Okay. You asked that the evidence in the case

1 be returned to you without analysis. Is that true or
2 not?

3 A. That part is true, yes, sir.

4 Q. Was DNA analysis ever done on that rifle as far
5 as you're aware?

6 A. I'm not aware of any.

7 Q. Captain, I want to talk to you a little bit
8 about the issue of what -- was it Sergeant Miller who
9 was out there or was it Deputy Miller?

10 A. Sergeant Miller.

11 Q. Sergeant. Excuse me. Sergeant Miller was sent
12 out to talk with Jason Payne, you've testified, and came
13 back and reported to you what you believed to be an
14 inconsistency between what he had said on the 911 tape.
15 Is that a fair characterization?

16 A. What Jason had said on the 911 tape?

17 Q. Yeah.

18 A. Yes, sir.

19 Q. You weren't a party to that conversation?

20 A. Party to what conversation?

21 Q. You didn't hear what Miller said to Jason
22 Payne?

23 A. That's correct.

24 Q. And you didn't hear what Jason Payne said to
25 Miller?

1 A. Yes, sir.

2 Q. You're just relaying what Deputy Miller said to
3 you?

4 A. Yes, sir.

5 Q. You put that in your affidavit as probable
6 cause for an arrest warrant, that -- let's just find it
7 here. Let me just ask it this way: Do you recall, from
8 your own recollection, what Sergeant Miller said to you
9 as he relayed the conversation he had with Jason Payne?
10 What did he tell you?

11 A. I don't recall the exact words, but he relayed
12 to me that the -- all the people had been accounted for,
13 that his son was at school and the other son was in, I
14 believe, Chicago.

15 Q. Have you come to learn that Jason Payne has a
16 son that does not live there, that does live in Chicago
17 or somewhere else? Did you ever check that out?

18 A. Yes, sir.

19 Q. And he had a son that was in school, doesn't
20 he?

21 A. Yes.

22 Q. That was true, that everyone was accounted for;
23 his son was in Chicago, his other son was in school?
24 Those are true statements?

25 A. Uh-huh.

1 Q. Do you see where the communication problem is?

2 The communication problem is, it seems apparent to me --

3 MR. WHEELER: I'm going to object to
4 testifying in a question.

5 THE COURT: Ask the question.

6 Q. (BY MR. PARKS) Let me ask it this way: Do you
7 know whether or not Sergeant Miller told Jason Payne
8 that y'all had only found one body in that house?

9 MR. WHEELER: I'm going to object to that
10 because he has no personal knowledge. He wasn't
11 present.

12 THE COURT: Overruled.

13 THE WITNESS: I assume that he did.

14 Q. (BY MR. PARKS) See there, you assume that he
15 did, but if he didn't, if Jason Payne thought that after
16 y'all had been in the house --

17 MR. WHEELER: Object to speculation.

18 MR. PARKS: I'll rephrase it.

19 THE COURT: Very well.

20 Q. (BY MR. PARKS) Would it seem logical to you
21 under the circumstances that if a person had reported
22 that two people had been shot, as is what happened on
23 this 911 tape, and the police went to the scene and had
24 spent 15 minutes in the house, where it only took him a
25 matter of seconds to find two bodies, do you think it

1 would be reasonable for that person to assume that you
2 had found two bodies and everybody was accounted for?

3 MR. WHEELER: I'm going to object to
4 speculation again. He's asking him to crawl into Jason
5 Payne's mind.

6 THE COURT: Overruled.

7 THE WITNESS: Are you asking me to
8 speculate what Jason was thinking?

9 Q. (BY MR. PARKS) Well, you've done that already
10 for us, Captain. I'm just trying to give you an
11 alternate --

12 MR. WHEELER: Object to argumentative, Your
13 Honor.

14 THE COURT: Sustained.

15 Q. (BY MR. PARKS) Captain, in your affidavit, you
16 have placed emphasis on and in front of this jury -- on
17 more than one occasion, you have placed emphasis on the
18 fact that Jason Payne said that everyone is accounted
19 for. You have interpreted that statement to mean --
20 what, I'm not exactly sure of -- some sort of
21 misrepresentation on the part of Jason Payne that's
22 suspicious. Isn't that the impression you intend to
23 make to the jury?

24 A. I believe my impression was just to state that
25 he never asked the condition of anybody and Mark came in

1 and told me what he said, what Mark relayed to me. That
2 was what -- that's all I was trying to state in my
3 affidavit.

4 Q. So -- well then, is it something that you would
5 now say to the jury really doesn't make much difference
6 in the trial of this court or do you think that's
7 important?

8 A. I think that's important.

9 Q. Do you think it would be important whether or
10 not you had misunderstood?

11 A. I'm not really certain on what you're trying to
12 ask me.

13 Q. Let me put it in as simple terms as I can:
14 There was no question that the 911 call says two people
15 have been shot?

16 A. Uh-huh.

17 Q. We're in agreement about that. Is there any
18 dispute that Jason Payne made that phone call?

19 A. No, sir.

20 Q. So right out front, he's saying two people are
21 shot. Is it your position that once y'all got to the
22 scene, he's trying to make like there wasn't two people
23 shot?

24 A. No, sir.

25 Q. Then what was the importance of the statement

1 that everyone is accounted for?

2 A. I felt like it was something that needed to be
3 stated. It's what Jason said.

4 Q. That's what Miller said Jason said. You didn't
5 hear any of that?

6 A. That's correct.

7 Q. Let's go into the utility room for a moment,
8 Captain. Do you recall correctly it was Deputy Burge
9 that found the clothes in the washer and the drier?

10 A. I believe that's correct, yes, sir.

11 Q. Did you personally ever go in and check the
12 conditions of those clothes or are you relying on what
13 Burge told you about the condition of the clothes?

14 A. Relying on what Burge told me.

15 Q. Would it be fair to say that it probably
16 be -- Burge's testimony would be the better recollection
17 of what the situation was there?

18 A. Probably so.

19 Q. Now, you indicated in your testimony earlier
20 that these clothes were freshly washed and dried. You
21 can't tell this jury when those clothes were washed, can
22 you?

23 A. No, sir.

24 Q. Do you know what a fluff cycle is?

25 A. A cycle that makes clothes fluffy.

1 Q. Would it surprise you to learn that some driers
2 have a fluff cycle that allows the machine to
3 periodically cut back on tumbling the clothes in the
4 drier and stop a while, and then if the clothes aren't
5 removed, it will --

6 MR. WHEELER: Objection to facts not in
7 evidence. If they want to put --

8 THE COURT: I'll sustain as to that.

9 Q. (BY MR. PARKS) Did you check whether or not
10 that drier had a fluff cycle?

11 A. I don't recall that, no, sir.

12 Q. Do you think it might be important if you're
13 going to come and imply to a jury that there was a fresh
14 load of clothes dried to check that out?

15 A. I -- I don't know exactly how to answer that.
16 You're asking --

17 Q. Well --

18 A. I -- I don't even know what a fluff cycle is,
19 so...

20 Q. -- let me ask it to you this way, Captain:
21 What importance did you place on the information that
22 there were warm clothes in the drier?

23 A. My inference to that was the time line, the
24 amount of time.

25 Q. Important, right --

1 A. Yes.

2 Q. -- important in setting a time line?

3 So in order to set that time line, wouldn't
4 it be important to know whether or not those clothes
5 could have been kept warm for hours or not?

6 A. I suppose so.

7 Q. Would it be important to know what the cycle
8 was, how long it took to do a load of wash, put it in
9 the drier, and dry it?

10 A. Probably so, yes, sir.

11 Q. Did y'all check that?

12 A. No, sir.

13 Q. You sent the clothes that were in there off for
14 testing?

15 A. Some of the clothing, yes, sir.

16 Q. I'm going to assume it's kind of the theory
17 that maybe Jason Payne put those clothes in the washer
18 and drier to get rid of blood. Is that going to be the
19 assertion?

20 A. Yes, sir.

21 Q. You sent that off for testing?

22 A. Yes, sir.

23 Q. Any blood found?

24 A. Not that I recall, sir.

25 Q. And you sent it off for testing knowing it had

1 been washed and dried?

2 A. Yes, sir.

3 Q. You know blood can be recovered even though
4 clothes have been washed and dried?

5 A. That's my understanding.

6 Q. But none was found in this case, right?

7 A. That's correct.

8 Q. Speaking of things that were not found, y'all
9 tested Jason Payne for gunshot residue, didn't you?

10 A. Yes, sir.

11 Q. Find any?

12 A. No, sir.

13 Q. You tested Austin Wages for gunshot residue,
14 didn't you?

15 A. Yes, sir.

16 Q. Find some?

17 A. Yes, sir.

18 Q. Indication that he had fired a weapon?

19 A. Or been in the presence of a weapon.

20 Q. Nearby when one was shot?

21 A. Yes, sir.

22 Q. And the results, at least, would indicate it
23 was not true of Jason Payne?

24 A. Or that he had washed his hands.

25 Q. Well, we can always think of some reason?

1 A. Absolutely.

2 MR. PARKS: Your Honor, may we approach?

3 THE COURT: Yes, sir.

4 (Bench.)

5 THE COURT: You are going into some area
6 that --

7 MR. PARKS: Yeah, I need a little time to
8 do my thoughts. We may --

9 THE COURT: That will be fine.

10 (Open court.)

11 THE COURT: Ladies and gentlemen, we're
12 going to go ahead and take our bunch break at this time.
13 Ask you the follow the same instructions you did
14 yesterday and be back in the jury room at 1:00 and we'll
15 proceed then at that time. Please go with the bailiff.

16 (Jury exits courtroom.)

17 THE COURT: Let the record reflect that the
18 jury has left the courtroom. We'll be in recess until
19 1:00.

20 (Recess taken from 11:56 a.m. to 1:00 p.m.)

21 THE COURT: Back on the record in Cause
22 20,529-2008, State vs. Jason Tad Payne. Let the record
23 reflect that counsel for the State, counsel for the
24 Defendant, and the Defendant is present. The jury is
25 not present.

1 Mr. Parks, you were doing
2 cross-examination?

3 MR. PARKS: Yes, sir.

4 MR. WHITLEY: Let me advise the Court the
5 State has the medical examiner here and we have the
6 insurance agent here for two days and we have the lady
7 from SWIFS. I've asked the Defense if we could take
8 them out of order and they have so agreed.

9 THE COURT: Very well. We'll reserve
10 further cross-examination.

11 MR. WHITLEY: I anticipate the medical
12 records and the insurance guy second and the GSR lady
13 would be third. They all should be relatively short
14 witnesses. And if I could ask the Court to let the jury
15 know they are being taken out of order or whatever the
16 Court wants to do, I'd appreciate it.

17 THE COURT: Very well. I will do that.
18 Let's bring them in.

19 (Jury enters courtroom.)

20 THE COURT: Let the record reflect that the
21 jury has returned.

22 Ladies and gentlemen, let me just make a
23 couple of comments just because sometimes if the Court
24 doesn't do this, people start speculating on what's
25 happening, and that can lead to some very erroneous

1 conclusions.

2 When we retired for lunch, the Defense was
3 conducting cross-examination, but the State has three
4 witnesses that probably aren't going to be that lengthy.
5 Nevertheless, they're from out of town and they have
6 other duties to attend to. They've ask the Defense and
7 the Defense has been courteous enough to agree to take
8 them out of order, so that's what we're doing. And it's
9 just something that's not uncommon, but that's what
10 we're going do at this point.

11 So the State may call its next witness.

12 MR. WHITLEY: State would call Dr. Keith
13 Pennington.

14 THE COURT: And you might want to keep the
15 microphone close. Sometimes you tend to drop your voice
16 a little bit, Mr. Whitley.

17 MR. WHITLEY: Yes, sir.

18 THE COURT: Were these witnesses sworn?

19 MR. WHITLEY: They need to be sworn.

20 (Witness enters courtroom.)

21 THE COURT: Dr. Pennington, let me ask you
22 to come around, and when you get there, I need for you
23 to raise your right hand.

24 (Witness sworn.)

25 THE WITNESS: Please have a seat.

1 J. KEITH PINCKARD, M.D.,

2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WHITLEY:

5 Q. Would you identify yourself for the court and
6 jury?

7 A. I'm Dr. Keith Pinckard.

8 Q. What is your occupation or profession?

9 A. I am the medical examiner at the Southwestern
10 Institute of Forensic Sciences in Dallas.

11 Q. And if you would, please, sir, tell the jury
12 your education and experience that qualifies you to hold
13 that position?

14 A. After college, I attended medical school and
15 obtained my M.D. degree. I then did a four-year
16 residency in pathology and a one-year fellowship in the
17 subspecialty of forensic pathology and I'm specialized
18 in pathology.

19 Q. Does what is commonly referred to as SIFS to
20 perform autopsies as requested by law enforcement
21 agencies?

22 A. Yes.

23 Q. All right. And in the case of Nichole Payne
24 and Austin Taylor Wages, did you perform autopsies on
25 those two individuals?

1 A. I performed an autopsy on the body of Nichole
2 Payne and supervised and participated in the autopsy of
3 Austin Taylor Wages.

4 Q. And as such, you are familiar with both
5 autopsies and the results of both autopsies?

6 A. Yes, sir.

7 Q. Let's talk about Nichole Payne first. Do you
8 need your report?

9 A. I've got it.

10 Q. Okay. I believe you're familiar with the date
11 of death which was December 11, 2007?

12 A. Yes.

13 Q. And on what date, did you perform an autopsy?

14 A. The next day.

15 Q. And if you would, give the jury an idea of what
16 is involved in an autopsy?

17 A. An autopsy is an examination of the body of a
18 deceased person. It consists of two parts: An external
19 exam and an internal exam. The external exam is the
20 outer surface of the body, basically the skin. The
21 internal exam is when the body cavities and the head are
22 opened, the internal organs are removed and examined.
23 And both of these examinations are to discover the
24 presence of and/or injury, ultimately with the goal of
25 determining the manner of death.

1 Q. And would you describe the body as presented to
2 you, Nichole Payne?

3 A. The body was received wearing clothing. The
4 body was also accompanied by a couple of sheets,
5 pillows, a black blanket, comforter, and both the
6 clothes and associated items had blood on them.

7 Q. In the course of your external examination,
8 what did you observe?

9 A. There was a gunshot wound of the head.

10 Q. Okay. Anything else of significance that you
11 observed in the external examination?

12 A. That was the major finding.

13 Q. Okay. What about internal examination?

14 A. The internal exam was significant for obviously
15 the injuries associated with the gunshot wound to the
16 head and that was limited to the head structure of the
17 skull, destruction of brain tissue, and bleeding.

18 Q. If you would, Doctor, I've pointed out what I
19 commonly refer to around our office as "Edgar." And
20 would this assist you in describing to the jury if you
21 were able use this anatomical body here?

22 A. Sure.

23 Q. If you would, sir, just please step down and
24 demonstrate on the mannequin here the nature of the
25 wound to the head that Nichole Payne suffered.

1 A. The gunshot wound entrance wound is right on
2 the back of the head, right where you feel -- on the
3 back of your head, there's a little bump right here, and
4 it was right in that region, right about here
5 [indicating].

6 Q. And were you able to determine an exit wound?

7 A. Not as such. The wound was consistent with
8 being that of a high-powered rifle, which means that in
9 combination with that and the close or contact range of
10 the wound, there was multiple lacerations causing a
11 gaping hole in the head. That's fairly -- of exit
12 wounds like that, you don't have a discreet exit wound.
13 It came out right here. It simply forces everything
14 open. [Indicating].

15 Q. Let me turn this around for the jury to see,
16 and come on around and point out where they can observe
17 where the entrance wound was?

18 A. Right here [indicating].

19 Q. And the whole top of the head was blown out?

20 A. Right. And actually, the entire head was sort
21 of open like this. And, in fact, that one large wound
22 was continuous with the entrance wound, so it wasn't
23 until I actually went like this with the flaps that that
24 the hole associated with the entrance wound became
25 apparent, so it's all connected as one wound on the top

1 of the head. [Indicating].

2 Q. Let me show you what's been marked as State's
3 Exhibit 84, 85, 86, 87, and ask if you recognize those
4 exhibits?

5 A. Yes.

6 Q. Do those exhibits accurately portray what they
7 purport -- what they represent on the 12th day of
8 December of 2007?

9 A. Yes.

10 MR. PARKS: Your Honor, we would object to
11 each of those photos on the provisions of Rule 403 --

12 (Bench.)

13 THE COURT: And you are tendering those, I
14 take it?

15 (State's Exhibits 84 through and including
16 87, offered.)

17 MR. WHITLEY: Yes, sir, we are offering
18 those exhibits.

19 THE COURT: You want to come on up,
20 Mr. Parks?

21 MR. PARKS: More specifically, Judge, it's
22 our position there is no real controversy as a cause and
23 matter of death as to Nichole Payne, and those photos
24 have no evidentiary benefit other than to inflame the
25 jury, so the prejudicial effect far outweighs any

1 probative value they might have in addition to what the
2 doctor very clearly testified to.

3 MR. WHITLEY: The wound inflicted, there's
4 oral testimony -- my understanding of the rule is if
5 oral testimony is admissible, limited numbers of
6 photographs are admissible to show the jury so the jury
7 can comprehend what the wound was.

8 THE COURT: Well, taking into consideration
9 Rule 403, I am going to go ahead overrule the objection
10 and admit State's Exhibits 84, 85, 86, and 87.

11 (State's Exhibits 84 through and including
12 87, admitted.)

13 MR. WHITLEY: The Court did admit those
14 exhibits, Judge?

15 THE COURT: Yes, I did.

16 (Open court.)

17 (BY MR. WHEELER)

18 Q. Let me show you what has been admitted as
19 State's Exhibit 84 and ask you to describe to the jury
20 what is portrayed in that photograph. You may show to
21 the jury the photograph as you're describing it.

22 A. This is a photograph of the descendant's head.
23 In addition to showing the identity of the descendant,
24 the primary feature of this photo is where one can see
25 the extent of the gunshot wound, specifically on the top

1 of the head where the scalp and the cranium have been
2 lacerated and fractured and the top of the head is
3 essentially open.

4 MR. WHEELER: May have publish this to the
5 jury, please?

6 THE COURT: Yes, sir.

7 (Exhibits published to jury.)

8 Q. (BY MR. WHITLEY) Next, show you 85, 86 and 87
9 and ask if you would, in order of sequence, describe to
10 the jury the photo in the proper number of the exhibit.

11 A. Actually, let me take them in reserve order of
12 their number.

13 Q. That would be fine.

14 A. 87 shows an external photograph of the back of
15 the head where, if you look through the laceration, you
16 can actually see a round hole in the bone that's
17 underneath the scalp showing where the bullet entered
18 into the head. And progressing onto 86 and 85, 85 is
19 just a more close up view of 86, looking into the head
20 after I've removed the brain where you can see basically
21 numerous fractures of the base of the skull. It's
22 supposed to be one solid piece and it's fractured into
23 several. And approximately, in the center of the
24 photograph right by the right rectangular sticker, you
25 can see the hole that entered into the head as well but

1 at this time from the inside of the head rather than the
2 outside.

3 Q. I realize these are pretty graphic, but I'm
4 going to do a little slide show.

5 (Showing exhibits to jury.)

6 Q. (BY MR. WHITLEY) Doctor, did you make any
7 findings that you were able to reach, any type of
8 conclusion as to how far away from the head was the gun
9 that imparted those injuries?

10 A. Yes. It's not always possible to determine
11 accurately; however, in this case, within the track of
12 the wound -- in other words, where that circular
13 fracture where the bone was, where the bullet went
14 in -- I identified several particles of gunpowder, and
15 that gives me the opinion that the gun was very close to
16 the back of the head at the time it was fired.

17 Q. Doctor, let me show you what has been admitted
18 into evidence as State's Exhibit 14, 15, 16, 17, 18, and
19 19. Looking I believe here --

20 A. Okay.

21 Q. -- do those photographs -- in your opinion, are
22 those photographs and the position of the body
23 consistent with your findings in the autopsy report?

24 A. Well --

25 Q. Let me rephrase that: Do those photographs

1 indicate that the gun was fired at a close range while
2 she was still in the bed there?

3 A. In other words, are you asking is it possible
4 that she sustained that gunshot wound while in that
5 position?

6 Q. Yes.

7 A. Yes, that's possible.

8 Q. Now, let's move to the 16-year-old boy who you
9 have identified as Austin Taylor Wages and you've also
10 identified the day of death as December 11, 2007. Did
11 you perform an autopsy on that body?

12 A. No.

13 Q. Who did?

14 A. Dr. Leon Kelly.

15 Q. And who is Dr. Leon Kelly?

16 A. As I mentioned when you asked about my
17 education and training, the last thing I said was in the
18 final year of training to become a forensic pathologist
19 or medical examiner, we do a one-year fellowship
20 training program as the final step in that.

21 At the place where I work now, we maintain
22 one of those programs, and at the time, Dr. Kelly was
23 undergoing his year of subspecialty training. While I
24 was performing autopsy on the previous case, he was
25 performing the autopsy on this case under my

1 supervision.

2 Q. So you were on the next table to his
3 supervising his work; is that correct?

4 A. Yes.

5 Q. Did you make any observations as to the
6 external portion of the autopsy?

7 A. Yes. There was a gunshot wound to the head in
8 this case as well.

9 Q. Okay. And were you able to determine an entry
10 point of the projectile?

11 A. Yes. On the upper lip.

12 Q. And were you able to obtain an exit wound?

13 A. Yes. That was on the back of the head toward
14 the right side.

15 Q. If you would, let's again step down to the
16 mannequin, and if you would, demonstrate for the jury
17 here -- let's see; yeah, there we go -- the point of
18 entry?

19 A. It was about right here on the upper lip
20 [indicating].

21 Q. And what about the exit wound?

22 A. Back here [indicating].

23 Q. Again, I'm going to turn the mannequin again
24 and let you point that out for the jury.

25 A. About right here [indicating].

1 Q. So you got the left upper left lip with an exit
2 wound approximately here [indicating]?

3 A. Yes.

4 Q. What was the general path of the bullet --

5 A. We describe path as --

6 Q. -- or trajectory?

7 A. We describe that in three dimensions, and when
8 I say, "these directions," that means relative to the
9 decedents's only body. So in this case, the path was
10 front to back, so the decedent's front to his back
11 upward and slightly left to right [indicating].

12 Q. I believe, according to your report, you noted
13 powder particles identified with cranium -- wait a
14 minute. Wrong one.

15 You noted in your report that there was
16 stippling on soot and skin; is that correct?

17 A. Yes, stippling on the skin around the entrance
18 wound.

19 Q. That would have been on the face?

20 A. Yes.

21 Q. What does that indicate to you?

22 A. It, again, gives an idea of range, so when a
23 gun is fired, more things than just the bullet come out
24 of it and those include particles of burnt and unburnt
25 gunpowder, and when those particles of gunpowder strike

1 the skin, they cause pinpoint abrasions which is the
2 stippling we're talking about. Again, it varies with
3 the type of gun and ammunition used, but in general, the
4 presence of stippling on the skin indicates the gun is
5 anywhere from a few inches to a few feet away from the
6 body when it's fired.

7 Q. Now, you did not conduct any type of test to
8 determine the actual distance the gun was away from
9 Austin Taylor Wages' face?

10 A. No, I don't do that.

11 Q. Okay. Did you take any measurements of arms
12 length and other body parts?

13 A. Yes, I did.

14 Q. And what were the measurements that you found
15 on his right arm?

16 A. Okay. From the right armpit to the tip of the
17 right thumb measured, like this, was 23 and
18 one-and-a-half inches and from the right armpit to the
19 tip of the right middle finger, like this, measured
20 26 inches [indicating].

21 Q. And did you do the same with the left arm?

22 A. Yes.

23 Q. And what were those measurements?

24 A. That same set of measures; 23-and-one-quarter
25 inches and 25-and-three-quarter inches respectively.

1 Q. Were you able to determine a cause of death?

2 A. Yes.

3 Q. And what was your opinion?

4 A. The cause of death was due to a gunshot wound
5 to the head.

6 Q. And did you have a cause of death for Nichole
7 Payne?

8 A. Yes, a gunshot to the head.

9 Q. Let me show you what has been marked for
10 identification as State's Exhibits 88, 89, 90, 91, and
11 92. Ask if you can identify those exhibits?

12 A. Yes.

13 Q. And do they accurately portray what they
14 purport to represent on or about December 11, 2007?

15 A. Yes.

16 Q. We offer State's Exhibit 88, 89, 90, 91, and
17 92.

18 (State's Exhibits 88 through and including
19 92, offered.)

20 MR. PARKS: No objection.

21 THE COURT: All right. Those exhibits are
22 admitted.

23 (State's Exhibits 88 through and including
24 92, admitted.)

25 Q. (BY MR. WHITLEY) And again, Dr. Pinckard, if

1 you would --

2 MR. WHITLEY: May I publish these to the
3 jury, Judge?

4 THE COURT: Yes.

5 (Exhibits published to jury.)

6 Q. (BY MR. WHITLEY) Take those in any order that
7 you prefer and explain to the jury what is shown in
8 those photographs and point out to the jury what you're
9 describing.

10 A. Actually 90 and 91 are duplicates. The others
11 I can sufficiently describe.

12 MR. KING: I'm sorry, I could not hear you.

13 THE COURT: If you would --

14 THE WITNESS: I said Exhibits 90 and 91 are
15 duplicate photographs and I can adequately describe with
16 these [indicating].

17 MR. PARKS: Your Honor, we can choose one
18 of those so there's not any confusion.

19 MR. WHITLEY: I'm sorry?

20 MR. PARKS: You want to choose one of those
21 two duplicates?

22 MR. WHEELER: We'll just withdraw these.

23 THE COURT: Let me just check those
24 numbers. That's Nos. 90 and 91 are withdrawn.

25 (State's Exhibits 90 and 91 are withdrawn.)

1 THE WITNESS: I will start with 89: Again,
2 this is essentially the same type of photo in the last
3 case. It shows the decedent's head, and the most
4 noticeable part of this photo is the entrance wound
5 defect in the upper lip and it's very obvious to see
6 scattered over the face are the multiple pinpoint
7 abrasions I was talking about caused by the particles
8 coming out of the gun.

9 Q. (BY MR. WHITLEY) And if you would, just point
10 that out on the --

11 A. So the wound being right here and then the
12 abrasions scattered all over the face, and actually
13 around the wound, you can see a very thin layer of soot,
14 which, again, is another indicating of range. You can
15 generally see soot up to a foot away. After that, you
16 don't tend to see it anymore.

17 And then the next picture, No. 88, is
18 simply a close up view of that entrance wound again,
19 right here on the upper lip. And then No. 92, that is
20 the exit wound on the back of the head on the right
21 side, and the funny shape of this wound is very typical
22 of exit wounds. They don't tend to be nice and round
23 like entrances, they tend to have this branching shape
24 [indicating].

25 Q. Thank you, Doctor. Now, on either of these two

1 that you preformed the autopsies on, describe their
2 relative health as you would conclude from the results
3 of your autopsy.

4 A. Aside from the gunshot wound in both cases,
5 there were no other significant abnormalities that were
6 found. In other words, no evidence of other injuries or
7 naturally disease of any kind.

8 Q. As a part of autopsy procedure, is a test done
9 for alcohol, drugs, et cetera?

10 A. Yes.

11 Q. And with regard to Nichole Payne, what was the
12 result of those tests?

13 A. From the blood that was collected from the body
14 at the time of autopsy, we detected four medications;
15 tramadol and citalopram which are both used mostly by
16 psychiatrists; antidepressants, relaxants.

17 Q. Describe?

18 A. They are prescription medications. Also found
19 was diphenhydramine, commonly known as Benadryl, and
20 norepinephrine which is a pain medication. Again, all
21 four of them are prescription drugs and none in
22 concentrations that would be considered to be toxic.

23 Q. What about alcohol or isotones?

24 A. They were not detected.

25 Q. And with regard to Austin Taylor Wages, was a

1 drug screen performed on him?

2 A. Yes.

3 Q. What was the result of that drug scene
4 toxicology?

5 A. In blood collected in his body in autopsy, we
6 did not detect of any drugs at all.

7 Q. No alcohol or isotones?

8 A. No.

9 Q. No marijuana?

10 A. No.

11 Q. Drug screen --

12 A. Negative.

13 Q. -- alcohol negative?

14 With regard to the subdural hematoma or
15 hemorrhage, can you explain that as being the result of
16 the gunshot wound or can you say some other form, some
17 other cause?

18 A. Which case are we talking about?

19 Q. On Austin Taylor Wages, I'm sorry, the
20 subdural --

21 A. The -- I'm sorry, which injury, could you
22 describe again, please?

23 Q. I'm looking at the subdural hemorrhage which I
24 think you mentioned at one time called a subdural
25 hematoma.

1 A. A subdural hemorrhage is bleeding on the
2 surface of the brain which would be associated with the
3 gunshot wound.

4 Q. You don't comply that that was from some other
5 external cause, do you?

6 A. No, it all fits with being related to the
7 gunshot wound.

8 Q. And let me direct your attention to State's
9 Exhibit 89. I'm particularly interested in what those
10 marks are that are visible underneath the chin?

11 A. Could you show me?

12 (Indicating.)

13 THE WITNESS: Well, those look -- they're
14 stippling marks that are the same that are on the rest
15 of the face.

16 Q. (BY MR. WHITLEY) Okay. Are the terms "soot"
17 and "stippling" interchangeable?

18 A. No.

19 Q. Explain to us the difference, if you would.

20 A. Soot is one of the items that comes out the
21 barrel of a gun. It's like smoke or -- in other words,
22 if you have a candle and put something under it, black
23 stuff gets deposited.

24 As I mentioned, soot can be visible on the
25 surface of the body up to a foot away. Stippling is

1 caused by abrasions striking the skin surface and break
2 the skin. And, again, depending on the gun and the type
3 of ammunition used, stippling is generally shown between
4 a few inches away and a few feet away, so it's
5 indicating range, but they mean different things.

6 Q. So I believe soot, then, you would expect to
7 find if the gun is within one foot?

8 A. Yes.

9 Q. What you've identified here is stippling?

10 A. It's actually both soot and stippling.

11 Q. Underneath the chin?

12 A. Underneath the chin is stipple marks.

13 Q. Not soot marks?

14 A. No.

15 Q. You indicated that the drug screen on Nichole
16 Payne indicated that there was a pain medication,
17 Benadryl, depression medication, and another variety of
18 pain medication?

19 A. There was norepinephrine, citalopram,
20 diphenhydramine, and tramadol.

21 Q. Right. If you would, tell us what those are
22 again.

23 A. Okay. Norepinephrine is a prescription pain
24 medication, citalopram is an antidepressant,
25 diphenhydramine is Benadryl and an antihistamine, and

1 tramadol is, I think, a muscle relaxant type of drug.

2 Q. How would those affect a person's alertness?

3 A. It's difficult to say exactly how certain drugs
4 will affect a certain person. In general, the
5 citalopram would not have expected to have much of an
6 effect. However, the other three can have a central
7 nervous system depressing effect or a sedative type of
8 effect.

9 Q. Would you expect them to make the person drowsy
10 or sleepy?

11 A. Possibly, but, again, in a specific person, it
12 would be difficult to say exactly what the effects might
13 have been.

14 MR. WHITLEY: Judge, I pass the witness.

15 THE COURT: Mr. Parks.

16 CROSS-EXAMINATION

17 BY MR. PARKS:

18 Q. Doctor, I have just a few questions for you:

19 It would be fair to say, would it not, that
20 the effects of the gunshot wound to each of the two
21 persons involved were pretty radically different?

22 A. I'm sorry, I didn't hear you.

23 Q. Yeah, let me break it down more: Let's talk
24 about Nichole first.

25 A. Okay.

1 Q. That was a wound that was either a contact or
2 very near contact wound?

3 A. Yes.

4 Q. That means the muzzle was very, very near to or
5 not touching the skin when it was fired; is that
6 correct?

7 A. Yes.

8 Q. So that -- would the effect -- not only the
9 bullet but the gases and other things that were
10 expelled, would that be an explanation for why the wound
11 to her head was more explosive, if you will, than the
12 wound to Austin's head?

13 A. Yes.

14 Q. Is it in any way consistent with having been
15 shot with the same weapon?

16 A. No, it is not inconsistent.

17 Q. That was a trick question, Doctor. So what
18 you're saying to the jury is that, certainly, both of
19 those two persons could have been killed with the same
20 weapon regardless of how the wound presented?

21 A. They could have, yes.

22 Q. You have no reason -- no way of knowing whether
23 they were or not?

24 A. From my examination, no.

25 Q. Were you able to recover a projectile from

1 either of the victims?

2 A. No.

3 Q. Were you ever contacted by Lieutenant Miles
4 Tucker or anyone from the Wood County Sheriff's Office
5 inquiring why these wounds presented differently?

6 A. I don't recall. I don't think so.

7 Q. Okay. With respect to Nichole Payne, Doctor,
8 you've told the jury that both she and Austin, the cause
9 of death was a gunshot wound to the head?

10 A. Yes.

11 Q. In Nichole's case, can you tell the jury what
12 the manner of death was?

13 A. In Nichole Payne, the manner of death is
14 homicide.

15 Q. Would you explain to the members of the jury
16 what manner of death means?

17 A. The manner of death is not necessarily what
18 caused the death but how the cause came about, so in
19 Texas, there's five choices: Natural, like cancer or a
20 heart attack; accident, like a car accident or falling
21 off a building; suicide, taking one's own life;
22 homicide, death by the hands of another; and
23 undetermined, as a result that can't be determined.

24 Q. And did you have a manner of death for Austin?

25 A. Yes.

1 Q. What was that?

2 A. Undetermined.

3 Q. Now, in reaching determining a manner of death,
4 medical examiners such as yourself consider history
5 that, given to you, that bear out that determination; is
6 that fair to say?

7 A. Well, actually, I'll extend that.

8 Q. Sure.

9 A. In fact, the cause of death is pretty much
10 obtained from the autopsy. That's the gunshot to the
11 head part, but the manner of death is actually far more
12 dependant on history and circumstances to determine. In
13 other words, if you show me a gunshot wound, okay, it's
14 a gunshot wound, but I don't know how it got there. Did
15 somebody shoot the person or did they shoot themselves?
16 Now, again, the history and the circumstances are what
17 go more to determining the manner.

18 Q. And would it be fair to say, Doctor, that
19 sometimes this is an ongoing determination, that while
20 you might not be able to determine the manner of death
21 at autopsy, it might come to light -- different facts
22 may come to light later that would cause you to be able
23 to make a determination?

24 A. Yes. In fact, we essentially stated that, not
25 in those exact words, but in the autopsy itself.

1 Q. That there was an ongoing investigation and it
2 was subject to being changed based upon --

3 A. Well -- and that would be the case in any case
4 that we ever do. If new information or data becomes
5 available, then we certainly reassess it at that time to
6 change our determination.

7 Q. So far as your records show, Doctor, did you
8 ever receive any additional information from the Wood
9 County Sheriff's Office that would bear on Austin's
10 manner of death?

11 A. Not -- no.

12 Q. If they had shared with you a report from their
13 own expert who reconstructed the scene and determined
14 that Austin died as a result of suicide, could that or
15 would that have changed the finding on the manner of
16 death for you?

17 A. Not as you've stated it. If I can put it in
18 other words that would be -- in other words, the issue
19 here of why I called this undetermined is because of the
20 nature of the wound and estimated range of fire. And so
21 the question is: With the wound being of intermediate
22 range, would it be possible for Austin to position the
23 gun and fire it himself? What that exact range would be
24 would depend on test firing to determine, to produce the
25 pattern of stippling that's the size depicted in the

1 photo.

2 So if I were to have that information and
3 it was impossible, using the measurements of the body,
4 to be as far away as that, well then, I could exclude
5 that it was a suicide and I would be able to call it a
6 homicide, as a example.

7 Q. Or a suicide?

8 A. Well, that would be a little more different
9 because if he could have done that, then it could have
10 been either way.

11 Q. Exactly. But we can determine some things just
12 based, for instance, on the path of the bullet?

13 A. Correct.

14 Q. For instance, one thing we do know is that the
15 bullet path was from under to up, so that if he were
16 standing at the time he was shot, the muzzle of the gun
17 would have had to have been lower than his head at the
18 time the shot was fired?

19 A. Not necessarily. In other words, if the
20 gunshot wound is here, the gun would have been tilted
21 this way, as long as it can connect the dots
22 [indicating].

23 Q. Between the --

24 A. Right.

25 Q. But it certainly wasn't straight up?

1 A. Correct. Again, I want to be careful about how
2 we use the words here. I can only describe the
3 trajectory relative between the muzzle of the gun and
4 the head. So as long as they line up, those two can be
5 anywhere in space as long as they line up with each
6 other.

7 Q. If I understand you correctly, the main -- the
8 reason you cannot determine a manner of death is because
9 of being unable to determine the distance from the
10 muzzle of the gun when it was fired to the face?

11 A. Yes. I can determine the -- I can determine
12 the distance in a very general sense, but, again,
13 because it depends on the gun and ammunition, because I
14 cannot rule out suicide based on that general
15 estimation, I was left calling it undetermined.

16 Q. Because you couldn't rule suicide out?

17 A. Because I could not rule it out.

18 Q. Okay. Fair enough.

19 MR. PARKS: Just moment, Your Honor. I
20 think I've --

21 (Pause in the proceedings.)

22 Q. (BY MR. PARKS) You indicated that the bodies
23 were accompanied by bedclothes?

24 A. The body of Nichole was accompanied by some
25 bedclothes, yes. And actually, both bodies were

1 accompanied by some bedding.

2 Q. Were the bodies dressed when they were
3 received?

4 A. Yes, they were.

5 Q. The bedclothes, was that all bagged?

6 A. We would have bagged them up, yes, for release.

7 Q. How did they come to you?

8 A. Oh, in the case of Austin Taylor Wages, the
9 bedding was accompanying the body just around the body.
10 And then the body of Nichole, they were in plastic bags.

11 Q. Okay. One last thing and I'll leave it alone:
12 The absence of soot would be an indicator that the
13 muzzle was further away rather than nearer?

14 A. Not exactly.

15 Q. I know that soot is lighter than the material
16 that causes stippling?

17 A. I would imagine so, but --

18 Q. It doesn't go as far?

19 A. Yes, it doesn't go as far.

20 Q. So if there is no soot, that does not
21 necessarily tell you that the gunshot wound was out
22 passed a foot, but if there is soot, it's a strong
23 indicator that the muzzle was within at least a foot at
24 the target at the time the shot was fired and, perhaps,
25 closer?

1 A. If I could may be reworded that way.

2 Q. All right.

3 A. The presence of soot indicates, again in
4 general terms, depending on the gun and ammunition. In
5 general, that the gun was probably not more than a foot
6 away. However, on the converse, if there's no soot,
7 that could mean one of two things; one, the gun is
8 farther away from that so the soot can't reach the body,
9 or, two, the gun is so close to the body, that
10 everything goes inside the wound.

11 Q. Nichole would be an example?

12 A. Yes, it would.

13 Q. But with Austin, we did find soot?

14 A. Yes.

15 MR. PARKS: Okay. That's all.

16 REDIRECT EXAMINATION

17 BY MR. WHITLEY:

18 Q. Did I understand you to say that you did find
19 soot on Austin? I thought we determined a minute ago
20 that there was no soot?

21 A. No, I pointed that out on the photo. There is
22 a very thin layer of soot right around the hole that the
23 bullet went into the lip. This black stuff here
24 [indicating].

25 Q. Okay. So that would, you say, probably within

1 a foot --

2 MR. KING: Excuse me, could you identify
3 that photograph?

4 THE COURT: The number of that photograph.

5 MR. WHITLEY: 88.

6 Q. (BY MR. WHITLEY) But you found no soot on the
7 underside of the chin; is that correct?

8 A. Yes, that's correct.

9 Q. Now, the amount of soot, can that be
10 determined?

11 A. Well, that's just a relative description. In
12 other words, it's not like you can make any kind of
13 measurement of how big or how much there is to make any
14 sort of estimation.

15 Q. Okay. And would it be fair to say the closer
16 the muzzle of the gun, the darker the soot because more
17 of it would be deposited?

18 A. Well, not necessarily because as you get -- as
19 you start from far away, you see nothing. As you get
20 closer and closer, you'll start to see some, but once
21 you get to a certain point even closer, the soot starts
22 going inside so you see less, so it will disappear
23 again.

24 Q. Was there any soot on the interior of the wound
25 on Austin Taylor Wages?

1 (Witness exits witness stand.)

2 THE COURT: Ladies and gentlemen, I think
3 given the time, let's go ahead and take your afternoon
4 break. Please be available in the jury room at 10
5 minutes after 2:00. Please go with the bailiff at this
6 time.

7 (Jury exits courtroom.)

8 THE COURT: We'll be in recess until 2:10.

9 (Recess taken from 1:59 to 2:10.)

10 THE COURT: Back on the record, then, in
11 20,529-2008, State vs. Payne. Let the record reflect
12 counsel for the State, counsel for the Defendant, and
13 the Defendant is present. Jury is not present.

14 Mr. Whitley, you are ready to proceed?

15 MR. WHITLEY: Ready, Judge.

16 THE COURT: And is the Defendant ready to
17 proceed?

18 MR. PARKS: Yes, Your Honor.

19 THE COURT: Bring them on in.

20 (Jury enters courtroom.)

21 THE COURT: Let the record reflect that the
22 jury has returned to the courtroom.

23 Mr. Whitley, you may call your next
24 witness.

25 MR. WHITLEY: Call Vickie Hall.

1 THE COURT: Ms. Hall, if you'll come on
2 around and raise your right hand.

3 (Witness sworn.)

4 THE COURT: Please have a seat.

5 VICKI HALL,

6 having been first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WHITLEY:

9 Q. Would you tell us your name, please?

10 A. My name is Vickie Hall.

11 Q. Ms. Hall, how are you employed?

12 A. I'm an employed as a trace evidence examiner at
13 the Southwestern Institute of Forensic Sciences, also
14 known as SIFS, in Dallas.

15 Q. Okay. Tell us what your education and training
16 is that qualifies you to hold that position.

17 A. I have a Bachelor's of Science Degree in
18 chemistry and a Master's Degree in chemistry. I have
19 attended numerous seminars. I'm a member of the
20 Institute of Forensic Sciences and I have been accepted
21 as an expert witness in eight states, Puerto Rico, the
22 Virgin Islands, and U.S. Military Court Marshals, and
23 I've been at SIFS for 19 years.

24 Q. And exactly what does a trace evidence examiner
25 do?

1 A. As a trace evidence examiner, I process
2 evidence as submitted by your Dallas County Medical
3 Examiners Office or any local police agencies. In the
4 trace evidence unit, we deal with evidence that pertains
5 to gunshot wound, residue analysis, fire debris
6 examinations, hair, fiber, glass, oftentimes paint or
7 fracture matches. I specifically deal with fire debris
8 and gunshot residue analysis.

9 Q. There has been testimony before the Court and
10 the jury that you performed a -- or a representative of
11 SIFS performed a GSR examination on Nichole Payne and on
12 Austin Taylor Wages; is that correct?

13 A. That is correct.

14 Q. Were you that person?

15 A. I am.

16 Q. All right. With regard to the GSR kit on
17 Nichole Payne, tell us what the results were.

18 A. On the samples on the hands of Nichole
19 Payne -- I mean, first of all, I look for particles that
20 contain three elements; antimony, barium, and lead. In
21 order to have gunshot residue to be present, I have to
22 find a particle that contains those elements.

23 On the hands of Nichole Payne, I did not
24 find particles that contained all three elements. I did
25 find two particles on the left hand that had a

1 composition of barium and aluminum, which is consistent
2 with gunshot residue, but it's not unique or
3 characteristic of GSR.

4 Q. Can you offer any explanation how those
5 chemicals were on her hands if they were not otherwise
6 been for gunshot residue?

7 A. Barium and aluminum are combinations that are
8 found in the environment of other sources besides
9 gunshot residue. They are consistent with gunshot
10 residue, but other sources can be -- like, pyrotechnics
11 or fireworks. Sometimes you might find it in even soil
12 compositions.

13 Q. You wouldn't think around December 11, 2007,
14 anybody would be shooting fireworks, would you?

15 A. It's not very common, no.

16 Q. Okay. Can you tell the jury how a person
17 accumulates GSR residue?

18 A. GSR residue or GSR particles can be deposited on
19 discharging a firearm or handling a firearm or from a
20 firearm component that has been recently fired so that
21 its particles have built on the surface of the firearm,
22 or is close to the firearm; maybe is close to the
23 discharged firearm, maybe they're just in close
24 proximity, maybe inside a vehicle, a small room, maybe
25 they're struggling for the gun or reaching for the gun

1 where they've just -- their hands are close to the gun
2 when it's discharged.

3 Q. Now, where did you find the particles you just
4 described?

5 A. The particles that I did find were on the back
6 of the left hand.

7 Q. Let me direct your attention to State's Exhibit
8 No. 18. You see what appears to be a left hand exposed
9 on the body of Nichole Payne; is that correct?

10 A. That is correct. I see both hands and the
11 backs are facing outward.

12 Q. Okay. So it would be consistent if she is a
13 victim of a gunshot wound at a very close range, it
14 would be consistent if you found gunshot wound residue
15 as it's exposed?

16 A. It's not common for gunshot victims to have
17 residue. They're in the environment of a discharging
18 firearm. They've been shot. In these particular
19 photographs, it does show that the hands are not
20 underneath any covers or covered in any manner.

21 Q. Now, with regard to the GSR kit that you
22 examined on Austin Taylor Wages, would you tell us the
23 results of that examination?

24 A. On the back of the right hand of Austin Taylor
25 Wages, I did find one particle that was characteristic

1 of gunshot residue; meaning it had all three elements
2 that I mentioned before. I also find another particle
3 that was similar to Nichole Payne, that it had the
4 barium-aluminum combination, but there was one
5 characteristic particle on the back of the right hand.

6 Q. And again, how does that one come in contact
7 with GSR residue?

8 A. Once again, the possibilities are that the
9 person was around a discharging firearm, handled a
10 firearm or firearm component, or fired that weapon
11 themselves.

12 Q. So you would expect to find gunshot wound on a
13 gunshot victim?

14 A. It not be uncommon, no.

15 Q. Now, with regard to -- I believe you also
16 examined a gunshot residue kit from hand wipings from
17 Jason Tad Payne?

18 A. That is correct.

19 Q. Tell us the result of that.

20 A. On these samples that were collected from Jason
21 Payne, they were different from the samples collected
22 from Nichole Payne and Austin Taylor Wages. These
23 samples were swabs, and instead of looking for
24 individual particles, I'm looking for the concentration
25 of the individual elements. It's a different collection

1 and a different examination, but I'm still looking for
2 antimony, barium, and lead. I'm just measuring the
3 concentration of the individual elements. And on the
4 samples of Jason Tad Payne, I did not find any elevated
5 levels of antimony, barium, or lead on the samples
6 collected.

7 Q. Now, how do you explain absence of gunshot
8 residue on a person?

9 A. The absence of gunshot residue could be that
10 they didn't fire a firearm or they've wiped or washed
11 their hands prior to the samples being taken, either
12 purposefully washing their hands, other incident wiping
13 of the residue; putting your hands in your pockets,
14 changing your clothes, running your fingers through your
15 hair. So the more active a person is, the better chance
16 they are -- there is of removing some if not all of the
17 residue. The other possibility is that the gun involved
18 is not a good depositor of gunshot residue and it's very
19 ammunition and weapon dependent.

20 Q. You mentioned washing or wiping the hands after
21 discharging the weapon. The person could be wearing
22 gloves?

23 A. That's possible such as wearing gloves.

24 Q. Now, if by his own omission, he fired a .30-30
25 rifle in the following days and the following evening,

1 you would expect that the lack of GSR would be as a
2 result washing or wiping, would you not?

3 MR. PARKS: Judge, I think this is a
4 mistake. That's not the testimony that would be
5 previous not following --

6 MR. WHITLEY: I couldn't hear his
7 objection, Judge.

8 THE COURT: I think you've just misstated
9 the -- you are referring to testimony as to firing a gun
10 the day before; is that correct?

11 MR. WHITLEY: That's what he testified to.

12 THE COURT: Yes, sir, that's what he said,
13 the following day. At any rate --

14 Q. (BY MR. WHITLEY) The day before -- I'm sorry.
15 If the person fired the day before, you would expect to
16 see gunshot residue?

17 A. That's correct. If the person has stated they
18 fired a firearm but no residue is detected, it could
19 just be that, once again, either they've wiped or washed
20 their hands intentionally or just through incident
21 contact or that the weapon involved wasn't one that left
22 high amounts of residue. In a long rifle such as a
23 rifle, it's not usually a good depositor on a shooter's
24 hands.

25 MR. WHITLEY: I'll pass the witness.

1 THE COURT: Yes, sir.

2 CROSS-EXAMINATION

3 BY MR. PARKS:

4 Q. Hello, Ms. Hall.

5 A. Hi there.

6 Q. We've seen each other before, not in Wood
7 County?

8 A. That is correct.

9 Q. You found one particle on the back of Austin's
10 hands?

11 A. That is correct.

12 Q. That contained the three elements that --

13 A. That's correct, it was a particle that
14 contained all three elements I'm looking for.

15 Q. Is this a particle that you have to look for
16 over a microscope?

17 A. I have to look for it under a scanning electron
18 microscope. It's an extremely small particle. On the
19 order of anywhere between 50 to 80 of these particles
20 side by side, they would be the width of a single human
21 hair.

22 MR. PARKS: Thank you, Ma'am. Have a good
23 trip back. Thank you.

24 MR. WHITLEY: May this witness be excused,
25 Judge?

1 MR. PARKS: No objection.

2 THE COURT: Thank you, Ma'am. You're
3 excused.

4 THE WITNESS: Thank you.

5 (Witness exits courtroom.)

6 MR. WHEELER: Your Honor, the State calls
7 Stephen McCombs.

8 THE COURT: Has he been sworn in?

9 MR. WHEELER: We'll need him sworn in.

10 THE COURT: Mr. McCombs, if you'll come
11 around please, sir, and raise your right hand.

12 (Witness sworn.)

13 THE COURT: Please have a seat.

14 STEVEN WAYNE McCOMBS,
15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. WHEELER:

18 Q. Good afternoon.

19 A. Good afternoon.

20 Q. State your name.

21 A. Steven Wayne McCombs.

22 Q. How are you are employed?

23 A. State Farm Insurance.

24 Q. How long have you been with State Farm
25 Insurance?

1 A. Since 1992.

2 Q. Where are your offices located?

3 A. Lufkin.

4 Q. What kind of training and experience do you
5 have in providing health insurance and life insurance
6 products?

7 A. Well, I'm licensed through the state and the
8 standard training that I assume every other insurance
9 company would give their agents.

10 Q. Are you familiar with the life insurance policy
11 that was purchased by Jason and Nichole Payne?

12 A. Yes.

13 Q. How did you come to know Jason and Nichole
14 Payne?

15 A. Through Nichole's parents.

16 Q. Where did you first meet these two?

17 A. You know, I don't really remember. I may have
18 met Nichole. I'm sure I was insuring her through auto
19 when she was still with her parents.

20 MR. PARKS: We're going to object to
21 relevance. As I understand, this is an expert witness
22 come to testify about a life insurance policy that was
23 purchased.

24 THE COURT: Do you want to --

25 MR. PARKS: It's not relevant how or when

1 or whether he ever met any of them.

2 MR. WHEELER: We haven't tendered him as an
3 expert. He's a fact witness that needs to get back to
4 Lufkin and we're taking him out of order.

5 MR. PARKS: Okay.

6 THE COURT: Very well.

7 Q. (BY MR. WHEELER) Anyway, you first met them
8 when?

9 A. Some time prior to June of '07, I would say,
10 maybe a month prior to that.

11 Q. When did they or approximately when did they
12 first approach you about life insurance?

13 A. We wrote their auto insurance and their home
14 insurance approximately a month or two, say, in April
15 of '07, April to May.

16 Q. So in April or May of 2007, they approached you
17 about buying a life insurance policy?

18 A. They came into the office to purchase the auto
19 insurance/home insurance. I can't say that they say
20 approached us. We probably did because we do that with
21 everyone. My staff is trained to ask them about life
22 insurance.

23 Q. And so your office, pursuant to its standard
24 operating procedure, asked them about life insurance?

25 A. Right.

1 Q. Did they make application for life insurance?

2 A. They were very interested at that point in
3 time. This was in, I'm going to say, May, but due to
4 some financial things they were doing at the time, they
5 said they wanted to wait, you know, a few weeks.

6 MR. PARKS: Your Honor, we're going to
7 object to any testimony about what they had in mind,
8 about what motive --

9 THE COURT: I'll sustain.

10 MR. WHEELER: The State's response on the
11 record is it's an admission of a party opponent,
12 anything he said in regard to this. It's not
13 custodial --

14 THE COURT: Well, we're talking about
15 things he thought in his brain, and I'm going to sustain
16 the objection.

17 Q. (BY MR. WHEELER) What did Mr. Payne, Jason Tad
18 Payne say to you with regard to the purchase of this
19 life insurance policy, as best you recall?

20 A. At the time that we completed the
21 application --

22 Q. Yes.

23 A. -- which was in June?

24 Q. Yes.

25 A. We completed the application. I asked him the

1 questions that go with the application. I don't
2 remember anything other than just maybe some small talk.

3 Q. Have you had an opportunity to review your
4 file?

5 A. Yes.

6 MR. WHEELER: May I approach the witness,
7 Your Honor?

8 THE COURT: Yes.

9 Q. (BY MR. WHEELER) I'm going to hand you what's
10 been marked as State's Exhibit 71 and admitted. This is
11 an application of a life insurance policy that was filed
12 with you?

13 A. Yes, it is.

14 Q. And here on Page 6 of 6, whose signature is
15 that?

16 A. That's Jason's signature.

17 Q. The Jason Tad Payne that signed this
18 application, is in the courtroom today?

19 A. Yes, he is.

20 Q. Could you point to him and identify him by an
21 article of clothing he's wearing?

22 A. Black jacket [indicating].

23 Q. Could you describe his shirt and tie?

24 A. Okay. Red shirt, red tie.

25 MR. WHEELER: May the record reflect that

1 the witness has identified the Defendant?

2 THE COURT: That request is granted.

3 Q. (BY MR. WHEELER) Now, with regard to this life
4 insurance policy, how much life insurance did he apply
5 for?

6 A. \$250,000.

7 Q. Was that on himself?

8 A. Yes.

9 Q. Who else did he apply for life insurance on?

10 A. Nichole.

11 Q. Anybody else?

12 A. The children.

13 Q. And by "the children," you mean Taylor Wages?

14 A. Yes.

15 Q. And Remington Payne?

16 A. Correct.

17 Q. And Jackson Payne?

18 A. Right.

19 Q. Were these applications all made at the same
20 time?

21 A. Yes.

22 Q. And that's pursuant with your contact with
23 them; would you like life insurance?

24 A. Correct.

25 Q. In with regard to this life insurance, what

1 does a person have to go through after they make
2 application? What do they have to do?

3 A. For that amount of insurance, they have to pass
4 a physical as well as they will be contacted by a
5 company which will ask them some medical questions.

6 Q. With regard to the children, were there any
7 medical conditions that were identified?

8 A. I do not recall any.

9 Q. With regard to Nichole Payne, were there any
10 medical conditions that were identified, according to
11 your records?

12 A. Yes.

13 Q. What was identified with regard to Nichole
14 Payne?

15 A. Well, those -- that information is not
16 necessarily shared with me, the agent. I believe that
17 it was responding to depression.

18 Q. And with regard to Jason Tad Payne, what
19 problems were there?

20 A. Meaning, medical problem?

21 Q. Yes.

22 A. None.

23 Q. What type of life insurance policy were Jason
24 and Nichole Payne talking to you about? Was it whole
25 life?

1 A. No, sir.

2 Q. Okay. What was it, then?

3 A. It was term.

4 Q. What was the term? What was the length of
5 policy?

6 A. 30 years.

7 Q. So they sought 30-year policies. After having
8 the physicals done and that information coming to you,
9 what did you do next?

10 A. Well, I contacted them to make them aware that
11 the policy did not come back issued as we had requested.

12 Q. For the jury, what does that mean?

13 A. Well, that means the premium that we quoted,
14 which is to say Nichole --

15 Q. Yes.

16 A. -- for Nichole was quite a bit more expensive
17 than what we had quoted simply because of the medical
18 condition.

19 Q. And what about the premium for Jason?

20 A. Jason's had come back considerably higher as
21 well.

22 Q. Why?

23 A. Due to tobacco rating.

24 Q. Did you arrange a meeting at your office at the
25 time to explain how the policies came back to you?

1 A. I do not recall us meeting at the office. We
2 did speak on the phone.

3 Q. And did you discuss what you had found with
4 Jason Tad Payne?

5 A. Yes.

6 Q. What did you explain to him?

7 A. I explained to him that the premium was higher,
8 that we could do the same thing we can do for Nichole,
9 but we can reduce the amount of coverage and keep the
10 premium basically the same as we quoted.

11 Q. After you explained this to Jason Payne, what
12 did he choose to do?

13 A. He chose to do what we call a not-taken. He
14 decided to decline the insurance.

15 Q. On whom?

16 A. On himself.

17 Q. In regard to himself, what did he decide to do?

18 A. The policy was accepted at \$100,000.

19 Q. In regard with the children, what did he decide
20 do?

21 A. The children's term rider was included on
22 Nichole's policy and they accepted that.

23 Q. And that included all three children?

24 A. Correct, there were -- there were four.

25 Q. Oh, so they included also for Danny?

1 A. Yes.

2 Q. Okay. Who was the primary beneficiary on
3 Nichole's policy?

4 A. Jason.

5 Q. Who was the secondary?

6 A. Jason's mom I believe, Jewel Payne.

7 Q. Fay Payne --

8 A. I think --

9 Q. -- is that correct?

10 A. I think that may be her middle name is Fay as
11 we have it listed.

12 Q. And this policy was ultimately taken out when?

13 A. The policy was -- the application date was June
14 the 26th, I believe.

15 Q. Of what year?

16 A. '07.

17 Q. Did Jason Payne try to collect that policy, the
18 proceeds of that policy after the deaths of his wife and
19 stepson?

20 A. No.

21 MR. WHEELER: Pass the witness.

22 CROSS-EXAMINATION

23 BY MR. PARKS:

24 Q. I'm sorry, is it Mr. McCombs?

25 A. Yes, sir.

1 Q. Mr. McCombs, do I understand that the original
2 request was for Jason and Nichole, \$250,000? Is that
3 what the original --

4 A. Correct.

5 Q. How much would the rider be for each of the
6 children?

7 A. \$10,000.

8 Q. And was it accepted at \$10,000?

9 A. Yes.

10 Q. Okay. So ultimately, what happened is there
11 was \$100,000 on Nichole and \$10,000 for the children?

12 A. That is correct.

13 Q. Okay. Now, do you remember what you quoted for
14 the \$250,000 term life for Jason?

15 A. I think I have it right here, if you would like
16 for me to look --

17 Q. Sure.

18 A. -- which is a copy of the same application.

19 Q. Yeah.

20 A. Annual premium of \$455.

21 Q. And what did it come back at?

22 A. I'm sorry, I really don't recall that
23 information. I do not --

24 Q. But it was higher --

25 A. It was higher.

1 Q. -- we know that?

2 A. Yes.

3 Q. I mean, was it?

4 A. I would say, generally, a tobacco rating is
5 going to increase it by 15 percent. If you will allow
6 me --

7 Q. Okay. On Nichole, a quarter of a million, what
8 did you quote on her?

9 A. The premium? \$351 annually.

10 Q. 351 a year. And you probably don't know, but
11 I'm going to ask: Do you recall what it came back at?

12 A. I really don't recall, but it would have been
13 somewhat similar to that as far as an increase,
14 somewhere around 15 percent.

15 Q. 15, 20 percent, something like that?

16 A. Right.

17 Q. Okay. So instead of paying the higher
18 premiums, they opted to reduce Nichole's to \$100,000?

19 A. That is correct.

20 Q. And then Jason decided just not to take his?

21 A. That is correct.

22 MR. PARKS: Okay. Thank you, sir. That's
23 all I have, Judge.

24 REDIRECT EXAMINATION

25 BY MR. WHEELER:

1 Q. Now, your home office was contacted by Jason
2 Tad Payne to give a recorded statement about this event,
3 wasn't it?

4 A. Yes.

5 Q. And he refused to give that recorded statement
6 about this event, didn't he?

7 A. Yes, he never did that.

8 Q. And that's why he hasn't collected on the
9 policy?

10 A. That's right.

11 MR. WHEELER: Pass the witness.

12 RECROSS-EXAMINATION

13 BY MR. PARKS:

14 Q. Were there claims on that policy, Mr. McCombs?

15 A. What do you mean?

16 Q. Well, did somebody ask for the money?

17 A. No. When I became aware of the situation, I
18 went ahead and filed the claim as we would normally do.

19 Q. Enter plead the money over into federal court?

20 A. What? I'm talking about State Farm.

21 Q. What?

22 A. I turned the claim in just like I do with
23 anyone else when I become aware of a death to State
24 Farm.

25 Q. Have you followed up at all to see whether or

1 not anyone has made a claim to State Farm for that
2 money?

3 A. I know -- I'm not sure what your question is.
4 You are referencing --

5 Q. All right. There was \$100,000 policy on
6 Nichole?

7 A. Uh-huh.

8 Q. Nichole is no longer alive. I would assume
9 that State Farm insurance owes somebody \$100,000. They
10 don't get to keep the money, do they?

11 A. No.

12 Q. So there's \$100,000 out there somewhere. Has
13 anybody gone to State Farm and said, I claim that on
14 behalf of me or the children or anybody? Do we know
15 where that \$100,000 is?

16 A. The money, according to State Farm, has been
17 turned over to the court system to let them decide.

18 Q. Tendered into court. So the jury will know,
19 that's where State Farm basically says we owe \$100,000
20 to somebody, but we're not going to make a decision who?

21 A. That's correct.

22 Q. We're going to put it in the court and it can
23 be decided by and by who this money belongs to?

24 A. True.

25 Q. So far as you know, who has gone to federal

1 court and asked or made a claim that it ought to come to
2 them?

3 A. I don't know of anyone who went to federal
4 court. I do know that Nichole's parents had filled out
5 a request or sent in a letter to prevent or to request
6 for them not to make that payment until they've looked
7 at it a little closer, maybe.

8 Q. That would be done in the natural course of
9 things, wouldn't it? As far as you know, are they
10 claiming that money themselves?

11 A. I don't know. No, sir, not as far as I know.
12 I don't know how they could claim the money.

13 MR. PARKS: That's all the questions I
14 have.

15 REDIRECT EXAMINATION

16 BY MR. WHEELER:

17 Q. It's actually \$110,000 because Taylor's policy
18 is an additional \$10,000; is that correct?

19 A. That is correct.

20 Q. And on this \$110,000 that was collectable four
21 months after the policy was taken out, the -- hang on
22 just a second.

23 Jason Tad Payne told you that he was
24 choosing not to take the policy out on himself for
25 financial reasons?

1 A. The reason that he did not take it was because
2 of the premium. Is that correct, if that's what you're
3 asking, the higher premium?

4 Q. Indicating to you that the money was an issue
5 with him?

6 A. Yes.

7 MR. WHEELER: Pass the witness.

8 RECROSS-EXAMINATION

9 BY MR. PARKS:

10 Q. Well, Mr. McCombs, in your line of work, do you
11 find it unusual at all that people might be concerned
12 about how much their insurance is going to cost them?

13 A. Not at all.

14 MR. PARKS: Okay. Thank you, sir. That's
15 all I have.

16 THE COURT: May this witness finally be
17 excused?

18 MR. WHEELER: Yes, please, Your Honor.

19 THE COURT: Thank you, sir. You're
20 excused. You're free to go.

21 THE WITNESS: Thank you.

22 (Witness exits courtroom.)

23 THE COURT: Are we ready to go back to
24 Officer Tucker?

25 MR. PARKS: Yeah.

1 THE COURT: If you'll ask him to come in.

2 (Witness enters courtroom.)

3 THE COURT: Come on over and have a seat,
4 and, of course, you remain oath.

5 Mr. Parks, whenever you're ready, you may
6 proceed.

7 MR. PARKS: Thank you, Your Honor.

8 OFFICER MILES TUCKER,
9 having been first duly sworn, testified as follows:

10 FURTHER CROSS-EXAMINATION

11 BY MR. PARKS:

12 Q. Captain Tucker, I'm trying to put in my mind
13 where we were. Let's go back to the scene. At least
14 we'll start back there for a few minutes, and I'll try
15 to wrap this up before too long.

16 You indicated that one of the first things
17 that struck you as odd was the difference between the
18 wound that you saw on Nichole and the wound that you saw
19 on Austin. Am I right about that?

20 A. (Moving head up and down.)

21 Q. And it's led you to believe that, perhaps,
22 those weren't made by the same weapon?

23 A. No, sir, that's -- I don't believe that's -- I
24 don't believe that's how I worded anything.

25 Q. Okay.

1 A. If you can point that out.

2 Q. Did you not testify that you thought the wound
3 to Taylor was odd?

4 A. Yes, I did.

5 Q. Did you not testify that you had concerns that
6 he and Nichole were not killed with the same weapon?

7 A. I said I did not know.

8 Q. You did not know?

9 A. Yes, sir.

10 Q. Did you think that it's possible, then, they
11 would have been killed by different weapons?

12 A. It was possible.

13 Q. Based on the wounds or what?

14 A. No, sir. I said I had no way of knowing.

15 Q. Well, was there any scintilla of evidence that
16 you had available to you that would lead you to that
17 conclusion?

18 A. That?

19 Q. That there were two different weapons?

20 A. No, sir.

21 Q. Yet, you still thought it was odd. I'm trying
22 to understand that, Captain. I don't understand your
23 thinking there.

24 A. I believe I narrated the fact that I believed
25 that Taylor's wound was odd.

1 Q. Yeah.

2 A. Yes, sir.

3 Q. And -- okay. Odd because you had never seen a
4 suicide that was not a contact wound?

5 A. Yes, sir.

6 Q. But not odd that it was different from
7 Nichole's wound?

8 A. That's correct.

9 Q. In fact, I believe you said, if I understood
10 you correct -- if I didn't, please correct me -- that
11 one of the issues you had with Noel Martin is because he
12 had said that it was a suicide, that he had seen it
13 many, many times and that that did not comport with your
14 experience, so you didn't believe what he had to say, in
15 effect?

16 A. No, sir, that's correct.

17 Q. That's not what you told this jury?

18 A. No, sir.

19 Q. Did you not tell the jury that you were upset
20 with Noel's findings because he said he had seen it
21 many, many times? Did I misunderstand that?

22 A. I said that Noel's explanation was difficult
23 because he had seen it many, many times.

24 Q. Well, was that at the meeting that you and the
25 district attorney and he had or was that at some other

1 time?

2 A. That's at the meeting we had.

3 Q. So he had said to you, this was a suicide,
4 Austin Taylor Wages killed himself?

5 A. Yes.

6 Q. And you said, why do you say that, or words
7 that effect?

8 A. Somebody did, I'm sure.

9 Q. And he said, because I've seen it many, many
10 times?

11 A. Yes, sir.

12 Q. Did no one follow up on that and say, well,
13 explain that to us, how is it that you brought all of
14 this equipment and stuff out there, break it down for
15 us, or did y'all just become upset with him and --

16 A. No, sir. I -- I was -- I asked a couple of
17 different times to explain and that's the explanation I
18 got, that it was a suicide.

19 Q. And Mr. Martin or Deputy Martin wouldn't go
20 into any detail with you to explain why he came to that
21 conclusion?

22 A. At that time, I don't recall him giving any
23 more detail than that, that he had seen it many, many
24 times.

25 Q. Do you have any reason to doubt that he had

1 seen it many, many times?

2 A. No, sir.

3 Q. Because he's very experienced at what he does,
4 isn't he?

5 A. Yes, sir, he is, very experienced.

6 Q. Seen many, many, many more scenes of this kind
7 than you have?

8 A. Yes, sir.

9 Q. In fact, he used work at the Wood County
10 Sheriff's Office, did he not?

11 A. Yes, he did.

12 Q. Was he at one point in time your training
13 officer?

14 A. I don't recall Noel ever being my training
15 officer, but he did used to work at the Wood County
16 Sheriff's Office. No argument about his qualifications.

17 Q. Did he work at the same time you did?

18 A. He did.

19 Q. At this meeting you described to us with you
20 and Deputy Martin and the District Attorney's Office,
21 about how long did that last?

22 A. Not long. I don't know how long exactly, but
23 not more than probably an hour.

24 Q. That would have been you, Deputy Martin, and
25 Mr. Wheeler, or someone else from the District

1 Attorney's Office?

2 A. There were representatives from the District
3 Attorney's Office there. I don't recall who all was
4 there.

5 Q. Okay. Was it here in the D.A.'s office where
6 the meeting was held?

7 A. In the jury room.

8 Q. Okay. At that point in time, did any of you,
9 any one of you say -- well, let me back up and say it a
10 little better: It's my understanding of your testimony
11 that at that point in time, Deputy Martin had not
12 represented anyone with a written report?

13 A. That's my understanding, yes, sir.

14 Q. Did any of you at that meeting say, Noel
15 Martin, we have got to have what you did, how you
16 reached your conclusions and opinions written down so we
17 can see them and review them? Did anybody say that?

18 A. Noel advised that he would be getting us a
19 report at that time.

20 Q. Did he advise it or did someone ask him for it?

21 A. I don't recall how the subject matter came up,
22 but he did say he would be getting us a report done.

23 Q. And ultimately, he did?

24 A. Yes, sir.

25 Q. Do you recall about how many pages are in that

1 report?

2 A. I don't recall.

3 Q. I believe you testified to the jury that you
4 were skeptical of Noel Martin's opinions in the matter
5 because you yourself had never seen a wound like this in
6 a suicide?

7 A. I don't recall if I said that or put it that
8 way. I was -- I would have preferred more of an
9 explanation and I felt like that our victim deserved
10 something more than just that.

11 Q. Noel wasn't telling you what you wanted to hear
12 and you wanted to hear more about that; is that fair to
13 say?

14 MR. WHEELER: I'm going to object that
15 that's argumentative. He didn't tell you what you
16 wanted to hear, so...

17 MR. PARKS: Let me rephrase.

18 THE COURT: I'll sustain.

19 Q. (BY MR. PARKS) What he was telling you did not
20 comport to what you had already determined to be the
21 facts?

22 A. I'm not sure I understand that question. I
23 just want to make sure I completely understand what
24 you're asking me, I apologize.

25 Q. You didn't believe Noel Martin was right

1 because it didn't comport with your experience?

2 A. That -- that's not true.

3 Q. It's not true?

4 A. No.

5 Q. Okay. So if I'm understanding what you're
6 saying, Captain, is Noel Martin may very well be right?

7 A. I didn't know at that time if Noel Martin was
8 right or not. I felt like it deserved a second look. I
9 knew that I didn't -- I didn't have the experience to
10 make that determination.

11 Q. Would it be fair to say that I guess at that
12 point you didn't trust Noel Martin's judgment enough
13 just to rely on it and you wanted to hear from somebody
14 else?

15 MR. WHEELER: Objection. That's needless
16 accumulative and repetitious, is the objection.

17 THE COURT: Overruled.

18 THE WITNESS: Would you repeat the
19 question, please?

20 Q. (BY MR. PARKS) Did I understand you correctly
21 that you didn't trust Deputy Martin's judgment in the
22 matter enough to accept his opinion and you wanted
23 another opinion?

24 A. I don't think I would -- no, I don't think I
25 would say that.

1 Q. Okay. Well, you didn't accept his judgment.

2 You went looking for another opinion, didn't you?

3 A. I sought -- I sought another opinion, yes, I
4 did.

5 Q. I want to get clear in my mind when you started
6 shopping other experts. Was it before or after the
7 meeting in the District Attorney's office?

8 MR. WHEELER: I'm going to object to
9 sidebar. The word "shopping" is pejorative.

10 THE COURT: Overruled.

11 THE WITNESS: I believe it was after.

12 Q. (BY MR. PARKS) After. And someone referred
13 Tom Bevel to you?

14 A. Yes.

15 Q. And were you referred to Tom Bevel before
16 Richard Ernest?

17 A. I believe that's correct, yes, sir.

18 Q. And Mr. Bevel is from Oklahoma; is that right?

19 A. Yes, sir.

20 Q. Do you remember about when you contacted
21 Mr. Bevel?

22 A. I don't remember the exact date, no, sir.

23 Q. Do you know whether or not Tom Bevel is a
24 forensic scientist?

25 A. I knew he was a forensic specialist and he had

1 been referred as someone that could look at the case and
2 give an opinion on the case.

3 Q. Did he ask you to send him any -- I mean, he
4 certainly was not here on the scene on the date that
5 this happened like Noel Martin was? We're talking about
6 months later, aren't we?

7 A. Yes, sir.

8 Q. So the bodies aren't even gone, but -- what
9 happened to the scene? Was it turned back over to
10 Mr. Payne?

11 A. The scene was released, yes, sir.

12 Q. Okay. So I guess Mr. Payne had been living in
13 the house for a while by that time?

14 A. That's possible, yes, sir.

15 Q. Do you know whether or not Mr. Bevel ever went
16 to the scene?

17 A. To my knowledge, he did.

18 MR. WHEELER: I'm going to object. No
19 personal knowledge, speculation about how Mr. Bevel
20 conducted his investigation. I object on speculation.
21 Mr. Bevel is available if he wants him to be called.

22 THE COURT: If he --- he was asked if he
23 knows. He can answer whether he knows or not.
24 Overruled.

25 Q. (BY MR. PARKS) So as far as you know, he went

1 to the scene; that is correct?

2 A. That's correct.

3 Q. Did he ask you to send him any information that
4 he could use to try and render an opinion in the matter?

5 A. Yes, sir.

6 Q. Did you share with Mr. Bevel your theories and
7 opinions about the case when -- at any time prior to his
8 rendering his opinion and writing his report?

9 A. I don't recall doing any of that, no, sir.

10 Q. Do you deny doing it or you just don't recall?

11 A. I do not believe I shared any opinion. I sent
12 him the reports.

13 Q. Well, the case reports would have included some
14 of your opinions, would it not?

15 A. It's case reports. It would have included what
16 I wrote in the case reports.

17 Q. The things that you found odd?

18 A. Yes, sir.

19 Q. Now, in a scientific scene reconstruction, is
20 it your understanding that the expert is supposed to
21 take a scientific approach, deal with the evidence
22 before him or her, and render an opinion based solely
23 and only on that evidence without regard to outcome?

24 MR. WHEELER: Objection. That's a question
25 for an expert. He's not being qualified as an expert.

1 THE COURT: I'll sustain it.

2 MR. PARKS: All right.

3 Q. (BY MR. PARKS) I want to touch on one thing,
4 the affidavit, before we move on. You wrote the
5 affidavit yourself; is that right?

6 A. Yes, sir.

7 Q. Now, with respect to that, do you do your own
8 typing or do you dictate that?

9 A. I do my own typing.

10 Q. Okay. And I believe in your testimony earlier,
11 you alluded to a conversation that you had with Ranger
12 Vance regarding the rifle and fingerprints. Do you
13 recall that?

14 A. Yes, sir.

15 Q. Now, you submitted the rifle to the DPS lab for
16 fingerprint analysis, DNA analysis, and fiber analysis.
17 We talked about that, correct?

18 A. Yes, sir.

19 Q. And in the affidavit -- and just so the jury
20 will know the difference between the affidavit and a
21 report, you made written reports about this. That's
22 standard operating procedure for any police department
23 is to do a lot of paperwork, quite frankly, in your
24 reporting, right?

25 A. Yes, sir.

1 Q. And those reports can contain pretty much
2 whatever you want to put in on it, what your
3 observations were, what your thought process was, what
4 you intended to do, what had been done, things like
5 that, but an affidavit is actually a sworn document that
6 is basically the same as testimony when you come into
7 court. You swear that your affidavit is true; is that
8 not so?

9 A. Yes, sir.

10 Q. And you did that in this case?

11 A. Yes, sir.

12 Q. Now, in your affidavit, you told the
13 magistrate -- and let's just make sure the jury
14 understands how this process works: As a police officer
15 or a police department or a deputy sheriff or a
16 sheriff's department, you don't have the authority to
17 issue a warrant for a citizen's arrest without a judge
18 or a magistrate issuing that warrant; is that right?

19 A. I'm sorry, one more time.

20 Q. Unless you see somebody breaking the law in
21 your own presence, as a practical matter, you have to go
22 to a magistrate to get a warrant to arrest somebody?

23 A. In most cases, yes, sir.

24 Q. And that's what the affidavit is for, it's to
25 show the magistrate what probable cause you have to

1 arrest a citizen, that there's some evidence that would
2 indicate that an offense was committed?

3 A. Yes, sir.

4 Q. So that's what you do, you make this affidavit
5 and take it to a judge, and you're telling the judge,
6 what I'm saying to you in here is true and correct; is
7 that right?

8 A. Yes, sir. To the best of my knowledge, yes,
9 sir.

10 Q. Best of your knowledge. Now, you indicate that
11 you spoke to Ranger John Vance about the rifle and said
12 in this affidavit that Ranger Vance told you that the
13 lab technician told him that there were no fingerprints
14 or smudges on the rifle; is that right?

15 A. Yes.

16 Q. And that the lab technician told him it would
17 be impossible for a gun to have no prints unless the
18 weapon was wiped down?

19 A. That's what I was told, yes, sir.

20 Q. Is it your testimony here today that that's
21 what Ranger John Vance told you?

22 A. Yes.

23 Q. Have you had an opportunity to review any of
24 Ranger Vance's reports?

25 A. No, sir.

1 Q. Do you have any reason to believe he would tell
2 you something different from what he's written in his
3 own reports?

4 A. No, sir.

5 Q. In this affidavit, you told the judge you were
6 presenting it to, that this rifle had been wiped down to
7 remove any fingerprints and you used that as probable
8 cause along with these other things that we've talked
9 about to get the warrant. Were you relying upon what
10 you say John Vance told you the lab technician told him
11 to make those statements?

12 A. I was.

13 Q. If that were wrong, if that is not what the lab
14 technician told John Vance, would that be an intentional
15 error on your part or a mistake?

16 MR. WHEELER: Objection. I've let it go
17 this far. This is improper impeachment.

18 THE COURT: Well --

19 (Bench.)

20 MR. PARKS: I -- I will go -- get off of
21 that.

22 THE COURT: Very well.

23 (Open court.)

24 Q. (BY MR. PARKS) Before I move on from that
25 subject, Captain, you are standing by what you say in

1 the affidavit as being the truth?

2 A. The truth to the best of my knowledge.

3 Q. As you knew it?

4 A. Yes, sir.

5 Q. And if that is error, it is not an intentional
6 error. Is that what you're saying to us?

7 A. That is correct.

8 Q. I believe you testified, Captain, that in your
9 opinion, or at least you stated in your affidavit and I
10 think you testified to it, that in your opinion, the
11 scene as Austin Wages was found had been staged. Is
12 that still your belief?

13 A. Yes.

14 Q. Do you believe that he was shot where he was
15 found or not?

16 A. I don't know.

17 Q. You don't know?

18 A. No, sir.

19 Q. What evidence of staging do you rely upon in
20 reaching your conclusion that it was staged?

21 A. I don't believe he could have shot himself.

22 Q. So it's got nothing -- well, let me put it this
23 way: Is there any evidence inside that house anywhere
24 that would indicate to you that Austin Wages was shot
25 somewhere else and brought to the place where he was

1 found?

2 A. No.

3 Q. There were no drag marks, no smears, nothing
4 that would indicate that he would have been brought from
5 another location and placed where he was?

6 A. That's correct.

7 Q. Okay. So that if he didn't shoot himself, he
8 would have had to have been shot by someone else right
9 there where he was?

10 A. That's a possibility.

11 Q. Well, is it at all possible that that's not the
12 case? I mean, you say it's possible, but you tell us
13 there's no evidence he was shot somewhere else?

14 A. I just don't know. I don't know where he was
15 shot at. I don't know how else to answer that.

16 Q. Is that because you weren't there?

17 A. No, I was not there.

18 Q. You weren't there, so you don't know where he
19 was shot?

20 A. No, sir, I wasn't there. You asked me if I was
21 there. I was not there.

22 Q. So is it -- you are telling the jury that it's
23 possible he may have been shot somewhere else, but
24 there's just no evidence of that? Is that what you're
25 saying?

1 A. I'm telling the jury that I don't know where he
2 was shot at.

3 Q. Do you believe it is possible for others to
4 make that determination who have a great deal more
5 experience and training than you?

6 A. It's possible.

7 Q. That's why you called Noel Martin in, isn't it?

8 A. Yes, sir.

9 Q. Can you tell this jury whether -- well, let me
10 ask it this way: Is it possible that Austin Taylor
11 Wages committed suicide right where he was found?

12 A. I don't believe so.

13 Q. I didn't ask you what you believe, Captain. Is
14 it possible?

15 A. I don't believe so.

16 MR. WHEELER: I'm going to object to the
17 argumentive --

18 THE COURT: I'm sorry?

19 MR. WHEELER: Objection to the argumentive
20 comments.

21 Q. (BY MR. PARKS) As a matter of fact, Captain,
22 the only reason any of us are here in this courtroom
23 today --

24 MR. WHEELER: Objection; form of the
25 question. Why we're here is not relevant, any tendency

1 to prove or disprove any element of the State's case.

2 THE COURT: Overruled.

3 Q. (BY MR. PARKS) The only reason we are here in
4 this courtroom today is because of your belief that
5 Jason Tad Payne is guilty of this offense, contrary to
6 the evidence?

7 MR. WHEELER: Objection. That assumes
8 facts not in evidence.

9 THE COURT: I'll -- I'll sustain. You need
10 to rephrase that, Counsel.

11 Q. (BY MR. PARKS) You found it odd, did you not,
12 that there was not what you considered to be enough
13 blood at the scene of Austin Wages, where his body was
14 found, that it was odd there not more blood? Did you
15 not state that in your affidavit?

16 A. The positioning, the placement of the blood and
17 more blood, yes.

18 Q. Indicated to you that he had been, what, shot
19 somewhere else?

20 A. No, sir.

21 Q. Where would the -- where would the missing
22 blood be?

23 A. I just found it an odd fact.

24 Q. You found it was odd that there was no blood
25 spatter? That's the correct term, isn't it, Captain,

1 not "splatter" like you put in your report?

2 A. That's fine, sir. Yes.

3 Q. You found it odd that there was no blood
4 spatter on the ceiling or walls, right?

5 A. Yes, sir.

6 Q. What about the blood spatter on the sheets that
7 were hanging on the wall behind the body? Did you see
8 that?

9 A. No, sir.

10 Q. Were there sheets taken from off the wall?

11 A. Yes, sir.

12 Q. Sent to the lab?

13 A. Yes, sir.

14 Q. Did they send back reports saying there was
15 blood on there?

16 A. I don't recall any reports to that.

17 Q. Did you follow up to find out whether there
18 were any?

19 MR. WHEELER: I'm going to object to this
20 line of questioning. They're assuming facts not in
21 evidence. The sheets are not in evidence.

22 THE COURT: Overruled.

23 THE WITNESS: Did I follow up on --

24 Q. (BY MR. PARKS) Yeah, I guess what I'm -- well,
25 no, I'll just -- no comments. Did you follow up to find

1 out what, if anything, the lab found on the sheets
2 behind the body that were hanging on the wall?

3 A. I don't recall if there was lab reports on the
4 sheets or not. I don't remember.

5 Q. So the jury will know, there were sheets
6 hanging there on the wall behind where the body was
7 found?

8 A. Yes, there was.

9 Q. So if there was blood spatter from him, it
10 wouldn't have been on the wall, it would have been on
11 the sheets?

12 A. There could have been some on the sheets and
13 the wall.

14 Q. All right. Captain, after the conference that
15 was had in the District Attorney's Office with Noel
16 Martin and you were not satisfied with his explanation
17 and decided to go forward with the case, despite his
18 findings, did you get authorization to do that?

19 MR. WHEELER: I'm going to object to the
20 form of the question. It assume a fact that there was
21 no evidence of that. He was dissatisfied with the
22 report that was not evidence. He was getting a second
23 opinion, not that he was dissatisfied.

24 Q. (BY MR. PARKS) I'll change it to your word.
25 You were "upset." Didn't you testify you were upset

1 from the question from the District Attorney of Noel
2 Martin's report?

3 A. I was upset that I didn't get an answer other
4 than that he had seen it many, many times.

5 Q. So after that, did you decide on your own to
6 continue to pursue the case or did you get authorization
7 from the Sheriff or any supervisors?

8 A. I don't recall if I discussed it with the
9 Sheriff or not, but it was my decision to go forward
10 with the other testing.

11 Q. We've seen some photographs of some holes in
12 the ground. Did those holes in the ground play a part
13 in your determination that Mr. Payne was guilty of this
14 offense?

15 A. They played a part.

16 Q. Who dug those holes?

17 A. I don't know.

18 Q. When were they dug?

19 A. I don't know.

20 Q. There was a path leading to them?

21 A. Yes, sir.

22 Q. Plain to see?

23 A. Yes, sir.

24 Q. You found it suspicious that these holes,
25 whoever may have dug them, whenever they were dug, were

1 in a grove of trees?

2 A. Yes, sir.

3 Q. This is in Wood County?

4 A. Yes, sir.

5 Q. Do you remember near about where those holes
6 were? Did it appear that there may have been an old
7 homesite or something of that kind, bricks and debris of
8 that nature laying in that area?

9 A. I'm sorry, what in that nature?

10 Q. Bricks, things like that, things that might be
11 evidence of an old homesite there?

12 A. I don't recall anything like that, no, sir.

13 Q. Did you look for things like that?

14 A. No, sir.

15 Q. Just concentrated on the holes in the ground?

16 A. Yes, sir.

17 Q. But to you, that's evidence that Mr. Payne is
18 guilty of this offense?

19 A. Sir?

20 Q. To you, that's evidence that Mr. Payne is
21 guilty of this offense?

22 A. No, sir.

23 Q. You just said that, didn't you?

24 A. You asked me if that was part of my
25 consideration. It was, yes, sir.

1 Q. Okay. Did you consider it as evidence of
2 guilt? How did you consider it if it wasn't evidence of
3 guilt?

4 A. I considered it as part of my case, yes, sir.

5 MR. PARKS: I believe I'll pass the witness
6 at this time.

7 MR. WHEELER: No further questions at this
8 time. Subject to recall, Your Honor.

9 THE COURT: Very well. Thank you sir.

10 MR. WHITLEY: You want to break?

11 MR. WHEELER: Well, can I approach, Your
12 Honor?

13 (Bench.)

14 MR. WHEELER: I've got to go to the
15 bathroom.

16 THE COURT: All right. We'll take a break,
17 then.

18 (Open court.)

19 THE COURT: We're going to take a break.
20 Let me ask you to remember your prior instructions and
21 be available in the jury room at 3:30.

22 (Jury exits courtroom.)

23 THE COURT: All right. And let the record
24 reflect the jury has left the courtroom.

25 We'll be in recess, then, until 3:30.

1 (Recess taken at 3:17 to 3:31.)

2 THE COURT: Back on the record State vs.
3 Jason Tad Payne. Let the record reflect that counsel
4 for the State, counsel for the Defendant, and the
5 Defendant is present. The jury is not present.

6 Is the State ready to proceed?

7 MR. WHEELER: State's ready.

8 THE COURT: Bring them back in.

9 (Jury enters courtroom.)

10 THE COURT: Let the record reflect the jury
11 has returned to the courtroom.

12 The State may call its next witness.

13 MR. WHEELER: State calls Todd Chance.

14 (Witness enters courtroom.)

15 THE COURT: If you'll come on over, please,
16 sir, and when you get to the stand -- you've already
17 been sworn?

18 THE WITNESS: Yes, sir.

19 THE COURT: Go ahead and have a seat, and
20 let the record so reflect.

21 TODD CHANCE,
22 having been first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. WHEELER:

25 Q. Good afternoon.

1 A. Good afternoon.

2 Q. Would you please state your name for the jury
3 and the record?

4 A. Todd Chance.

5 Q. What is your occupation?

6 A. I'm employed for Lowe Funeral Home.

7 Q. Do you live here in Wood County?

8 A. Yes, I do.

9 Q. What are your duties and responsibilities with
10 Lowe Funeral Home?

11 A. General funeral directors responsibilities;
12 essentially make removals, performing embalmings,
13 conduct funerals, anything that's associated with the
14 timely taking care of the deceased person; burial,
15 cremations, things of that nature.

16 Q. Were you employed with Lowe Funeral Home on or
17 about December 11, 2007?

18 A. Yes, sir, I was.

19 Q. Did you have the same duties and
20 responsibilities then that you do now?

21 A. Yes, sir, I did.

22 Q. On that date, did you receive a call with
23 regard to two decedents on State Highway 37 in Wood
24 County?

25 A. Yes, sir, I did.

1 Q. When you received that call, what did you do?

2 A. The secretary took the initial information
3 about the location, and myself and coworker, Tom
4 Williams, went with our removal vehicle to the scene.

5 Q. When you went to the scene, what did you do?

6 A. We checked in with the officers that were
7 there. They instructed us when was the appropriate time
8 to make the removal and we proceeded to do so.

9 Q. When you say, "make the removal," first with
10 regard to the female decedent, what did you do?

11 A. Well, Judge Clancy Holmes instructed us to go
12 over there and we took one of our cots from our Suburban
13 we use for removals. We took the cot into the room that
14 she was in and placed the end lower down because she was
15 on the bed. I believe then we placed -- we call them
16 the crash bag, but it was a plastic heavy vinyl
17 container. When we made the removal, we picked her up,
18 placed her in the container, zipped it, closed it, put
19 that whole thing on the cot, covered with the cot cover,
20 and proceeded to the car.

21 Q. When you put Nichole Payne inside this crash
22 bag, was she clothed?

23 A. She was partially clothed, which she had on
24 bedtime clothing.

25 Q. So you put her in there along with the

1 clothing?

2 A. That's correct.

3 Q. Did you place any bedding in there with it?

4 A. Yes.

5 Q. These items that you placed in the bag along
6 with Nichole Payne, what did you do with those?

7 A. They were zipped into the bag along with her
8 and taken to the medical examiner's.

9 Q. Is that what you were instructed to do?

10 A. Yes.

11 Q. By whom?

12 A. By the Justice of Peace Clancy Holmes, and
13 also, there was a Texas Ranger in there at the same
14 time.

15 Q. How many times have you transported bodies
16 along with their accompanying clothing?

17 A. Many.

18 Q. Many?

19 A. Yeah.

20 Q. Can you estimate how many?

21 A. I would say approximately 3 to 500.

22 Q. So you've transported with clothing and bedding
23 on many occasions?

24 A. To the medical examiner's office, yes.

25 Q. In just that way?

1 A. In just that way.

2 Q. In regard to the young man, when you went in,
3 what did you see?

4 A. He was in the bed as well, deceased in, like, a
5 converted type garage area that was used as a bedroom.

6 Q. What did you do?

7 A. We took our other cot, we brought it to the
8 bedside, we placed the disaster pouch on top of it, on
9 top of the cot, removed the remains put and the bedding
10 inside the disaster pouch, and I believe they did raise
11 the garage door for us. It was kind of you -- it could
12 be -- it hadn't been opened in a good while because it
13 had been converted into a room, and then placed the body
14 and the cot, everything inside the Suburban.

15 Q. Anything fall out of the bedding that you
16 noticed?

17 A. Not that I'm aware of, but my focal point would
18 have been the body. Investigation is not my
19 responsibility. The officers were handling that.

20 Q. Okay. You carried that bedding along with the
21 young man in this disaster pouch to your Suburban?

22 A. That's correct.

23 Q. What's the difference between a crash bag and a
24 disaster pouch?

25 A. They're exactly the same thing. Disaster

1 pouchs are essentially -- it's a term we use that's more
2 of a heavy duty type of bag, but essentially, they're
3 the same. A crash bag can also be a lighter weight
4 material, but sometimes we use these heavy duty black
5 bags. They have six to eight handles and they're able
6 to care a normal sized human.

7 Q. Did you know or know of Nichole Payne at the
8 time you arrived at that scene?

9 A. Yes, I knew her.

10 Q. Had you met her personally?

11 A. In a business nature, I had.

12 Q. So you had seen her and talked to her before?

13 A. We had worked with her with her business.

14 Q. What was her business?

15 A. They conducted dove releases mainly at
16 funerals. I suppose weddings is very possible, but
17 certainly at funerals we used them as well.

18 Q. The body that you recovered out of the back
19 bedroom, who was that?

20 A. That was Nichole Payne.

21 Q. Did you recognize her when you saw her?

22 A. Yes.

23 Q. Okay. I'm going to hand you what's been marked
24 as State's 84. Can you identify it?

25 A. Yes, sir.

1 Q. Who is that in the photograph?

2 A. Well, it appears to be Nichole.

3 Q. Okay. That was the decedent that you removed
4 from State Highway 37?

5 A. That's correct.

6 Q. Okay. When you arrived, did you transport the
7 two, Nichole and her son, together to the Southwestern
8 Institute of Forensic Sciences?

9 A. Mr. Williams, my coworker, did.

10 Q. And they were delivered and Mr. Williams
11 returned?

12 A. That's correct.

13 MR. WHEELER: I'm asking to approach again,
14 Your Honor.

15 THE COURT: Yes, sir.

16 MR. WHEELER: I apologize.

17 Q. (BY MR. WHEELER) I want you to refer here to
18 Exhibit No. 15 that we have here. Is this what Nichole
19 Payne was wearing at the time you retrieved her remains?

20 A. Yes, sir.

21 Q. And the bedding that you see here, is that the
22 bedding you put in the crash bag along with her?

23 A. Yes, it is.

24 Q. And that's the clothing you put in the crash
25 bag along with her?

1 A. Yes, sir.

2 Q. And that's what Mr. Williams transported to the
3 Southwestern Institute of Forensic Sciences in Dallas?

4 A. That's correct.

5 Q. Now, next, I'm going to show you what has been
6 marked State's Exhibit 53. Is that what you saw in the
7 boy's bedroom?

8 A. Yes, sir.

9 Q. And the bag, the disaster pouch that you placed
10 Taylor in, is this clothing he was placed in in that bag
11 with --

12 A. That's correct.

13 Q. That's head to toe all that clothing that went
14 with him?

15 A. From head to toe.

16 Q. Also this blue sleeping bag and the quilt and
17 the sheet?

18 A. That was all scooped up and put in the --

19 Q. Was put in the bag as well. And that was
20 transported to SIFS?

21 A. That is correct.

22 Q. Had you met the young man before?

23 A. No, sir, I hadn't.

24 Q. Okay. With regard to the dove business, did
25 you work with Nichole Payne on few or many occasions?

1 A. I would say approximately half a dozen.

2 Q. And was Jason Tad Payne ever there working with
3 her on a dove release?

4 A. I had never met him.

5 Q. So you never seen him before in transacting the
6 business of the dove release?

7 A. No, sir.

8 Q. This dove release business that Nichole had,
9 what she do?

10 A. Well, at the -- when you have a committal
11 service, it's one of the -- it's one of the ceremonies
12 that a person can have in respect to remembrance of a
13 loved one. When they have the committal service,
14 there's a Biblical reference of the one joining into the
15 three descending into the heavens, you know,
16 metaphorically.

17 Q. What did they do with the doves?

18 A. The doves, they normally return to the home. I
19 don't know exactly. They're essentially homing pigeons,
20 so they return to where they're housed.

21 Q. Each time that Nichole performed this service
22 for you, how much was she paid?

23 A. I don't have the exact figures, but I'm
24 guessing around \$150.

25 Q. And they've done that about a half a dozen

1 times?

2 A. I would say approximately half a dozen times.

3 Q. Okay. Pass the witness, Your Honor?

4 CROSS-EXAMINATION

5 BY MR. PARKS:

6 Q. Just a couple of things, Mr. Chance: Do you
7 have a contract with the county to do these services or
8 this --

9 A. That's a private business.

10 Q. Well, I understand that's a private business,
11 but I'm saying --

12 A. Do we have a county contract for the dove
13 releases or --

14 Q. No, to transport people.

15 A. No, sir. No, sir. They call us and we just
16 bill them as they call us.

17 Q. Okay. So it's on an as-needed basis?

18 A. That's correct.

19 Q. Have you been given any training on how to
20 handle potential evidence on one of these scenes?

21 A. No, sir, but I do have 20-years experience
22 making removals.

23 Q. Well, I understand. Do you transport stuff
24 that's wet as well as dry?

25 A. Yes, sir, we do. If something was soaked with

1 water and the officer in charge of the investigation
2 instructed me to do so, that's what I would take. I
3 would also take any medications if anyone asks us to
4 take the medications, and we do that as well.

5 Q. What if it was something that had blood
6 splatter and blood smears and bloodstains and blood
7 pools and it was wet and they said, bag it up, would you
8 do that?

9 A. Things like that, they usually have bags for
10 us, but if they asked me to do it, I would do that, yes.

11 Q. In fact, some of the things that you
12 transported to SIFS, your coworker transported to SIFS
13 was wet with blood?

14 A. It would certainly appear to be, yes.

15 MR. PARKS: That's all the questions I
16 have.

17 MR. WHEELER: Nothing further. May this
18 witness finally be excused, Your Honor?

19 MR. PARKS: No objection.

20 THE COURT: Thank you, sir. You're free to
21 go.

22 (Witness exits courtroom.)

23 MR. WHITLEY: Call Mark Miller.

24 (Witness enters courtroom.)

25 THE COURT: Mr. Miller, just come on over,

1 if you would, please. You were sworn earlier, were you
2 not?

3 THE WITNESS: Yes, sir.

4 THE COURT: Just go ahead and have a seat.

5 DETECTIVE MARK MILLER,
6 having been first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WHITLEY:

9 Q. Would you tell us your name, please, sir?

10 A. Mark Miller.

11 Q. And how are you employed, sir?

12 A. I'm a detective with the Mt. Pleasant Police
13 Department.

14 Q. Say that again.

15 A. I'm a detective with the Mt. Pleasant Police
16 Department.

17 Q. All right. What is your training and
18 qualification that qualifies you to hold that position?

19 A. I completed the police academy, I have numerous
20 hours of training, and I hold a Master's Certificate.

21 Q. How long have you been a police officer?

22 A. About 16 years now.

23 Q. Where were you employed December 11, 2007?

24 A. Wood County Sheriff's Office.

25 Q. What capacity did you work there?

1 A. At that time, I was patrol supervisor and K9.

2 Q. Were you a uniformed officer?

3 A. Yes, sir.

4 Q. Let me direct your attention to December 11,
5 2007, and ask if you were on duty that day approximately
6 9:00 a.m. in the morning?

7 A. Yes, sir, I was.

8 Q. What were you doing at that time?

9 A. At that time, I was at the hospital with one of
10 our other officers.

11 Q. Did you receive any type of dispatch or
12 instruction to go to a location approximately a mile up
13 the road on Highway 37?

14 A. One of the officers that received the dispatch
15 told us to go to that location.

16 Q. What was the standard operating procedure at
17 the Wood County Sheriff's Department in regard to
18 homicide calls and dispatches?

19 A. Well, at that time, it would be to respond with
20 multiple units for backup in an unknown situation.

21 Q. Were you designated backup?

22 A. Yes, sir.

23 Q. Approximately, what time did you arrive at the
24 scene?

25 A. It was just a few minutes, just a few minutes

1 after we received the call. I was here in town.

2 Q. Approximately, what time was that?

3 A. Sir, I don't remember the time. It was just a

4 little after we received the call.

5 Q. Was it after 9:00 a.m. in the morning?

6 A. Yes, sir.

7 Q. Before 10:00 in the morning?

8 A. Before 10:00, yes, sir.

9 Q. And before 9:30 in the morning?

10 A. Yes, sir.

11 Q. What did you do when you arrived at the scene?

12 A. I pulled up in the driveway and went into the

13 house.

14 Q. Who did you observe in the house?

15 A. Lieutenant Tucker.

16 Q. Did he give you instructions?

17 A. Yes. He asked me to help check the house for

18 another victim.

19 Q. And did you do that?

20 A. Yes, sir.

21 Q. At some point in time, did he request and tell

22 you to go outside and talk to the Defendant?

23 A. Yes, sir, he did.

24 Q. What did he ask you to do?

25 A. He asked to go out there and check to see if

1 there was anybody else that supposed to be in the house.

2 Q. At that time, how many victim did you discover?

3 A. One.

4 Q. Who was that?

5 A. The female victim.

6 Q. And did you, in fact, go out and talk to the
7 Defendant?

8 A. Yes, I did.

9 Q. What did you say to him?

10 A. I asked him if there was anyone else in the
11 residence and he said no. I asked him where his
12 children were. He started telling me where the kids
13 were. He said his daughter was with him; she's here
14 with me. He had taken one son to school and another son
15 was visiting family.

16 Q. Did he say anything about a son being in the
17 garage?

18 A. No, sir.

19 MR. WHITLEY: Pass the witness, Judge.

20 CROSS-EXAMINATION

21 BY MR. PARKS:

22 Q. Detective Miller, did you prepare a report in
23 this matter?

24 A. No, sir, I did not.

25 Q. So you're testifying totally from your memory?

1 A. Yes, sir.

2 Q. Didn't write anything down?

3 A. No, sir.

4 Q. Didn't commit a report to the department?

5 A. No, sir.

6 Q. How long were you in the house before you were
7 asked to go out and talk to Jason Payne?

8 A. Long enough to check the interior of the house
9 to find the second victim.

10 Q. One minutes? Five minutes?

11 A. Five minutes.

12 Q. About five minutes?

13 A. Yes, sir.

14 Q. Did you ever hear the 911 call?

15 A. No, sir, I've not heard it.

16 Q. Is it -- was it your feeling at the time out
17 there that Jason Payne was trying to hide the existence
18 of Austin Taylor Wages' body?

19 A. At the time, I didn't know where the second
20 body was, so...

21 Q. So, I mean, did it appear to you as a police
22 officer that he was trying to hide his existence by his
23 answer that his daughter was with him, his son was at
24 school, and his other son was in Chicago? That was all
25 true, wasn't it?

1 A. That's what he told me, yes, sir.

2 Q. So he would have had to know that y'all hadn't
3 found Austin in order to make a decision to be deceptive
4 about an issue that he had already stated to the police
5 in a phone call?

6 MR. WHITLEY: Judge, that assumes that the
7 Defendant made those assumptions. We have no evidence
8 to that effect.

9 MR. PARKS: I'm sorry, assumes he --

10 THE COURT: Repeat that.

11 MR. WHITLEY: I'll withdraw it.

12 THE COURT: He withdrew it.

13 MR. PARKS: That's all I, Have judge.

14 MR. WHITLEY: Nothing further.

15 THE COURT: Thank you, sir.

16 (Witness exits courtroom.)

17 THE COURT: Let's take a five minute
18 recess. We'll be back here real shortly.

19 (Jury exits courtroom.)

20 (Recess taken from 3:53 to 4:04.)

21 THE COURT: Back on the record in Cause
22 20,529-2008, State vs. Jason Tad Payne. Let the record
23 reflect counsel for the State, counsel for the
24 Defendant, and the Defendant is present. Jury is not
25 present.

1 Is the State ready to proceed?

2 MR. WHEELER: State's ready, Your Honor.

3 THE COURT: Is the Defendant ready to
4 proceed?

5 MR. PARKS: Defendant is ready.

6 THE COURT: Bring them on in.

7 (Jury enters courtroom.)

8 THE COURT: Let the record reflect the jury
9 has returned to the courtroom.

10 Ladies and gentlemen, again, for the
11 purpose of not having you speculate, I think I visited
12 with you when you were first seated that in a rural
13 county where we have no other district courts around,
14 there are some other things that demand my attention. I
15 had something that I thought was an emergency I had to
16 deal with. It had nothing to do with this case at all.

17 The State may call its first witness.

18 MR. WHEELER: State calls Cindy Robinson,
19 Your Honor.

20 (Witness enters courtroom.)

21 THE COURT: Come on around, and you were
22 sworn earlier?

23 THE WITNESS: No.

24 THE COURT: Let me get you to raise your
25 right hand.

1 (Witness sworn.)

2 THE COURT: Please have a seat.

3 CINDY ROBINSON,

4 having been first duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. WHEELER:

7 Q. Good afternoon. Would you please state your
8 name for the jury?

9 A. Cindy Robinson.

10 Q. How are you currently employed?

11 A. I'm a real estate agent.

12 Q. Are you licensed by the State of Texas?

13 A. Yes, sir.

14 Q. How long have you been a real estate agent?

15 A. About seven years.

16 Q. Where is your principal office?

17 A. At my house right now.

18 Q. In 2007, where was it?

19 A. On Main Street in Quitman.

20 Q. With regard to the house out on State

21 Highway 37, Ms. Robinson, were you involved in the

22 transaction that transferred title of that property to

23 Jason Tad Payne?

24 A. Yes, sir.

25 Q. Who approached you about the house?

1 A. Got a phone call from Nichole to show it to
2 them.

3 Q. Do you recall approximately when you received
4 that phone call?

5 A. In May, some time in May.

6 Q. Some time in the Spring of 2007, you got a
7 phone call?

8 A. Uh-huh.

9 Q. Did you show them the house?

10 A. Yes, I did.

11 Q. At the time that you showed the house, who were
12 the owners of the house?

13 A. It was a company out of -- I can't remember
14 where. It was Michigan or some place. It was a
15 relocation company.

16 Q. When you showed the house, who did you show the
17 house to?

18 A. The first time, I showed it to Nichole and
19 Jason, their three children, and his mother, and then
20 they brought -- the next time they saw it, they brought
21 her parents down there.

22 Q. At what point or approximately how long after
23 that second visit were you contacted about offering a
24 contract for a purchase of the house?

25 A. Oh, I think they put the contract on the house

1 the first visit.

2 Q. How long did it take to arrange a closing on
3 the house?

4 A. Are you asking me how long did it take to close
5 on the house?

6 Q. Well, I'm wondering how long between the
7 contract was executed was it before you sat down and
8 actually closed?

9 A. Maybe 30 days.

10 Q. Did you have to reset the closing any or did it
11 close right then?

12 A. I believe it closed right then.

13 Q. The property that was transferred to Jason and
14 Nichole Payne, did it include any acreage --

15 A. Yes.

16 Q. -- or was it just a house?

17 A. No, it was the house and 12-plus acres.

18 Q. What was the listing price for the house?

19 A. I want to say it began at, like, 239, and they
20 dropped it down to 229.

21 Q. And at the time of closing, was the price
22 agreed to the \$229,000?

23 A. No, they negotiated that contract for 215.

24 Q. So it was negotiated down to \$215,000?

25 A. Yes, sir.

1 Q. Okay. What are the property taxes like on that
2 house?

3 A. I'm not aware of the property taxes. I want to
4 say, and this is just me off the top of my head trying
5 to remember, maybe \$1,200, maybe 16.

6 Q. And when were those taxes due?

7 A. The taxes were paid at closing.

8 Q. What school district was this house in?

9 A. Quitman.

10 Q. So each calendar year you'd have to pay your
11 property taxes on that house; is that correct?

12 A. Yes.

13 Q. The closing, where did the closing take place?

14 A. Don Roberts in Quitman.

15 Q. And do you recall approximately when the
16 closing was?

17 A. I want to say the end of May.

18 Q. Do you recall who attended?

19 A. Myself, Jason, and Nichole.

20 Q. And do you recall how Jason Payne paid for the
21 house?

22 A. With a cashier's check.

23 Q. Was that through any financing company or
24 mortgage lender or --

25 A. No, sir.

1 Q. -- out of his personal funds?

2 A. Yes.

3 Q. So they paid \$215,000 plus the closing costs
4 and taxes and commission with a cashier's check?

5 A. Yes, sir.

6 Q. In approximately May of 2007?

7 A. Yes, sir.

8 MR. WHEELER: Pass the witness.

9 CROSS-EXAMINATION

10 BY MR. PARKS:

11 Q. Was the property, Ms. Robinson, put in both
12 Jason and Nichole's names?

13 A. Yes, sir.

14 Q. Do you know whether or not those funds that
15 were used to buy the house were community property or
16 separate property of Jason's?

17 A. I don't know that.

18 Q. Was it your understanding that they had bought
19 the house free and clear of any mortgages or any
20 encumbrances?

21 A. Yes.

22 MR. PARKS: That's all I have.

23 MR. WHEELER: One further thing, Your
24 Honor.

25 THE COURT: Yes, sir.

1 REDIRECT EXAMINATION

2 BY MR. WHEELER:

3 Q. Ms. Robinson, the Jason Payne that participated
4 in the purchase of that property, is he here in the
5 courtroom today?

6 A. Are you asking me is he here?

7 Q. Yes, ma'am.

8 A. Yes.

9 Q. Could you point to him and identify an article
10 of clothing he's wearing?

11 A. He's there with the black jacket [indicating].

12 Q. Could you describe his shirt and tie, please?

13 A. Red shirt. I think blue tie.

14 MR. WHEELER: Is it blue?

15 MR. PARKS: It's him. We can see it's him.

16 MR. WHEELER: I ask the record to reflect
17 that the witness as identified the Defendant.

18 THE COURT: I'll grant that request by the
19 State.

20 MR. WHEELER: Okay. Thank you. Nothing
21 further, Your Honor.

22 MR. PARKS: We have nothing further.

23 THE COURT: Thank you, Ma'am.

24 MR. WHEELER: May this witness be released
25 please, Your Honor?

1 MR. PARKS: No objection.

2 THE COURT: You are released. You're free
3 to go.

4 THE WITNESS: Thank you.

5 (Witness exits courtroom.)

6 MR. WHEELER: State calls Randall Lain.

7 (Discussion held off the record.)

8 THE COURT: Mr. Lain, you were sworn
9 earlier?

10 THE WITNESS: Yes, sir.

11 THE COURT: Go ahead and have a seat.

12 And let the record so reflect.

13 DEPUTY RANDALL LAIN,

14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WHEELER:

17 Q. Good afternoon.

18 A. Good arch.

19 Q. Would you please state your full name for the
20 jury?

21 A. Randall David Lain.

22 Q. How are you currently employed?

23 A. I'm employed with Jeff Davis County Police
24 Department.

25 Q. You're a licensed peace officer with the State

1 of Texas?

2 A. Yes, sir, I am.

3 Q. How long have you been certified by the State
4 of Texas as a peace officer?

5 A. Six years.

6 Q. Could you describe for the jury the training
7 that you've received and the experience that you have
8 that led you to become a certified peace officer?

9 A. Went through a police academy, regular police
10 academy, 16-week police academy. Have mandatory hours
11 every year to be a police officer. Went to some extra
12 schools different agencies sent me to and became a
13 police officer.

14 Q. What are your current duties in the Jeff Davis
15 County?

16 A. It's kind of a five county coalition. I'm in
17 the task force down there.

18 Q. Were you employed with the Wood County
19 Sheriff's Office on or about December 11, 2007?

20 A. Yes, sir, I was.

21 Q. What was your rank?

22 A. I was a sergeant.

23 Q. What were your duties with the Wood County
24 Sheriff's Office?

25 A. I was a CID investigator.

1 Q. When you say CID investigator, first, what does
2 CID stand for?

3 A. Criminal Investigations Division.

4 Q. What did you do specifically?

5 A. I investigated crimes, criminal offenses.

6 Q. Did that include crime scene investigation?

7 A. Yes, sir.

8 Q. Do you recall the events of December 11, 2007?

9 A. Yes, sir.

10 Q. Where were you at approximately 9:00 on
11 December 11, 2007?

12 A. I had a car wreck earlier that morning. I was
13 in a high-speed pursuit and wrecked a car. I was at the
14 emergency room here in Quitman. A deputy come in and
15 said they had a homicide out of town here, and I left
16 there and went.

17 Q. I take it you were on duty?

18 A. Yes, sir.

19 Q. Were you in uniform?

20 A. Yes, sir.

21 Q. You were plain clothes?

22 A. Plain clothes, but with a badge.

23 Q. Were you in a marked patrol unit?

24 A. No, sir.

25 Q. Were you in what was left of a marked patrol

1 unit?

2 A. Yes, sir.

3 Q. When you received that information, what did
4 you do?

5 A. Went to a residence out here where Lieutenant
6 Tucker gave me the address. I went out there and --

7 Q. The location that you responded to, is it in
8 Wood County?

9 A. Yes, sir.

10 Q. And when you first rolled up, what did you see?
11 Who did you see first?

12 A. I seen my captain at the gate at the driveway.
13 He let me in.

14 Q. Who is that?

15 A. Captain Joe Blair.

16 Q. What was he doing at the front gate?

17 A. Just keeping people out, just letting law
18 enforcement in.

19 Q. Okay. What did you do then?

20 A. Went up to the house, to the residence.

21 Q. Who did you see out in front of the residence?

22 A. Seen a white male that I didn't know at the
23 time standing there with Sergeant Mark Miller and
24 proceeded to go on in the house and talk -- speak with
25 Lieutenant Tucker.

1 Q. Did you see anybody else out in the yard?

2 A. Seems like there was another deputy out there.

3 Q. The white male that you didn't know that you
4 saw in the front yard, do you see him in the courtroom
5 today?

6 A. Yes, sir.

7 Q. Could you point to him and identify him by his
8 clothing he's wearing?

9 A. Wearing a black jacket.

10 Q. What color shirt?

11 A. Looks like a red, maroon -- maroon tie.

12 MR. WHEELER: I ask the record to reflect
13 that the witness has identified the Defendant.

14 THE COURT: Closest to what I've seen
15 today. I'll grant that.

16 Q. (BY MR. WHEELER) When you went inside, what
17 did you see?

18 A. Lieutenant Tucker led me back to a back
19 bedroom. Then I observed a deceased female lying on the
20 bed. Lieutenant Tucker asked me to go outside and speak
21 to Mr. Payne, see what I could find out about what was
22 going on.

23 Q. Did you speak with Mr. Payne?

24 A. Yes, sir, I did.

25 Q. What did you ask him?

1 A. I asked him, you know, what had happened.

2 Q. What did he say?

3 A. He told me he found his wife had been shot. I
4 had already spoke with Lieutenant Tucker and Sergeant
5 Miller and they advised me that there was just one
6 victim at that time.

7 Q. After you talked with Jason Payne, did you know
8 there was more than one victim?

9 A. After afterwards, yes, sir.

10 Q. What did he tell you?

11 A. Asked Mr. Payne -- there was a white dodge
12 pickup pulled up on the west side off the house and
13 asked Mr. Payne if that was his vehicle. He stated yes.
14 I asked him if he had any problems if we might look
15 through it in a minute. He stated no, no problems at
16 all. I seen another vehicle. I can't remember the make
17 of it. It was a SUV type of vehicle in the driveway. I
18 asked him whose vehicle was that and he stated that was
19 his wife's.

20 I turned around and I observed a small Ford
21 Ranger, maroon in color sitting there, and I asked
22 Mr. Payne whose vehicle this was and he said, "That's my
23 son's." I asked Mr. Payne, "Where's your son at," and
24 he stated, "In the garage." I asked -- I advised
25 Mr. Payne that, "You just advised me that nobody else

1 was in the house." He kind of got upset and started
2 crying. He said that his son was in the garage. I
3 immediately went and got Lieutenant Tucker and went into
4 the garage.

5 Q. And what did you see in the garage?

6 A. I seen a young white man with a gunshot wound
7 to his head.

8 Q. Now, during the course of the investigation
9 there, who was in charge of that crime scene?

10 A. That would be Lieutenant Tucker.

11 Q. And what did he assign you to do at the crime
12 scene?

13 A. Go speak with Mr. Payne.

14 Q. And did you collect evidence at the crime
15 scene?

16 A. I was there when they collected some evidence,
17 yes, sir.

18 Q. Now, in bedroom -- let's start in the laundry
19 room. Did you go and see what was in the laundry in the
20 washing machine?

21 A. I was there, yes, sir.

22 Q. Did you see the contents of the washing
23 machine?

24 A. Yes, sir.

25 MR. WHEELER: May I approach, Your Honor?

1 THE COURT: Yes, sir.

2 MR. WHEELER: Could I get you to open the
3 bag? Go ahead and take the contents out without showing
4 it to the jury.

5 THE WITNESS: Yes, sir.

6 (Witness complies.)

7 Q. (BY MR. WHEELER) Do you know what's in that
8 bag?

9 A. Pretty much, yes, sir.

10 Q. What is it?

11 A. I believe there's going to be a pair of sweat
12 pants and a towel.

13 Q. Go ahead and have a look. What do you see?

14 A. It's going to be a jacket, that's what it is.

15 Q. That's what was in this washer that day?

16 A. Yes, sir.

17 Q. Are those items in the same or substantially
18 similar condition to what you saw December 11, 2007, --

19 A. Yes, sir.

20 Q. -- in that washer?

21 MR. WHEELER: State offers State's
22 Exhibit 93.

23 (State's Exhibit 93, offered.)

24 MR. PARKS: No objection.

25 THE COURT: Admitted.

1 (State's Exhibit 93, admitted.)

2 Q. (BY MR. WHEELER) Now. Those clothes that you
3 saw, were they given to Lieutenant Tucker?

4 A. Yes, sir.

5 Q. To enter into evidence?

6 A. Yes, sir.

7 Q. This coat that was in the washing machine on
8 this December morning --

9 A. Yes, sir.

10 Q. -- is that an adult male coat?

11 A. Yes, sir.

12 Q. And a towel as well?

13 A. Yes, sir.

14 Q. That's what was in the washer?

15 A. Yes, sir.

16 Q. And let's see. Did you find it odd -- I
17 withdraw that.

18 I'm showing you what's been marked State's
19 Exhibit 38. Is that the interior of that washer?

20 A. Yes, sir.

21 Q. And is that the coat you saw inside that
22 washer?

23 A. Yes, sir.

24 Q. And is that the same coat that we have there on
25 the table?

1 A. Yes, sir.

2 Q. Okay. Did you see Todd Chance at that crime
3 scene collect Taylor Wages' body?

4 A. Yes, sir.

5 Q. Did you see the bedding get collected?

6 A. Yes, sir.

7 Q. Anything fall out of that bedding?

8 A. Yes, sir.

9 Q. What fell out of the bedding?

10 A. Looked like the copper jacket off of some kind
11 of ammunition.

12 THE COURT: Can you pull that microphone
13 down just a little bit?

14 THE WITNESS: Yes, sir.

15 Q. (BY MR. WHEELER) Would you repeat to the jury
16 what you saw fall out of the bedding with the body of
17 Austin Wages?

18 A. There was -- the copper jacket that goes with
19 the led part of a bullet was in that blanket and fell on
20 the floor.

21 Q. When you saw that fall out, did you report that
22 to anybody?

23 A. Yes, sir. Officer Burge was standing there.

24 Q. I'm going to hand you what's been marked
25 State's Exhibit 94.

1 MR. WHEELER: And for purposes of the
2 record, I would make clear that we have changed the
3 color of the sticker from red to white.

4 Q. (BY MR. WHEELER) You can go ahead and have a
5 look in that. Tell me -- if you can, identify it. Yes
6 or no?

7 A. Yes, sir.

8 Q. What is it?

9 A. It is a copper bullet.

10 Q. Is it in the same or substantially similar
11 condition as it appeared after falling out of the
12 bedding on December 11, 2007, when you saw it?

13 A. Yes, sir, it is.

14 MR. WHEELER: State offers State's
15 Exhibit 94.

16 (State's Exhibit 94, offered.)

17 MR. PARKS: No objection.

18 THE COURT: Admitted.

19 (State's Exhibit 94, admitted.)

20 Q. (BY MR. WHEELER) That's the bullet that fell
21 out of the bedding?

22 A. Yes, sir.

23 Q. You didn't write a report in this case, did
24 you?

25 A. I don't recall if I did or not. I thought I

1 had, yes, sir.

2 Q. But you haven't reviewed a report before you
3 came in here?

4 A. No.

5 Q. And the fact is the first time we've spoken
6 about this case is right now, isn't it?

7 A. Yes, sir.

8 Q. And you're testifying purely from memory?

9 A. Yes, sir.

10 Q. Is it standard operating procedure for an
11 officer not to write a report when there are two bodies
12 on the ground?

13 A. No, sir.

14 Q. That's wholly inappropriate?

15 A. Yes, sir.

16 Q. And you know that, don't you?

17 A. Yes, sir.

18 Q. Now, you collected a little bit of evidence
19 while you were out there?

20 A. Yes, sir.

21 Q. The evidence you collected -- was the evidence
22 you collected, it was submitted to Miles Tucker and then
23 placed into evidence; is that right?

24 A. Yes, sir.

25 Q. First, I'm going to hand you what's been marked

1 as State's Exhibit 96. There's some writing on the
2 outside of that. Whose writing is that?

3 A. That's my writing.

4 Q. And first, if you would, look in there and tell
5 me, if you know, if you can identify what that is? Yes
6 or no?

7 A. Yes, sir, I can.

8 Q. What is it?

9 A. It's the jacket of a .30-30 bullet.

10 Q. Where was it located?

11 A. It was on the garage floor.

12 Q. Is it in the same or substantial same condition
13 it was in at the time you recovered it on December 11,
14 2007, on the floor of the garage of the Payne residence?

15 A. Yes.

16 MR. WHEELER: State offers Exhibit No. 96.

17 (State's Exhibit 96, offered.)

18 MR. PARKS: No objection.

19 THE COURT: 96 is admitted.

20 (State's Exhibit 96, admitted.)

21 Q. (BY MR. WHEELER) Now, I'm going to hand you
22 State's Exhibit 95. What is that or can you identify?

23 A. It's a shell casing.

24 Q. Is it the same or substantially similar
25 condition it was in at the time you recovered it on

1 December 11, 2007?

2 A. Yes, sir.

3 Q. Where did you recover it from?

4 A. This one here, sir, I don't recall where it
5 was.

6 Q. But it's a discharged shell casing?

7 A. Yes, sir.

8 Q. Was it recovered at that scene?

9 A. Yes.

10 Q. How do you know?

11 A. It seems like it -- [inaudible].

12 Q. It wasn't on the floor?

13 A. Yes, sir.

14 Q. Where was the other one?

15 A. Just going by memory, I believe it was still in
16 the rifle.

17 Q. Still in the rifle?

18 A. Yes, sir.

19 Q. It's the one still in the rifle?

20 A. I'm thinking it was.

21 Q. Is it in the same or substantially similar
22 condition at the time you recovered it on December 11,
23 2007?

24 A. Yes, sir.

25 MR. WHEELER: State offers State's

1 Exhibit 95.

2 (State's Exhibit 95, offered.)

3 MR. PARKS: No objection.

4 THE COURT: Admitted.

5 (State's Exhibit 95, admitted.)

6 Q. (BY MR. WHEELER) The two cartridges that you
7 just looked at, are they the same caliber?

8 A. Yes, sir.

9 Q. What are they?

10 A. .30-30.

11 Q. And they were both located in Taylor's room?

12 A. Yes, sir.

13 Q. In looking through the house, did you also
14 locate a box of cartridges?

15 A. I don't recall that.

16 Q. Were you asked do anything else at that crime
17 scene by Lieutenant Tucker?

18 A. No, sir.

19 Q. And that's the conclusion of what you did while
20 you were there?

21 A. Yes, sir.

22 MR. WHEELER: Pass the witness.

23 CROSS-EXAMINATION

24 BY MR. PARKS:

25 Q. Deputy Lain, is it deputy or sergeant?

1 A. Deputy Lain.

2 Q. Deputy?

3 A. Yes.

4 Q. Just a couple of things --

5 A. Yes, sir.

6 Q. -- is it possible that you wrote a report about
7 this and it's just been lost or mislaid?

8 A. That's very possible, yes, sir.

9 Q. You don't have an independent recollection one
10 way or the other?

11 A. No, sir.

12 Q. What you're telling us here is the best of your
13 recollection?

14 A. Yes, sir.

15 Q. Did it appear to you on the scene when you were
16 talking with Mr. Payne that he was trying to hide the
17 fact that his son was in the garage?

18 MR. WHEELER: I object to the state of mind
19 testimony. That's been limine'd out.

20 THE COURT: Well --

21 MR. PARKS: I'll rephrase.

22 THE COURT: Yes, sir.

23 Q. (BY MR. PARKS) Let's talk a minute about the
24 contents of the washier and drier. Were you the one who
25 actually took that out of the drier or was that Burge?

1 A. I believe it's going to be Officer Burge, yes,
2 sir. He was handing it to me as he was taking it out.

3 Q. He took it out and gave it to you. What, did
4 you put it in a bag?

5 A. Yes, sir.

6 Q. Did you have -- well, let me ask you this: Do
7 you know who put those items in the washer and drier?

8 A. No, sir.

9 Q. Do you know when they did that?

10 A. No, sir.

11 Q. But y'all recovered them, bagged them, and sent
12 them out for testing?

13 A. Yes, sir.

14 Q. Did you ever learn what the results of the
15 tests were?

16 A. No, sir.

17 Q. Mr. Wheeler made reference to the jacket as
18 being an adult's jacket. Is there any reason why that
19 couldn't belong to a teenager?

20 A. No, sir.

21 Q. Do you know how large Austin Taylor Wages was?

22 A. No, sir.

23 Q. Okay. The copper jacket, you're talking about
24 the casings?

25 A. Yes.

1 Q. It's the jacket along the led core of a bullet;
2 is that right?

3 A. Uh-huh.

4 Q. And you found that when it fell out among the
5 bedclothes?

6 A. Yes, sir.

7 Q. In your experience as a police officer, Deputy
8 Lain, would that indicate to you that Austin Taylor was
9 probably shot right there where he was found with that
10 jacket in the bedclothes, assuming there was an entrance
11 and an exit?

12 A. Yes, sir.

13 Q. Okay. Did you bring that jacket to the
14 attention of Lieutenant Tucker?

15 A. Yes, sir.

16 Q. He knew about it?

17 A. Yes, sir.

18 Q. He knew it had been found there?

19 A. Yes, sir.

20 Q. The shell casings, one of them, they're both
21 .30-30s?

22 A. Yes, sir.

23 Q. Both the same brand of ammunition?

24 A. Yes, sir.

25 Q. To the naked eye, both of them appear to be

1 identical?

2 A. Yes, sir. Yes, sir.

3 Q. One of them was on the floor of the garage
4 there, of the bedroom where Austin was found?

5 A. Yes, sir.

6 Q. Your recollection is that the other one may
7 have still been in the gun?

8 A. Yes, sir.

9 Q. Do you have a recollection of ejecting that
10 yourself from the rifle or someone else --

11 A. No, sir.

12 Q. -- taking it out?

13 A. No, sir, I didn't do it.

14 Q. I'm sorry?

15 A. I -- I didn't do it.

16 Q. You did not?

17 A. No.

18 Q. So whoever did had -- it was someone else?

19 A. Yeah.

20 Q. Did you see them do that as far as you recall?

21 A. No, sir, I -- I don't recall if I did or not.

22 I -- I never handled the rifle.

23 Q. Do you know whether there were any -- whoever
24 handled the rifle, do you know whether or not they were
25 using gloves?

1 A. Yes, sir. Again, I'm just going by memory, but
2 I'm thinking that the Ranger is the one that handled the
3 rifle.

4 Q. That handled the rifle?

5 A. Yes, sir.

6 Q. Would that be Kemp?

7 A. Yes, sir.

8 Q. Whoever did it, in order to get that shell
9 casing out would have had to manipulate the action of
10 that rifle?

11 A. Yes, sir.

12 MR. PARKS: Thank you, Deputy. That's all
13 I have.

14 MR. WHEELER: May I approach, Your Honor?

15 THE COURT: Yes, sir.

16 DIRECT EXAMINATION

17 BY MR. WHEELER:

18 Q. I'm going to hand you what's been marked as
19 State's Exhibit 97. Can you identify it, yes or no?

20 A. I'm not even sure what it is. I'm sorry.

21 Q. Well, let me ask you this: Whose arm is that
22 in that photograph?

23 A. Probably -- probably mine.

24 Q. And you worked at that crime seen?

25 A. Yes, sir.

1 Q. Is that a fair and accurate depiction of your
2 arm on December 11, 2007?

3 A. Yes, sir.

4 Q. Y'all worked with the laundry?

5 A. Yes, sir.

6 Q. I'm asking you that because I'm wanting to know
7 if y'all were wearing gloves when you were handling the
8 evidence?

9 A. Yes, sir.

10 MR. WHEELER: State offers State's
11 Exhibit 97.

12 (State's Exhibit 97, offered.)

13 MR. PARKS: I have no objection.

14 THE COURT: Admitted.

15 (State's Exhibit 97, offered.)

16 Q. (BY MR. WHEELER) So even working with the
17 clothes, the officers had dawned on --

18 A. Yes, sir.

19 Q. -- black gloves?

20 A. Black gloves, yes, sir.

21 Q. That was pursuant to departmental procedure?

22 A. Yes, sir.

23 Q. When you saw Jason Payne, was he wearing a
24 coat?

25 A. I don't recall. I don't recall.

1 Q. When you saw Taylor Wages, was he wearing a
2 coat?

3 A. Seemed like Taylor was wearing a jacket.

4 Q. He was wearing a hoodie when you found him?

5 A. Uh-huh.

6 MR. WHEELER: Pass the witness.

7 CROSS-EXAMINATION

8 BY MR. PARKS:

9 Q. Were all the clothes bagged in the same bag
10 together?

11 A. No, sir. No, sir.

12 Q. Separate bags?

13 A. Yes, sir.

14 Q. That's standard procedure?

15 A. Yes, sir.

16 Q. So there's no cross contamination between --

17 A. Right.

18 Q. If one item had blood on it, for instance, you
19 wouldn't mix the one that didn't?

20 A. Right.

21 Q. Y'all were careful with that?

22 A. Yes, sir.

23 Q. The bedding that was taken from the bedrooms --

24 A. Uh-huh.

25 Q. -- were they -- was that all separated --

1 A. Yes, sir.

2 Q. -- out in different bags?

3 A. Yes, sir.

4 Q. Wasn't allowed to be scrunched up and shipped
5 in one bag together?

6 A. No, sir.

7 Q. That would have been bad, wouldn't it?

8 A. Yes, sir.

9 MR. PARKS: That's all I have, Judge.

10 MR. WHEELER: Nothing further, Your Honor.

11 THE COURT: Thank you, sir. You may step
12 down.

13 MR. WHEELER: May this witness finally be
14 released, Your Honor?

15 MR. PARKS: Sure.

16 THE COURT: Yes, sir.

17 You're free to go.

18 THE WITNESS: Thank you, sir.

19 (Witness exits courtroom.)

20 MR. WHITLEY: May I approach, Judge.

21 THE COURT: Yes, sir.

22 (Bench.)

23 MR. WHITLEY: Our next witness is going to
24 be the Ranger and I would anticipate he's going to be on
25 the stand more than 20 minutes.

1 THE COURT: Yeah. Let me just ask you:
2 We've got designated tomorrow for our expert witnesses.

3 MR. PARKS: Yeah, the experts.

4 MR. WHITLEY: Now, the Ranger has the chain
5 of custody. If they want to go ahead and do the experts
6 prior to the time we finalized our chain of custody on a
7 couple of items, then --

8 MR. PARKS: We haven't complained about the
9 chain of custody, yet. I don't have any reason to
10 believe that we will. I mean, if that's --

11 MR. WHITLEY: I mean --

12 MR. PARKS: -- what--

13 MR. KING: We can put the experts on
14 tomorrow and I'll follow up with the Ranger on a couple
15 of items.

16 MR. PARKS: That's fine.

17 MR. WHITLEY: There's not -- well, they are
18 in evidence at this point to identify that those are the
19 ones that were actually examined.

20 THE COURT: Do y'all feel we're going to be
21 through with them tomorrow?

22 MR. WHITLEY: The experts? I would think
23 so.

24 MR. PARKS: Yeah, I would expect so, Judge.

25 MR. WHEELER: We may need to work a little

1 late if we have to, but let's see if we can get them
2 done.

3 THE COURT: Just in case, let's have the
4 Ranger available.

5 MR. WHITLEY: Well --

6 MR. PARKS: He's from where?

7 MR. WHITLEY: San Angelo.

8 THE COURT: All right.

9 MR. WHITLEY: He's living out in Sulphur
10 Springs. He's probably going to go home and come back
11 Tuesday if --

12 MR. PARKS: That's correct.

13 MR. WHITLEY: -- he can.

14 MR. PARKS: I would expect it's going to
15 take all day or nearly all day tomorrow with the
16 experts, I would just guess.

17 MR. WHEELER: Me too.

18 THE COURT: Let's see -- well, if everyone
19 is in agreement.

20 (Open court.)

21 THE COURT: Ladies and gentlemen, I think
22 we're going to recess for the day at this point. And
23 I'm going to ask you to remember your instructions;
24 again, don't talk to anyone, don't let anyone talk to
25 you, if anyone attempts to do that, report that to the

1 bailiff or to me immediately. We will start again in
2 the morning at 9:00 a.m. and should have a full day
3 tomorrow, so please go with the bailiff at this time.

4 (Jury exits courtroom.)

5 THE COURT: All right. The jury has left
6 the courtroom. We'll be in recess, then, until
7 9:00 a.m.

8 MR. WHEELER: One matter:

9 THE COURT: Yes.

10 MR. WHEELER: Understanding how our time is
11 working now, probably it would be best on Tuesday
12 morning we have the hearing proposed --

13 THE COURT: I'm sorry?

14 MR. WHEELER: -- but I'm thinking that
15 probably Tuesday morning is a good time. That would
16 give us an hour.

17 THE COURT: How long are we going to need
18 to have that hearing?

19 MR. WHEELER: What I'm anticipating is
20 we're going to have to hear from several witnesses in
21 the limine hearing to determine whether the testimony is
22 admissible under three evidentiary rules put before the
23 Court and that's going to take a little time. My guess
24 is probably an hour-, two-hour hearing.

25 THE COURT: All right. And I don't have

1 any reason to think your expectation is probably the
2 time to take it up and does sound like that's when we
3 should do it, but can we hold that decision until
4 tomorrow evening to decide how we're going to handled
5 that? Obviously, we're not going to get to it before
6 then. I mean, all those people are virtually all the
7 ones that are locally, are they not?

8 MR. WHEELER: Oh, no. They're from the
9 Nacogdoches area.

10 THE COURT: Let's just plan to do it
11 Tuesday morning unless there's some reason why we can't
12 do it. I just need to remember when I release the jury
13 tomorrow evening, not to bring them in 9:00 Tuesday
14 morning, and -- and we may be optimistic and bring them
15 a little sooner than we really probably going to get to
16 them, but at least we can get them in a little bit
17 later.

18 MR. WHEELER: Yes, sir.

19 MR. PARKS: We'll try to help you remember.

20 THE COURT: Very well.

21 (Proceedings recessed.)

22

23

24

25

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

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24

25

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402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 7 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
)
)
VS.) WOOD COUNTY, TEXAS
)
)
)
JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 3

On the 22nd day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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JANUARY 22, 2010

EXHIBIT INDEX

STATE 'S

	NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
6	98	Aaron Polk, M.D., records			
7		of Nichole Payne	15	15	7
	99	Blood standards	44	44	7
8		(RETAINED BY DISTRICT CLERK)			
9	100	Bloody clothing			
10		(RETAINED BY DISTRICT CLERK)	49	50	7
	103	Curriculum Vitae of			
11		Tom Bevel	68	68	7
	104	Photograph	76	76	7
12	108	Photograph	76	77	7
	109	Photograph	109	109	7
13	110	Photograph	137	137	7
	111	Resume of			
14		Richard Ernest	154	154	7
	112	Photograph	160	160	7
15	113	Test-fire exemplar			
		at 6 inches			
16		(RETAINED BY DISTRICT CLERK)	175	176	7
17	114	Test-fire exemplar			
		at 8 inches			
18		(RETAINED BY DISTRICT CLERK)	175	176	7
19	115	Test-fire exemplar			
		at 10 inches			
20		(RETAINED BY DISTRICT CLERK)	175	176	7
21	116	Test-fire exemplar			
		at 12 inches			
22		(RETAINED BY DISTRICT CLERK)	175	176	7
23	117	Test-fire exemplar			
		at 14 inches			
24		(RETAINED BY DISTRICT CLERK)	175	176	7
25					

1 CHRONOLOGICAL INDEX - CONT'D
 2 VOLUME 7 OF 12
 3 (TRIAL ON THE MERITS, DAY 3)
 4 JANUARY 22, 2010

5 EXHIBIT INDEX - CONT'D

6 STATE'S

7	NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
8	118	Test-fire exemplar			
9		at 16 inches			
10		(RETAINED BY			
11		DISTRICT CLERK)	175	176	7
12	119	Test fire exemplar			
13		at 18 inches			
14		(RETAINED BY			
15		DISTRICT CLERK)	175	176	7
16	120	Posterboard with			
17		photographs of			
18		Austin Taylor Wages			
19		(RETAINED BY			
20		DISTRICT CLERK)	175	176	7
21	121	Template			
22		(RETAINED BY			
23		DISTRICT CLERK)	189	189	7

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

2 THE COURT: On the record in 20,529-2008,
3 State vs. Jason Tad Payne. Let the record reflect
4 counsel for the State, counsel for the Defendant, and
5 the Defendant is present. The jury is not present.

6 Is the State ready to proceed?

7 MR. WHEELER: State's ready, Your Honor.

8 THE COURT: Is the Defendant ready to
9 proceed?

10 MR. PARKS: Defendant is ready.

11 (Jury enters courtroom.)

12 THE COURT: Let the record reflect that the
13 jury has returned to the courtroom.

14 Ladies and gentlemen, let me give you a
15 word of explanation as to what we're doing today: This
16 is a day that both sides have decided that they want to
17 put on their expert witnesses. Each side has expert
18 witnesses. That won't seem strange as to the State's
19 experts, but we will be putting the Defendant's experts
20 before the State has rested.

21 It's a little bit out of order. It's a
22 little bit like the situation of -- well, I guess, don't
23 be trying to say or guess why we're doing it. It's out
24 of order. Everybody knows that. It's for scheduling
25 purposes. It's for those who are here to testify.

1 All right. Mr. Wheeler, whenever you're
2 ready, you may call your first witness.

3 MR. WHEELER: The State calls Dr. Aaron
4 Polk.

5 THE COURT: Dr. Polk, please come on
6 around, and you have not been sworn earlier?

7 THE WITNESS: I have not been sworn.
8 (Witness sworn.)

9 THE COURT: Please have a seat.

10 AARON C. POLK, JR., M.D.,
11 having been first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. WHEELER:

14 Q. Good morning.

15 A. Good morning.

16 Q. Would you please state your name for the jury?

17 A. Dr. Aaron C. Polk, Jr.

18 Q. Dr. Polk, what is your profession?

19 A. Family practice.

20 Q. How long have you been a family practitioner?

21 A. 30 -- 35 years.

22 Q. What qualifications do you have in the area of
23 family practice?

24 A. I'm board certified in family practice and I
25 keep up my board certification. I've completed medical

1 residency and I've been practicing for 35 years.

2 Q. Where do you practice?

3 A. Nacogdoches, Texas.

4 Q. In Nacogdoches, did you have a patient named
5 Nichole Payne?

6 A. Yes, I did for one encounter.

7 Q. And during that encounter, did you talk to
8 Nichole Payne?

9 A. Yes, I did.

10 Q. And did you take a history from her?

11 A. Yes, I did.

12 Q. What's the purpose of taking a history from a
13 person in the practice of medicine as you practice it?

14 A. First of all, to find out why they're there and
15 to obtain pertinent information to help figure out what
16 their problem is and what we can do to help them with
17 their problems.

18 Q. In the case of Nichole Payne, did you take a
19 history?

20 A. Yes, I did.

21 Q. And were you able to diagnose a condition?

22 A. Yes, I did.

23 Q. And were you able to prescribe medications for
24 her?

25 A. Yes, I did.

1 Q. Let's start with the history: What did she
2 tell you was the problem?

3 A. I would have to look at the record to be more
4 specific.

5 MR. WHEELER: Okay. May I approach, Your
6 Honor?

7 THE COURT: Yes, sir.

8 MR. WHITLEY: Judge, may I approach?

9 THE COURT: Yes, sir.

10 (Bench.)

11 MR. WHITLEY: I noticed one of the Defense
12 experts is in the courtroom. He hasn't been sworn. We
13 ask that he be removed from the courtroom.

14 MR. PARKS: Experts have been exempt.

15 MR. WHITLEY: When the other experts are
16 testifying. He doesn't have to be in here now.

17 MR. PARKS: Whatever the Court wants to do.
18 He's not testifying about anything he's got to say.

19 THE COURT: I think they're exempt, so he
20 can be in the courtroom.

21 MR. WHITLEY: I didn't understand.

22 THE COURT: I think they're exempt. I
23 don't think that's a problem.

24 (Open court.)

25 MR. WHEELER: Pardon me, Your Honor.

1 THE COURT: That's fine.

2 MR. WHEELER: We have to look through this
3 stuff.

4 (Pause in the proceedings.)

5 MR. WHEELER: Sorry for the delay.

6 THE WITNESS: I can tell you what's in
7 there, but it's always best to have it in front of me to
8 be sure.

9 MR. WHEELER: May I approach?

10 THE COURT: Yes, sir.

11 Q. (BY MR. WHEELER) I'm going to hand you what's
12 been marked as State's Exhibit 98. Would it help you to
13 refresh your memory to refer to those records?

14 A. These records do not reflect the visit for
15 which I saw her.

16 Q. Okay. But these are your records, aren't they?
17 They have your name on them?

18 A. Yes, these records are Nichole Payne and some
19 demographic information and a radiology report.

20 Q. And they were supplied by your office?

21 A. That's correct. It does not include the visit
22 for which I was asked to testify.

23 Q. Well, tell us about the visit about which you
24 were asked to testify.

25 A. Okay. Is the mic on?

1 THE COURT: Yes, sir, it's on.

2 THE WITNESS: The visit I think that is in
3 question was -- I don't even know the date because I did
4 not bring that information with me --

5 MR. WHEELER: Sure.

6 THE WITNESS: -- pertained to a situational
7 depression, and you may have a copy of that particular
8 visit. I'm sure it was provided to you. She stated
9 that she had been depressed. She had been taking
10 Zoloft.

11 Her husband had been unemployed, I believe,
12 for about four months as he had sustained injuries from
13 a motor vehicle accident. She was being bothered
14 particularly because of financial distress as well and
15 she was being supported -- they were being supported by
16 a loan from her attorney at 13-percent interest.

17 And at that time, I discussed with her
18 situational depression, various options, and prescribed
19 a medication called Cymbalta.

20 MR. WHEELER: Yes, sir.

21 THE WITNESS: And I saw her that time only
22 and I have not seen her since.

23 Q. (BY MR. WHEELER) Well, I want to get this
24 clear: She did come to see you at your office on
25 Russell Boulevard in Nacogdoches, Texas; is that

1 correct?

2 A. Yes.

3 Q. And you did take a history from her that you
4 described to the jury; is that correct?

5 A. That's correct.

6 Q. And as a result of that visit, you diagnosed
7 her with what?

8 A. Depression.

9 Q. And based on that diagnosis of depression, you
10 prescribed her?

11 A. Cymbalta. I believe it was 30 milligrams.

12 Q. And according to what you have here, that
13 medication was refilled. Did you prescribed her Zoloft
14 as well?

15 A. I do not believe I did. I believe she was
16 already on Zoloft.

17 Q. Did you know whether she had any allergies?

18 A. I would have to look on her demographic there,
19 but I don't believe there were any allergies noted.

20 Q. And she had, let's see, tramadol in her system.
21 Are you familiar with tramadol?

22 A. Yes, I am.

23 Q. Did you have prescribe tramadol to her?

24 A. I don't have any tramadol prescribed to her at
25 that time.

1 Q. With regard to the citalopram, are you familiar
2 with citalopram?

3 A. Yes, I am.

4 Q. Did you prescribe that medication to her?

5 A. No, I did not.

6 Q. You are familiar with the side-effects of that
7 particular medication?

8 A. Yes.

9 Q. What are they?

10 A. Side-effects for citalopram are similar of
11 those to many of the antidepressants, and there's a
12 myriad -- there's a list of side-effects any medication
13 would have. If you look in the PDR, you would have
14 everything listed as potential side-effects. One common
15 one might see are headaches, perhaps nausea,
16 jitteriness, lack of sleep or sleepiness, and sometimes
17 weight gain, and then there's just a whole lot of that
18 that are minor and infrequent.

19 Q. And finally, norepinephrine, you are familiar
20 with that drug?

21 A. Say it again.

22 Q. Norepinephrine. I can really try this or I can
23 show it to you.

24 A. You can show it to me, but that's a generic
25 name, probably, and I don't recognize that.

1 Norepinephrine, that is probably one of the Darvon or
2 Darvocet compounds.

3 Q. Did you prescribe that to her?

4 A. No, I did not.

5 Q. Do those type of medications, do they have
6 side-effects?

7 A. Yes.

8 Q. What are the side-effects?

9 A. Again, potentially numerous; headaches and,
10 perhaps, nausea, and in excess could be vomiting, but
11 there are so many of them that are reported, but there
12 are very few, really.

13 Q. You yourself, did you prescribe Cymbalta?

14 A. I prescribed Cymbalta.

15 Q. Do you recall the emotional state she was in
16 when you visited with her?

17 A. Only from what I alluded to there, referenced
18 to. She was obviously depressed and bothered by the
19 unemployment situation and the financial situation,
20 particularly those things.

21 Q. How did her emotions manifest themselves to
22 you?

23 A. I don't remember any other details other than
24 just what I mentioned. I made a brief note that I spent
25 quite a bit of time with her.

1 Q. Were these records that I handed to you earlier
2 made by or from information transmitted by a person with
3 knowledge that are recorded in them?

4 A. Yes.

5 Q. Were these records made at or near the time
6 they were recorded?

7 A. Yes.

8 Q. Was it in the regular course of your business
9 to make such records?

10 A. Yes.

11 Q. Was it the regular course of your business to
12 keep such records?

13 A. Yes.

14 MR. WHEELER: Your Honor, State offers
15 State's Exhibit 98.

16 (State's Exhibit 98, offered.)

17 MR. PARKS: May I see them?

18 MR. WHEELER: I'd like the record to
19 reflect that the -- those have already been tendered to
20 the Defense previously in trial.

21 MR. PARKS: No objection.

22 THE COURT: State's 98 is admitted.

23 (State's Exhibit 98, admitted.)

24 Q. (BY MR. WHEELER) And the records reflect that
25 on April 23, 2007, Nichole Payne was seven weeks and

1 four days pregnant; is that correct?

2 A. If that's what the records say, that would be
3 correct.

4 Q. And that she was tearful in your visit with
5 her, very tearful?

6 A. I believe so, yes.

7 MR. WHEELER: Pass the witness.

8 CROSS-EXAMINATION

9 BY MR. PARKS:

10 Q. That's why you prescribed medication for her,
11 right?

12 A. Correct.

13 MR. PARKS: Thank you, Doctor. That's all
14 I have.

15 MR. WHEELER: Nothing further. May this
16 witness finally be excused, Your Honor?

17 MR. PARKS: No objection, Your Honor.

18 THE COURT: Thank you, sir. You're free to
19 go.

20 (Witness exits courtroom.)

21 MR. WHITLEY: Call Walter Henson.

22 (Witness enters courtroom.)

23 THE COURT: Let me let you get on around
24 and --

25 MR. WHEELER: Your Honor, may I approach?

1 THE COURT: Yes, sir.

2 (Bench.)

3 MR. WHEELER: If they're going to have
4 their expert here, I would like to have permission to
5 have Dr. Bevel in the room.

6 THE COURT: Of course.

7 MR. WHEELER: I appreciate it.

8 (Open court.)

9 THE COURT: Come on around and raise your
10 right hand.

11 (Witness sworn.)

12 THE COURT: Please have a seat.

13 WALTER HENSON,

14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WHITLEY:

17 Q. Good morning, sir.

18 A. Good morning.

19 Q. Would you identify yourself for the Court,
20 jury, and the trial record?

21 A. My name is Walter Henson.

22 Q. How are you employed?

23 A. I'm an employed as a latent print expert.

24 Q. Tell us your qualification to hold that
25 position.

1 A. I've been with the Department of Public Safety
2 a little over 23 years. The past 20 years have been in
3 fingerprint comparisons and identifications. The last
4 10 years or so I've been in the crime lab processing and
5 developing latent prints. I've attended numerous
6 schools from the FBI, the Texas Police Association, and
7 other law enforcement entities as well as on-the-job
8 training that we receive on a daily basis.

9 Q. What is the nature of fingerprint comparison?

10 A. The skin on your fingers and your palms and the
11 bottoms of your feet are different. It's textured.
12 When these ridge impressions are transferred to another
13 item, you can take a known set of exemplars and compare
14 the ridges and the pattern types to effect an
15 identification that those two prints were made by the
16 same individual.

17 Q. Based on your experience and all the scientific
18 literature in the field, do any two persons have the
19 name fingerprint characteristics?

20 A. No, sir, they do not.

21 Q. These are individual characteristics assigned
22 to one person; is that correct?

23 A. Yes, sir.

24 Q. Were you furnished a fingerprint card bearing
25 the name of Jason Tad Payne by the Wood County Sheriff's

1 Department?

2 A. Yes, sir, I was.

3 Q. That was transmitted to you by Ranger Kemp, was
4 it not?

5 A. Yes, sir, I believe so.

6 Q. He also transmitted to you a Winchester rifle,
7 which has been admitted into evidence here. I'm going
8 to ask you, if you can, to identify what's been admitted
9 as State's Exhibit 64. And it bears the serial number
10 of -- let's see here. It's a Winchester Model 94,
11 .30-30. Maybe you know where the serial number is. I
12 can't find it. Let me just ask you: Is that the rifle
13 that was transmitted to you for fingerprint comparisons?

14 A. Yes, it was. There's my case number and
15 initials on the side noting it's the one that was handed
16 to me.

17 Q. All right. Let me also show you what's marked
18 for identification as State's Exhibits 95 and 96.

19 A. Okay. Yes, sir. Again, my initials are at the
20 bottom and the date when I resealed it.

21 Q. What about Exhibit 95?

22 A. Again, there's my tape and my initials on the
23 bottom of the packaging.

24 Q. Now, these were what?

25 A. Two live rounds and two spent shell casings.

1 Q. Like so [indicating]?

2 A. Yes, sir.

3 Q. I noted on the packaging, "Shell casing on
4 floor, garage." Same thing with the other exhibit.

5 A. Okay.

6 Q. Did you perform a fingerprint analysis on the
7 rifle?

8 A. Yes, sir, we did. We processed it for latent
9 prints.

10 Q. Tell the jury the process that you used,
11 please, sir.

12 A. Particularly, firearms, the chances for
13 developing fingerprints are kind of slim. Oil and
14 water -- latent prints are pretty much -- they don't
15 always mix together real well, so our chances for
16 developing prints, you know, it happens infrequently.
17 We use a superglue processing to kind of make a
18 molecular bound with any perspiration and it will
19 highlight those fingerprints on a smooth surface, and so
20 we processed it with superglue, used a florescent dye,
21 and put it under a laser to see if any prints appeared.

22 Q. Is that an accepted methodology in looking for
23 fingerprints?

24 A. Yes, sir, it's a fairly common practice.

25 Q. Did you find any fingerprints?

1 A. No, I did not.

2 Q. Did you find any smudges?

3 A. No, I did not.

4 Q. Did you find any indications the gun had been
5 handled by an individual?

6 A. No, I did not.

7 Q. Now, if there's testimony before this jury that
8 the Defendant shot the gun the day before, would you
9 expect to find some indication of human fingerprints or
10 smudges or some other way that the gun was handled?

11 A. I would have expected areas on the gun that
12 would have indicated that it was handled in some nature,
13 yes.

14 Q. As a result of finding any indication of the
15 gun being held, did you form any opinions?

16 A. I was a little surprised by it, yes.

17 Q. Would that be consistent with a gun being wiped
18 down?

19 A. Well, it could happen because of packaging when
20 submitted to us. Yes, if it have been wiped down or
21 something to that nature, that would preclude to
22 anything being on there.

23 Q. Now, let's move to the shell casings: How do
24 you load a rifle with that caliber of rifle?

25 A. Usually, there's a grip on the side that you

1 thumb the shell through and lock it and load it and you
2 cycle them through -- through the lever.

3 Q. Did you analyze and look for fingerprints on
4 each of those shell casings?

5 A. I did.

6 Q. And what was the result of that analysis?

7 A. On the two spent shell casings, there was one
8 spent shell casings that showed evidence of some latent
9 prints. There was not enough there to do a comparison.
10 There wasn't enough there. It was just enough to let us
11 know at some time somebody had handled that.

12 (Interruption in the proceedings.)

13 MR. WHITLEY: Let's wait until the
14 ambulance gets by.

15 (Pause in the proceedings.)

16 Q. (BY MR. WHITLEY) If you would please go ahead.

17 A. Okay. On the one spent shell casings, there
18 were some ridge characteristics to indicate at one time
19 something had touched that and left that ridge
20 characteristic or that ridge detail that we were talking
21 about. There just wasn't enough there to do a
22 comparison.

23 (Interruption in the proceedings.)

24 Q. (BY MR. WHITLEY) As to the other shell
25 casings?

1 A. There was nothing.

2 Q. But there was an indication that that had been
3 handled by a human?

4 A. That one shell casings, the spent one, yes,
5 there was.

6 Q. Now, the live round you testified to?

7 A. I didn't develop anything on either of those.

8 MR. WHITLEY: I'll pass the witness.

9 MR. PARKS: If it please the Court.

10 THE COURT: Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. PARKS:

13 Q. Mr. Henson, do you recall when you received
14 that rifle at the lab at DPS?

15 A. I have to look at my notes.

16 Q. Let me just show you something that would
17 refresh your memory.

18 MR. PARKS: May I approach, Your Honor?

19 THE COURT: Yes.

20 Q. (BY MR. PARKS) Does this appear to be a
21 document from DPS?

22 A. Yes, it is.

23 Q. Does that indicate to you when that item was
24 received?

25 A. Yes, it was received by somebody in our lab in

1 December of '07.

2 Q. And would it also reflect what all did come to
3 the lab and for what purpose?

4 A. Yes, it should be an accurate representation of
5 what was received.

6 Q. Okay. Because y'all got stuff other than
7 firearms, did you not?

8 A. Yes, sir, we did.

9 Q. But you're the latent print man and that was
10 what you were task to do, to see --

11 A. Yes. All I was asked to do or look at was the
12 rifle and the shell casings and the live rounds.

13 Q. Now, if an item that you are to look at comes
14 into the lab with orders from different kinds of tests,
15 is there a protocol of who gets those items and in what
16 order --

17 A. Yes, sir.

18 Q. -- does that make sense to you?

19 A. Yes, sir, there is.

20 Q. So if the rifle had come in with an order for
21 DNA testing, for instance, if there were bloodstains
22 that needed to be determined whose they were or what WAS
23 the DNA, would that lab get them before you?

24 A. Typically, that's the way that would go. Now,
25 in this case, the Ranger asked that the evidence be

1 brought to the Austin lab. It wasn't sent to the Tyler
2 lab like it normally would have. So when the rifle was
3 received, the DNA technician and the trace evidence
4 technician were with me present in the room when we
5 opened and removed the rifle.

6 Q. Do they do anything or do they just watch you
7 in your work?

8 A. I did have a kind of overall examination of it
9 first to see if there was any visible ridge detail prior
10 to their processing, but, yes, then they were allowed to
11 take swabs from the end of the barrel and on the barrel,
12 but we were all present when that was taking place.

13 Q. I understand. And correct me if I'm wrong, but
14 the processes that you use have a potential, at least,
15 to destroy what they might need to do later?

16 A. Yes, sir, that is a possibility.

17 Q. And so you're careful to preserve those things
18 that need to be preserved before you start your
19 processes?

20 A. Yes, sir. That's usually why they get the
21 evidence prior to our handling.

22 Q. Of course, you have no way of knowing who and
23 under what conditions this rifle was handled before it
24 came to you?

25 A. No, sir, I have no way of knowing.

1 Q. Okay. Was that trigger and the trigger guard
2 area swabbed down for DNA testing, do you know?

3 A. I don't know if they took swabs of that or not.
4 She'll know if she's -- if she's called to testify,
5 she'll know, but I didn't make note of it, no.

6 Q. That wasn't your job, right?

7 A. Right.

8 Q. Okay. Now, pardon me for this question, but I
9 need to ask you: Are you one in the same as Stanford
10 Henson?

11 A. Yes, sir, that's me.

12 Q. Okay. You did not find -- well, let me ask you
13 this: In your profession, is it unusual for you to find
14 and identify latent prints from a firearm that
15 belongs -- of the person that owns the firearm?

16 A. Well, again, latent prints on a firearm of any
17 kind are unusual to develop, but to answer your
18 question, if someone handles a firearm on a regular
19 basis and you develop their prints on that, that would
20 not be unusual as well.

21 Q. But very often you examine firearms and you
22 find no developable --

23 A. Correct.

24 Q. -- fingerprints?

25 A. Correct.

1 Q. And that doesn't raise any red flags for you?

2 A. Yes.

3 Q. You talked with Ranger Vance about the lack of
4 prints and smudges on the rifle; do you recall that?

5 A. I don't recall that conversation, but I'm not
6 saying that it didn't transpire. I don't remember it.

7 Q. Would you have told Ranger Vance, Mr. Henson,
8 that the lack of identifiable prints or smudges, that it
9 would be impossible for that condition to exist unless
10 a person had wiped the firearm down?

11 A. Well, if he had asked me a specific question, I
12 would have talked to him about it. The word
13 "impossible" would be kind of -- that's a word I don't
14 think I would have used. I would say that I would have
15 expected evidence that the firearm had been handled.

16 Q. And would you have told him it's possible, as
17 you told this jury, it's possible that it was wiped
18 down?

19 A. I would say that could have been the result of
20 the packaging.

21 Q. Or just the result of the circumstances of
22 the --

23 A. Any number of things.

24 Q. Any number of things?

25 A. Correct.

1 Q. Okay.

2 MR. PARKS: Thank you, sir. That's all I
3 have.

4 MR. WHITLEY: I have nothing further,
5 Judge.

6 THE COURT: May this witness be finally
7 excused?

8 MR. WHITLEY: Yes.

9 MR. PARKS: Yes, sir.

10 THE COURT: You're excused.

11 (Witness exits courtroom.)

12 THE COURT: Call your next witness.

13 MR. WHITLEY: Melissa Valadez.

14 (Witness enters courtroom.)

15 THE COURT: Yes, ma'am, let me get you to
16 come on over, if you would, and when you get to the
17 stand, raise your right hand.

18 (Witness sworn.)

19 THE COURT: Please have a seat.

20 MELISSA VALADEZ,

21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. WHITLEY:

24 Q. Are you comfortable?

25 A. Yes, I am.

1 Q. Good. Would you tell the Court and the jury,
2 please, what your name is?

3 A. My name is Melissa Valadez, V-a-l-a-d-e-z.

4 Q. And, Ms. Valadez, how are you employed?

5 A. I'm a forensic scientist with the Department of
6 Public Safety in Austin, Texas.

7 Q. And in what part of the laboratory do you work?

8 A. I work in the trace evidence section.

9 Q. And if you would, please, tell us what trace
10 evidence section employees do?

11 A. We examine evidence primarily from crime scenes
12 and what we analyze are hairs, fibers, shoes, and tire
13 impressions, soil and glass.

14 Q. And if you would, tell us what your education
15 and training and experience is to qualify you to hold
16 that position?

17 A. I have a Bachelor's of Science Degree in
18 Chemistry from Texas A&M University. I went on to
19 receive a Master's Degree in forensics in Alabama. I
20 was hired with DPS as a forensic scientist in the trace
21 evidence section in the areas I described earlier. I've
22 attended numerous conferences and classes outside of DPS
23 as well, and I've been there for about eight years
24 performing analyses.

25 Q. And how long you said, eight years, with DPS?

1 A. Yes, correct.

2 Q. Did you have any other job in the field --

3 A. No, I did not.

4 Q. -- prior to DPS?

5 On or about December the 18th, 2007, did
6 you receive certain items, evidence from a Ranger Kemp?

7 A. Yes, I did.

8 Q. Among those was a rifle, correct?

9 A. Yes, that's correct.

10 Q. And some known hair samples from a person by
11 the name of Austin Taylor Wages?

12 A. Yes, that's correct.

13 Q. And another hair sample, known hair sample from
14 a Nichole Payne?

15 A. Yes, that's correct.

16 Q. Both of whom are deceased. And what were you
17 requested to do with those items of evidence?

18 A. I was requested to exam the rifle for the
19 presence of any hair, if any hair was detected, and
20 recover and compare that with Wages and Payne.

21 Q. And did you do that type of analysis?

22 A. Yes, I did.

23 Q. And what was the result?

24 A. There was no hair recovered from the rifle or
25 any of the packaging that was surrounding the rifle;

1 therefore, no further comparisons were performed.

2 Q. Now, what methodology did you use to perform
3 that analysis?

4 A. The examination that I performed was visual. I
5 looked at it with an unaided eye and I used a flashlight
6 to exam the rifle and inside the barrel.

7 Q. I take it you said you found no hair?

8 A. Correct.

9 Q. Did you find any fiber or anything on the
10 rifle?

11 A. There was nothing that was noted on the rifle,
12 but we were not specifically looking for fibers.

13 Q. But if during the process of looking for the
14 hair, you probably also seen other items on the rifle,
15 would you not?

16 A. It is our custom that when we exam an item of
17 evidence, we would know any other material that was
18 recovered, and I didn't know of any other material.

19 MR. WHITLEY: Pass the witness.

20 CROSS-EXAMINATION

21 BY MR. PARKS:

22 Q. Just a couple of things, Ms. Valadez: Before
23 you received the rifle, you have no way of knowing
24 whether or not it was handled or by whom or how; would
25 that be fair to say?

1 A. Yes, that's correct.

2 Q. And prior to packaging and sending to you, if
3 that rifle had been handled or manipulated, is it
4 possible that any hairs or fibers that might have been
5 there could have been lost or destroyed?

6 A. That's correct.

7 MR. PARKS: Thank you, Ma'am. That's all I
8 have.

9 MR. WHITLEY: I have nothing further. May
10 this witness be excused?

11 MR. PARKS: I have no objection.

12 THE COURT: Thank you, Ma'am. You're
13 released.

14 (Witness exits courtroom.)

15 MR. WHITLEY: Michelle Bonnette.

16 (Witness enters courtroom.)

17 THE COURT: Yes, Ma'am, come on over to the
18 witness stand, please, and when you get there, I need
19 for you to raise your right hand.

20 (Witness sworn.)

21 THE COURT: Please have a seat.

22 MICHELLE BONNETTE,

23 having been first duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. WHITLEY:

1 Q. Good morning.

2 A. Good morning.

3 Q. You are comfortable now?

4 A. Yes, thank you.

5 Q. Good. Tell us your name, please.

6 A. Michelle Bonnette.

7 Q. How are you employed?

8 A. I'm employed as a forensic scientist for the
9 Department of Public Safety.

10 Q. Pull that mic up a little.

11 A. Is that better?

12 Q. What is your education, training, and
13 experience to qualify you to hold that position?

14 A. I began my education after high school at the
15 University of Texas at Austin where I obtained a
16 Bachelor's of Science Degree in Human Biology
17 concentration in cell molecules. I went onto a graduate
18 degree from Virginia University and obtained a Master's
19 in forensic science, in forensic microbiology. I began
20 working for DPS about a year in serology and about a
21 year in DNA where we are independent case analysts.

22 Q. And how long have you been with DPS?

23 A. Two and a half years.

24 Q. Approximately, how many different cases have
25 you handled in that period of time?

1 A. I would say probably 2 to 300, at least.

2 Q. Now, on or about December the 18th, did you
3 receive certain items of evidence from Ranger Philip
4 Kemp?

5 A. December 18th was the date that the lab
6 received them. It was a few days after I actually
7 processed that evidence.

8 Q. And among those items was a Winchester rifle, a
9 copper jacket from the garage floor of the crime scene,
10 two shell casings, two live .30-30 rounds, a blood card
11 from a person named Austin Taylor Wages, a known blood
12 card from a Nichole Payne, both of whom were deceased, a
13 hair standard from Austin Taylor Wages and a hair
14 standard from Nichole Payne. Did you also receive a
15 buccal swab from Jason Payne?

16 A. Yes, those list of items were the entire list
17 of items submitted. As a serologist, I was only given
18 the Winchester, the known standard from Austin Taylor
19 Wages and the known standard from Nichole Payne and the
20 known buccal swab from Jason Payne. The other items I
21 didn't look at.

22 Q. Okay. What type of analysis did you perform?

23 A. I did a presumptive test for the presence of
24 blood. I perform a test to see if blood is present. It
25 might have a false positive, but those are things with a

1 couple of other findings that indicates the need for
2 further testing. If it's negative, it's a good
3 indication blood's present, and we proceed with our
4 analysis.

5 Q. Now, you say you performed the test on the
6 first item?

7 A. Yes.

8 Q. The copper jacket?

9 A. No, I didn't look at that.

10 Q. No, blood cards?

11 A. Those I just collected. I didn't test them
12 since they're known blood samples. We don't test those.

13 Q. Really, the only thing you tested was the
14 rifle?

15 A. Yes.

16 Q. Not against the other items?

17 A. Right.

18 Q. Did you visually look at them?

19 A. No, I only see -- if there were outer packages,
20 sometimes they package them in one larger box, but I had
21 taken out the rifle, but I believe that was separate. I
22 can check my evidence log. Yeah, the rifle was in its
23 own container. I didn't see the outer package of those
24 blood standards or the buccal swab which contained item
25 one.

1 Q. What was the analysis?

2 A. We collected swabbing from this item. There
3 were 22 items that I did not examine. I then collected
4 the known blood cards from both Austin Taylor Wages and
5 Nichole Payne and the buccal swab from Jason Payne.

6 Q. Did you carry forward and do a DNA analysis?

7 A. Before we first report, we had sent a DNA
8 follow-up upon completion, a report completion DNA, but
9 before a DNA analysis was assigned to that case, we
10 received a phone call asking that we transfer it to a
11 private lab because we have a large backlog and it takes
12 a private lab to get it done quickly and there was a
13 rush on the case. We were informed -- let me see who
14 that was -- by Austin Taylor Wages -- I'm sorry, Miles
15 Tucker from the Wood County Sheriff's Office called and
16 requested that be sent to a private laboratory in the
17 general area that we have a working relationship with.

18 Q. To make a long story short, you transferred the
19 items of evidence to Orchid?

20 A. I just transferred the collection to -- I
21 swabbed the stain detected as blood and I sent those
22 swabbings to that private lab.

23 MR. WHITLEY: Okay. I pass the witness.

24 CROSS-EXAMINATION

25 BY MR. PARKS:

1 Q. Ms. Bonnette, do your notes reflect what day
2 you did your work on this case?

3 A. Yes, they do.

4 Q. When was that?

5 A. January 22nd, 2008.

6 Q. Did you actually get the rifle itself to
7 examine or did you get swabs from the rifle?

8 A. I got the rifle and then I was the one that
9 generated those swabbings myself. I collected those as
10 well.

11 Q. Was that before or after the rifle had been to
12 the fingerprint lab?

13 A. Before I transferred -- in my report, I say I
14 did my work first, then I transferred the Item 1, the
15 rifle to the latent print section.

16 Q. So before it ever got to the fingerprint
17 section, you had done your examination and taken your
18 swabs, DNA, and all of that?

19 A. Yes.

20 Q. Did you do that the fingerprint lab or did you
21 do it in your part of the lab?

22 A. In my part of the laboratory.

23 Q. Were you the only person present, as you
24 recall?

25 A. I share that lab with three other analysts.

1 Q. The fingerprint analyst wouldn't have been
2 there?

3 A. No.

4 Q. Okay.

5 A. We did have kind of a pre-meeting. If there's
6 an item of evidence that's combo, we call it, with other
7 sections; meaning, it's requested that multiple
8 different disciplines get together beforehand to go
9 over, we'll look at the item, make sure who's going
10 first, second, nothing that isn't jeopardizing evidence
11 with the second or third analysis. We did meet on 17th
12 in the trace evidence section and looked at it. I
13 didn't make any collections. The trace examiner and I
14 looked for whatever it was -- I think she was requested
15 for hairs on the item.

16 Q. Would that have been Ms. Valadez?

17 A. Yes.

18 Q. Okay.

19 A. We talked together. It was sent to our section
20 in the serology section. Then when I was done, it
21 went -- we kind of have a working relationship, so we're
22 not jeopardizing anyone else's evidence before we send
23 it on.

24 MR. PARKS: Sure. Thank you. That's all I
25 have.

1 MR. WHITLEY: I have nothing further. May
2 she be excused, Judge?

3 MR. PARKS: No objection.

4 THE COURT: Thank you, Ma'am. You're free
5 to go.

6 (Witness exits courtroom.)

7 MR. WHEELER: State calls Amy Rogers, Your
8 Honor.

9 (Witness enters courtroom.)

10 THE COURT: If you'll come on over here to
11 the witness stand and raise your right hand.

12 (Witness sworn.)

13 THE COURT: Please have a seat.

14 AIMEE ROGERS,

15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. WHEELER:

18 Q. Good morning.

19 A. Hi.

20 Q. State your name for the Court and jury?

21 A. Aimee Rogers.

22 Q. What is your occupation?

23 A. I am a DNA analyst.

24 Q. Could you tell the jury what educational
25 background you have that qualifies you for your duties?

1 A. Yes. I have a Bachelor's of Science Degree in
2 biology from the University of Texas in San Antonio. I
3 also have a postgraduate certificate in forensic DNA
4 from the University of Florida. I have continuing
5 education I perform twice a year and I also attend
6 continuing education for state hours every year.

7 Q. Have you received any additional training in
8 the area of DNA testing?

9 A. Yes. I have onsite training at my job,
10 extensive training upheld by the FBI standards.

11 Q. Are you published?

12 A. No, I'm not.

13 Q. Have you testified in court before?

14 A. Yes, I have.

15 Q. Do you belong to any professional associations?

16 A. Yes. I'm a member of the American Association
17 of Forensic DNA Analysis and Administrators.

18 Q. Have you testified in court before as an expert
19 witness?

20 A. Yes, I have.

21 Q. In the area of DNA comparison?

22 A. Excuse me, yes, I have.

23 Q. Has this been on few or many occasions?

24 A. On a few.

25 Q. Does this include courts in the Dallas County?

1 A. No.

2 Q. Does it include this county?

3 A. No.

4 Q. And where have you testified?

5 A. In Harrison County.

6 Q. Down in Houston. Will you tell the jury what
7 DNA is?

8 A. Sure. Well, DNA stands for Deoxyribonucleic
9 Acid. That's basically the generic blueprint. It's a
10 chemical found within the cells of your body. It's what
11 makes you unique. It gives you your eye color and hair
12 color. It's unique with the exception it's inherited by
13 your parents. You receive half from your mother and
14 half from your father. And it's the same over time.
15 The same DNA you were born with as a baby, is the same
16 DNA you hold now as an adult. It's the same DNA in your
17 blood.

18 Q. Now, how is this DNA applied in a forensic
19 setting?

20 A. When we receive items of evidence, we first
21 examine them for biological material. We then process
22 them for DNA testing for the purposes of generating a
23 DNA profile. If we are submitted an example, we are
24 able to compare the two, the evidence and the reference
25 samples submitted.

1 Q. Is it possible to take DNA from biological
2 material found at a crime scene and compare it with DNA
3 from the blood sample taken from an individual?

4 A. Yes, it is.

5 Q. So you can compare the two?

6 A. Yes, we can make comparisons.

7 Q. What would this comparison tell this jury?

8 A. This comparison allows us to identify the
9 source where it came from.

10 Q. Is there a particular scientific method
11 involved in the testing of DNA?

12 A. Yes, there is.

13 Q. And is there a particular scientific method
14 used to extract DNA from the biological material?

15 A. Yes.

16 Q. What are the protocol for identification?

17 A. We first receive an item of evidence and we
18 examine it for biological material. We then take a
19 portion of this evidence, and through a series, we add
20 chemicals to be able to isolate this DNA. We make many,
21 many copies, exact copies of this DNA, and we're able to
22 generate a DNA profile.

23 Q. Does one person's DNA defer from another's?

24 A. Yes. Your DNA profile is unique.

25 Q. Does DNA change over a lifetime?

1 A. No, it does not.

2 Q. I'm going to hand you what's been marked as
3 State's Exhibit 99. Can you identify it?

4 A. Yes, I can.

5 Q. Are those the sample standards that you
6 received at your offices from Taylor Wages and Nichole
7 Payne?

8 A. May I refer to my notes?

9 Q. Yes, please do, if it would help refresh your
10 memory.

11 A. Yes, they were.

12 Q. When and where did you first see these blood
13 standards?

14 A. They were submitted to my laboratory on June
15 11th of 2008.

16 Q. How do you recognize this as the blood
17 standards you look at it?

18 A. My initials as well as the Orchid, the company
19 I work for, evidence tape is located on the envelopes.

20 Q. Did you conduct a DNA analysis of the blood
21 standards of Taylor Wages and Nichole Payne?

22 A. Yes. I took cuttings from these items and they
23 were sent to DNA and I analyzed the results from this
24 test.

25 Q. Were these items tampered with in any way when

1 you took your cuttings?

2 A. No.

3 MR. WHEELER: State offers State's
4 Exhibit 99.

5 (State's Exhibit 99, offered.)

6 MR. PARKS: No objection.

7 THE COURT: State's Exhibit 99 is admitted.

8 (State's Exhibit 99, admitted.)

9 Q. (BY MR. WHEELER) Now, in this case, was a
10 washcloth submitted to your office?.

11 A. Yes, it was.

12 Q. I'm going to hand you what's been marked
13 State's Exhibit 62 and I want you to look in it without
14 touching it.

15 A. (Witness complies).

16 Q. Have you seen this item before?

17 A. I have gloves. May I look at the --

18 Q. Sure, please do.

19 A. (Witness complies). Yes.

20 Q. When and where did you first see this
21 washcloth?

22 A. It was submitted to my laboratory on May 28th
23 of 2008.

24 Q. Did you conduct a DNA analysis of it?

25 A. Yes, I examined it for biological material,

1 sent it to DNA testing, and analyzed the result of this
2 evidence item.

3 Q. Was it tampered in any way at the time you took
4 the samples?

5 A. No, it was not.

6 Q. How did you conduct a DNA analysis of the
7 washcloth?

8 A. I first examined it for biological material. I
9 then took a cutting from this. I sent it -- forwarded
10 it to processing, and we were able to isolate DNA and
11 make, many, many copies to compare to any reference
12 samples that would be submitted.

13 Q. Have you compared the results of your testing
14 of the blood standard of Nichole Payne with the results
15 of the testing from the washcloth?

16 A. Yes, I did.

17 Q. What were the results of that comparison?

18 A. I concluded that in the absence of an identical
19 twin, the DNA profile cutting from the stain of the
20 washcloth is identified as originating from Nichole
21 Payne.

22 Q. After obtaining the result, how do you express
23 the probability that someone could have the same DNA
24 profile as the profile you just identified?

25 A. I then perform a statistical analysis, and then

1 I concluded that the frequency of this generic profile
2 in a random unrelated individual in the black population
3 would be one in 1.10-quintillion; in a random unrelated
4 individuals in the Caucasian population would be 1 in
5 114.9-quadrillion, in unrelated individuals for the
6 southwest Hispanic population, it's 1 and
7 3.55-quintillion; and the frequency in the southeast
8 Hispanic population is 1 in 910.7-quadrillion; and in
9 the general Asian population, the frequency is 1 and
10 23.1-quadrillion of a unrelated individuals.

11 Q. Quintillion and quadrillion, does the
12 expression of these probabilities based on an accepted
13 scientific method?

14 A. Yes. We perform a statistical analysis known
15 as a Random Match Probability that uses the Product
16 Rule.

17 Q. Applying, this probability method to the
18 results you obtained with regard to the washcloth, what
19 is the probability that the sample belongs to someone
20 other than Nichole Payne?

21 A. The numbers that we have generated are
22 approximately millions times the Earth's population.
23 Those are the numbers I have stated for the five most
24 common populations in the United States.

25 Q. So it's very unlikely it's someone other than

1 Nichole Payne?

2 A. Yes. You would have to test a quintillion
3 amount of people, which is a million times of Earth.

4 Q. Based on that probability, you can say with
5 scientific certainty that the sample from the wash rag
6 came from Nichole Payne?

7 A. Yes, I can conclude with scientific certainty
8 that the washcloth originated from Nichole Payne.

9 Q. You also reviewed the DNA on the clothing of
10 Taylor Wages, haven't you?

11 A. Yes, I have examined the evidence for
12 Mr. Austin Wages. Is that the same as Taylor Wages?

13 Q. Let's talk about what exactly you examined on
14 Taylor Wages:

15 THE COURT: She asked if Austin Wages is
16 the same person as Taylor Wages.

17 MR. WHEELER: Yes.

18 Thank you.

19 THE WITNESS: That's -- okay. Then, yes, I
20 did.

21 Q. (BY MR. WHEELER) I'm about two questions
22 ahead.

23 A. Yes.

24 Q. Yes, it's the same person.

25 A. Okay.

1 Q. Did you examine that clothing?

2 A. Yes, I did.

3 Q. You examined his socks?

4 A. Yes.

5 Q. T-shirt?

6 A. Yes.

7 Q. Jeans?

8 A. Yes.

9 Q. Boxers?

10 A. Yes.

11 Q. Jacket or the hoodie he was wearing?

12 A. Yes, the hoodie.

13 Q. In fact, all the clothing that you received at

14 the Southwestern Institute of Forensic Sciences, that

15 was brought to your lab?

16 A. Yes, we received it from the Wood County

17 Sheriff's Office.

18 Q. The Wood County sheriff's office brought it to

19 you?

20 A. Yes.

21 Q. I'm going to hand you what's been marked as

22 State's Exhibit No. 100. Is there any identifiers from

23 your lab on this item?

24 A. Yes, sir, the case identifiers are on Orchid

25 evidence tape and my initials and that of my coworker.

1 Q. Okay. Go ahead and open that and exam that
2 using gloves --

3 THE COURT: There are some scissors.

4 THE WITNESS: Thank you.

5 MR. WHEELER: -- and without showing the
6 contents to the jury.

7 (Witness complies.)

8 THE WITNESS: Okay.

9 MR. WHEELER: Okay. I have some fresh
10 gloves. Let me get those for you.

11 THE WITNESS: Thank you. Okay.

12 Q. (BY MR. WHEELER) Is this the clothing that you
13 examined?

14 A. My laboratory examined those items.

15 Q. Is it in the same or substantially same
16 condition at the time you examined it?

17 A. Yes, according to my notes.

18 Q. Was it altered in any way --

19 A. No.

20 Q. -- when you examined it?

21 A. No, it was not.

22 MR. WHEELER: State offers State's
23 Exhibit 100.

24 (State's Exhibit 100, offered.)

25 MR. PARKS: No objection.

1 THE COURT: State's Exhibit 100 is
2 admitted.

3 (State's Exhibit 100, admitted.)

4 Q. (BY MR. WHEELER) Now, you compared that
5 clothing with the results of the blood card of Nichole
6 Payne, didn't you?

7 A. Yes, I did.

8 Q. With regard to the clothing, when and where did
9 you first see it?

10 A. My laboratory received this clothing on
11 October 7th of 2008.

12 Q. Did you -- the method that you used to conduct
13 the analysis of the clothing defer in any way from what
14 you previously described to this jury?

15 A. No, it did not.

16 Q. Did you test the hoodie from --

17 (Interruption in the proceedings.)

18 THE WITNESS: We examined this hoodie --

19 THE COURT: Let me ask you to wait until
20 the ambulance passes. That's common problem here on the
21 square.

22 (Pause in the proceedings.)

23 THE COURT: Yes, ma'am. Go ahead.

24 THE WITNESS: Okay. We examined this
25 hoodie for the presence of biological material.

1 Q. (BY MR. WHEELER) Did you exam it for the
2 presence of Nichole Payne's blood or her DNA?

3 A. Yes. We examined all of the items based on the
4 Wood County Sheriff's Office notes for the presence of
5 blood in general.

6 Q. Did you test the socks?

7 A. We also, yes, examined these items for
8 biological material.

9 Q. Did you test the jeans?

10 A. Yes, we did.

11 Q. Did you test the T-shirt?

12 A. Yes, we did.

13 Q. Did you test the boxers?

14 A. Yes, we did.

15 Q. So you tested all the clothing that accompanied
16 Austin Taylor Wages from the Southwestern Institute of
17 Forensic Sciences that was brought to your office?

18 A. Yes, all the clothes we received was first
19 examined for biological material; in this case, blood.

20 Q. Did you compare the results of your analysis
21 State's Exhibit No. 100, Austin Taylor Wages' clothing
22 with a results of your analysis of Nichole Payne's DNA
23 sample?

24 A. Yes. Any evidentiary items that go forward to
25 the DNA processing are compared to all the reference

1 samples that were also submitted for this case.

2 Q. What were the results of the comparison from
3 the result of this testing from Nichole Payne's sample?

4 A. We concluded that the DNA profile obtained from
5 this clothing was consistent with the DNA profile
6 obtained for Austin Taylor Wages.

7 Q. And not for Nichole Payne?

8 A. No.

9 Q. With regard to the probability of this sampling
10 matching Taylor Wages, what is the probability that the
11 sample belongs to someone or the samples belong to
12 someone other than Taylor Wages?

13 A. For these items, a statistical analysis was not
14 performed. This was because since it was his clothing
15 and we detected his DNA profile on his clothing, you
16 would expect to find that result, so therefore, we did
17 not perform a statistical analysis on these items.

18 Q. Can you say with scientific certainty that the
19 samples from the clothing are only those of Austin
20 Taylor Wages?

21 A. I can conclude they were consistent with Austin
22 Wages. It matches his DNA profile.

23 Q. And you didn't find anything from Nichole
24 Payne?

25 A. No, I did not.

1 MR. WHEELER: Pass the witness.

2 CROSS-EXAMINATION

3 BY MR. PARKS:

4 Q. Ms. Rogers, with respect, first, to State's
5 Exhibit 62, the washcloth that you examined, early in
6 your testimony there's no question in your mind or any
7 reasonable person's mind that that blood belonged to
8 Nichole Payne; is that true?

9 A. I'm sorry, could you repeat your question,
10 please?

11 Q. Yeah. The blood on the washcloth, that was
12 Nichole Payne's?

13 A. Yes, the blood identified on the stain of the
14 washcloth originated from Nichole Payne.

15 Q. And your analysis proves that to any reasonable
16 degree of certainty that we could have; is that fair to
17 say?

18 A. Yes, it originated from Nichole Payne.

19 Q. So it's Nichole Payne's blood. You determined
20 that from your scientific analysis?

21 A. Yes, I did.

22 Q. Could you tell us when it got there?

23 A. No, I cannot.

24 Q. Can you tell us what circumstances it got
25 there?

1 A. No, I cannot.

2 Q. Can anybody else, I mean, that wasn't there at
3 the time? From any scientific process, can you date the
4 blood?

5 A. No, I cannot. With DNA testing, we cannot tell
6 how a sample is deposited or how long it's been there.
7 I can only determine the source of that stain.

8 Q. Okay. Thank you, Ms. Rogers.

9 With respect to the same items that you
10 examined, do you recall whether or not you examined some
11 other clothes that came from a washer or a drier?

12 A. Yes, I also received other items in this case.
13 We also received a cap and another hoodie.

14 Q. Did you receive a jacket or a towel, anything
15 that indicated it came from a washer or a drier?

16 A. It would be the hoodie and the cap or the other
17 items that we received in our laboratory.

18 Q. And what sort of analysis, if any, did you do
19 on those items?

20 A. Like any other evidentiary sample, we examined
21 this cap and hoodie for the presence of biological
22 material.

23 Q. How do you do that? Do you -- for instance, if
24 you're looking for blood, do you use Luminol?

25 A. No. That is one type of testing that is

1 performed, but that is not performed in our laboratory.

2 Q. Okay. So if you were just testing for blood,
3 you would use Luminol. If you're testing or looking for
4 other biological materials, how do you go about doing
5 that?

6 A. When I first receive -- I'm sorry, could you
7 repeat as far as your question again?

8 Q. Yeah.

9 A. Thank you.

10 Q. If you were specifically looking for blood, you
11 would use Luminol or a process like Luminol, but Luminol
12 would not necessarily work for other biological
13 material?

14 A. Since my laboratory -- I'm not very familiar
15 with Luminol. I know it's used to look for blood. In
16 this case, we used another alternative testing type to
17 Luminol. It's called Castle-Meyers Testing.

18 Q. Would it detect the presence of any biological
19 material including blood?

20 A. It would only detect the presence of blood.

21 Q. Oh, only blood. All right. I'm not asking
22 this question very artfully, I guess, Ms. Rogers.

23 A. Okay.

24 Q. Did you use that process in this case?

25 A. Yes. We use the presumptive testing for blood

1 on all the evidentiary items submitted to our
2 laboratory.

3 Q. Did that process detect any blood among the
4 items from the washer and drier?

5 A. No, they were presumptively negative for the
6 presence of blood.

7 Q. Okay. Now, if you knew something had been run
8 through a washer and drier, would that prevent you from
9 finding biological material if it existed there?

10 A. That would be possible.

11 Q. Why would you test it? I mean, let me put it
12 another way: If you know, does the simple process of
13 washing and dry a piece of clothing with blood on it get
14 rid of all traces of that blood in all cases?

15 A. I see. It would have to depend on the amount
16 of staining present and how the stain was deposited, so
17 I can't really say for sure if the washer or drier would
18 wash out all of the clothing. I mean -- excuse me, all
19 the staining from the clothes. I do know that the
20 testing processes that we use are very sensitive and
21 that's all I can conclude. I cannot determine anything
22 else.

23 Q. If you did the process that you described on
24 items of clothing that had been washed and dried and
25 your process did detect the presence of blood, would it

1 be fair that that would not surprise you?

2 A. I guess it could be possible if there's a large
3 amount of staining. The tests are very sensitive, so if
4 there was blood present, left on the clothing, we
5 definitely would have detected positive results for
6 those particular items.

7 MR. PARKS: Thank you, Ms. Rogers. That's
8 all I have.

9 MR. WHEELER: Nothing further, Your Honor.
10 May she be released?

11 MR. PARKS: No objection.

12 THE COURT: Thank you, you're released as a
13 witness.

14 THE WITNESS: Thank you.

15 (Witness exits courtroom.)

16 THE COURT: All right. I think we'll
17 probably go ahead and take our morning break at this
18 point. Ladies and gentlemen, let me ask you to remember
19 your prior instructions and be available in the jury
20 room at 10:40. Please go with the bailiff at this time.

21 (Jury exits courtroom.)

22 THE COURT: All right. Let the record
23 reflect the jury has left the courtroom.

24 Unless anyone has anything we need to take
25 up outside their presence, we'll be in recess until

1 10:40.

2 MR. WHEELER: I made a Bill of Exception
3 with regard to the transcript of a video and this court
4 was left with the impression that that wasn't provided
5 to the Defense. If the Court will recall, there was
6 time when all the evidence was ordered to be presented
7 to the Defense, and they had the opportunity to inspect
8 it. That transcript was with that evidence in the jury
9 room at the time of inspection and has been made
10 available to the Defense, so I wanted to make that clear
11 on the record.

12 MR. PARKS: Well, you know, the purpose of
13 meeting with our experts in viewing the evidence was to
14 look at the physical evidence of the case. That would
15 have been important for our experts to see. Now, the
16 fact that that transcript was somewhere in that room
17 does not, I would think, satisfy the requirement that
18 the State furnish us that.

19 You know, that's sort of like saying -- and
20 I'm not saying that that's the case here -- but kind of
21 like saying, we showed them the exculpatory evidence
22 because it was at the bottom of ten boxes and let they
23 look at the boxes. I -- you know, to me, it's sort of a
24 tempest in a teapot, but the fact it was in the room
25 with our expert is hardly the same thing as furnishing

1 it.

2 MR. WHEELER: It's very simply this: I
3 don't want this court left that the ball was hidden. I
4 just wanted you to know that.

5 MR. PARKS: I will say on the record that I
6 do not for one second believe that that item was
7 intentionally kept from the Defense. I have no thought
8 in that regard whatsoever. It just was not given to us.

9 THE COURT: Very well. I think the record
10 is made, so we'll go forward.

11 MR. WHEELER: Okay. Thank you. Appreciate
12 it.

13 THE COURT: Yes, sir.

14 (Recess taken at 10:26 to 10:41.)

15 THE COURT: Get back on the record in
16 20,529-2008, State versus Jason Payne. Let the record
17 reflect that counsel for the State, counsel for the
18 Defendant, and the Defendant is present. The jury is
19 not present.

20 Yes, sir.

21 MR. PARKS: It's not a big thing, but I
22 anticipate there's going to be photographs shown by
23 the -- during the course of the next witness that our
24 expert needs to be in a position in the courtroom where
25 we can see that and we're just going to ask that he come

1 up with us.

2 MR. WHITLEY: That's fine.

3 MR. PARKS: And my question is: Do we tell
4 the jury anything about that so they don't wonder who
5 this is wandering around the courtroom?

6 THE COURT: Probably not unless you think
7 we need to. I mean, I really -- I don't --

8 MR. PARKS: That's fine.

9 THE COURT: They'll find out. What we'll
10 do here is we're going to close these doors off so they
11 can go ahead and have a little more space to --

12 MR. PARKS: Sure.

13 THE COURT: With that, is everybody ready
14 to proceed?

15 MR. WHITLEY: Let me get these exhibits.

16 THE COURT: That be fine. Mr. Whitley, I
17 will remind you to please keep your voice up, too.

18 All right. Then if everyone's ready, then
19 let's bring the jury in.

20 (Jury enters courtroom.)

21 THE COURT: All right. Let the record
22 reflect the jury has returned to the courtroom.

23 The State may call its next witness.

24 MR. WHITLEY: Call Tom Bevel.

25 THE COURT: Mr. Bevel, come on around, and

1 when you get here, let me ask you to raise your right
2 hand.

3 (Witness sworn.)

4 THE COURT: Please have a seat.

5 TOM BEVEL,

6 having been first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WHITLEY:

9 Q. Good morning.

10 A. Good morning.

11 Q. Would you identify yourself, please, for the
12 court, the jury, and the trial record?

13 A. Yes, my name is Tom Bevel. Last name is
14 spelled B-e-v-e-l.

15 Q. Where do you live, Mr. Bevel?

16 A. In Norman, Oklahoma.

17 Q. And what is your occupation or profession?

18 A. I'm a senior partner of Bevel, Gardner, &
19 Associates. This is a forensic education and consulting
20 company. Approximately 50 percent of our work is in
21 education. We have several different 40-hour courses
22 that we teach and the other half is in case analysis
23 such as this case.

24 Q. If you would, do have experience in law
25 enforcement?

1 A. Yes, sir. Retired in 1996 after 27 years with
2 the Oklahoma City Police Department. About 18 of those
3 years was in the forensic science section area. I would
4 have worked as a specialist, similar to today what they
5 talk about on CSI processing crime scenes, also as a
6 sergeant/lieutenant/captain in those -- that particular
7 area, ultimately the assistant lab director. The last
8 assignment I had was as a commander in person crimes in
9 the investigative bureau. That would have been
10 homicide, robbery, missing persons, unsolved cases,
11 things like that.

12 Q. In your career in law enforcement, would you
13 tell the jury approximately how many homicide scenes you
14 have worked?

15 A. It's going to be in the thousands.

16 Q. And would you give your best estimate of the
17 number of those scenes that were criminal homicides,
18 murders?

19 A. On death investigations, your suicides
20 typically run fairly close to homicides, so they would
21 be almost 50/50.

22 Q. So according to your count -- you said
23 thousands. Can you give us some estimate of how many
24 actual suicides that you have worked?

25 A. A thousand or more.

1 Q. And if you would, please, sir, how many of
2 those, as best as you can estimate, were committed with
3 long guns?

4 A. Fairly small number of them were with long
5 guns. I don't know a number.

6 Q. Now, since in the course of your career, can
7 you give us a brief synopsis of your forensic training?

8 A. Yes, sir. In bloodstain pattern analysis, I
9 have had three 40-hour basic courses, two advance
10 courses; again, in bloodstain pattern analysis. One of
11 those was specifically dealing with forensics of fluids.
12 In the area of crime scene reconstruction,
13 probably -- well, the best course that I had was in
14 Hendon, England, at the Hendon Police College which is a
15 subsidiary of Scotland Yard. That was a six-week
16 course.

17 At the end of that, I did the on-the-job
18 training with the laboratory processing -- personally
19 processing all the various types of tests they would do.
20 At the end of that, I had an 80-hour course of
21 instruction with the Hendon Medical Hospital
22 specifically doing autopsies, studying what you can tell
23 from the wound relative to a forensic science standard
24 point.

25 Also, I have completed the Technical

1 Investigation Course that is from the Southwestern
2 Institute of Forensic Sciences. That is a cooperative
3 between the Oklahoma Medical Examiner's Office in
4 Oklahoma City. In shooting reconstruction, I've
5 completed -- let me just say that I apologize. I have
6 an upper respiratory infection, so if I start losing my
7 voice, I apologize. Also, I had a number of workshops
8 in shooting incident reconstructions from various
9 association.

10 Q. I'm looking at your curriculum vitae here, I
11 notice in 1970, formal training in forensic training up
12 to 2009. Would that be correct?

13 A. Yes, sir.

14 Q. Okay. Without going through each one of those,
15 what is the IABA?

16 A. That is the International Association For
17 Bloodstain Pattern Analysts.

18 Q. You have had numerous courses with IABA?

19 A. That's correct.

20 Q. What is IAI?

21 A. The International Association For
22 Identification.

23 Q. And I notice you have numerous formal training
24 courses from that institution?

25 A. That would be correct.

1 Q. What is the ACSR?

2 A. That would be the Association For Crime Scene
3 Reconstruction.

4 Q. And I notice there are numerous formal training
5 and formal forensic training by that organization that
6 you've attended?

7 A. Yes, sir, that is correct.

8 Q. Was AAFS?

9 A. The American Academy of Forensic Science.

10 Q. And again, I notice there are several, if not
11 numerous, courses you attended with that organization?

12 A. Yes, sir.

13 Q. Do you serve on any type of peer review boards?

14 A. I have, yes.

15 Q. And would you give us a synopsis of that?

16 A. The Association For Crime Scene Reconstruction
17 you can request peer review to become, for example, a
18 diplomat or a distinguished member. I have served on
19 that a number of times and that would be with, again,
20 the Association For Crime Scene Reconstruction. And
21 also, for the International Association for
22 Identification, I have served as peer review.

23 Q. Have you received any type of honors or awards
24 for your service in your career?

25 A. I have been the charter president for the

1 Association For Crime Scene Reconstruction as well as
2 the International Association of Bloodstain Pattern
3 Analysts. I'm sorry. I've been a diplomat or fellow
4 for the International Association For Identification,
5 the International Association For Bloodstain Pattern
6 Analysts, Association For Crime Scene Reconstruction,
7 and I've had some other awards.

8 Q. Do you belong to any professional associates?

9 A. I belong to basically all of those that we have
10 mentioned.

11 Q. And have you published works in the area of
12 crime scene reconstruction?

13 A. Yes, sir. I have a number of articles that I
14 have. I've also coauthored three textbooks about
15 bloodstain pattern analysis, subtitled Introduction to
16 Crime Scene Reconstruction, and the first textbook,
17 Practical Crime Scene Reconstruction.

18 Q. And have you taught any courses or lectured at
19 any universities? Tell us what you have done in the
20 area of teaching that you can summarize for us.

21 A. In basic bloodstain pattern analysis, I will be
22 teaching next week in Texas. That be the 106th course
23 that I have personally taught. That's in BPA I,
24 Bloodstain Pattern Analysis II, 25 to 30 of those
25 course. In Crime Scene Reconstruction I, around 30, and

1 Crime Scene Reconstruction II, I would guess around 10,
2 and besides the 40-hour courses, I have lectured all
3 across the United States and many foreign countries.

4 Q. Let me show you State's Exhibit 101 and 102.

5 A. Yes, sir.

6 Q. Can you identify those, please, sir?

7 A. Yes, sir. 102 is the textbook I coauthored
8 with Ross Gardner. This is Practical Crime Scene
9 Analysis and Reconstruction, and Exhibit 101 is the
10 Third Edition.

11 Q. Are either of these books or any other book
12 that you have coauthored or authored used in the formal
13 training in crime scene reconstruction and/or bloodstain
14 pattern analysis?

15 A. There is a certification program through the
16 International Association For Identification in
17 bloodstain pattern analysis. They also have one that
18 begins this March in crime scene reconstruction and
19 those are the textbooks that are required for that
20 study.

21 Q. Next, let me show you what's been marked for
22 identification State's Exhibit 103 and ask you if you
23 recognize that exhibit?

24 A. Yes, sir. This is the CV on myself.

25 MR. WHEELER: We'd offer State's

1 Exhibit 103.

2 (State's Exhibit 103, offered.)

3 MR. PARKS: No objection.

4 THE COURT: State's 103 is admitted.

5 (State's Exhibit 103, admitted.)

6 Q. (BY MR. WHITLEY) Mr. Bevel, were you called
7 upon and requested by a member of the Wood County
8 Sheriff's Department to perform a crime scene
9 reconstruction on a homicide located just north of
10 Quitman Texas on Highway 37?

11 A. That is correct.

12 Q. Do you recall the name of the two deceased
13 individuals?

14 A. I do.

15 Q. Would you tell it to the jury?

16 A. Okay. That would be Taylor Wages and Nichole
17 Payne.

18 Q. Now, what information were you furnished for
19 use to doing a crime scene reconstruction?

20 A. There was a recording of the 911 call,
21 transcript and video recordings of the interview of
22 Jason Payne, and that was 66 pages plus a video, crime
23 scene images recorded by W. Burge, hand-drawn sketch
24 of the first floor, autopsy report of Taylor Wages,
25 eight pages; autopsy report of Nichole Payne, seven

1 pages, evidence list that was four pages, supplement
2 report by Mr. Burge, four pages, offense report by Miles
3 Tucker, two pages, and then there are 1, 2, 3, 4, 5
4 one-page supplement reports by Miles Tucker with one
5 exception and that would be Misty Burns for a total of
6 93 pages. On September -- in September, I received the
7 firearm in question for testing that was done on 9/2 and
8 9/3. I have -- well, for this report, that was all that
9 I had at that time. Since that time, I've received the
10 color photographs of the two victims from the medical
11 examiner's office that I did not have for this report as
12 well as some additional reports.

13 Q. Have you seen the report of one of the Defense
14 experts, Noel Martin?

15 A. I have, yes, sir.

16 Q. And have you seen the report of Ed Hueske?

17 A. Yes, sir.

18 Q. Did you receive everything from the Wood County
19 Sheriff's Department that you felt was necessary to
20 perform a proper crime scene reconstruction?

21 A. Yes, sir.

22 Q. Now, if you would, tell the jury when you start
23 into a crime scene reconstruction, the protocol that you
24 follow?

25 A. Obviously, you have to become familiar with all

1 the material that is available to study it. Ultimately,
2 you develop investigative questions that you feel would
3 assist you in trying to put the pieces together. With
4 an investigative question which is, in essence, the
5 problem you're trying to identify, you identify viable
6 hypotheses to take place in order for that to occur.
7 You try to falsify any one of the hypotheses that are
8 developed for that specific investigative question.
9 Ultimately, if you are not able to falsify them, then
10 you certainly have to consider that as a viable way it
11 could have occurred. In some instances, you would do
12 specific testing such as the test firing of this
13 particular rifle.

14 Q. And in this case, did you form various
15 hypotheses?

16 A. I did, yes, sir.

17 Q. Could you tell the jury what those hypothesis
18 were?

19 A. One of them had to do with, was Taylor holding
20 the rifle barrel with his hand at the time of the
21 gunshot.

22 Q. Okay. Let's talk about that a minute, please
23 sir.

24 MR. WHITLEY: If I may, may I have a
25 minute, Judge --

1 THE COURT: Yes, sir.

2 MR. WHITLEY: -- to put these exhibits up?

3 (Pause in the proceedings.)

4 Q. (BY MR. WHITLEY) And if you would, Mr. Bevel,
5 step down and take a look at the photographs I've
6 published here for the jury. Familiarize yourself with
7 them please, sir.

8 (Witness complies.)

9 THE WITNESS: Yes, sir.

10 Q. (BY MR. WHITLEY) Just have a seat. You've
11 seen those before, haven't you?

12 A. Yes, sir, I have.

13 Q. They were part of the data and information that
14 the Wood County Sheriff's Department furnished to you,
15 are they not?

16 A. That is correct.

17 Q. With regard to your hypothesis regarding
18 holding the rifle, do you find anything significant in
19 any of these photographs?

20 A. Yes, there are a number of things that are
21 significant.

22 Q. I believe you had some other photographs with
23 you this morning?

24 A. I did, yes.

25 Q. Do you have them with you?

1 A. Yes, sir.

2 Q. What was the purpose of formulating the
3 hypothesis of holding the gun?

4 A. In Officer Noel Martin's report, he
5 hypothesized that Taylor was holding the gun, and I
6 addressed the same investigative question. Obviously,
7 it pertains to the likelihood of a self-inflicted
8 gunshot wound or another person inflicting the gunshot
9 wound.

10 MR. WHITLEY: Judge, I would like to use
11 this chair, if I could.

12 THE COURT: Yes, sir.

13 Q. (BY MR. WHITLEY) If you would, just come down
14 here and have a seat and duplicate the scene as you
15 remember it being reconstructed.

16 A. You --

17 Q. It's behind you.

18 A. You obviously have to start from the final
19 resting position what is referred to as reverse
20 engineering because that's a known; in essence, your
21 starting point. From this particular scene, we are able
22 to identify from where Taylor's head is resting against
23 the bedding that there is a trail of blood that is kind
24 of a semi-arcing loss of blood across the corner edge of
25 the bed, and you would simply rotate him because he's

1 above that losing blood, you would rotate him from a
2 resting position back around over the loss of blood on
3 the bed. We also have on his right thigh blood that has
4 fallen and been deposited. We have blood on his right
5 thumb and a portion of the inner fingers. We also have
6 to consider where the rifle is located. All of those
7 things are coming into play, and in our investigative
8 questioning, what we start asking is if he did have
9 ahold of the rifle with his right hand and the blood
10 that is lost got on the rifle as he is holding and his
11 hand --

12 Q. Let me interrupt you right here.

13 A. Yes, sir.

14 Q. If would you be so kind as to go to the picture
15 and --

16 A. Yes, sir.

17 Q. -- walk the jury photographically as you've
18 told them, please.

19 A. Yes, sir. In State's Exhibit 51, it's a little
20 bit of an overview. We can see that both feet are on
21 the carpeted area of the floor. His knees are extended
22 out from the edge of bed. The blood that I was talking
23 about that extends over the edge of the bed would be
24 right here where I'm pointing in Exhibit 51
25 [indicating]. We can see it much better in Exhibit 54.

1 This would be the blood loss in the direction he is
2 falling as he rotates to the bed. In 51, we can see the
3 firearm, with the butt of the weapon against the carpet,
4 and it is extending upward touching the left hand,
5 basically on the portion or top of the left hand. We
6 can see that better in No.52, Exhibit 52. We can also
7 see that that's at an approximate 45-degree angle the
8 way that that's laying, and we can get some other views
9 of each one of these. No. 53, if you were to take the
10 head and raise Taylor up and rotate him to the left,
11 this is going to be consistent with the travel that he
12 took to get where he is at and the blood loss that is
13 there. Also, 53 shows the loss of blood that has
14 tissue, possibly bone mixed in with it, and this is
15 certainly important for later. We see that there are
16 spinnings that are going out away from that particular
17 edge of the bloodstain and that will come into play. 55
18 and 56 are close-ups of Taylor showing the entry wound
19 in 55 and the stippling that is shown across the face in
20 both 55 and 56. 50 is a different view showing what is
21 extended past the bed as Taylor was laying on it. His
22 head would be up as I'm pointing here, and this is the
23 remainder of the room behind that.

24 Q. All right. Are you ready to go forward as you
25 stopped the testimony?

1 A. Yes, sir.

2 Q. If you would continue in regard to the first
3 hypotheses.

4 A. And I know it's been cleared, but let me do it
5 also.

6 Q. Good idea.

7 (Pause in the proceedings.)

8 THE WITNESS: If Taylor was holding the gun
9 and the blood is coming from the entry wound and
10 landing, what I would predict in the way of confirming
11 or falsifying that is looking at that area of the hand
12 where any of the blood would be stopped. And on the
13 backside, it depends on how far you go as to whether or
14 not you could get the thumb exposed because this is the
15 lower part. If we are getting blood with this being
16 held approximate -- and we know how this has to be
17 facing because the blood is on top. If it's on top,
18 we're not going to be able to get it from the bottom
19 from this occurrence, so we're able to position the gun
20 in this matter. Where I would look for blood would be
21 in this area of the index finger simply from holding the
22 gun if any blood is going to that particular point, and
23 we don't have really good photographs of that area. You
24 can see enough of the finger that I don't see any traces
25 of blood in the area that I would be expecting if that's

1 the way you are holding it.

2 Q. Let me at this point show you State's
3 Exhibit 104 and 108 and ask: Do you recognize those
4 exhibits?

5 A. I do, yes, sir.

6 Q. Now, do they accurately portray what is
7 purportedly shown?

8 A. Yes, sir, they do.

9 MR. WHEELER: Offer 104 and 108.

10 (State's Exhibits 104 and 108, offered.)

11 MR. PARKS: Can I take him on voir dire?

12 THE COURT: Yes, sir.

13 VOIR DIRE EXAMINATION

14 BY MR. PARKS:

15 Q. Mr. Bevel, were you at the scene?

16 A. I was not at the scene.

17 Q. How do you know these accurately portray
18 anything?

19 A. I would have to depend upon the people that
20 were there as to whether or not they were accurate.

21 Q. Okay. So in answer to his question, you don't
22 know whether these accurately portray anything, but you
23 believe they should?

24 A. I believe they should, yes.

25 MR. PARKS: I don't have any objection,

1 Judge.

2 THE COURT: That's State's Exhibit 4 and 8;
3 is that correct? Was that --

4 THE COURT REPORTER: 104 and 108.

5 THE COURT: Oh. 104 and 108 are admitted.

6 (State's Exhibits 104 and 108, admitted.)

7 FURTHER DIRECT EXAMINATION

8 BY MR. WHITLEY:

9 Q. These pictures are blowups of the area shown in
10 the ones that are on the poster board, are they not?

11 A. They are, yes, sir.

12 Q. They were furnished to you by the Wood County
13 Sheriff's Department?

14 A. Yes, sir.

15 Q. You have no reason to believe they're not
16 accurate?

17 A. I have no reason to believe.

18 Q. Certainly consistent with what was furnished to
19 you by the Wood County Sheriff's Department, aren't
20 they?

21 A. Yes, sir.

22 Q. Which has already been identified as accurately
23 portraying the scene?

24 A. Yes, sir.

25 Q. Now, what do you find significant in those two

1 exhibits?

2 A. In 108 and 104, they're simply a slightly
3 different view and close-up of the right hand, and we're
4 able to see, where I'm pointing with my finger, blood
5 that has gone over the base of the right thumb, and that
6 is seen in both of the exhibits. And we are looking at
7 the top portion and the inner portion of the index
8 finger in an area where I would expect there to be blood
9 if, again, you were holding the rifle and your finger is
10 stopping the blood flow.

11 MR. WHITLEY: May I publish these to the
12 jury, Judge?

13 THE COURT: Yes, sir.

14 (Pause in the proceedings.)

15 THE COURT: Whenever you're ready
16 Mr. Whitley.

17 MR. Whitley: Well, I would like for the
18 jury to see them if I could, Judge.

19 (Pause in the proceedings.)

20 Q. (BY MR. Whitley) Now, again, Mr. Bevel, what
21 exactly is it that you find or the lack thereof in those
22 two photographs that leads you to conclude that holding
23 the gun with the right hand is not consistent with the
24 evidence?

25 A. That we don't find blood on the finger that

1 would be exposed to any blood flow, and there are other
2 reasons besides that, but that is certainly one.

3 Q. What are the other reasons?

4 A. If we had a sufficient amount of blood when you
5 look at the close-ups of this, the blood extends from
6 one side all the way over to the sight as well as in
7 between toward the front of the muzzle. If we can
8 envision blood either being dripped down with volume or
9 a spirt out. Since we have the whole area covered in
10 blood, it is in my opinion not possible for liquid blood
11 to get that kind of coverage and not have excess blood
12 surrounding it, otherwise it would leave a much smaller
13 area that the blood was landing on, and I would look for
14 and expect to find any excess blood missing that
15 particular area down on the carpet, on the lower pants.
16 Also, as we looked at the right thigh a minute ago, we
17 can see that there is what is referred to as spinning,
18 and that is blood that has impacted. And, of course,
19 the pants are fairly absorbant where this is not, but
20 that that producing ricochets that the blood is bounding
21 and spinning out. I certainly would expect that to
22 occur on a harder surface such as this. Likewise, I
23 would look for that to be ricocheting out from the gun
24 and I would look for it on the lower pants legs and the
25 carpet and it simply is not there. And when you take

1 both of those into consideration along with some other
2 points, it is in my opinion that that falsifies that
3 hypothesis the hand was holding the gun at the time of
4 discharge.

5 Q. What does the term "blowback" mean?

6 A. Blowback is a term where blood is going in the
7 opposite direction than what the bullet is travelling,
8 and that's where the back part comes in. With the
9 impact of the bullet, it is fairly frequent that you
10 will have some back splatter back in the direction where
11 the bullet is fired.

12 Q. Did you find evidence of blowback in this case?

13 A. Where I would look for it would be basically on
14 the hand. What I'm seeing on the hand is larger blood
15 loss, not spatter consistent with back spatter.

16 Q. Would you also expect to see, with the gun in
17 this position, blood or biological matter beneath
18 the -- on the floor, so to speak?

19 A. I would look for that, and that would be
20 consistent with what we're finding on the right thigh.

21 Q. Was there anything on the floor?

22 A. To my knowledge and from my examining the
23 photographs, I don't see anything consistent with that
24 on the floor.

25 Q. With the gun that you just demonstrated fired,

1 would you expect to see biological matter on the floor?

2 A. Mixed with blood, I would.

3 Q. Would you expect to see biological matter above
4 the entry wound some place -- or the exit wound, I'm
5 sorry?

6 A. Of the exit wound, you are more likely to
7 have -- that would be forward spatter blood going in the
8 direction of the bullet travelling upon the exit. You
9 would more likely to have some of that than you are from
10 the back spatter.

11 Q. Did you observe any of that, any biological
12 material above the edge of the --

13 A. Above the --

14 Q. Above the exit wound?

15 A. Well, that's confusing me.

16 Q. That may be unartfully stated, then. What I'm
17 getting to is: Did do you have any forward spatter?

18 A. That I can, from the photographs, actually
19 identify, I cannot.

20 Q. Would you expect to see that?

21 A. I would expect to see some, yes.

22 Q. Is what you don't see inconsistent with the
23 positioning of the gun as you've demonstrated it?

24 A. Well, you're limited as to how far you can go
25 when you don't find something. That I'm not pointing it

1 out in the photographs doesn't mean is it or isn't
2 there. I simply don't have the ability to identify it.

3 Q. Certainly not there in sufficient quantity to
4 be observable?

5 A. That would be accurate.

6 Q. What else do you find inconsistent with the
7 position of the gun as you demonstrated it?

8 A. Okay. In showing that is it at an approximate
9 45-degree angle, there's two things: Number one,
10 anybody who's ever shot a .30-30 is quite aware that
11 there's a fairly substantial kick or recoil into the
12 shoulder. The butt of this weapon is against a very
13 thin carpet or throw rug. Beneath that is cement, and
14 that is not a giving substraight like your shoulder
15 would be. Newton's Second Law basically talks about for
16 every action there is an equal and opposite reaction.
17 Where that applies in this particular case where the gun
18 is fired, there's going to be a very substantial recoil
19 going backwards. It cannot give in the cement, so
20 therefore, that's going to be transferred basically
21 laterally. And where I would expect this gun to go upon
22 being fired against that hard cement floor is to kick
23 outward and probably be found on the floor simply like
24 this [indicating].

25 Q. That's certainly not consistent with the

1 position of the rifle in the photographs, is it?

2 A. Yeah, it is not. And the additional point is
3 the fact that the weapon is resting against the top of
4 the left hand. To get that there, I can't say it would
5 be impossible, but with all the pieces of the puzzle
6 we're looking at, it kicking out, lack of blood in one
7 location, lack of blood in the carpet and lower
8 extremities, I certainly would not expect it to be at
9 that location.

10 Q. Now, you did certain test firing, did you not?

11 A. I did, yes, sir.

12 Q. What were the results of your test firing?

13 A. The methodology that I used for my test firing
14 was from the autopsy report which is look at the spread
15 that was identified of the stippling and the soot that
16 was on the face of Taylor. I was trying to match that
17 approximate general area which is really not the best
18 methodology to use. At that time, I did not have the
19 90-degree close-up shot of Taylor that came from the
20 medical examiner's office. From those, you can count
21 the stippling in an identified area and look at the
22 density, the numbers in that particular area. Not
23 having a photograph with which I could do that
24 accurately, I looked at trying to identify the general
25 area of spread on the face. And that, in my testing,

1 turned out to be from eight inches away or further, more
2 likely around 10 inches. It could be as short as eight
3 inches. I requested that an independent person also do
4 this and I sent the gun after I got through test firing
5 it to Richard Ernest who is a firearms examiner in the
6 Fort Worth area. He had the straight on 90-degree
7 photographs from the medical examiner's office and he
8 did a methodology where you're looking at the density,
9 the numbers of stippling within that identified area.
10 In that opinion, that is the more accurate method and I
11 would defer to his report.

12 Q. Using your own findings to start with --

13 A. Yes, sir.

14 Q. -- you determined it was probably eight inches
15 from the end of the barrel?

16 A. At a minimum. That would be a minimum range.

17 Q. Now, you have also concluded, I believe, that
18 it would be very difficult, if not impossible, to
19 maintain the trajectory or the track of the bullet and
20 be able to pull the trigger and press the safety lever.
21 Could you demonstrate that for us?

22 A. Yes. If we place this on the approximate
23 entry -- and I'm going to go ahead and close this -- if
24 you're doing this with your left hand, to get down to
25 get the correct trajectory while depressing and pulling,

1 it is possible by really stretching at the eight-inch
2 level. It certainly would be much easier to not worry
3 about getting that correct trajectory to just simply
4 lower and to bring it closer, but at eight inches, I
5 could not state that that would be impossible.

6 Q. It would be very difficult, would it not?

7 A. To keep the correct trajectory through the
8 head. And when, you know, somebody is demonstrating
9 this, we have a tendency to look at the hand to reach
10 the trigger, where you need to be looking is up here,
11 what is this doing with the trajectory to get down
12 because the head can move very slightly in order to
13 reach it.

14 Q. How long is your arm length?

15 A. My arm length is about 22 and a quarter inches.

16 Q. If there's testimony that Austin Taylor Wages
17 had a 23-and-a-half-inch-reach arm length, would that
18 change your opinion?

19 A. It certainly is longer than my reach. And if I
20 can get close to doing it at eight inches with a little
21 bit of a strain, I certainly would believe that he
22 could. I also used a teenager that was about the same
23 physical stature with the same arm measurement to
24 attempt this at eight inches. He could still effect it.
25 He had a tendency to start losing the trajectory through

1 the head, but once you went beyond eight inches, it
2 became very, very difficult to -- well, once you get to
3 that point with the hand, at least in my opinion, he
4 isn't able to do it.

5 Q. How many suicides have you worked in your
6 career that were noncontact wounds?

7 A. I think there have been a few that were close
8 range, but one of the very first things that you look
9 for in a suicide is contact. By far, the majority are
10 contact wounds for a suicide.

11 Q. Now, if you would, that, I'll tell you, this is
12 a dowel rod. If you would like to --

13 A. Yes, sir.

14 Q. Would you demonstrate again the difficulty you
15 have, if you could, depressing the safety on that gun
16 and pulling the trigger? I believe you mentioned
17 Mr. Ernest, his results were 10 inches, plus or minus
18 two, were they not?

19 A. Yes, sir. And if we place the end of the dowel
20 rod into the mouth, and to start reaching again -- don't
21 look at my -- down there, look at the trajectory up
22 here. And in order to start reaching, I have to change
23 that trajectory and I still have to press it in to get
24 the trajectory. I don't believe at 10 inches it is
25 possible.

1 Q. Even assuming that it is possible, based on
2 your training and experience, your observation of some
3 many, many years, would it be consistent to someone
4 bound to commit suicide to go through all that trouble
5 to do it?

6 A. I cannot address somebody's mind --

7 MR. PARKS: We object to that. That calls
8 for a conclusion with no foundation.

9 MR. WHITLEY: That's based on his training
10 and experience, what he's seen over the years, Judge.

11 THE COURT: Overruled.

12 MR. WHITLEY: You may answer.

13 THE WITNESS: Okay. What I have to rely on
14 is the majority of -- that the great majority of the
15 cases of contact wound. In this case, it is not a
16 contact wound. And if we can take the dowel rod out, it
17 is so much easier to get closer in order to effect it.
18 It is also odd, unusual for a frontal face
19 self-inflicted wound with the exception of inner oral or
20 underneath the chin. Those are the only two places that
21 I can remember self-inflicted from a frontal face.

22 Q. (BY MR. WHITLEY) Now, in order to get the
23 trajectory that the medical examiner reported, how would
24 a person who is standing in front of you with a rifle,
25 would you demonstrate how -- how that trajectory could

1 be maintained?

2 A. Yes. We can certainly see how this position
3 can be an upward flow, and what we have to do is simply
4 rotate the head by moving the rifle. From this position
5 to this position, you're able to effect the same
6 trajectory through the head. It's just a matter of
7 moving the head in line with the long axis of the
8 firearm.

9 Q. Have you seen gunshot residue on the back of
10 prior victims' hands?

11 A. I have, yes.

12 Q. Can you explain, based on your training and
13 experience, how that would get there?

14 A. Finding visible GSR on the back of a person's
15 hand, simply, is placing that gun in the area where the
16 GSR is escaping and making contact. You can put in this
17 case very little support for using that to say much
18 simply because in both parties, Nichole's and Taylor's,
19 there isn't any question he's in the presence of a
20 firearm that's discharged, and to find any GSR on him,
21 if you didn't, I would be surprised. You would expect
22 you would because we know he's in an area where a
23 firearm has been discharged, so it really doesn't mean
24 that much.

25 Q. Let me change horses here just a minute. You

1 have already told us that you disagree with Noel
2 Martin's theory that the gun was held in the right hand
3 and the trigger was pulled in the left hand?

4 A. Yes, sir.

5 Q. And that's based upon the blood pattern that
6 you've just described?

7 A. It's based on all the things we've talked
8 about, from the gun kicking out, from the blood on the
9 end of the barrel, not being on the index finger, not
10 having additional blood on the outside of where this
11 blood would have landed on the barrel, which, again,
12 would be the lower leg and carpet area. In essence,
13 everything we've talked about, I think, comes into play.

14 Q. Would you agree with his statement that
15 noncontact wounds are common in suicides of this nature?

16 A. I would very strongly disagree that noncontact
17 wounds are common. They are not.

18 Q. Do you have an opinion as to whether or not
19 Austin Taylor Wages committed suicide?

20 A. I do, yes.

21 Q. What is that opinion?

22 A. That all of the physical evidence, in concert
23 and holistic view, in my opinion, it is inconsistent
24 that this is a suicide or a firing by Taylor. This is
25 an, excuse me, a firing by some other person.

1 Q. Now, you formulated, I believe, three
2 scenarios. Would you outline those for us?

3 A. Yes, sir.

4 THE COURT: Does he need to remain there
5 for that purpose?

6 MR. WHITLEY: He can take his seat.

7 THE WITNESS: Yes, sir. The possible
8 scenarios that I considered was Taylor shot Nichole and
9 then shot himself; two, Taylor shot himself and someone
10 else shot Nichole --

11 Q. (BY MR. WHITLEY) Let's go back to formulating
12 your hypothesis and trying to disprove it: Did you do
13 that with Taylor shot himself and then shot Nichole?

14 A. Yes, sir, I did.

15 Q. And would you be so kind as to repeat that for
16 the jury, what your findings were?

17 A. Okay. There was findings in the investigative
18 reports from the investigators that were originally on
19 the scene. Some of -- and, again, I should point out
20 this is subjective information as opposed to objective,
21 but I did consider it because it was in the reports.
22 The disparities in body temperatures and presence of
23 gunpowder in Taylor's body compared to Nichole's body
24 indicating that Taylor was dead before Nichole was shot.

25 Q. Now, those are not absolutes?

1 A. They are absolutely not absolutes.

2 Q. But they are consistent with the other findings
3 and other data and other observations you made in this
4 case?

5 A. And, again, you have to take everything in a
6 holistic view, all the information, and that would be
7 accurate, yes, sir.

8 Number two, Taylor shot himself and someone
9 else shot Nichole. This comes back to what we were
10 demonstrating in the chair, all those various pieces. I
11 did consider that you could also possibly use your toe
12 to both press the lever as well as activate the trigger.
13 I have seen that in past cases, and in those cases that
14 we were comfortable that that was what had occurred, we
15 found an indentation in the sock where you're sticking
16 your toe in the trigger guard and it's depressing the
17 sock. I looked at that in this and don't see it.

18 There's no physical evidence of some third
19 party other than the family basically being there.

20 Q. (BY MR. WHITLEY) Would the fact that there was
21 no evidence of a forced entry or struggle factor into
22 these conclusions?

23 A. It certainly would, yes.

24 Q. How would that factor in?

25 A. Okay. Struggle, you could certainly identify

1 from physical evidence that was there, for example, torn
2 clothing, any scratches, or debris under the
3 fingernails. That would be looked for at the autopsy.
4 That would certainly create a different scenario as to
5 how the gun might or might not be held and, in essence,
6 fought over. There is no evidence of something like
7 that, like a burglary. There's no forced entry.
8 Nichole was very likely asleep on the bed at the time
9 that her gunshot occurred. That was a contact wound.
10 All of those come into play.

11 Q. Okay. I interrupted you in repeating your
12 scenarios.

13 A. The next one up is Jason shot Taylor and Jason
14 shot Nichole. I considered a number of areas such as
15 the noted presence of fresh gunpowder in Nichole's room,
16 the lack of that noted in Taylor's room. Again, we have
17 to consider that it's a much tighter room for Nichole's
18 than what it is in the garage for Taylor.

19 Body temperatures, you have to be careful
20 there. The only accurate way of doing that is taking
21 body temperatures ambient temperatures and taking all
22 those factors, and, of course, that was not done. It
23 was the observation Taylor was cooler than Nichole was;
24 however, she had been under blankets and he was fully
25 dressed, but not under blankets.

1 Q. Let me interrupt you again. There's a
2 statement in Noel Martin's report explaining the odor of
3 gunpowder as the, "Blood in great quantities and
4 biological material often produce an odor that could be
5 mistaken with gunpowder." Do you agree with that
6 statement?

7 A. That would depend on the individual. If you
8 have a person who's never ever been exposed to the smell
9 of gunpowder, I could say that that may be; they could
10 confuse the two. Any law enforcement officer who has
11 training --

12 MR. PARKS: We will object to that. It
13 calls for a conclusion and supposition.

14 MR. WHITLEY: Your Honor, he's an expert
15 witness.

16 MR. PARKS: You cannot testify what every
17 law enforcement --

18 THE COURT: At this time, he hasn't been
19 qualified for that. I sustain the objection.

20 Q. (BY MR. WHITLEY) Based on your personal
21 experience with officers you have worked with, do you --

22 MR. PARKS: Same objection, Your Honor.

23 THE COURT: And I'll sustain at this time.

24 Q. (BY MR. WHITLEY) Okay. Let's go back to your
25 personal experience. Do you feel it is -- let's see.

1 Did you have any officers working under
2 your command that would confuse blood and biological
3 material?

4 THE COURT: Let me ask counsel to approach.
5 (Bench.)

6 THE COURT: If this expertise can be
7 developed --

8 MR. WHITLEY: I'm sorry?

9 THE COURT: If this expertise can be
10 developed, we're going to develop it outside the
11 presence of the jury. What we need to determine is
12 whether he's tested the ability to smell gunpowder --

13 MR. WHITLEY: He's been in the homicide
14 division, Judge. He knows what officers do and --

15 MR. PARKS: We need a 702 hearing on that.

16 THE COURT: Just a second. If you need to
17 do that, we can do it outside the presence of the jury
18 but I think, you know, at this point, he's definitely
19 been qualified as an expert in blood splatter, but not
20 to the ability of officers to distinguish the smell of
21 blood and gunpowder.

22 MR. WHITLEY: He can certainly testifies he
23 disagrees with Noel Martin.

24 MR. PARKS: But he has.

25 THE COURT: Yes, sir. But when you're

1 asking about what officers can or cannot smell, I mean,
2 that's --

3 MR. WHITLEY: Well, Judge --

4 THE COURT: Do you need to send the jury
5 out and try to develop that?

6 MR. WHITLEY: I think I would like to do
7 that.

8 THE COURT: All right.

9 (Open court.)

10 THE COURT: Okay. Ladies and gentlemen,
11 let me ask you to remember your instructions and please
12 go with the bailiff to the jury room at this time.

13 (Jury exits courtroom.)

14 THE COURT: All right. And let the record
15 reflect the jury has left the courtroom.

16 Mr. Whitley, if you want to proceed with
17 that, you may do so at this time.

18 RULE 702 HEARING

19 DIRECT EXAMINATION

20 BY MR. WHITLEY:

21 Q. Mr. Bevel, I want to talk with you a few
22 minutes about noting the confusing the odor of gunpowder
23 and biological brain material. I take it you feel
24 confident in saying you have not been confused by the
25 two?

1 A. I have not, no.

2 Q. Have you ever had an officer been confused with
3 the two?

4 A. Not to my knowledge, ever.

5 Q. In all of your training, published works, have
6 you made a determination whether that's a common mistake
7 officers make?

8 A. In my opinion, it is not.

9 Q. Have you ever had an officer that you know of
10 that was confused by the odor of gunpowder and that of
11 biological material?

12 A. Never.

13 Q. How many cases have you worked? How many cases
14 have you personally worked where gunpowder was present
15 and biological material was present?

16 A. It's going to be -- the way you asked the
17 question, if a firearm has discharged, there's going to
18 be GSR present. As to whether or not you can smell it,
19 is another issue. It's going to be present.

20 Q. Have you, in all of your training and
21 experience, dealt with the problem of mistaking
22 gunpowder odor for that of human tissue and blood?

23 A. I have not. In 105 completed 40-hour courses,
24 we use two units of blood, 500 milliliters each, which
25 is fairly large volume, and that's never even come up as

1 a possible issue. With that, we also discharged
2 firearms.

3 MR. WHITLEY: Judge, I would submit he's
4 qualified to render an opinion as to whether or not a
5 seasoned police officer is going to confuse blood matter
6 and brain matter with gunpowder.

7 THE COURT: Did you have any --

8 CROSS-EXAMINATION

9 BY MR. PARKS:

10 Q. Did you conduct blind tests to see whether or
11 not people confuse gunpowder with biological matter?

12 A. I've never done a blind test.

13 Q. Have you ever heard of anyone who has?

14 A. Not to my knowledge.

15 Q. In all the literature, have you ever seen that
16 ever done by anyone anywhere?

17 A. I never even heard the issue brought up until
18 this case.

19 Q. So you can't describe any scientific
20 methodology that would have been employed by yourself or
21 any other person coming to opinion of a scientific
22 matter that is routinely and regularly used and admitted
23 in the scientific community regarding this issue?

24 A. From my experience, I think that that is a
25 common sense. It wouldn't require an expert.

1 Q. It wouldn't require anybody to tell the jury
2 about that. They can make up their own determination.
3 You disagree with Mr. Martin?

4 A. I do disagree with him, yes.

5 MR. PARKS: Judge, this is not an issue, in
6 our opinion. I think it's inappropriate for expert
7 testimony.

8 THE COURT: What I'm going to allow is
9 based on his experience, great deal of experience around
10 gunpowder and around blood to express his opinion as to
11 whether or not the two can be confused. I understand
12 Mr. Martin, Officer Martin has expressed opinion on that
13 as well, and that's fine. The jury, you know, can
14 listen to both of them. Neither of them should be
15 testifying as to what officers generally should or
16 shouldn't be able to smell about it. To my knowledge, I
17 don't have anything indicating there were tests run with
18 other people, but they both have experience around blood
19 and they have experience around gunpowder, and so let's
20 limit the expertise to that.

21 MR. WHITLEY: Let me make sure I
22 understand. He's entitled to testify that based on his
23 training and his experience, he's never known an officer
24 to be confused by the --

25 MR. PARKS: No.

1 THE COURT: In -- in his training and
2 experience that the aroma of fresh blood and recently
3 expended gunpowder do not smell in a matter that's
4 easily confusable, shouldn't be confusable, but I -- he
5 shouldn't pass on what other people do. He can deal
6 with his own olfactory and senses and he can express
7 that based on his long years of experience. And if
8 Mr. Martin has a different opinion based on his, he can
9 do that, but he shouldn't be testifying about what other
10 people should or shouldn't think about it.

11 MR. WHITLEY: Okay.

12 THE COURT: Are we ready to proceed?

13 MR. WHITLEY: Did you release the jury
14 for lunch?

15 THE COURT: No, sir.

16 MR. WHITLEY: We're ready to proceed.

17 THE COURT: Let's bring them back in.

18 (Jury enters courtroom.)

19 THE COURT: All right. And let the record
20 reflect the jury has returned to the courtroom.

21 Mr. Whitley, whenever you're ready, you may
22 proceed.

23 FURTHER DIRECT EXAMINATION

24 BY MR. WHITLEY:

25 Q. Let me revisit the gunpowder versus human

1 biological material. Based on your training and your
2 experience of many, many years, do you have an opinion
3 as to whether or not gunpowder odor and human biological
4 material are confused by smelling alike?

5 A. I have an opinion, yes, sir.

6 Q. What is that opinion?

7 A. That you can tell the difference between the
8 two.

9 Q. And, again, I say if Noel Martin expressed his
10 opinion that they are often confused, would you agree
11 with that?

12 A. I disagree with that, yes.

13 Q. Let me ask regarding the term "soot" and the
14 term "stippling". Can you tell us the difference, based
15 on your training and experience?

16 A. Yes. Stippling is burned -- partially burned
17 or unburned gunpowder particles that are obviously
18 discharged from the bullet and impacting the skin, and
19 if the person is still alive, there may even be a ting
20 of red that is referred to as petechial reaction;
21 whereas, soot which is much, much finer smoke than this
22 burning of the residue and it does not have the ability
23 to break the skin and create petechial hemorrhages.
24 It's much, much lighter, finer.

25 Q. Okay. With regard to the stippling, what

1 distance from the muzzle of the gun to the wound would
2 you expect to find stippling?

3 A. That would vary. Obviously, on the weapon in
4 this case, it's going to have to go up into the feet
5 ranges as opposed to inch range.

6 Q. What about soot?

7 A. Once again, you're looking at the amount and
8 the distribution. If it is a high concentration, that
9 would put the end of the muzzle closer. If it is a
10 light concentration and more disbursed and spread out,
11 that puts the end of the muzzle further back.

12 Q. On a close wound, would you expect to see
13 stippling inside the wound?

14 A. That is a common occurrence, yes, sir.

15 Q. What about soot?

16 A. If it is close enough, you would find soot in
17 the wound track, yes.

18 Q. Did you find anything in this case that there
19 was soot on the inside of the wound?

20 A. Not to my knowledge.

21 Q. Do you recall the medical examiner in his
22 report noting a thin layer of soot is essentially
23 deposited around the entrance wound deposited inferiorly
24 to the lower lip upwards to one inch from the center of
25 the --

1 A. I do recall that.

2 Q. Do you have an opinion based on a thin layer of
3 soot being deposited as the distance between the muzzle
4 and the wound?

5 MR. PARKS: Your Honor, we object to that
6 because there's no adequate foundation for him to know
7 what is or what is not a thin layer. It's not
8 quantifiable. The State's own witness testified to
9 that.

10 MR. WHITLEY: I asked if he agreed to that.

11 THE COURT: I sustain the objection.

12 Q. (BY MR. WHITLEY) Have you reviewed Ed Hueske's
13 report in regard to soot?

14 A. I have.

15 Q. Do you agree with his conclusions?

16 A. That would depend upon the specific conclusion.
17 He has multiple opinions there.

18 Q. What about the presence of the soot underneath
19 the boy's chin?

20 A. Under his chin, I'm not aware of there being
21 soot underneath the chin.

22 Q. There's stippling there, is there not?

23 A. There is.

24 Q. According to the picture?

25 A. You can see it in the picture.

1 Q. The medical examiner would not expect the
2 muzzle at a distance of greater than one foot. Would
3 you agree with that?

4 A. Again, it would depend upon the individual
5 firearm and ammunition. In this case, that or further
6 away.

7 Q. But not closer?

8 A. Not -- well, let me be sure I understand your
9 question.

10 Q. I'll withdraw the question.

11 Based on all the evidence that you were
12 submitted, can you find any evidence that the weapon was
13 fired from beneath the boy's chin?

14 A. From beneath the chin with him looking down,
15 with him looking up as long as you raised the rifle with
16 it, that would still be below the chin. There is some
17 slight stippling below the chin which says that the end
18 of the muzzle is at least far back that would clear the
19 face and get underneath the chin.

20 Q. But there is no soot underneath the chin?

21 A. Underneath the chin, no.

22 MR. WHITLEY: I pass the witness, judge.

23 THE COURT: All right. Ladies and
24 gentlemen, I think we're going to go ahead and stop for
25 lunch at this time. Let me ask you to remember your

1 prior instructions, particularly if you're going to be
2 going out to eat here in Quitman; really, if you're
3 going to be going out anywhere, to wear your juror
4 badges and then report back to the jury room at
5 1:00 -- well, let's say five after 1:00, and we'll try
6 and get started as quickly as we can.

7 (Jury exits courtroom.)

8 THE COURT: The jury's left the courtroom.
9 We're in recess until 1:00.

10 (Recess from 12:01 to 1:05.)

11 THE COURT: Back on the record in Cause
12 20,529-2008, State vs. Payne. Let the record reflect
13 that counsel for the State, counsel for the Defendant,
14 and the Defendant is present. The jury is not present.

15 Is the State ready to proceed?

16 MR. WHITLEY: State's ready, Your Honor.

17 THE COURT: Is the Defendant ready?

18 MR. PARKS: Defendant is ready.

19 THE COURT: You had just passed the witness
20 and you're ready.

21 Bring them in.

22 (Jury enters courtroom.)

23 THE COURT: Let the record reflect the jury
24 has returned to the courtroom.

25 Mr. Parks, whenever you're ready, you may

1 proceed.

2 MR. PARKS: May it please the Court.

3 CROSS-EXAMINATION

4 BY MR. PARKS:

5 Q. Mr. Bevel, would it be fair to say that it is
6 possible that Taylor Wages committed suicide?

7 A. Given the totality of the physical evidence, I
8 don't believe so.

9 Q. I didn't ask you that. Is it entirely possible
10 that Taylor Wages committed suicide?

11 A. I answered the best way that --

12 Q. No, sir, you gave me your opinion.

13 A. Yes, sir.

14 Q. You are saying it's impossible for him to have
15 committed suicide considering the evidence given?

16 A. It would be inconsistent with the physical
17 evidence, yes, sir.

18 Q. Mr. Bevel, I'm going to ask you this question
19 until you answer it: It is impossible for him to have
20 committed suicide?

21 MR. WHITLEY: I'm going to object to
22 counsel lecturing the witness?

23 THE COURT: Yes. Don't be --

24 MR. PARKS: I'm sorry.

25 Q. (BY MR. PARKS) Is it impossible, given the

1 state of the evidence, for Taylor Wages to have
2 committed suicide?

3 A. Almost nothing is impossible.

4 Q. In fact, you testified that to the jury
5 earlier, did you not, that it was possible he committed
6 suicide?

7 A. Again, nothing is impossible.

8 Q. So it is entirely possible?

9 A. Actually, that is not true statement, is it?
10 62, having never been 40 in my life, so, I mean, not
11 everything is possible. Can I rule that with scientific
12 certainty?

13 Q. I'll let you answer that one.

14 A. No.

15 Q. No. Now, when you were first engaged, roughly,
16 by the State as an expert?

17 A. That would have been in July of '08.

18 Q. And you wrote a written report for the State
19 dated September 5, 2008; is that correct?

20 A. That's correct.

21 Q. Now, let me cover a little of other ground,
22 Mr. Bevel: You are being paid?

23 A. I am, yes.

24 Q. That's entirely appropriate for experts to be
25 compensated for their work in a case?

1 A. It is.

2 Q. Whether or not for the State or the Defense?

3 A. That's correct.

4 Q. Nothing wrong with that?

5 A. Correct.

6 Q. So you were engaged in July or June?

7 A. Yes.

8 Q. And agreed to a review of the evidence --

9 A. I did.

10 Q. -- for the State and to render an opinion?

11 A. I did.

12 Q. And you rendered opinion or opinions in the

13 written report that you submitted to the State?

14 A. Yes, sir.

15 Q. Do you stand by those opinions?

16 A. I do.

17 Q. Okay. Anything about that report that you

18 would change one way or the other if you were rewriting

19 it today?

20 A. Well, that I can recall, no.

21 Q. Okay. Now, the things that you've testified or

22 many of the things you've testified today are not in

23 that written report, are they?

24 A. There are some things. For example, I

25 testified to the report of Mr. Martin, or excuse me,

1 Officer Martin. Some of that is not in here, that is
2 correct.

3 Q. And the testimony that you've given with
4 respect to those photographs, none of that is in your
5 report, is it?

6 A. Well, I would disagree.

7 Q. Did you even have those photographs to review
8 when you wrote your report?

9 A. Yes, sir.

10 Q. Did you?

11 A. Yes, sir.

12 Q. Did you have the autopsy photographs?

13 A. I did not.

14 Q. Okay. Those were the photographs you did not
15 have?

16 A. That's correct.

17 Q. Okay. Now, do you consider that you are a
18 scientist, Mr. Bevel?

19 A. I think that is arguable depending on the side
20 you look at. Am I an academically degreed scientist?
21 No. Have I been trained in science and its proper
22 application? Yes.

23 Q. Your educational background is in criminal
24 justice; is that fair to say?

25 A. That's correct.

1 Q. Okay. So the expertise that you have garnered
2 along the way has been since your college education?

3 A. Since my degree.

4 Q. Gosh, it's been, what, 30 years since you took
5 that course that you consider to be most important of
6 all your education?

7 A. That would be about right.

8 Q. Okay. What was your purpose, I guess, for what
9 you were hired for? What were you hired to do by the
10 State of Texas?

11 A. To do an analysis on this particular case, do
12 an analysis of the physical evidence and to render an
13 opinion as to the best explanation of the events that
14 took place.

15 Q. I believe in your report you refer to that as
16 an event analysis?

17 A. Yes, sir.

18 Q. Is that different from a crime scene
19 reconstruction?

20 A. It is a methodology of doing crime scene
21 reconstruction.

22 Q. Crime scene reconstruction, correct me if I'm
23 wrong, is essentially a scientific endeavor that is
24 basically guided by the physical evidence that's there;
25 is that fair to say?

1 A. I would say that is.

2 Q. Whereas, an event analysis can take into
3 consideration subjective and nonscientific matters?

4 A. It can.

5 Q. In fact, it is?

6 A. It is very, very common that ancillary
7 information that is ancillary would not be considered
8 scientific.

9 Q. In fact, you relied a good deal in reaching
10 your conclusions on things that you were told, at least
11 via reports, by Miles Tucker?

12 A. Yes, I did consider what was in his report.

13 Q. Did you make a decision what you were going to
14 say and work backwards?

15 A. Well, my analysis, for example, as we talk
16 about those pictures, that starts in a reverse engineer,
17 so that depends on what part of the analysis you're
18 referring to.

19 Q. Did Miles Tucker tell you his theory of this
20 was?

21 A. I don't recall him telling me that, no.

22 Q. Can you describe that from the reports that he
23 sent you?

24 A. I think that you could, yes.

25 Q. So you knew the direction, at least the Wood

1 County Sheriff's Office, was going in the matter?

2 A. Well, that particular individual as to what he
3 might believe, yes.

4 Q. Okay. Well, when you wrote your report, you
5 did not have the report of Noel Martin?

6 A. I had the first one, but not the second one.

7 Q. You did not have autopsy photographs?

8 A. That's correct.

9 Q. You did not have Ed Hueske's report?

10 A. I did not.

11 Q. Okay. Now, I believe you told us today, in
12 fact, previously have told us that at least in the
13 matter of range of fire, that you would defer to Richard
14 Ernest, the expert that you helped the State engage?

15 A. I did, yes.

16 Q. Okay. And that would be just -- actually, just
17 so the jury is not confused, I don't believe, they are
18 with respect with how far away the muzzle was?

19 A. Yes.

20 Q. And that's range of fire?

21 A. And as I explained, the methodology I used was
22 looking at the overall pattern which is across the face
23 and identified in the autopsy report. If you have a
24 straight on shot and you're able to identify the numbers
25 of stippling within an identified area, I think is a

1 more accurate way of doing it because I don't do that
2 if --

3 Q. You didn't have the photographs?

4 A. I did not.

5 Q. All you had was a description?

6 A. That's correct.

7 Q. However, Mr. Ernest did have the photographs?

8 A. That's correct.

9 Q. You consider that his process would have been a
10 bit more reliable than yours?

11 A. I believe it is more accurate.

12 Q. More accurate, all right. Mr. Bevel, do you
13 believe that Austin Taylor Wages was not shot where he
14 was found?

15 A. Well, he is not shot -- shot laying down on the
16 bed.

17 Q. Well, at that location. Do you think he was
18 shot somewhere else?

19 A. I do not.

20 Q. Then what difference does it make whether or
21 not you find any, what did you call it, forward -- not
22 blowback, but the opposite of blowback?

23 A. Well, I don't know that it really changes
24 anything.

25 Q. Doesn't make any difference, does it?

1 A. No. If you find it, it would be considered
2 consisted with forward spatter. If you don't, it
3 doesn't mean it wasn't there, but it just means it
4 wasn't found and couldn't be if it wasn't.

5 Q. So absent of evidence is not evidence, is it?

6 A. That's a Carl Sagan statement, and I agree with
7 it.

8 Q. Do you know how far it was to the nearest
9 target where any such matter could have been placed?

10 A. I'm not sure I'm following you there.

11 Q. Well, there's been testimony here, and I
12 believe it was alluded to in your testimony, you would
13 have expected to have seen some matter, blood or brains
14 or something, on the walls or the ceiling or somewhere
15 that you did not see?

16 A. On the exit?

17 Q. On the exit.

18 A. Yes, I would have expected there to be some,
19 yes.

20 Q. Well, how far would that go?

21 A. It depends on the size of the particulate. If
22 you're talking about the misting blood that was sub one
23 millimeter, it's travelling through air, air resistance
24 overcomes its velocity rather quickly because it doesn't
25 have sufficient mass to overcome air resistance. That

1 generally goes at maximum about four feet, but if you
2 interject something else into blood such as tissue,
3 hair, bone, that's a greater mass that can go a greater
4 distance, so there's a lot of variables there.

5 Q. So what was the distance to the nearest target
6 for that in this particular scene?

7 A. It would have been past the edge of the bed
8 towards the curtains hanging over the closet.

9 Q. You never went to the scene?

10 A. No, sir.

11 Q. So you really can't answer that question. You
12 don't know how far?

13 A. I don't have a measurement, no, I don't.

14 Q. So it may be that it was too far away to even
15 be a target and wouldn't be unusual at all?

16 A. And in that case, if it doesn't reach that
17 distance and there is debris in the air, then it would
18 come down due to gravity and be on the carpet.

19 Q. Was it on the carpet?

20 A. To my knowledge, no.

21 Q. Do you know one way or the other for sure?

22 A. To my knowledge, I don't know.

23 Q. You don't know. So that's a part of your
24 testimony, that you found it unusual, but it really
25 isn't unusual for you not to have found it if you don't

1 know those other matters? You didn't have enough
2 information to make that judgment, did you?

3 A. To state it is unusual, it is unusual to not
4 find it.

5 Q. Would it be unusual if the nearest target was
6 six feet or more away?

7 A. Well, sir, that's ignoring that there's a floor
8 in between that six foot away.

9 Q. What effort did you make to determine whether
10 or not any of that matter was on the floor?

11 A. Other than looking at the pictures and the
12 report, that's it.

13 Q. Whose blood was on the end of that rifle?

14 A. We don't know because it was not tested.

15 Q. In your testimony, all of the testimony that
16 you gave to the jury about the amount of blood that was
17 on the end of that rifle, the mass of blood that you
18 surmised from and took your testimony all that way,
19 assumed it was Austin's blood, didn't it?

20 A. You have to assume that. That is what the
21 investigative question is.

22 Q. Then if it is not, then all of that stuff you
23 told the jury really doesn't apply, does it?

24 A. Yes, it does apply. Yes.

25 Q. Mr. Bevel, were you describing to the jury how

1 it came to pass that Austin Wages could not have shot
2 himself and you extrapolated your opinion based on what
3 you found on the end of that rifle?

4 A. That is certainly one of the considerations,
5 yes, sir, along with other points.

6 Q. And that assumed that blood was Austin's?

7 A. You have to argue it both ways. It is
8 Austin's --

9 Q. When you testified --

10 A. Sir, may I finish?

11 Q. -- that the jury should not --

12 MR. WHITLEY: May he answer the question?

13 MR. PARKS: If he would. I'm sorry, Judge.

14 THE COURT: Rephrase your question.

15 Q. (BY MR. PARKS) When you testified to the jury
16 about your opinion that you came to extrapolating from
17 the amount of blood that you found on the end of that
18 rifle, giving that testimony, it was that assumption
19 that that blood was Austin's, was it not?

20 A. For that particular part of the analysis, it
21 has to be.

22 Q. It has to be?

23 A. Yes.

24 Q. So if it wasn't Austin's blood, you're starting
25 from a false premise?

1 A. No, sir. If it is not Austin's blood, that
2 goes to a different investigative question.

3 Q. Do you disavow what you just said to the jury?

4 A. Absolutely not.

5 Q. So if I understand you correctly, all of the
6 testimony that you made to the jury that had the basis
7 in the amount of blood that you found on the end of the
8 rifle sustains even though you don't know whose blood it
9 was? Is that what you're telling us?

10 A. For the investigative question as to whether or
11 not Taylor had shot himself, the blood was the issue.
12 You have to approach it that it was his blood.

13 Q. Exactly. And that's how you approached it,
14 right?

15 A. Yes, counselor.

16 Q. And if you're wrong, you're wrong, aren't you?

17 A. No. That would lead to the other investigative
18 question.

19 Q. What, where did the blood come from?

20 A. Absolutely, absolutely.

21 Q. That's obvious, Mr. Bevel. It would have to be
22 his mother's?

23 A. Thank you. It is very obvious.

24 Q. Did you do any testing other than the range of
25 fire testing?

1 A. No, sir.

2 Q. Did you ever actually view any of the actual
3 physical evidence?

4 A. At the time I wrote this report, no.

5 Q. Did you ever view the socks?

6 A. Let me back up. Physical evidence and testing,
7 I did view, obviously, the firearm.

8 Q. Sure. Socks?

9 A. No, sir.

10 Q. So your conclusions that you draw having to do
11 with the possibility that Austin may have shot himself
12 using his toe to pull the trigger rests slowly upon the
13 photograph that you saw of his socks?

14 A. That would be accurate.

15 Q. Never asked to see the socks to see whether or
16 not they would or would not crease?

17 A. I did not ask to see the socks.

18 Q. You made some issue of no forced entry or
19 struggle would be consistent with someone in the family
20 or friend or whatever it was shot both Mrs. Payne -- I
21 don't remember exactly what you said, but that it would
22 consistent with your theory that Jason shot both of
23 them, the fact that there was no forced entry or signs
24 of struggle?

25 A. That doesn't prove Jason shot them.

1 Q. Doesn't prove anything, really, I mean, whether
2 it was suicide or he was shot. It's just as consistent
3 with a suicide, isn't it?

4 A. My understanding of the question may have been
5 motive like we were talking about a third party in a
6 burglary or something along that line.

7 Q. That's how you took it?

8 A. It is.

9 Q. What is a void, Mr. Bevel?

10 A. A void -- and it has to be identified with a
11 continuation of blood surrounding it. If I held this
12 paper up and my hand is in front of it and blood or some
13 other substance covers my hand, goes between the fingers
14 onto the paper, now I lift my hand away, the void would
15 be the outline of my hand that caught whatever that
16 liquid was.

17 MR. PARKS: May I approach, Your Honor?

18 THE COURT: Yes, sir.

19 Q. (BY MR. PARKS) Mr. Bevel, do you recall
20 State's Exhibit No. 51? I believe it is State's Exhibit
21 No. 53.

22 A. Would you --

23 Q. Do you see this photo -- do you need to come up
24 and take a look at it?

25 A. Yes, sir.

1 Q. Do you see this photo of Austin Wages? The
2 rifle is here and the right arm is here and there's
3 blood that runs from here all the way across to his hand
4 [indicating]. Do you see a void in that blood track?

5 A. No.

6 Q. Does that tell you anything?

7 A. That there's not a void.

8 Q. Okay. In your report -- I'm going back to your
9 report of September 5th, Mr. Bevel -- you indicate that
10 an event analysis is an in-depth crime scene
11 reconstruction using objective methods to evaluate the
12 physical evidence, but now you've also told us that also
13 includes some subjective determinations --

14 A. It almost always includes some subjective. The
15 analysis part first is based on the physical evidence
16 and then ancillary information.

17 Q. Okay. And you came to your conclusions at the
18 end of your report and you gave us the three possible
19 scenarios. You've already testified to the jury about
20 that. One, that Tyler shot his mother and then
21 committed suicide?

22 A. Yes, sir.

23 Q. And then, one, that an unknown person shot them
24 both, and then, one, that Jason shot both Taylor and
25 Nichole?

1 A. Yes, sir.

2 Q. And you came down on the side of Jason shooting
3 Taylor and Nichole, and you base that on objective and
4 subjective matters?

5 A. Yes, sir.

6 Q. You took into consideration the things that
7 Miles Tucker said in his reports?

8 A. Yes, sir.

9 Q. You took into consideration what you called
10 disparities in body temperatures?

11 A. Yes, sir.

12 Q. You took, I guess with whole cloth, that what
13 Miles Tucker said that Nichole was warm and Taylor was
14 cold?

15 A. I did consider that, yes.

16 Q. And you've told the jury here today that you
17 have to leaven that subjectivity with a consideration of
18 the scene itself, whether she was under covers, what
19 kind of clothes she was in, the kind of location where
20 she was as opposed to Taylor --

21 A. Yes.

22 Q. -- who was out in a garage and all of those
23 things?

24 You didn't make that distinction in your
25 written report, did you?

1 A. I would have to read it. I'm not sure. I
2 think I mentioned that I considered that information.

3 Q. Right. And reached the conclusion, did you
4 not, that Taylor was shot and had been dead for some
5 long while before they ever went to school that morning?

6 A. I did not say that.

7 Q. Did you say the evidence indicates that Taylor
8 was dead long before Jason took the children to school?

9 A. Could you refer me to that in the report? I
10 don't actually recall that.

11 MR. PARKS: May I approach?

12 THE COURT: Yes, sir.

13 Q. (BY MR. PARKS) Does this appear to be your
14 report, Mr. Bevel?

15 A. Yes, sir.

16 Q. Let me refer you to the last page, Paragraph 3
17 right here.

18 A. Yes, sir. The part I did not remember was,
19 "...long before."

20 Q. Is that still your position?

21 A. That it would be before.

22 Q. I'm sorry?

23 A. I'm not sure I would still include "long." How
24 long is long?

25 Q. Well, did you consider your report before you

1 wrote it and sent it to the State?

2 A. I did. You asked me if there was anything I
3 might change before, that might be one of them, leaving
4 the word "long" out.

5 Q. Well, would you change the fact that your
6 opinion was that Taylor was dead prior to Jason going to
7 school?

8 A. I believe that is the better explanation.

9 Q. And so that would mean he was dead before
10 Nichole was shot?

11 A. Correct.

12 Q. Do you have any evidence to support that?

13 A. In looking at the physical evidence in its
14 totality of everything that we've been talking about
15 relative to Taylor shooting himself, the disparity in
16 body temperature, the smell of gunpowder, strong in one
17 area than the other, as counsel agreed, the obvious
18 source of the blood on the barrel if it isn't Taylor's,
19 it would be mom's, all of that taken into consideration,
20 my opinion and belief that that is the better
21 explanation.

22 Q. But you can't tell us when that or under what
23 circumstances that might have occurred?

24 A. That what might have occurred?

25 Q. That Taylor got shot before his mother?



1 A. I'm not sure I'm following you.

2 Q. You would have taken out, "...long before
3 Jason"?

4 A. Right.

5 Q. Do you have a theory as to when that would have
6 happened?

7 A. Likely before they go to school.

8 Q. During the night?

9 A. I don't believe that would have been that long
10 of a period, no.

11 Q. So as far as you know, did anybody take any
12 liver temperatures?

13 A. I don't believe that was ever done.

14 Q. That would be an accurate way of determining --

15 A. Well, even then, there are a lot of problems in
16 doing that.

17 Q. So when we take the information that one body
18 felt warm to the touch and the other body felt cold to
19 the touch, any conclusions that are drawn from that is
20 either guesswork or just one step barely above it,
21 wouldn't you agree?

22 A. I would say that's subjective information.

23 Q. The same with respect to smelling gunpowder.
24 First, you would have to assume that that was an
25 accurate determination that it was, in fact, gunpowder.

1 Then you would have to take into consideration what was
2 the atmospheric conditions under which he smelled that
3 if you're going to contrast it with another area?

4 A. As well as the experience and training of the
5 individual and exposure to what gunpowder smells like.

6 Q. You are aware, for instance, that the ceiling
7 in that garage is about two feet taller than the
8 ceilings in the house? Would that make a difference?

9 A. Everything in the way of any variable has to be
10 considered.

11 Q. Did you consider that in coming to your
12 conclusion?

13 A. I did consider that that's a garage setting and
14 that's a larger room, yes, sir.

15 Q. Do you know whether or not that metal door on
16 one side of the room that formed the wall used to be a
17 garage door and whether or not it even met the floor?

18 A. I don't know that, no.

19 Q. But all of that would have played a part in
20 that?

21 A. Every bit of it would come into play.

22 Q. But that was information you really didn't have
23 when you made a determination to consider the smell of
24 gunpowder and the temperature of the bodies? You didn't
25 have that information?

1 A. I don't think anybody took temperatures of the
2 bodies.

3 Q. By the way, that was Newton's Third Law, not
4 the Second that you quoted.

5 A. Well, then I stand corrected.

6 Q. I guess probably just two other things,
7 Mr. Bevel, and I'll be done: First, with respect to the
8 path of the bullet --

9 A. Yes, sir.

10 Q. -- and your demonstration that you made to the
11 jury sitting there in the chair holding the gun --

12 A. Yes.

13 Q. -- that way, this way, or the other in
14 describing how the muzzle of the barrel would have been,
15 in your opinions that you reached, according to what you
16 did, let me just ask whether or not you took deflection
17 and fragmentation into consideration at all in reaching
18 your opinion?

19 A. What I took into consideration was the entry
20 and exit point and the description by the medical
21 examiner.

22 Q. Took entrance and exit and you extrapolated
23 from there?

24 A. Yes, sir.

25 Q. Without consideration, if I'm understanding you

1 correctly, without consideration of deflection or
2 fragmentation?

3 A. If there is a dramatic change in the actual
4 angle from the point of entry and exit, that is
5 typically identified in the autopsy report.

6 Q. So the answer's "no"?

7 A. Well, yes, I do consider it. I looked at the
8 autopsy report and they --

9 Q. So --

10 A. -- and they did not indicate that there is any
11 evidence or they would talk about it.

12 Q. So that was not a real factor in your
13 determination as it was not in the autopsy report?

14 A. You can -- you can consider from the entry and
15 the exit, that typically that -- there's not a perfect
16 straight line, but it is a path that's fairly reliable
17 unless there's some reason that it is deflected,
18 typically off of bone.

19 Q. And is there evidence from the autopsy report
20 that this bullet traveled through bone or hit bone?

21 A. Well, the two bones that it's hitting is the
22 bone on the skull in the entry and the bone on the exit,
23 the skull bone.

24 Q. Was there evidence of fragmentation of the
25 bullet?

1 A. I don't actually recall that.

2 Q. Okay. All right. One last thing, Mr. Bevel,
3 and I'm going to be through: Are you familiar with the
4 Journal of the Forensic Science?

5 A. Yes, sir.

6 Q. What is that? Tell the jury.

7 A. That is a journal that studies are written
8 about various issues of forensic science. They also do
9 book reviews, typically articles or news.

10 Q. Is it a reputable journal?

11 A. I think that it is, yes.

12 Q. Recognized in the scientific community as
13 something that can be read and studied and relied upon?

14 A. Yes, sir.

15 Q. Do you have any psychiatric or psychological
16 training?

17 A. No, sir. Well, I had a class in college in
18 psychology, but I don't consider that any expertise.

19 Q. You are in a position to make judgments about a
20 person's effect based upon recording?

21 A. I have had training in interview, and, yes, I
22 think that I can, at least, form an opinion relative to
23 listening to interviews to a certain extent. Not as a
24 psychiatrist, no.

25 Q. As a matter of fact, according to your report,

1 you considered -- you listened to and considered the 911
2 tape?

3 A. I did.

4 Q. And you considered that -- well, first, in your
5 report, you say that you considered Mr. Payne's aspect,
6 a-s-p-e-c-t?

7 A. Yes, sir.

8 Q. And then later in your report, you referred to
9 affect, a-f-f-e-c-t?

10 A. Yes, sir.

11 Q. I'm sorry, pardon me. Effect, e-f-f-e-c-t.

12 A. Okay.

13 Q. You have aspect and effect, when, in fact, the
14 proper term is "effect," isn't it?

15 A. I believe it is.

16 Q. Did you check your report for mistakes like
17 that?

18 A. You always attempt to. Perfectly written
19 document, I don't think I ever have.

20 Q. Okay. All right. Well, you refer to writing
21 books, so let's go to that. State's Exhibit 102, which
22 I believe was marked and shown to the jury, but not
23 admitted into evidence. Perhaps it was 101. Let me
24 just see. Yeah, 101, Bloodstain Pattern Analysis, Third
25 Edition?

1 A. Yes, sir.

2 Q. You wrote that book?

3 A. Along with Ross Garner.

4 Q. Was that book reviewed in the Journal of
5 Forensic Sciences?

6 A. It was.

7 Q. And did you read that review?

8 A. I certainly did and responded to it.

9 Q. You agree with it?

10 A. Absolutely don't agree with it. I think you
11 also have to look at the history of conflicts and bad
12 blood from the person that ended up writing it.

13 Q. You had personal problems with him?

14 A. I certainly did.

15 Q. So when he wrote that, "Although the scientific
16 method, conservatism, and objectivity are stressed
17 periodically, examples of poor science and practice
18 abound. A deficit of these essentials are particularly
19 evident in many of the described cases," he goes on and
20 points out you misname stuff, velocity and accelerate,
21 you misstate the clotting problems of blood.

22 And finally, he says, "There is no doubt
23 that bloodstain pattern analysis is a science.
24 Unfortunately, the authors have failed to capture its
25 essence. Instead, the present text can best be

1 described as 'Cargo Cult Science,' a phrase coined by
2 Richard Feynman in his commencement address to the
3 Caltech class of 1974. As used, Feynman was describing
4 a particular manifestation of pseudoscience, one in
5 which someone believes he or she has correctly harnessed
6 all the trappings and rituals of science but is missing
7 a critical component: Scientific integrity. Alas, much
8 more is missing from this text; science itself is
9 absent?"

10 A. You have to consider the history of the person
11 who is writing it as to exchanges that have gone back
12 and forth between parties. You also -- what I would
13 encourage you to do is simply consider the foundation
14 and weight and the way you apply to it whether or not
15 somebody who has bad blood towards both Ross Garner and
16 myself wrote a book review of his personal opinion. And
17 also what is not being read is the reply that we gave to
18 it.

19 Q. So he just didn't like you?

20 A. He simply doesn't, no.

21 Q. In fact, he complains in here some of the same
22 things we see in your report, sloppy editing, misnaming
23 things, not having the right name for things. We see
24 the evidence of that very thing in your report here
25 today?

1 A. As I stated previously, I don't believe that I
2 have ever written a perfect document. As many times as
3 I've gone over even the books, even the editors of the
4 books, you can go in and find mistakes. That happens.

5 Q. Was --

6 A. I admit to being human.

7 Q. Was the editorial board of the Journal of
8 Scientific Science who allowed this review in against
9 you, too?

10 A. That is almost always allowed on any book
11 review. By the way, he has written four book reviews
12 and every one of them are caustic about the other three
13 people, too.

14 MR. PARKS: Okay. It's his fault. I'll
15 pass the witness.

16 REDIRECT EXAMINATION

17 BY MR. WHITLEY:

18 Q. Just a couple more questions: If the DNA
19 testing resulted in none of Nichole's blood found on the
20 clothes of Austin Taylor Wages, would that surprise you?

21 A. I would expect to find some blood on that
22 clothing, yes, sir.

23 Q. Now, we visited the term "blowback"?

24 A. That would be, correct.

25 Q. Okay. And if Austin Taylor Wages were --

1 assuming that he killed his mother, we know that that's
2 a contact wound on Nichole Payne --

3 A. Yes, sir.

4 Q. -- he would have had to lean over the bed, put
5 the gun next to her, and fire it? Would that be close
6 enough that you would expect blowback blood on his
7 clothing?

8 A. Yes. In fact, with contact wounds, there's
9 blood splatter because of the gases helping to explode
10 the cranium.

11 Q. And the lack of DNA bloodstains on his clothing
12 would be consistent with him not being the shooter on
13 his mother, Nichole?

14 A. I would -- the best I can answer that is that I
15 would expect there to be some and none is found.

16 Q. Let me show you what's been marked for
17 identification as State's Exhibit No. 109?

18 A. Yes, sir.

19 Q. Do you recognize that exhibit?

20 A. I do, yes, sir.

21 Q. As a matter of fact, a copy of that is in your
22 report, is it not?

23 A. It is.

24 Q. What is your observations -- wait. Let me
25 offer it into evidence.

1 Does it accurately show what it purports to
2 represent?

3 A. To my knowledge, yes, sir.

4 Q. You relied on it in your report?

5 A. Yes, sir.

6 Q. Is this the type of material that experts
7 typically rely upon in your field?

8 A. Yes, sir.

9 MR. WHITLEY: Offer State's Exhibit 109.

10 (State's Exhibits 109, offered.)

11 MR. PARKS: No objection.

12 THE COURT: State's 109 is admitted.

13 (State's Exhibits 109, admitted.)

14 Q. (BY MR. WHITLEY) What of interest did you note
15 about State's Exhibit 109?

16 A. That on the area -- as we're looking at the
17 victim in bed, we're looking at her back, and from her
18 back towards us, essentially on the white items, you're
19 able to see blood -- what appears to be blood and be
20 consistent with back spatter from the gunshot to her
21 head.

22 Q. Would you expect more blood or human matter?

23 A. I would expect there to be more, yes. The
24 sub-one millimeter stain is typically not visible in a
25 photograph.

1 Q. Do you have any explanation as to why there's a
2 lack of blood matter there?

3 A. Well, I mean, we do have it. As far as the
4 misting blood, I expect it to be there, but you can't
5 see it in the photograph.

6 Q. Now, back to the subject of the lack of blood,
7 what did you refer to that as, forward splatter?

8 A. Referring back to Taylor's bed or --

9 Q. Yes, back into Taylor's room and the area
10 behind where the bed was and the body was found.

11 A. Yes, sir, that would be forward splatter; blood
12 going in the same direction as the bullet exited.

13 Q. Are any of the photographs representative of
14 the area that you were speaking of that you would expect
15 to find blood of some type?

16 A. It would, yes.

17 Q. Would you mind pointing out which one of those
18 exhibits?

19 A. In Exhibit 51, the blue blanket that's
20 underneath Taylor, any of that area in that direction
21 would be a location that I would be looking for forward
22 spatter. The dark color of the material, the
23 substraight certainly is not as conducive as the white
24 blanket on Nichole's bed for seeing it especially in a
25 photograph, but that would be the general area. Simply

1 behind him as, again, we have to rotate him back up in
2 an upright position.

3 Q. Now, as close a range as Nichole was killed,
4 you would expect to find -- would you expect to find
5 blood on the gun if it was a contact wound?

6 A. I would expect some blood to be there, yes.

7 Q. And blood -- a gun fired from approximately
8 eight to 10 inches or closer, if you'd please, to Austin
9 Wages, would you expect to find blood on his gun?

10 A. I would expect to, yes.

11 Q. That would be consistent with your statement
12 that you would expect both of their blood to be on the
13 gun, would it not?

14 A. It would.

15 Q. Now, you had mentioned the hand on the gun and
16 demonstrated that for us, did you not?

17 A. Yes.

18 Q. You've already identified State's Exhibit 108
19 and pointed out where you had expected to have found
20 blood and the absence of that blood; is that correct?

21 A. Yes, sir.

22 Q. Let me show you what's marked for
23 identification purpose as State's Exhibit 110 and ask do
24 you recognize that exhibit?

25 A. I do, yes, sir.

1 Q. And does it accurately portray what it purports
2 to show?

3 A. In my opinion, yes, sir.

4 Q. It was presented to you by the Wood County
5 Sheriff's Department?

6 A. That's correct.

7 Q. It's a picture of the scene, is it not?

8 A. Yes, sir.

9 Q. Is that typically the type of evidence that you
10 rely upon in your field of expertise?

11 A. It is common.

12 MR. WHITLEY: Offer State's Exhibit 110.

13 (State's Exhibits 110, offered.)

14 MR. PARKS: No objection.

15 THE COURT: Admitted.

16 (State's Exhibits 110, admitted.)

17 Q. (BY MR. WHITLEY) If you would, take both of
18 the exhibits, 108 and 110, and demonstrate to the jury
19 what your earlier testimony was?

20 A. May I stand?

21 110 would be on the right and 108 to the
22 left, and these are photographs of the hand. The one
23 that's just been introduced, 110, is a different angle
24 and a close-up, and what we're able to look at is the
25 inner portion of the index finger that if the hand is

1 around the gun and blood is flowing down to that finger,
2 which if that is there, that could create a void, that
3 is where I would look for the blood to be if that is
4 occurring.

5 Q. And, of course, there is no blood there --

6 A. No, sir.

7 Q. -- is that correct?

8 Now, if I understood the cross-examination
9 correctly, it was suggested that the blood on the gun
10 was that of Nichole Payne; am I correct there?

11 A. That's my understanding.

12 Q. If that is the case and he put his hand on that
13 gun at the location where the blood is, would you expect
14 to find blood on the palm of his hand, of his right
15 hand?

16 A. I would.

17 Q. Is what you observed in the photograph
18 consistent with that hypothesis?

19 A. It is not.

20 Q. So in your opinion, your scenario of him seated
21 on the bed and right on the top of the barrel and
22 pulling the trigger with his left hand or toe, that's
23 not consistent with the evidence?

24 A. In my opinion, that is not consistent.

25 Q. Let's talk about the bloodstain pattern

1 analysis for a few minutes. Give me and tell the jury
2 the process you go through in writing a book and having
3 it published.

4 A. Okay. Typically, you make a proposal to a
5 publishing company. They will consider other books that
6 are out there and how well they are selling as to
7 whether or not there might be a market for this. If
8 they believe that there is, you sign a contract. You
9 have it generated within a specified amount of time.
10 Once you have written it, it goes through, typically, a
11 peer review as well as an editor with the publishing
12 company. They send it back to you. You go over it
13 looking for any changes or additions that may take
14 place, then you send it back to the publishing company,
15 and in a short period of time thereafter, it is
16 published.

17 Q. And I notice this was CRC Press?

18 A. Yes, sir.

19 Q. And underneath that, it's Taylor & Francis
20 Group?

21 A. Yes, sir.

22 Q. Is that the publishing company in police type
23 publications?

24 A. That's one of their divisions, yes, sir.

25 Q. Is that the division you were dealing with?

1 A. Yes, sir.

2 Q. So they have some expertise in the area you're
3 publishing?

4 A. They have some expertise. And to judge what
5 the book is worth, I would put much more emphasis on a
6 committee that selects it for the study material in the
7 particular discipline as a book review.

8 Q. What type of peer review did this book have?

9 A. It is basically the same process.

10 Q. And it was approved and published. Is it in
11 general circulation?

12 A. It is in general circulation. And once again,
13 that is the required study text for the certification in
14 crime scene reconstruction.

15 Q. Has it received any good reviews other than
16 from Mr. Richard Feynman who was not impressed?

17 A. Actually, both of the books have received
18 favorable reviews, but they have also received -- well,
19 the third edition received the one that I would say was
20 not.

21 Q. Where did the favorable reviews come from?

22 A. At this juncture, I would have to go back and
23 review myself from where they came from because they're
24 from different venues and by different people and I'm
25 sorry, I can't tell you where that is exactly. I just

1 don't recall.

2 Q. How did you feel about the attack that you
3 received from Mr. Feynman?

4 A. I don't think that I liked it. How else can
5 you say it? However, putting it in perspective, it is
6 not unexpected.

7 Q. Who is Vernon Gebeth?

8 A. Vernon Gebeth is the series editor for the
9 forensic science books through CRC, Taylor & Francis.
10 He has written a very, very thick textbook on homicide
11 investigation. It's called Practical Homicide
12 Investigation. He's also written a textbook on sexual
13 assault investigation and he is the series editor for
14 all the CIC books.

15 Q. Did he review your book?

16 A. He did.

17 Q. I noticed that he also referred to the works of
18 Vincent Di Maio?

19 A. Yes, sir.

20 Q. Who is Vincent Di Maio?

21 A. Di Maio is -- actually, there's two Di Maigos,
22 father and son, both medical examiners; a long, long
23 history of being in that field.

24 Q. Publish their work?

25 A. Yes, sir.

1 Q. Let's talk about the Practical Crime Scene
2 Analysis & Reconstruction?

3 A. Yes, sir.

4 Q. You and Ross Garner were the authors of that
5 book?

6 A. Yes, sir.

7 Q. It's also published by the CRC Press?

8 A. Yes, sir.

9 Q. Is it in general circulation?

10 A. It is.

11 Q. Where is being used?

12 A. It's being used in some college courses. I use
13 it in mine. I am adjunct professor at the science
14 program at the University of Oklahoma. I teach a
15 particular class and I use it there. It is, as I said
16 previously, part of the study material for the
17 certification.

18 Q. Did it go through the same peer review process
19 as Bloodstain Analysis?

20 A. Yes, it would be identical.

21 Q. Is CRC Press known to publish garbage text?

22 A. Well, they certainly try not to.

23 Q. What is their reputation?

24 A. They have a good reputation.

25 Q. You are pleased to have them as your publisher?

1 A. I am, yes.

2 MR. WHITLEY: Again, I pass the witness,
3 Judge.

4 RECROSS-EXAMINATION

5 BY MR. PARKS:

6 Q. Peer review is important, is that what you're
7 saying?

8 A. Peer review is important, yes, sir.

9 Q. Was your report peer reviewed?

10 A. It was.

11 Q. And why -- who was it? Who did it?

12 A. It was Iris Dally.

13 Q. I'm sorry?

14 A. Iris Dally.

15 Q. And who is Iris Dally?

16 A. She is a former DNA analyst with the Oklahoma
17 State Bureau of Investigation. She spent about
18 something well over seven years as a field investigator,
19 got out of the lab, and went to become an investigator,
20 and basically does the same thing that I am doing. She
21 is also a partner in Bevel, Garner & Associates.

22 Q. I see. Your company?

23 A. Well, yes.

24 Q. Yeah. From looking at your report, you could
25 have said Albert Einstein peer reviewed it for all we

1 know. Nobody else's name is on that report, is it?

2 A. I don't think I could have had Albert Einstein.

3 Q. Well, that --

4 A. I assumed it was.

5 Q. The point being, there's nothing on your report
6 to indicate that it was ever peer reviewed. The only
7 way we know if it was is you're saying so?

8 A. And that comes from an actual case. And where
9 was I at? In a different state --

10 Q. I didn't ask you --

11 A. Well, I need to explain.

12 Q. I asked you whether or not anybody put their
13 name on your report as having peer reviewed it, and your
14 answer was no?

15 A. Can I explain that?

16 Q. If they want to you explain it, they can ask
17 you to explain it.

18 A. Okay.

19 Q. You're not telling us, are you, that bad books
20 are never published?

21 A. Of course, not.

22 Q. But yours is a good book?

23 A. It depends on the individual that's reading it
24 and what they think of it.

25 Q. But you stand by it?

1 A. I would stand by it especially since it's being
2 used in certification programs.

3 Q. Some certification programs?

4 A. The --

5 Q. You're not saying the only way anybody can be
6 certified in blood splatter is to read your book, are
7 you?

8 A. Well, currently, yes, that is correct.

9 Q. Is that right?

10 A. Yes, sir.

11 Q. And where is this being taught?

12 A. Where is it being taught?

13 Q. Yeah. Who certifies it?

14 A. The International Association for
15 Identification is the group that has the only
16 certification in bloodstain spatter analysis. I don't
17 believe there is anyone else that has one.

18 Q. Only them. And when did they start using your
19 book?

20 A. I believe -- and it wasn't this edition, and
21 they have recently just switched books for the
22 bloodstain, but it is still one of our books. Very
23 close to the inception of when they started the program.

24 Q. That was the second edition you're talking
25 about?

1 A. I believe that's correct.

2 Q. Now, despite all of this, despite all of your
3 books, all of this other stuff, you stand by your
4 opinion that probably what happened here was that Taylor
5 was killed before Nichole?

6 A. Yes, sir.

7 Q. If that was Nichole's blood on the end of that
8 rifle, that would blow that theory right out of the
9 water, wouldn't it?

10 A. How?

11 Q. Well, would you expect to see -- you're right,
12 yes, sir. I guess you wouldn't.

13 A. Well, thank you.

14 Q. That's an interesting theory you got there. We
15 won't know, though, because that blood was never tested?

16 A. That is correct.

17 Q. Among all of the other stuff that's been done
18 here, you've never seen a report where the blood on the
19 gun was tested?

20 A. That is correct.

21 Q. So in your theory, at some point in time,
22 either the night or the morning or at some time, Taylor
23 was shot and then Nichole?

24 A. I believe that's the better explanation.

25 Q. Thank you.

1 A. Is it possible that that could be reversed? Of
2 course it's possible.

3 Q. A lot of things are possible, aren't they?

4 A. Yes.

5 MR. PARKS: I'll pass the witness -- or
6 wait a minute.

7 Q. (BY MR. PARKS) Before I do that, let me ask
8 you this: What is lividity?

9 A. Lividity is the settling of blood due to
10 gravity.

11 Q. Have you seen any signs of lividity in the
12 extremities of Nichole among the photographs that you
13 have reviewed?

14 A. There is some evidence of that, yes.

15 Q. Have you seen any signs of lividity in the
16 extremities of Taylor in the photographs that you've
17 reviewed?

18 A. I do.

19 Q. Where?

20 A. In the palmar area and towards the fingers.

21 Q. I'm sorry?

22 A. The palmar area and towards the fingers.

23 Q. And could you tell us where those photographs
24 are? Do you remember which ones those are?

25 A. I think we've looked at one of them.

1 MR. WHITLEY: I'm sorry?

2 MR. PARKS: We'll look at them later.

3 That's all I've got, Judge.

4 MR. WHITLEY: I have nothing further.

5 THE COURT: Thank you, sir. You may step
6 down.

7 THE WITNESS: Thank you, sir.

8 THE COURT: Ladies and gentlemen, we'll
9 take our first break. Remember your prior instructions
10 and be available in the jury room at 2:20. Please go
11 the bailiff at this time.

12 (Enter exits courtroom.)

13 THE COURT: Let the record reflect that the
14 jury has left. We'll be recess.

15 (Recess taken from 2:08 to 2:20.)

16 THE COURT: Let me get back on the record
17 in 20,529-2008, State vs. Jason Tad Payne. Let the
18 record reflect that counsel for the State, counsel for
19 the Defendant, and the Defendant is present. The jury
20 is not present.

21 Is the State ready to proceed?

22 MR. WHEELER: State's ready, Your Honor.

23 THE COURT: Defendant ready to proceed?

24 MR. PARKS: Defendant is ready.

25 THE COURT: Bring them back in.

1 (Jury enters courtroom.)

2 THE COURT: Let the record reflect the jury
3 has returned to the courtroom.

4 The State may call its next witness.

5 MR. WHEELER: Your Honor, the State calls
6 Richard Ernest.

7 THE COURT: If you'll come on around, and
8 when you get to the witness stand, let me get you to
9 raise your right hand.

10 (Witness sworn.)

11 THE COURT: Please have a seat.

12 RICHARD ERNEST,
13 having been first duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WHEELER:

16 Q. Good afternoon.

17 A. Good afternoon.

18 Q. Would you state your name?

19 A. Richard Ernest, E-r-n-e-s-t.

20 Q. How are you currently employed?

21 A. I'm the lab director for Alliance Forensics
22 Laboratory in Fort Worth. I'm a forensic scientist and
23 lab director.

24 Q. As the lab director, what are your
25 responsibilities?

1 A. Basically, the daily operation of the forensic
2 laboratory. Ours is a firearms forensics laboratory.

3 Q. How long have you been in the field?

4 A. Almost 33 years at this point.

5 Q. Could you please explain to the jury your
6 supervisory responsibilities with the Tarrant County
7 Medical Examiner's Office when you were there?

8 A. I was there from 1990 to 1999 as the head of
9 the firearms laboratory; just the daily operation of the
10 firearms unit there; microscopic examinations and tool
11 mark examinations of all kinds, almost daily trips down
12 to the autopsy room there, and so that was pretty much
13 my routine on a daily basis for the nine years I lived
14 there.

15 Q. Before that, where were you?

16 A. Well, I started my career at the Georgia State
17 Crime Laboratory in Georgia. That was in 1977. I
18 underwent extensive training courses in a variety
19 different subjects there in the Criminalistics Section.
20 Basically, we were the crime scene units for the State
21 of Georgia, and I was trained in crime scene
22 examination, firearm examination, trace evidence
23 examinations, arson-related examination, gunshot residue
24 analysis. All those various areas I was trained in and
25 kind of specialized with the area of firearms and tool

1 marks early on. And most of my daily activities for
2 almost 14 years that I was there related to firearms and
3 tool marks examination. And then, also, any crime
4 scenes where I was assigned to go to the crime scene, I
5 worked dozens upon dozens, somewhere in the range of 200
6 to 250 major crime scenes.

7 Q. Can you describe to the jury your educational
8 background that led you to get into the firearms field?

9 A. I received my Batchelor's of Science Degree
10 from the University of Georgia, and I worked for a
11 couple of different companies before going to the
12 Georgia State Laboratory. I graduated from the
13 university with a Batchelor's of Science in microbiology
14 and the chemistry.

15 So the Georgia State Crime Laboratory
16 basically hired people with degrees of a minimum of a
17 Batchelor's of Science Degree in one of the hard
18 physical sciences. It had to be chemistry, physics,
19 something like that as an intro level.

20 Q. Have you published any articles in the area of
21 firearms examination?

22 A. Yes. I'm a distinguished member of the
23 Association of Firearms & Tool Mark Examiners, and I
24 attend those yearly meetings quite frequently. I want
25 to say I've made it to all of them. I generally give a

1 paper to them, and at the last count, 20 different
2 papers I've given and/or published in the AFTE journals.

3 Q. Have you had any additional training in the
4 area of firearms examination with particular emphasis on
5 firing distance?

6 A. Well, yes. I've attended a couple of different
7 specialized courses in firearms identification, both of
8 them at the FBI Academy. One of them is known as
9 Specialized Techniques in Advanced Firearms
10 Identification School and the other one is Gunpowder &
11 Gunshot Residue School. I've been to both of those
12 schools at the FBI Academy that specifically relate to
13 this particular field.

14 Q. Have you taught any courses in the area of
15 firearms?

16 A. Yes. I've taught a number of different
17 courses, not only at police academies, I've taught
18 back-to-back, three-day schools for a joint NIJ project
19 for working professionals on shooting scene
20 reconstructions.

21 Q. Do you belong to any professional
22 organizations?

23 A. I do. I belong to, as I said, as a
24 distinguished member of the Associations of Firearms &
25 Tool Marks Examiners. In addition to that, I'm a member

1 of the American Academy of Forensic Sciences. I'm a
2 member of both the Southwestern Association of Forensic
3 Association and of -- and I'm a member of the
4 Association for Crime Scene Reconstruction and a number
5 of other similar types of organizations.

6 Q. Have you received awards and been recognized in
7 the work of firearms examination and determining firing
8 distances?

9 A. I have. I have received awards for the years
10 within the Association of Firearms & Tool Marks
11 Examiners; Key Member of the Year, that kind of thing.

12 Q. What certifications do you hold?

13 A. I hold a certification as a certified firearms
14 examiner through the Association of Firearms & Tool
15 Marks Examiners.

16 Q. Have you testified as an expert witness before?

17 A. A few times. About 1,500 at last count.

18 Q. Does this include expert testimony in the
19 courts of this state?

20 A. It does. I've testified here in Texas hundreds
21 of times, probably.

22 Q. When a firearm expert performs an analysis
23 concerning firing distance, what do you normally do?

24 A. Well, basically, you're looking at whatever
25 pattern is on the clothing or on the body of the victim

1 and then trying to match that by taking the same type of
2 firearm and the same type of ammunition and firing it at
3 different distances to see the pattern produced either
4 by the gunpowder residue coming out of the end of
5 barrel; in the case, of a shotgun, shotgun pelt pattern,
6 and approximating the distance for that particular
7 round.

8 MR. WHEELER: May I approach, Your Honor.

9 THE COURT: Yes, sir.

10 Q. (BY MR. WHEELER) I'm going to hand you what's
11 been marked as State's Exhibit 111. Can you identify
12 it?

13 A. Yes, sir. This looks like a fairly recent copy
14 of my resume.

15 Q. Is that a fair and accurate copy?

16 A. Yes.

17 MR. WHEELER: State offers State's
18 Exhibit 111.

19 (State's Exhibit 111, offered.)

20 MR. PARKS: No objection.

21 THE COURT: Admitted.

22 (State's Exhibit 111, admitted.)

23 Q. (BY MR. WHEELER) What AFL?

24 A. It's Alliance Forensic Laboratory.

25 Q. Where is it located?

1 A. It's located in Fort Worth. It's within a
2 complex of buildings that relate to gun shops, gun
3 ranges, gunsmiths, and my laboratory sits in the middle
4 of all of those buildings.

5 Q. How long have you been employed with Alliance
6 Forensics Laboratory?

7 A. I incorporated it in 2003, and then it was
8 accredited in 2006. I've been at that location since
9 2003.

10 Q. With regard to your duties as lab director, do
11 your duties include making determinations of gun muzzle
12 distance in shooting cases?

13 A. Yes.

14 Q. What educational background do you have that
15 qualifies you as an expert in that area?

16 A. I've been doing muzzle-to-target distance
17 determinations for almost 33 years, right from the
18 beginning of my training at the Georgia Bureau of
19 Investigation.

20 Q. With regard to muzzle-to-target distance, have
21 you received specialized training in muzzle-to-target
22 distance?

23 A. Yes, a specialize course with the FBI Academy,
24 Gunpowder & Gunshot Residue School.

25 Q. We're not talking about gunpowder or residue,

1 we're talking about firing distances. Have you taught
2 any courses in determining firing distances?

3 A. Well, it's part and parcel of the schools that
4 we put on in firearms identification. Because this is
5 so closely allied with what we do in the laboratory as
6 far as the routine daily types of things that we do in a
7 firearms lab, it's all part and parcel to that.

8 Q. Have you written articles in that area?

9 A. I don't recall that any of my particular
10 articles have dealt with muzzle-to-target distance
11 determinations, per se.

12 Q. They have dealt with firearms?

13 A. Oh, absolutely. In so many of my cases, that's
14 a component of it as far as distance determinations.

15 Q. Have they been a component of the articles
16 you've written?

17 A. Well, I have to double check my list of
18 published articles, but I don't think that I've had but
19 maybe one or so papers that dealt with distance
20 determinations.

21 Q. This particular field and the paper you've
22 delivered, was that paper peer reviewed?

23 A. Yes.

24 Q. Are your other works peer reviewed?

25 A. If they're written for the journals --

1 Q. Are --

2 A. -- at AFTE.

3 Q. Is the opinion that you have, does it lend
4 itself to verification by a scientific method of
5 testing?

6 A. It is. It follows the scientific method of the
7 study of things.

8 Q. In a shooting case, is it possible to determine
9 the approximate distance between the gun and the victim
10 at the time the gun was fired?

11 A. That's the whole intent of it, and, yes, it
12 does.

13 Q. What do you need to make that determination?

14 A. Well, you need to have either the same firearm
15 involved or one just like it and you have to have the
16 same ammunition and you have to have something to base
17 it upon, either the clothing of the victim or, if it's
18 not an area that's covered by clothing, then we're
19 talking about the skin and the residues deposited on the
20 skin, and specifically, we're talking with the gunpowder
21 stippling or tattooing around the gunshot hole.

22 Q. I'm asking the question the jury has heard
23 before: What is your understanding of stippling? What
24 is stippling?

25 A. It is when the gunpowder punctures through the

1 skin. They act like tiny punches through the skin, and
2 then blood wells up underneath and forms a bright red
3 dot wherever they've punctured through the skin. So you
4 have a central gunshot hole through, then the gunpowder
5 tattooing that has punctured and blood has welded up and
6 formed these series or pattern of dots around that
7 gunshot hole.

8 Q. Now, assuming the firearm is recovered and that
9 you have high quality photographs from the medical
10 examiner, what do you do with those items to make your
11 determination of muzzle-to-target distance?

12 A. Well, first off, we look at that photograph and
13 determine whether we do, in fact, see any kind of
14 gunpowder tattooing there, then we either try to
15 increase or decrease the size of that photograph. It
16 must have a scale in it, and most of these medical
17 examiner photographs will have some sort of scale in the
18 photograph.

19 We want to make that scale one-to-one as
20 far as we want to increase or decrease the size of that
21 photograph or a copy of it until we have a one-to-one
22 image. And then once we've got that, then we can
23 measure the size and the gunpowder particle density that
24 we see on the tattooing pattern.

25 Q. How often have you performed this type of

1 analysis?

2 A. Hundreds of times.

3 Q. Using photographs?

4 A. Do what?

5 Q. Using photographs?

6 A. If necessary. Obviously, we go by the
7 photographs as a basis unless we are actually in the
8 autopsy room and take our own photographs and
9 measurements, which I've done many times.

10 MR. WHEELER: May I approach, Your Honor?

11 THE COURT: Yes.

12 Q. (BY MR. WHEELER) I'm going to hand you what's
13 been marked as State's Exhibit 112. Can you identify
14 that?

15 A. This is one of the photographs of the face of
16 the victim, and it does have in it a scale so that we're
17 able to use that, then, to determine the pattern that we
18 see of the gunpowder particle tattooing around the
19 gunshot hole.

20 Q. Is this a true and accurate copy of the
21 photograph you did your investigation on?

22 A. Yes.

23 Q. And did you prepare a demonstrative exhibit
24 that incorporates this photograph --

25 A. Yes.

1 Q. -- for presentation today?

2 A. Yes.

3 Q. Would the use of that demonstrative exhibit
4 assist you in your presentation to the jury?

5 A. Yes.

6 Q. Okay. Thank you.

7 MR. WHEELER: State offers State's
8 Exhibit 112.

9 (State's Exhibit 112, offered.)

10 MR. PARKS: No objection.

11 THE COURT: Admitted.

12 (State's Exhibit 112, admitted.)

13 Q. (BY MR. WHEELER) And I'm showing you what has
14 been marked as AFL 2008-1112-CRP-001. It's dated
15 December 17th, 2008. What is this?

16 A. This is the photograph that we used to try to
17 make the determination.

18 Q. That was identical of the photograph that was
19 just admitted?

20 A. Yes.

21 Q. This is your demonstrative aid?

22 A. Yes.

23 MR. WHEELER: Permission to publish, Your
24 Honor.

25 THE COURT: Yes.

1 MR. WHEELER: Thank you.

2 Q. (BY MR. WHEELER) When did you first see that
3 photograph?

4 A. I have to double check my notes. These
5 photographs came into us after some of the earlier
6 evidence we had gotten.

7 Q. Did you bring your notes today?

8 A. I did.

9 Q. Would it assist you in testifying to refer to
10 your notes?

11 A. It would.

12 Q. Please do so.

13 A. Thank you.

14 Yes, the autopsy photographs came into us
15 at the laboratory on December the 12th.

16 Q. And how do you recognize it?

17 A. Well, we have -- first off, I've examined these
18 photographs both at the time they came in and then
19 afterwards many times. These are the photographs that I
20 used.

21 Q. What procedure did you follow with regard to
22 the photographs in this case?

23 A. To make a one-on-one [sic] color copy of
24 this -- a one-to-one and then to use that as a basis for
25 the measurements that were made.

1 Q. Were you able to observe a gunshot pattern in
2 the autopsy photo provided to you?

3 A. Yes.

4 Q. I'm going to hand you what's been marked
5 State's Exhibit 64. Can you identify this?

6 A. Yes. This is the particular rifle that was
7 turned into us as evidence in this case.

8 Q. Have you seen this item before?

9 A. Yes.

10 Q. Okay.

11 A. It came into us at the laboratory on November
12 the 12th, 2008. And I don't think I said the year, but
13 12-12-2008 is the date the photographs came in. I'm
14 sorry.

15 Q. We're a little confined in our space.

16 A. That's okay. If I take a headlong plunge at
17 you, I don't mean it.

18 Q. How do you recognize that as the rifle?

19 A. This particular rifle I've seen many times. We
20 have our crime laboratory numbers on them, item numbers.

21 Q. Did you conduct any test with the rifle?

22 A. Yes.

23 Q. Could you explain to the jury the tests that
24 you conducted with the rifle?

25 A. Yes. They're twofold: First off, we did test

1 firings and compared the test firings that were
2 collected in the -- the prior cartridge casings were
3 compared microscopically back to the evidence bullet
4 jacket from the scene and also the two fired .30-30
5 cartridge casings from the scene.

6 Q. Now, let me stop you there so we can be
7 precise: Did you use ammunition that was different than
8 what was identified at the scene or identical to what
9 was found at the scene?

10 A. Identical. We're using Remington .30-30
11 Winchester caliber, with 170 grain Core-Lokt soft
12 points. We also had some of that same type of
13 ammunition that was turned into us at the laboratory and
14 we used our stock of ammunition for test firings, and I
15 believe we used one of the evidence ammunitions for test
16 firings.

17 Q. Why it is?

18 A. We wanted to make sure that every variable that
19 we can control is going to be the same. We don't want
20 to use some other type of ammunition that might have a
21 different kind of gunpowder or a different burning
22 characteristic to the gunpowder that was used. So what
23 we want to use, if we can, is the same gun and the exact
24 same type of ammunition.

25 Q. The test firings that you're describing, where

1 did that take place?

2 A. At our laboratory.

3 Q. And when did they take place?

4 A. On or about the 12th or the 17th of December.

5 Q. And if you could, after you fired into water,
6 what did you do then?

7 A. Collected those test firings. And as far as
8 the microscopic comparisons go, we collected those test
9 bullets and fired cartridge casings. The first thing we
10 do is we try to match those test bullets against each
11 other.

12 We put this on the comparison microscope
13 which is basically, like, two microscopes sitting side
14 by side that are bridged together optically so that
15 under the microscope, you have one field of view with
16 one of them sitting side by side and there's a split
17 line in the center so you can see one thing in direct
18 comparison with another under magnification.

19 Our general working range in magnification
20 is anywhere from about 10 times the size of it up to
21 about 40 times the size of it, and at that those
22 magnifications, we can see the very tiny tool marks that
23 are printed on the outside of the test-fired bullet by
24 the rifling of the barrel. The rifling is a series
25 spiral grooves that are cut into the interior of the

1 barrel as a spine for the bullet to give it stability
2 going down range and accuracy.

3 On a microscopic level, that scores the
4 outside of the bullet, and as it's fired, it creates a
5 series of tiny lines or what we call stria. And every
6 particular firearm barrel is unique in the subset of
7 stria that prints on the outside of the bullet. And we
8 know with quite a few years of experiments with
9 manufactured rifles and handguns and so forth that have
10 been consecutively manufactured at the factory, we can
11 tell those apart from each other.

12 And we know that the stria on the outside
13 of these test bullets, if you can match those against
14 each other, then we know this particular rifle is making
15 good reproducible marks for identification purposes. We
16 may be looking at hundreds of lines that are in a set
17 pattern that are outside the bullet, but once you got it
18 lined up properly, everything will be in sync with each
19 other all the way around the bullet.

20 So that's how we go about doing normal
21 firearms identification. The only shortfall to that is
22 if the bullet is badly damaged. Then you can't do
23 anything with it. In this particular case, that was the
24 issue; the bullet jacket was damaged to the point where
25 you couldn't give it a full identification back to the

1 test bullets.

2 Q. And that was my question: You saw the bullet
3 that was recovered from Taylor Wages' room, the badly
4 deformed bullet?

5 A. Yes.

6 Q. Did you perform a microscopic analysis of that
7 bullet?

8 A. Yes.

9 Q. Can you determine whether that bullet was fired
10 from the .30-30 rifle?

11 A. We were not able to say. We can say it's the
12 same caliber, it's the same rifling structure, but
13 because of the mutilation, we're just not able to give
14 it a full identification.

15 Q. The firearm itself that you were test firing,
16 was it in good working condition?

17 A. Yes, it is.

18 Q. Have any mechanical defects whatsoever?

19 A. No.

20 Q. With regard to the action, how did you load the
21 gun?

22 A. Well, it's loaded in through the side gate as
23 usual.

24 Q. And how did you chamber a round?

25 A. Work the lever of the gun to chamber a live

1 round into the chamber.

2 Q. What's required to fire the weapon?

3 A. Well, you have to have the lever safety pulled
4 up, you have to have the lever pulled tight against the
5 rifle, and then put your finger on the trigger and pull
6 with the right amount of force, which in this particular
7 case is roughly three-and-a-half pounds.

8 Q. On the rifle, if the lever itself is not
9 depressed after a round is chambered, if you don't
10 depress that lever, can you pull the trigger and have
11 the gun fire?

12 A. No. It's designed so the lever is going to be
13 pushed away from the fire, and this is a safety built
14 onto it. So you have to grab the rifle and pull that
15 snug so you defeat that safety, then you can pull the
16 trigger.

17 Q. Could you demonstrate that to the jury, please,
18 with State's Exhibit 64.

19 A. You notice when I rack this back and chamber
20 it, if there were a live round in the magazine tube, I
21 would have just chambered that round by working that
22 action like that. As long as I hold down this lever,
23 it's going to stay snug up against that rifle, but if I
24 turn loose of it, it pops out a little bit [indicating].

25 There's a piece right here that is pushing

1 out under spring pressure so that, in and of itself, it
2 pushes it out every time. That has to be depressed or
3 you can't pull the trigger and fire the rifle. If you
4 try to fire it like so, you can't -- you can't pull
5 that. So you've got to be able to hold on to that, pull
6 it up snug against the rifle, and then you can fire it
7 [indicating].

8 Q. So two separate actions are required to be able
9 to discharge a round from this firearm?

10 A. Yes.

11 Q. You must hold the lever against the body of the
12 weapon and then you must pull the trigger?

13 A. That's correct.

14 Q. Otherwise, it will not discharge?

15 A. That's correct.

16 Q. Okay. Did you test fire this weapon with
17 ammunition that was identical to what was located at the
18 crime scene?

19 A. Yes, sir, I did.

20 Q. Okay. Could you explain the test firing
21 procedure to the jury, please?

22 A. Live rounds are loaded into the magazine tube
23 through the loading gate, and then once that's been
24 done, we chamber a live round and then we put it into
25 the port of the shooting tank that we have in the lab.

1 It's a large tank of water about eight feet long, four
2 feet deep, four feet wide, something along that line.
3 Then we fire at an angle down into the water.

4 The bullet is slowed down, falls down to
5 the bottom of the tank of water. Then you work the
6 lever to kick loose the empty cartridge case out the
7 lever, and when you close the action, you've chambered
8 up the next live round ready for firing. You snug up
9 that lever safety, then pull the trigger, and fire the
10 next round.

11 And once we have our test fires collected,
12 then we mark those as test fires and then we do our
13 microscopic comparisons. And we didn't talk about it,
14 but also microscopic comparisons are done with the fired
15 cartridge casings.

16 Q. Were you able to make any determinations from
17 your microscopic examination of the test-fired cartridge
18 casings?

19 A. I was. I was able to match the fired cartridge
20 casings against each other in terms of their microscopic
21 characteristics, and there, we're looking at a different
22 set of machining marks on them, such things as the fire
23 pin impression and the breach face markings where the
24 back of the bolt marks against the head of the cartridge
25 casing. Also, we're looking at extractor and ejector

1 marks in inside that chambering area and marks inside
2 the chamber. All of those tiny marks, again, are unique
3 to each particular rifle chamber.

4 And once you're able to match the
5 test-fired cartridge casings against each other, first
6 off, you know this rifle is making good marks that could
7 be used for comparison purposes, and then place in its
8 place on one side of the scope and one of the
9 evidence-fired cartridge casings and look at that versus
10 the test firings. In this particular case, we were able
11 to match those evidence cartridge casings, the two from
12 the scene, back to the test-fired cartridge cases fired
13 by us in this particular rifle.

14 Q. Now, in layman's terms for this jury, you have
15 the two empty cartridges that were recovered from the
16 scene that are in evidence here and you have your test
17 firings that you've done. In layman's terms, what does
18 it mean when you had what was recovered from the scene
19 versus your test-firing cartridges, what is the
20 significance to this jury of what you discovered
21 microscopically?

22 A. Well, in my opinion, these two fired-cartridge
23 casings that came from the scene were fired in this
24 particular rifle based on its microscopic
25 characteristics.

1 Q. Based on the microscopic characteristics, the
2 two you examined, they were fired from that gun?

3 A. In my opinion, yes.

4 Q. Now, you did further testing, right?

5 A. I did.

6 Q. After you completed the microscopic
7 examination, what did you do next?

8 A. Well then, after the autopsy photos were
9 brought to us or turned over to us, then we started
10 doing muzzle-to-target distance determination testing in
11 this particular case.

12 Q. Where were these tests conducted?

13 A. There at the firing range at the laboratory.

14 Q. What evidence was used to conduct the test?

15 A. Well, what we used, again, is the rifle itself,
16 same type of ammunition. We carefully mark off
17 distances from the end of the barrel, which is called
18 the muzzle, from the muzzle of the gun to our test
19 material. And in this particular case, we use sheets of
20 about five-mill, clear plastic sheeting material. This
21 is common material like you might go to Home Depot and
22 use plastic sheeting material.

23 Q. Okay. Let's go piece by piece: You want to
24 determine muzzle-to-target distance, correct?

25 A. Correct.

1 Q. When you have the firearm to test fire it, do
2 you mount it, do you just hold it up to your shoulder?
3 How do you accurately determine, with some measure of
4 control, how far this muzzle is to your target?

5 A. Well, we have our target, so it's stationary.

6 Q. What it's mounted on?

7 A. It's mounted on cardboard and sat into the
8 stand. It's at a stationary point. You're out in front
9 of it. And the way that we normally do this and the way
10 we did it in this particular case, we have somebody
11 standing to the side that is carefully -- as you move
12 that barrel back and forth, they've got a ruler in place
13 or a yardstick or whatever it may be, a tape measure, to
14 go from the target material to the end of the barrel,
15 and when everything is set to a particular degree, then
16 you fire from that distance.

17 Q. How many people are involved in the
18 experimentation at the time you performed the test
19 firings in this control setting?

20 A. Two. And it may be more that are observers,
21 but two normally.

22 Q. But fundamentally required is two persons?

23 A. Yes.

24 Q. Okay. First question with regard to the test
25 firing: Is something visibly observable coming out of

1 the end of that weapon when it's fired?

2 A. Well, as it's fired, you have the loud sound or
3 report of the firearm. You've got gun smoke coming out
4 of the end of the barrel. You can't see the bullet
5 coming out because it's going 2,000 feet per second, so
6 basically, the length of almost seven football fields in
7 one second, and then you have the bullet, and then you
8 have gunpowder particles, both burned and partially
9 burned gunpowder particles, and then you have, as I said
10 before, the gun smoke or combustion of that gunpowder.

11 Q. What do you visually see when that comes out?
12 If a layman is looking at that with the naked eye, can
13 you describe what you're going to see when this weapon
14 is fired with identical ammunition to what was found at
15 the crime scene?

16 A. Smoke and a little bit of flame coming out of
17 the end of the barrel.

18 Q. That's what you're going to see?

19 A. That's what you're going to see.

20 Q. All right. The target that you have, that's
21 milled plastic?

22 A. Five-mill, I think, five-thousands of an inch,
23 something like that.

24 Q. That's an important factor in the expert area
25 of firing distance, isn't it?

1 A. Well, the material that you fire into is all
2 important. Obviously, we can't fire into human skin. I
3 have to say that I've looked for volunteers over the
4 year and I just haven't found any. So we've tried a lot
5 of semblance over the years. What we could come closest
6 to, and five-mill plastic allows us to -- there's
7 several different advantages to it: First off, by using
8 that five-mill plastic, it doesn't tear up so easy when
9 you have close shots where you have the greatest amount
10 of gas blowing the targets to bits, normally, and that's
11 a big paper type of target.

12 Over the years, we've tried dozens of
13 different materials that would allow us to see what's
14 coming out of the end of the barrel. I like to use
15 something where I can see every gunpowder particle and
16 particle fragment. Where it hits that plastic, it makes
17 a dent or goes right through the plastic. So then I can
18 mark where every gunpowder particle and every gunpowder
19 particle fragment hits that target and forms a pattern.
20 Up close it's a dense pattern of a small size, and as
21 you get back from that, that pattern widens up and
22 spreads out, and I can mark all of that.

23 Q. You used the word, "pattern". When you're
24 talking about the plastic and what you're seeing on
25 there, the things that make the pattern in the plastic,

1 the things that make the pattern in the plastic, what
2 are the things that make the pattern in the plastic?

3 A. Gunpowder particles. Both burned and unburned
4 gunpowder particles and particle fragments make those
5 indentations in the paper or plastic.

6 Q. Is that the same thing that's observable on the
7 face of Taylor Wages in the autopsy photos?

8 A. That's exactly what we're seeing, the red dots
9 around the gunshot hole.

10 Q. Okay. Let me get these marked first.

11 (Discussion held off the record.)

12 Q. (BY MR. WHEELER) I'm going to hand you what
13 has been marked 113 through 120. Can you identify
14 these?

15 A. Yes. These are the various patterns at
16 different distances and also the photographs of the
17 victim's face.

18 Q. Are they in the same or substantially same
19 condition as they were at the time you conducted the
20 test firings in this case?

21 A. Yes, they're exactly the same.

22 MR. WHEELER: Your Honor, the State offers
23 State's Exhibit 113 through 120.

24 (State's Exhibits 113 through and including
25 120, offered.)

1 MR. PARKS: I've never seen them.

2 (Pause in the proceedings.)

3 MR. PARKS: I have no objection.

4 THE COURT: State's Exhibits 113 through
5 120 are admitted.

6 (State's Exhibits 113 through and including
7 120, admitted.)

8 MR. WHEELER: Thank you, Your Honor.

9 Q. (BY MR. WHEELER) Now, if you could, put that
10 on one of these easels. And when we refer to these
11 targets, if you can, refer to them by exhibit number for
12 the record.

13 A. All right, sir.

14 Q. First: The first test firing that was
15 conducted on this firearm was conducted at what
16 distance?

17 A. Six inches.

18 Q. Could you please locate the pattern for the
19 six-inch test firing?

20 A. Yes. It's this one and it's marked State's
21 Exhibit 113 [indicating].

22 Q. Would you please publish that to the jury?

23 A. Just by placing it up here?

24 Q. Yes, place it on the easel.

25 (Witness complies.)

1 Q. (BY MR. WHEELER) With regard to this exhibit,
2 first, was the pattern achieved -- in the six-inch test
3 firing as shown in this exhibit, was it made by the
4 firearm, the .30-30 Winchester?

5 A. Yes.

6 Q. Was it made using identical ammunition that was
7 located at the crime scene?

8 A. Yes.

9 Q. Could you please describe for the jury what
10 we're looking at in this exhibit?

11 A. Well, what we're looking at, then, is a sheet
12 of plastic. Here's the gunshot hole through the center
13 of the pattern here, and out to the side of this, this
14 dense, very dense gunpowder particle pattern is what
15 we're looking at [indicating]. In particular, we're
16 looking at the density of that pattern and how dense and
17 tight that is as far as the number of particles per
18 square inch, that type of thing.

19 Q. How does the curvature of the face on the young
20 man, Taylor Wages, affect your analysis of
21 muzzle-to-target distance?

22 A. Well, we do have to factor it in.

23 Q. Okay. How do you factor it in?

24 A. Well, first off, we don't know for sure exactly
25 what angle that bullet came through his face, but what

1 we've done in this particular case, we know that this
2 area, here's the gunshot hole through the corner of the
3 mouth, and we know, by looking at the pattern, that this
4 is the densest part or closest this would be to the
5 muzzle of the gun.

6 So what we've done is we've marked off an
7 area. It's actually 2-and-7/8ths inches by two inches,
8 so that we could cover as much as that area as we could
9 where the pattern is the densest. That's the closest
10 this could be. Off to the sides, this gets thinner, and
11 then as you can hopefully see across the type of the
12 eyebrows here, it has thinned off to almost nothing. We
13 do see a pattern just one or two pellets down below, but
14 this is the densest part of this pattern or, in essence,
15 that's as close as that gun came to his face.

16 Q. For purposes of the record, all of the pattern
17 that you're describing in this test area, you have
18 outlined in a box on the photograph; is that correct?

19 A. Yes, I have.

20 Q. And all of that area is above the chin and
21 measured to the wound on the young man's face, right?

22 A. Yes.

23 Q. Okay. Going from this analyzed area to the
24 target, how do you compare the two?

25 A. Okay. So what we've done, then, is we make an

1 exact template, which I've got here.

2 Q. If it would assist you in your testimony, go
3 ahead and retrieve it.

4 A. Thank you.

5 We've made a template that's the exact same
6 size, and the "X" marks the center of that gunshot hole.
7 And so using that, then, we go through and place that
8 "X" over the center of the gunshot hole. It doesn't
9 really matter in what orientation you do this, as long
10 as you put that "X" on the gunshot hole, you can go all
11 around this target and you can count how many particles
12 are in that box.

13 We know that this box covers an area of
14 5.75 square inches. That's two inches by two-and-7/8ths
15 inches, 5.75 inches. So we can mathematically figure
16 out how many particles do we have in one-square inch and
17 put that into a table and basically look at the
18 gunpowder particle density as we get further and further
19 from the end of the barrel.

20 Q. So your focus is the density of the
21 concentration of particles within a defined area?

22 A. It is.

23 Q. How important it is that you have a one-to-one
24 ratio between the photograph and the actual victim?

25 A. Crucial.

1 Q. If the picture, the photograph you're looking
2 at is too big, does that skew the results?

3 A. If the photograph they've taken in the autopsy
4 room is not produced to us as a one-to-one, then we can
5 make a photocopy of that and adjust it up and down to
6 where it's exactly one inch, which is what we've done in
7 these photos.

8 Q. And you're only able to do that and get your
9 measurements right because you have a scale in the
10 photograph?

11 A. Exactly.

12 Q. So we're dealing with the photograph that this
13 jury is seeing that is identical in size to Taylor
14 Wages' face?

15 A. Exactly.

16 Q. And then you take that area and compare it to
17 your target?

18 A. Yes.

19 Q. Okay. At the six-inch distance, how does the
20 target compare to the wound that you see on Taylor
21 Wages?

22 A. Well, at the six-inch, this is much too dense a
23 pattern compared what is seen on his face.

24 Q. How do you know it's too dense?

25 A. Mathematically, it's too dense, but just by

1 looking at it, as far as the powder pattern, tattooing
2 pattern on his face, it's much sparser.

3 Q. When you say it's much sparser, for the people
4 on the jury, does that mean that the particles of
5 gunpowder that constitute stippling are farther apart on
6 his face than those represented in the target that's
7 identified as the six-inch target?

8 A. Exactly. Okay. So that's it for the six-inch.

9 Q. Okay. Now, next: What is the next distance
10 from which the weapon was test fired?

11 A. Eight inches.

12 Q. And could you identify the next target, please?

13 A. Yes. It's going to be State's Exhibit No. 114.

14 Q. On State's Exhibit No. 114, how are you able to
15 recall the distance from the muzzle to the plastic
16 target?

17 A. Again, by the same technique that we described
18 before.

19 Q. And did you make some identifying mark on the
20 target to show it's the eight-inch target?

21 A. Yes. It's marked eight inches, and the other
22 State's Exhibit No. 113 is marked as six inches.

23 Q. At the eight-inch target, did you use the same
24 weapon that was used at the crime scene in Wood County?

25 A. Yes.

1 Q. Did you use the same ammunition as what was
2 located at the crime scene in Wood County?

3 A. Yes.

4 Q. Okay. Could you describe to the jury what you
5 did, then, with the same gun, same ammunition?

6 A. Well, exactly the same procedure that we
7 described at six inches was repeated for eight inches.
8 And, again, we're looking at the particle count we get
9 in that box. And here's the template. It hasn't been
10 marked with a sticker, but at any rate, putting the
11 center of the gunpowder hole over it and looking at the
12 distribution of the particles around that gunshot hole,
13 and we're making a calculation of how many particles per
14 square inch [indicating].

15 Q. So you take this template -- and you have an
16 "X" on the template which is where the bullet hole is in
17 the photograph?

18 A. Yes.

19 Q. And you put it where the bullet hole is in your
20 target. And then what you do inside this box at the
21 target?

22 A. You carefully count how many gunpowder
23 particles are there inside that box.

24 Q. That's how you determine density
25 mathematically?

1 A. That's correct.

2 Q. And with regard to the photograph, how do you
3 determine density of particles on that photograph?

4 A. Same thing: How many particles are we seeing
5 around that gunshot hole in that box area.

6 Q. Okay. Now, for the jury, there are a lot of
7 things inside that box on that boy, aren't there?

8 A. There are.

9 Q. I mean, a young man that age, he's going to
10 have hairs?

11 A. True.

12 Q. He's going to have acne?

13 A. True.

14 Q. And then he's going to have the gunpowder
15 that's burrowed into his skin as well?

16 A. Correct.

17 Q. How do you distinguish between these when you
18 perform your count to determine density inside that box?

19 A. First off, I marked all of those that I clearly
20 recognized as tattooing, and then I came back. There
21 were some others that may have been tiny marks from his
22 stubble of his beard.

23 Q. Let's stop there. First, those areas that were
24 clearly identified as tattooing, how do you know it's
25 clearly tattooing?

1 A. It has a look to it where the gunpowder has
2 burned or punctured into the skin and blood has weld up
3 underneath. These -- these areas such as on No.
4 113 -- excuse me, I'm sorry, State's Exhibit No. 120,
5 the photographs of the face, such areas as these where
6 there's a clear red mark, those are classic gunpowder
7 tattooing.

8 So in this area, I marked all of those that
9 were very clearly gunpowder tattooing and marked all of
10 those to begin with. And then there were some in here
11 that I thought, well, that could be just stubble of his
12 beard and I'm going to mark them anyway and give them
13 the benefit of the doubt. So this is the densest area.
14 I basically marked everything that was in there that had
15 any chance of being gunpowder tattooing.

16 Q. Now, that brings me to this point: With regard
17 to -- well, you could call it rate of error. You could
18 call it erring on the side of caution. What do you call
19 it when you say, I'm going to include everything in my
20 determination of the density of the gunpowder particles
21 in the photograph of Taylor Wages?

22 A. I think it's being fair to both sides of an
23 issue. I have given a buffer here to increase that
24 gunpowder particle density as much as it possibly can be
25 by counting everything.

1 Q. What is the significance of increasing the
2 gunpowder density in determining the density of the
3 particles on the photograph of the young man?

4 A. Well, as you increase the density, you're
5 coming closer.

6 Q. So you're erring on the side of bringing that
7 muzzle closer --

8 A. Exactly.

9 Q. -- to the target?

10 A. Exactly.

11 Q. With regard to the template on the eight-inch
12 target, how did you perform your comparison?

13 A. Same thing, gunpowder particles per square
14 inch.

15 Q. And what did you find?

16 A. That the density was still higher than what
17 we're seeing on the victim's face.

18 Q. What did you do next?

19 A. Went to the next sized target which was 10
20 inches.

21 Q. And what exhibit number is that, sir?

22 A. This is State's Exhibit No. 115.

23 Q. Could you please publish that to the jury?

24 (Witness complies.)

25 THE WITNESS: Then this is the gunpowder

1 particle distrubution at 10 inches. And again,
2 following exactly the same procedure that we've talked
3 about before, we placed our "X" over the center of the
4 gunshot hole and we count every particle that has struck
5 the plastic there and get a particle count?

6 MR. WHEELER: Yes, sir.

7 THE WITNESS: And then compare it against
8 the one seen on the victim's face.

9 Q. (BY MR. WHEELER) And what were the results of
10 your comparison at the 10-inch muzzle-to-target
11 distance?

12 A. Still had a slightly higher particle count at
13 the 10-inches.

14 Q. Even though you erred on the side of caution in
15 the photograph --

16 A. That's correct.

17 Q. -- you still didn't see the same density at 10
18 inches that you saw in the photograph --

19 A. Exactly.

20 Q. -- of the particles?

21 A. Exactly.

22 Q. In regard to the photograph itself and the area
23 you chose, you did choose the area of maximum density or
24 concentration of particles in the photograph, didn't
25 you?

1 A. Yes. And it would have been wrong on my part
2 if I had decided to -- for instance, if I had decided to
3 count the other area to go out either to the side or up
4 across the nose, my particle count would have been a lot
5 lower in that box. So this is the area where we see the
6 maximum amount of per square inch on his face
7 [indicating]. That's the closest his face could be.

8 Q. Now, what was the next target you used?

9 A. The next target was at 12 inches.

10 Q. All right. And that's which State's exhibit
11 number?

12 A. This is State's Exhibit No. 116.

13 Q. Did you fire that target using the same weapon
14 an the same type of ammunition as was located at the
15 scene?

16 A. Yes.

17 Q. Did you compare that target with the
18 photographs that had already been counted for density of
19 particles?

20 A. Yes.

21 Q. What did you find at the 12-inch target?

22 A. At the 12-inch mark, this was the closest in
23 being regards to gunpowder particle pattern density of
24 what is seen on the victim's face. This is fairly close
25 to exactly the same [indicating].

1 Q. Did you continue test firing the gun after you
2 saw a match with regard to density?

3 A. Yes.

4 Q. What did you do next?

5 A. After that, we continued to fire and the next
6 pattern up was 14 inches, which is State's Exhibit No.
7 117. And exactly the same type of determination was
8 made using the template and taking a particle count, and
9 now at 14 inches, we're starting to fall below the
10 pattern density of what we saw on the victim's face as
11 far as particle per square inch.

12 Q. What's the significance of that?

13 A. That means that the distance of the 14-inch
14 shot is a little bit further from what we're seeing on
15 the victim's face.

16 Q. It's too far; is that right?

17 A. It is.

18 Q. Okay. Did you conduct any further test
19 firings?

20 A. I did. The next pattern that was fired was at
21 16 inches, which is State's Exhibit No. 118. And again,
22 following the same procedure with the template and
23 marking off how many particles are in that box, now
24 we're falling below the pattern that we're seeing on the
25 victim's face.

1 Q. Which is significant for what reason?

2 A. Well, it means that the 16-inch mark was beyond
3 what's seen on the victim's face in terms of the
4 gunpowder particle pattern density. We followed that
5 with one more shot, with 18 inches. This is State's
6 Exhibit 119.

7 Q. Yes, sir.

8 A. And it's even a thinner pattern than what we
9 seen at 16 inches.

10 Q. Is it your opinion that the gun was fired at
11 18 inches?

12 A. No, sir.

13 Q. May I have your template, please?

14 A. Yes, sir.

15 Q. Is this in the same or substantially the same
16 condition that you used in your testing?

17 A. Yes, sir.

18 Q. Is it the identical templet you used in the
19 testing?

20 A. Yes.

21 MR. WHEELER: State offers State's
22 Exhibit 121.

23 (State's Exhibit 121, offered.)

24 MR. PARKS: No objection.

25 THE COURT: Admitted.

1 (State's Exhibit 121, admitted.)

2 Q. (BY MR. WHEELER) A skeptic might say, it
3 sounds like you just looked at a picture counting dots.
4 Now, in terms of, first, the method you're using, for
5 how many years has this method been employed within the
6 law enforcement community to determine muzzle-to-target
7 distance?

8 A. I can't say that it's used everywhere and in
9 every place, but I've seen it used for all of my career,
10 the better of 30 years. And these types of techniques
11 are nothing new. Medical examiners have been using the
12 distribution of gunpowder particles around a wound to
13 give them some sort of estimate of distance for as far
14 as back in the literature. It's described in various
15 textbooks, and, in particular, of what a lot of folks
16 think of is kind of the Bible of gunshot wounds is a
17 book called, Gunshot Wounds, by Dr. Di Maio --

18 Q. Yes, sir.

19 A. -- which specifically mentions this type of
20 thing, and he had conducted some tests early on. Before
21 it became all but illegal to shoot animals and do animal
22 testing, he had actually done studies with live animals
23 that were anesthetized and then shot to create theses
24 tattooing patterns.

25 Q. So the methodology that you're using is a

1 tested, peer reviewed methodology?

2 A. It is, and there's been quite a few other
3 scientific papers that have dealt with this same issue
4 and with the types of substraight materials that we use
5 to fire into, whether plastic or paper or cardboard or
6 whatever it might be.

7 Q. You explained to the jury why the plastic is
8 superior?

9 A. Hopefully, I have done a good job. To say
10 we've tried a lot of materials over the years really
11 doesn't touch the hem of the garment. We've really
12 scoured the countryside to try to look for things that
13 would help us see that pattern the best and --

14 Q. Now, that's an important issue with regard to
15 seeing the pattern best. Let's say you used cotton
16 twill material as a target. What's the problem with
17 cotton twill if that's what you're firing at?

18 A. Well, it's not going to be very easy to see
19 where every particle hit. Some may bounce off of that
20 target. Here with the plastic, that's irrelevant
21 because everywhere it hits and bounces off, it makes a
22 mark so you know where it hit at and you can mark that
23 on the target. It's important to have the right kind of
24 substraight or you can't see the pattern like you
25 should. And there's some materials out there that have

1 been used that are just -- they're simply so inadequate,
2 you wouldn't want to use them and.

3 Q. So that's the significance: You've got to see
4 the particles to be able to do the comparison, correct?

5 A. Exactly.

6 Q. With regard to the photograph, is that the best
7 quality photograph that was possible to obtain?

8 A. I think so.

9 Q. That's from the medical examiner?

10 A. Yes.

11 Q. With regard to this firearm you've measured it,
12 you've tested it, and you've had to look at it?

13 A. Yes.

14 Q. How long is that barrel?

15 A. 20 inches.

16 Q. So you've got a 20-inch long barrel?

17 A. Yes, and 24 inches from the end of the barrel
18 to the trigger.

19 Q. 24 inches to here [indicating]?

20 A. That's right.

21 Q. And how much further to the lever to be able to
22 depress that and hold that?

23 A. I knew you would probably ask me a question I
24 hadn't measured and you got me on that one.

25 Q. You want to measure it?

1 A. Sure, why not.

2 Q. For purposes of the record, I'm handing
3 Mr. Ernest a ruler. Now, how much further to the lever?

4 A. Well, to the very back end of the lever is a
5 distance from the end of the muzzle to the back end of
6 the lever, about 28 inches.

7 Q. 28 inches. Now, you said that based on your
8 analysis, the muzzle-to-target distance was how far?

9 A. 12 inches, and I gave it some room. It's an
10 approximate value. I said 12 inches, plus or minus two
11 inches on either side of that mark.

12 Q. Measure that from the lever to the end of that
13 dowel rod to the muzzle.

14 A. Okay. So that is a foot out of the end of the
15 muzzle and this is greater than the yardstick here. The
16 yardstick is 36 inches, of course, and then I would say
17 approximately about another three or four inches on the
18 end of that, so this would be, you know, 39, 40 inches
19 to the back end of that lever [indicating].

20 Q. More than a yardstick, more than three feet
21 from where you believe the entry wound was to the lever?

22 A. Yes.

23 Q. Okay. And based on your analysis and your
24 report, can you say with reasonable scientific certainty
25 that it is impossible for a person to operate that gun

1 in a manner that he or she can inflict a mortal wound at
2 that distance?

3 A. That use of the word "impossible," I can't, as
4 a scientist, go along with. As we say, anything is
5 possible. It may be possible that it may be raining
6 peanut butter, but it's highly unlikely, almost
7 virtually impossible for that to happen.

8 For you to have the kind of situation
9 you've got here where if the young man wanted to fire
10 this weapon, with the kind of distance that we're
11 talking about, he would have had to hold on to the
12 barrel and then work the mechanism basically with both
13 of his feet. He's got to close that lever and hold it
14 tight somehow and then also work the trigger or he's got
15 to have some other longer device, some of which was
16 never found, to extend his reach.

17 Q. So we don't have a lever or pulley or stick at
18 his feet?

19 A. That's correct. That's correct.

20 Q. And for him to operate that gun, it would have
21 taken both his feet, his hands, and hold it a distance
22 nearly a foot from his face?

23 A. That's correct.

24 Q. And in your expert opinion, after 30 years of
25 doing this in Georgia and in Texas, that ain't likely?

1 A. It's not very likely.

2 Q. What's the importance of using the same gun?

3 A. The importance of using the same gun is we've
4 taken away any factor that might be there by using
5 another gun. If there was something about the diameter
6 of the barrel all the way down that could have caused
7 any kind of difference, then we're eliminating any
8 possibility of there being any question of anything
9 else.

10 Q. I want you to do this for the jury: Have you
11 seen what's known as a spread method of determining
12 muzzle-to-target distance?

13 A. Oh, yeah. Yeah, pattern size. The problem
14 with that is that very quickly here, you start getting a
15 pattern size that's bigger than his face.

16 Q. Why?

17 A. Well, because once you get beyond the borders
18 of the pattern, then it's beyond the edges of his face.

19 Q. Is it like firing something cone shaped and
20 spreading out like a ball?

21 A. Yes.

22 Q. Which means whatever you're firing at is
23 curving away from you?

24 A. In essence, that's true.

25 Q. So the spread analysis, with the results of a

1 spread analysis when you're talking about the human head
2 here, that curvature of the face would skew the results,
3 wouldn't it?

4 A. It would. And if your powder pattern is bigger
5 than the ball or the face, you've got the edges of that
6 pattern missing the face. So, in essence, you've
7 got -- the further you get from the end of the barrel,
8 the more likely the spread is going to be beyond the
9 edges of his face.

10 Q. I see.

11 A. And this is -- this is a way of giving you a
12 method of determining that distance.

13 Q. The particle count you're doing, did you just
14 sit there with the naked eye or did you use any
15 magnifying glass?

16 A. You have to be able to hold these targets with
17 reflected light and carefully. We do use
18 microscopes -- well, not microscopes, or a magnifying
19 glass to see that clearly, but everywhere a powder
20 particle or a particle fragment has indented that
21 plastic, then that's where we make a mark.

22 Q. So what you're looking at there, it is
23 assisted, the count that you're making, with some sort
24 of magnification device and proper light?

25 A. Yes. You have to have the proper lighting to

1 do it and it's also advisable to use a magnifying glass.
2 What we have is a large flow light source to be able to
3 see that clearly.

4 Q. Is your lab certified?

5 A. It is accredited.

6 Q. What accrediting entity has certified your lab?

7 A. Both the State of Texas through the Texas
8 Department of Public Safety Laboratory. We're
9 accredited through them, and more importantly, we're
10 accredited through the American Society of Crime Lab
11 Directors, Laboratory, and Accreditation Board.

12 Q. Why that more important to the jury?

13 A. Well, basically, it's the gold standard by
14 which forensic laboratories are accredited or not. It's
15 very difficult to get ASCLD accreditation.

16 Q. In this case, have you had an opportunity to
17 review the report by the Defense expert, Ed Heuske?

18 A. I have.

19 Q. Have you reviewed the test firing information
20 that was in his report?

21 A. I have.

22 Q. Have you had an opportunity to review the
23 targets he produced in his test firing?

24 A. I have.

25 Q. Well, the first thing I have to ask is: What

1 method did he use in performing his test firing?

2 A. I can only speak to the fact that I looked at
3 the targets that he had produced, and he used a
4 different substraight material. He said that it was a
5 material called craft board, I believe, that he had
6 gotten from a craft place such as Michael's.

7 Q. And when you say substraight, that means?

8 A. Target material.

9 Q. So he used craft board?

10 A. Some source from Michael's Craft Supplies.

11 Q. And then what's next in your review of his
12 material?

13 A. I looked at the different targets he had fired.
14 He started out, I believe, at four inches and went
15 incrementally up to about 10 inches, so he had fired a
16 number of different test patterns using, I would
17 imagine, the same type of method to mark off from the
18 end of the barrel to his target material --

19 Q. I see.

20 A. -- and then made those test fires.

21 Q. Now, you've been doing this a long time, so
22 could you tell the jury, first: What were Ed Hueske's
23 results with regard to the test firing?

24 A. What I noted, particularly of note to me was
25 that this craft material that he had was very similar in

1 some regards to -- maybe some of you remember a product
2 called naugahyde, which is kind of a simulated leather.
3 This is very similar to it. It's kind of a white
4 material that's fired into it. It's got kind of a
5 spongy material to it, a thin type of board.

6 And these patterns really did show up
7 the -- not the gunpowder so much as the powder burns
8 coming out the end of the barrel. And at the four-inch
9 mark, the six-inch mark, the eight-inch mark, you had
10 very intense staining on these materials, but as far as
11 trying to see where every gunpowder particle and
12 particle fragment had gone into this material, in my
13 opinion, it's not a very suitable material. It's quite
14 difficult.

15 Q. You said, "powder burns." What's a powder
16 burn?

17 A. The gun smoke that comes out of the end of the
18 barrel, the combustion product of firing a rifle is
19 basically like carbon smoke.

20 Q. That fiery gases?

21 A. That's heated gas.

22 Q. Do they leave a noticeable mark at a close
23 range?

24 A. They do.

25 Q. Are they on that boy?

1 A. There are on this area around the mouth, around
2 the gunshot wound area, but they're not very clear as
3 far as these photographs go for any other kinds
4 of -- and it's described by the doctor as being a light
5 pattern [indicating].

6 Q. So it was light according to the autopsy
7 doctor, right?

8 A. Yes.

9 MR. PARKS: That's a misstatement --

10 MR. WHEELER: That is not.

11 MR. PARKS: -- "thin" -- I'll withdraw it.

12 Q. (BY MR. WHEELER) And with regard to the wound
13 itself, those heated gases, they didn't get in that
14 wound, according to the autopsy report, did they?

15 A. As far as I know, no.

16 Q. Which indicates what, in your experience?

17 A. Well, these tremendous amount of gases that's
18 coming out of the muzzle, right out of the muzzle, if
19 this had been anywhere close to the boy's face such as
20 near contact or contact, first off, you wouldn't have
21 had this tattooing pattern around here, and then
22 secondly, you would have had tremendous damage to his
23 head. And this may look very damaged, but in terms of
24 the high-powered rifle and what it will do to you up
25 close, it will basically split you wide open.

1 Q. What about at a distance of four inches?

2 A. Same type of thing; devastating tearing. From
3 there on in, you're looking at tremendous damage; pieces
4 of skull blown all over the place, that type of thing.

5 Q. Like you've seen in thousands of cases?

6 A. Like you saw in the other victim here.

7 Q. Now, with regard to Ed Hueske's results, how
8 far did he say that muzzle was from the target?

9 A. Well, he had mentioned in this report as close
10 as four inches.

11 Q. And why is that wrong?

12 A. We're not seeing the kind of powder burns you
13 even see on his targets at four inches.

14 Q. The wound that you see and the density of the
15 particles that you see there, is it possible at all
16 scientifically for that to exist at a distance of four
17 inches, muzzle-to-target distance?

18 A. No. In my opinion, no.

19 Q. What was Ed Hueske's maximum range?

20 A. I would have to double check his reports. It's
21 been a few days since I've looked at his report.

22 Q. Go ahead.

23 A. Perhaps you know where this is located at.

24 MR. PARKS: Page 8.

25 MR. WHEELER: Page 8.

1 THE WITNESS: Thank you. You've saved me a
2 lot of reading there. "...sat on the bed and shot
3 himself in the face at a muzzle to target distance of
4 between 4 and 10 inches..."

5 Q. (BY MR. WHEELER) Is there anywhere, based on
6 your examination of this firearm, your examination of
7 the ammunition, your examination of the deposits of
8 stippling, your examination of the photographs and the
9 wound, your examination of the autopsy report, and your
10 examination of everything else, that that firearm could
11 have been discharged at Taylor Wages at four inches?

12 A. No.

13 Q. Five inches?

14 A. No.

15 Q. Six?

16 A. No.

17 Q. Eight inches?

18 A. No.

19 Q. Nine inches?

20 A. No.

21 MR. WHEELER: Pass the witness.

22 CROSS-EXAMINATION

23 BY MR. PARKS:

24 Q. 10 inches?

25 A. 10 inches, yes. That's my lower figure,

1 12 inches, plus or minus two inches.

2 Q. That's his outer limit?

3 A. Correct.

4 Q. So y'all agree on at least 10 inches, right?

5 A. It could be as close as 10 inches.

6 Q. Would you disagree with the medical examiner if
7 there was testimony that the outer limit that would
8 typically be seen for soot to be deposited is 12 inches?

9 A. Again, that kind of depends on the gun and
10 ammunition involved. In this particular case, that's
11 probably a good ballpark figure.

12 Q. That is evidence, isn't it, soot?

13 A. It is.

14 Q. That's evidence that you basically ignored in
15 your tests, is it not?

16 A. I didn't ignore it.

17 Q. It's not mentioned.

18 A. I don't think I went into it, no.

19 Q. In fact, you used an medium that wouldn't even
20 have the soot adhere to this plastic?

21 A. Well, it does coat the plastic on the closer
22 ranges.

23 Q. The closest range you used was six inches. Did
24 it coat the plastic at six inches?

25 A. Yes.

1 Q. Did it coat the plastic at eight inches?

2 A. With a very coating, yes.

3 Q. Why didn't you mention that on your report?

4 A. I was centered in more on the pattern size and
5 pattern density.

6 Q. You chose to go with one part of the evidence
7 and, in fact, Mr. Heuske decided to concentrate on the
8 other evidence, the soot?

9 A. I don't think that's true at all.

10 Q. Okay. Just thought I'd see if you'd agree with
11 it. You don't?

12 A. No.

13 Q. All right. But we are in agreement that at
14 least at 10 inches, you and Mr. Heuske are in agreement?

15 A. Yes, I would agree with that. There's --
16 there's a proviso I would throw into that, and that is
17 that according to my targets, the powder pattern density
18 was actually significantly more than 10 inches, but
19 being conservative, I gave it a mark of 12 inches, plus
20 or minus two. I don't think it's as close as 10 inches,
21 but that's just -- being conservative, I put that.

22 Q. But certainly, if the soot is there and if the
23 medical examiner is right, we would expect the 12 inches
24 outside, you could see it could be as short as 10
25 inches, right? I thought that's what you said?

1 A. Yes.

2 Q. Okay.

3 A. And again, if you're saying that the doctor
4 said that a ballpark figure is 12 inches --

5 Q. No, that's not what he said. He said that he
6 saw soot out to 12 inches and generally no further than
7 that.

8 A. Who said this and based upon what -- what
9 testing?

10 Q. Based upon his own experience as a medical
11 examiner. You just testified medical examiners have
12 been using --

13 A. I'm sorry, sir, but in the autopsy report, I
14 didn't see that the medical examiner did any testing
15 like that. I --

16 Q. You're not understanding what I'm saying,
17 Mr. Ernest?

18 A. I don't think I did. I'm just not going where
19 you'd like me to go.

20 Q. He didn't say that there was testing done in
21 this case --

22 A. If it's his opinion, then it would be his
23 opinion.

24 Q. That's right. And what I asked you was whether
25 or not you agree with that, and just a few minutes ago,

1 you said, generally, yes, you would?

2 A. Generally, yes.

3 Q. Okay. Thank you. Would it be fair to say that
4 we can lop about six inches off your measurement a while
5 ago that you did with your yardstick -- let me strike
6 that.

7 Why did you measure to the back of the
8 lever?

9 A. To get the entire lever, you've got to get your
10 foot on there, so it's got to be somewhere on that
11 lever.

12 Q. But it doesn't have to be at the back?

13 A. No, but, you know, if it was closer to the
14 trigger mechanism, it would take more force to push it.

15 Q. Well, how --

16 A. So basically, I was giving you the benefit of
17 the doubt.

18 Q. By measuring it as long as you could?

19 A. Exactly, which would take less force.

20 Q. How much force would it take? What was the
21 pound pressure to pull that trigger down?

22 A. I didn't measure that.

23 Q. But you measured the trigger pressure?

24 A. Yes.

25 Q. You didn't think it was important to measure

1 the lever pressure?

2 A. I did not measure it.

3 Q. So you measured the full 12 inches out. You
4 didn't give us the benefit of the two inches, that you
5 said it could be less than, that that is 10 --

6 A. Sir, my report gives you that benefit.

7 Q. When you were measuring -- Mr. Whitley put that
8 stick in the end of the rifle out to the maximum
9 12 inches, didn't he?

10 A. He did.

11 Q. And you measured to the maximum back part of
12 the lever, didn't you?

13 A. Correct.

14 Q. Okay. Does atmosphere or conditions -- I'm
15 assuming wind conditions might affect these patterns you
16 see if you fired it outside and the wind is blowing, or
17 would it?

18 A. Yes, that would be a factor.

19 Q. I'm assuming you didn't do that?

20 A. No, it's in an indoor range.

21 Q. Did you fire two shots at each distance to
22 check against each other in the patterns that you see?

23 A. No.

24 Q. Now, you mentioned white cotton twill as a
25 potential receptacle for these test shots. That's what

1 Mr. Bevel says?

2 A. I believe that's correct.

3 Q. And would it be fair to say that no matter, I
4 guess, what medium you use, it's likely to have some
5 advantages and some disadvantages?

6 A. No. There are some that clearly have no
7 advantages to them whatsoever and should never be used.

8 Q. Did you see anybody using any of those in this
9 case?

10 A. I'd have to say, yes.

11 Q. That would be Mr. Heuske?

12 A. That would be.

13 Q. You didn't approve of his --

14 A. I think that that's really a bad substraight to
15 use.

16 Q. Would it surprise you to think that yours is
17 the same for him?

18 A. Would it surprise me if I thought he had the
19 same opinion?

20 Q. Yes.

21 A. No, it wouldn't.

22 Q. I guess the bottom line, Mr. Ernest, is
23 this -- or let me ask it this way: If that rifle can be
24 manipulated and fired in such a way that Taylor could
25 have been shot and killed as he was outside of 10 inches

1 or 12 inches or 14 inches, it really wouldn't make any
2 difference what we're talking about here today, would
3 it?

4 A. The way you worded that question, sir, I don't
5 think I could go along with that.

6 Q. Because you don't think it can be done?

7 A. No, I didn't say that it's impossible.
8 Obviously, there are ways in which you can stretch that
9 out probably even beyond the ranges we're talking about,
10 but it would take some doing to do that.

11 Q. Take a little effort?

12 A. A lot of effort and then for what you decided
13 you were trying to kill yourself, anyway.

14 Q. So what you're saying is that that's not the
15 way you would do it, if it's up to you?

16 A. Well, based on my experience, I've never seen
17 anybody on a known suicide shoot themselves in the face
18 and that's based on hundreds of cases. Now, there's
19 plenty of people that have shot themselves in the head
20 either in the temple or under the chin or in the mouth,
21 but I have never seen a known case of suicide, male or
22 female, in my 33 years of shooting themselves directly
23 looking at the barrel in the face. It has never
24 happened.

25 Q. And is that your opinion what happened here is

1 that he is looking directly into the barrel?

2 A. If he shot himself, yes.

3 Q. Did you ever go to the scene of this offense?

4 A. No.

5 Q. Didn't need to?

6 A. I didn't say that. I wanted to go, but just
7 never happened.

8 Q. Okay. How much of this subjective
9 determination that you've just told us about based upon
10 your experience and your obvious pretty strong feelings
11 about it played into your determinations here today?

12 A. It has nothing to do with the muzzle-to-target
13 distances.

14 Q. Did you take photographs? Can we see what you
15 do or -- or did, or do we have to rely on you telling us
16 how far away --

17 A. Rely on how far away it --

18 Q. Yeah. When you say you shot it at 12 inches,
19 do we have to rely on you telling us that's how far it
20 was?

21 A. Well, if I'm sitting on the court stand under
22 oath and I tell you it's six inches, you can take it to
23 the bank.

24 Q. We do have to rely on that?

25 A. That's true.

1 Q. Subjectively, you've made a determination
2 yourself, based upon your experience, this would not
3 have been a suicide?

4 A. I think I testified, based on my experience,
5 I've never seen such a suicide.

6 Q. I understand that.

7 MR. PARKS: That's all the questions I
8 have, Judge.

9 MR. WHEELER: Nothing further.

10 THE COURT: Thank you, sir. You may step
11 down.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: Ladies and gentlemen, let's
14 take our afternoon break. We're running a little late
15 on that. Please be available in the jury room at 4:05
16 and remember your prior instructions.

17 (Jury exits courtroom.)

18 (Recess taken from 3:54 to 4:09.)

19 THE COURT: Back on the record in Cause
20 20,529-2008, State vs. Payne.

21 After visiting with counsel, I need to
22 bring the jury back in and instruct them, but we will be
23 stopping, then, for the rest of this week.

24 So if you'll bring the rest of the ladies
25 and gentlemen of the jury in.

1 (Jury enters courtroom.)

2 THE COURT: All right. And let the record
3 reflect that the jury has returned to the courtroom.

4 Ladies and gentlemen, I think we're going
5 to go ahead here in just a minute and stop for the day,
6 this being Friday. Of course, that will be for the
7 weekend, and as I indicated earlier, I do have some
8 other things that are going on. We cannot continue on
9 Monday. We're going to have to skip Monday, as we've
10 planned from the beginning. Then I have some other
11 things I have to take care of early Tuesday.

12 Rather than -- I'm not exactly how long
13 that's going to take on Tuesday. Rather than have you
14 report in at 9:00 a.m., I feel pretty safe in
15 saying -- I can't lose much time if I ask you to be here
16 at 10:30. You might still have to wait for a little
17 bit, but hopefully, not very long. We will be starting
18 pretty close to that.

19 I need for you to remember your
20 instructions. This is going to be a long period when
21 you're gone, so this is the time to be particularly
22 careful. Now, there is probably going to be news about
23 the case going on. Be carefully to avoid any contact
24 with anything like that. Don't let anybody talk to you
25 about it or get to talking about anything that has to do

1 with the trial. And if anybody is attempting to get in
2 touch with you, after you refuse to let them talk to
3 you, then you need to get in touch with the Court as
4 quickly as you can and let us know what the problem is.

5 If you will remember all those instructions
6 and then report to the jury room at 10:30 in the morning
7 next Tuesday, hopefully we will be getting started real
8 quick. Please go with the bailiff at this time.

9 (Jury exits courtroom.)

10 THE COURT: All right. Let the record
11 reflect that the jury has left the courtroom.

12 And, of course, we're going to be recessed
13 here in just moment, but -- until 10:30. We'll be in
14 recess until 9:00 a.m. in Tuesday in this case. So
15 we'll take up those matters that we were hoping to get
16 taken right after the voir dire exam, those proffers in
17 regard to the witnesses that are in question. We'll
18 take those up Tuesday morning at 9:00 a.m. We'll be
19 recess at this time.

20 (Proceedings recessed.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$ _____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 8 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE	)	402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 4

On the 26th day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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

2 M O T I O N I N L I M I N E

3 THE COURT: On the record in 20,529-2008,
4 State vs. Jason Tad Payne. Let the record reflect
5 counsel for the State, counsel for the Defendant, and
6 the Defendant is present. The jury is not present.

7 Let me visit with you all on how you think
8 this should be done. It's my understanding that the
9 State would be proffering witnesses. I don't know how
10 many you have out there that you want to call during
11 trial, proffering witnesses you think would
12 cover -- would present a reasonable indication of the
13 kind of evidence that you're seeking to present that the
14 Defense has indicated they thought shouldn't be able to
15 present, so we have enough before to address whatever
16 issues the Court's going to need to address.

17 MR. WHEELER: Your Honor, I want to make
18 sure we know exactly what we're doing this morning, and
19 my understand is what we're here for is a motion in
20 limine that was made orally, since we don't have any
21 motion in writing, and the objections that are made, are
22 lodged in this oral motion has to do the relevance with
23 each of our witnesses under 401, the danger of unfair
24 prejudice; under 403; and an objection under 404(A), to
25 show specific acts demonstrating conformity of

1 character. So we're trying to figure out exactly where
2 we're headed here with regard to what we have to profer
3 that each of our witnesses are going to testify to.

4 We've got these concerns, as I understand
5 them: The state of mind of Nichole Payne, the state of
6 mind of Taylor Wages, the financial state of the family,
7 and the status of the marital relationship. Looks like
8 those are the four issues to be addressed. That's our
9 understanding.

10 MR. PARKS: And -- well, of course, 701 is
11 also in. I filed a memorandum and served the State with
12 that. It wouldn't be a surprise to the State.

13 MR. WHEELER: It's the lay witness
14 testimony rule.

15 MR. PARKS: And we really don't know what
16 the witnesses are going to say, so it's a little bit
17 hard for us to say exactly what our objections are going
18 to be unless we hear what they say. If they're going to
19 say what I think they're going to say, then our
20 objections are good. It's simply a matter of --

21 MR. WHEELER: 38.36 of the Texas Code of
22 Criminal Procedure, as we start to lay the groundwork,
23 it says as follows: "Evidence in Prosecutions For
24 Murder." This particular statute has been adopted by
25 the Court of Criminal Appeals in Lamb versus State to

1 apply to capital murder prosecutions. In Lamb versus
2 State -- so I can cite it to the Court, it's 68 S.W.2d
3 11. In that case, the evidence that was introduced
4 before the court and to the jury was evidence of a
5 victim's good character. It was permitted, admitted
6 into evidence pursuant to 38.36.

7 The rules is as follows: "In all
8 prosecutions for murder, the state or the defendant
9 shall be permitted to offer testimony as to all relevant
10 facts and circumstances surrounding the killing and the
11 previous relationship existing between the accused and
12 the deceased" -- so in this case, it would be Jason Tad
13 Payne and Nichole and Jason Tad Payne and Taylor
14 Wages -- "together with all relevant facts and
15 circumstances going to show the condition of the mind of
16 the accused at the time of the offense." So it's a
17 relevance rule that sets out some additional parameters
18 for us.

19 Now, the Court of Criminal Appeals has made
20 clear that it does not officiate Rules 401, 403, or
21 403(A), but it does permit additional specific acts to
22 show character conformity when they support these items
23 that are enumerated inside the rule. So that piece of
24 law needs to be before the Court.

25 MR. PARKS: That's -- I've got a problem

1 with that. That has nothing to do with a bunch of these
2 students and counselors. That's been my main concern,
3 somebody else, not the state of --

4 MR. WHEELER: Under Rule 403, there is no
5 danger or confusion of the issues. The Defendant has
6 deposited suicide and murder as Taylor Wages actions, so
7 we're not in any danger of confusing this jury in regard
8 to putting on evidence of his good character.

9 MR. PARKS: Rule 701 prohibits that.
10 That's as simple as I can say it. What they're trying
11 to do is put on evidence about which a person could not
12 reach an ultimate opinion and then invite the jury to
13 reach such an opinion from the inference that has been
14 laid.

15 What they're intending to do, Judge, quite
16 frankly, is to call witnesses to say that Taylor Wages
17 was happy, that he loved his mother, that he was
18 cheerful, whatever, whatever, whatever. They can't ask
19 under 701, "Do you have an opinion whether or not he was
20 suicidal?" 701 totally excludes that.

21 So what they want to do is stop right there
22 and leave the inference, and the caselaw says that they
23 can't even bring the inference into court. Then they
24 want the court to speculate on evidence about which even
25 their own witness could not opine as to the ultimate

1 purpose of that testimony.

2 It has no other purpose other than to
3 invite speculation about something the witnesses can't
4 testify about, and it seems to me as simple as that.
5 It's got nothing do with character or any of that
6 business. It's about trying to get the jury to
7 speculate about an ultimate fact based on inferences
8 that are inadmissible.

9 MR. WHEELER: I don't understand that
10 argument or the logic about it. It's about his
11 character but it's not about his character? The Court
12 of Criminal Appeals in Lamb versus State says that
13 evidence of a victim's good character is in under --

14 MR. PARKS: No, it is under --

15 THE COURT: Let me see that. I like
16 to -- if you would.

17 MR. WHEELER: Of course, there's more than
18 that that we're going do have to address.

19 THE COURT: Did you wish to go ahead and
20 call someone, profer some testimony to address this
21 issue?

22 MR. WHEELER: Well, our fear is we're going
23 to give away our entire work product, the issues
24 that -- rather than going and fishing through the
25 State's case under a preview so they know what the

1 inculpatory evidence is.

2 I'm thinking in terms of the state of the
3 marital relationship and the financial state of the
4 family, and then if we need to hear other issues as the
5 court directs. And I can make the profer orally, and if
6 we need to, hear testimony.

7 THE COURT: I'm not understanding that
8 there's any concern on the part of Defense as the
9 relationship between Mr. Payne and his wife, the marital
10 relationship. If I'm wrong on that, let me know. I'm
11 not understanding them to have any objection concerning
12 the financial condition of the family.

13 MR. WHEELER: They lodged that objection
14 with regard to the business affidavits that were timely.

15 THE COURT: As to timely is a different
16 issue. As to whether -- but, I guess, let me have the
17 Defense tell me whether my assumptions are correct or
18 wrong.

19 MR. PARKS: We have no real objection to
20 what Mr. Wheeler states the law to be, but that
21 provision in the law does not trump all other rules of
22 evidence. So the relationship between Mr. Payne and
23 Mrs. Payne as far as I'm concerned is relevant so long
24 as that testimony is inadmissible for some other reason.
25 That doesn't matter.

1 They can't testify as to hearsay. If
2 they've got personal knowledge, they can testify as to
3 their personal knowledge, but it's not carte blanche to
4 have a witness say anything they want to about their
5 opinions.

6 MR. WHEELER: I have brought to the Court
7 out of the Court of Criminal Appeals, Smith versus
8 State, which is 5 S.W.3d 673, delivered June 1999.
9 It's precise authority for the Court to understand how
10 the rule of evidence works with 38.36. I thought it
11 would be helpful.

12 THE COURT: What's your understanding of
13 what it's going to be tell me as useful to the
14 circumstances to this case?

15 MR. WHEELER: Well, in regard to the
16 marital relationship: First, the state of mind rule
17 applies with regard to Nichole Payne. So the Court will
18 have to perform an analysis with regard to her words as
19 to whether those words told to other people demonstrated
20 Nichole Payne's state of mind and, therefore, meet the
21 hearsay objection if the Court rules that they're
22 admissible under the state of mind objection than those
23 statements about the --

24 THE COURT: What I'm understanding is, you
25 think it's not a violation of 404(A) to go into Nichole

1 Payne's state of mind as a way of proving whether or
2 not -- relevant to proving whether or not the Defendant
3 murdered her or not?

4 MR. WHEELER: Sure. It shows the condition
5 of his mind.

6 THE COURT: No. You didn't say his mind,
7 her mind.

8 MR. WHEELER: Well, it's both as well
9 because we have an immediate 38.36 as well. We put on
10 evidence about her state of mind to show his condition
11 of mind at the time of the killing. That's the way the
12 caselaw indicates this situation works. In a murder
13 prosecution, if we put on state of mind evidence to show
14 a deteriorating, a spiralling down marital relationship,
15 that has to do with not only the relationship with the
16 accused and the deceased, it has to do with another item
17 under 36.38, which is the condition of the Defendant's
18 mind at the time of the killing.

19 Now, the nature of the evidence that we're
20 talking about is testimony that she had to talk to her
21 family members from a closet when she talked to them on
22 the phone, a bathroom; she was intending to seek a
23 divorce, and that she had entered into an extramarital
24 relationship, so those pieces of evidence are there.

25 THE COURT: Yes, sir. Except -- I'm sorry,

1 go ahead.

2 MR. PARKS: Well, you know, here's
3 what -- to sort of illuminate what the article
4 means -- and it doesn't mean that they can shovel up
5 anything they want to -- the nature of the relationship
6 such as whether the victim or accused were friends or
7 coworkers or married or estranged, separated, or
8 divorcing is admissible. Now, if any of those things
9 apply, that's fine, but when we start getting into
10 people coming to say, which is what I anticipate they
11 want to put in, that from some source or another, the
12 witness heard that Nichole said that she was afraid of
13 Mr. Payne is not what is contemplated by this article.

14 It's not -- you know, the word "relevant"
15 is important and used in here: "In all prosecutions for
16 murder, the state or the defendant shall be permitted to
17 offer testimony as to all relevant facts and
18 circumstances surrounding the killing and the previous
19 relationship existing between the accused and the
20 deceased." But, still, there must be some relevance
21 beyond just showing the character of any person,
22 including the defendant, that he acted or -- or some
23 other person acted in conformity with that character
24 trait.

25 Certainly, the relationship between

1 Mr. Payne and Mrs. Payne is admissible. Certainly, if
2 they have evidence that is not otherwise excluded by
3 reason of 403 or hearsay as to the state of their
4 marriage, that's fine. The problem I have, Judge,
5 frankly, with this particular case is that it appears to
6 me that the State's prosecution is basically just throw
7 everything we can get our hands on against the wall and
8 see if anything sticks.

9 If this was not -- if the motive in this
10 case was not a marital relationship, perhaps, it was
11 then they perceived they had financial difficulties
12 without tying any of this stuff in other than as an
13 invitation for the jury to speculate about something
14 they really cannot connect that is relevant to the
15 offense on trial.

16 THE COURT: Well, I think that's an issue
17 which goes -- as it seems to me, Mr. Parks, correct me
18 if you think I'm wrong, but that's just an issue of the
19 Court weighing 403 as to whether -- obviously, it would
20 certainly appear to be relevant and admissible unless
21 the -- unless the prejudice outweighs the relevance, and
22 so that basically would mean simply that the Court
23 simply needing to make that call, and -- but, otherwise,
24 that would not be something that's -- that gets beyond
25 potentially admissible evidence.

1 I think that's the concern I have is
2 anything that might come in that's for -- which there's
3 not going to be any theory that would get in there and
4 would -- could throw a skunk in the jury box that I
5 can't get the aroma out and we end up, you know, blowing
6 this whole process.

7 MR. WHEELER: I'm going to bring to the
8 Court's attention Martinez versus State, 17 S.W.3rd 677,
9 out the Court of Criminal Appeals. It is about 803, Sub
10 3, the hearsay exception of the existing state of mind;
11 a victim's statement that she was afraid of the
12 appellant was a statement of declarant's then existing
13 state of mind. That falls within hearsay 803(3),
14 hearsay exception.

15 Next, I want to read to you from Garcia
16 just cited by the Defense: "First, Garcia argues that
17 these statements were not admissible under 803(3), state
18 of mind hearsay exception. We disagree. Rule 803(3)
19 provides that a statement of a declarant's then existing
20 state of mind, emotion, sensation or physical condition
21 such as intent, plan, motive, design, mental feeling,
22 pain or bodily health is not excluded by the hearsay
23 rule even though the declarant is available as a
24 witness.

25 Texas courts have held that the type of

1 statement contemplated by this rule includes a statement
2 that on its face expresses or exemplifies the
3 declarant's state of mind such as fear, hate, love, and
4 pain. Thus, a victim's statement regarding her
5 emotional response to a particular person qualifies as a
6 statement of then existing state of emotion under Rule
7 803(3)." That's what Garcia says.

8 MR. PARKS: Then it comes relevant as to
9 when that was made and whether or not because of time
10 considerations 403 may come in.

11 MR. WHEELER: Now, the next thing is the
12 characterization of the prosecution as a spaghetti
13 prosecution. "The evidence already before the jury
14 includes but is not limited to the following: The
15 interview of Jason Tad Payne where he says he has no
16 marital problems; the interview of Jason Tad Payne where
17 he says he has no financial problems; Dr. Polk indicates
18 Nichole Payne was on antidepressants because of
19 financial problems just a few months before her death;
20 Steven McCombs who says a \$100,000 insurance policy was
21 on Nichole Payne and \$10,000 on Taylor Wages; Jason Tad
22 Payne had refused his policy, sought payment of proceeds
23 after deaths, and refused to be recorded when claiming
24 those moneys; Dr. Pinckard who said that antidepressants
25 were in Nichole Payne's system at the time of death; and

1 Cindy Robinson who said they had paid \$215,000 in cash
2 for the house. Now, that evidence is before the Court.

3 Now we move into the marital relationship
4 itself: We have a Dmitri Nobles who is making clear
5 that he is in a relationship with Nichole Payne and has
6 exchanged letters with Nichole Payne. We have Richard
7 Hawthorne who will identify that this Defendant has
8 bought three automobiles on top of that house with the
9 \$300,000 that they received in settlement moneys. We
10 have the bank records that have been offered as State's
11 Exhibit No. 67, which is properly authenticated and
12 meets the hearsay exception business records of the
13 money that was paid out to Nichole and Jason Tad Payne,
14 the \$300,000, as well as other bank records showing that
15 at the time of death they had no money. They were
16 broke.

17 We have Sherry Hawthorne who had it made
18 clear to her by Nichole in a telephone conversation just
19 prior to her death that she was afraid of this Defendant
20 and was making burial plans. We have Sarah Hawthorne
21 who confessed she was not having sex with Jason Payne
22 except one time prior to death, goodbye sex is how it's
23 characterized; that she came to Tyler a couple months
24 prior to Nichole's death to discuss divorce, that she
25 had conversations with her indicating that she feared

1 for her life, Nichole did. Sarah knew about the
2 boyfriend Dmitri and she can also testify to the boy's
3 relationship with his mother, which was positive.

4 THE COURT: All right. Let me get into
5 that, and you're getting into areas that I am concerned
6 on in there. Why would that not be in violation of
7 404(A)?

8 MR. WHEELER: They have put in front of
9 this jury that the boy murdered his mother. It is not a
10 confusion of the issues in this case under 403 and it's
11 certainly relevant pursuant to opening statement given
12 that the boy had a very close relationship with his
13 mover and would never harm her. And that's the
14 perception of the relationship that the witnesses have.
15 They observed it. They saw the relationship. They can
16 testify to what they saw.

17 MR. PARKS: Judge, I just have to respond
18 to one thing: The fact that the State makes an opening
19 statement does not put evidence --

20 MR. WHEELER: That's the Defense's opening
21 statement. And confusion of the issues is addressed,
22 too, under 403, and this court has been asked to address
23 403. So that is absolutely before this Court, whether
24 this boy murdered his own mother.

25 THE COURT: Let me just -- I'm still not

1 sure if, even if that's correct, how that gets you
2 around 404(A). That does not allow getting into -- in
3 other words, if that's not going to the relationship
4 between the boy and Mr. Payne, the Defendant, did not go
5 between the relationship between Mrs. Payne and the
6 Defendant, it has to do with the relationship between
7 the boy and his mother, and -- and you're seeking to
8 prove the fact --

9 MR. WHEELER: The condition of the mind of
10 the Defendant at the time of the killing. That's --

11 THE COURT: We're not talking about the
12 mind of the Defendant. We're talking about whether or
13 not -- the relationship between the boy and his mother.

14 MR. WHEELER: But I am. That's where I'm
15 headed. We have in this case our theory, which is this
16 Defendant killed his wife and his stepson for money.
17 Their money condition, poor financial condition, coupled
18 with the marital problems, led to the killing where he's
19 seeking that money and he's blaming the boy -- the
20 Defense is blaming the boy for the killing.

21 The condition of his mind at the time is
22 that the relationship between mother and the son was so
23 bad, he's such a horrific child that he's murdered his
24 own mother, we have to rebut that. That is what was put
25 on by the Defense as their argument in opening

1 statement, that he believes that this boy's capable of
2 killing his mamma, and we have to rebut it.

3 THE COURT: But -- but why would
4 you -- would that make inadmissible evidence admissible
5 that hasn't anything to do with relevance, just with
6 whether you can put on that kind of testimony, period?

7 MR. WHEELER: Under Lamb v. State, 38.36,
8 evidence of good character is admissible. It just flat
9 is. It's admissible.

10 THE COURT: Let me read Lamb v. State. Let
11 me get back to reading what it says. Give me a second.

12 MR. WHEELER: Maybe I can back up a step.
13 We're not putting on specific acts. The 404(A) is the
14 specific acts rule. We're not putting on specific acts.
15 How do I perceive the evidence? That's the evidence
16 coming through these witness. That's not specific act
17 testimony.

18 (Pause in the proceedings.)

19 THE COURT: Go back to 404(A), Mr.
20 Wheeler --

21 MR. WHEELER: Yes, sir.

22 THE COURT: -- you've got the basic
23 proposition laid out that evidence of a person's
24 character or character traits are not permissible for
25 purposes for proving action and conformity with that

1 character trait unless there's an exception, and then
2 there are several exceptions listed under 404(A), and
3 I'm not understanding which exception that discussing
4 the relationship between the boy and his mother would
5 fall.

6 MR. WHEELER: Well, 404(A) deals with
7 specific acts. We're not trying to prove an action.
8 The Defense has deposited to this jury that this is a
9 case of matricide where the boy has killed his mother.
10 We've got to rebut that. That's the legal -- that's the
11 evidence posture we're under.

12 The evidence that we have under 701 has to
13 do with the opinions of the relationship, and the
14 opinions of relationship between mother and son was that
15 the relation was good. So fundamentally, it's a simple
16 proposition.

17 THE COURT: Let me just go with you on
18 that. Okay. The relation between the mother and son is
19 good.

20 MR. WHEELER: Sure.

21 THE COURT: What is that -- that is
22 relevant for what purpose?

23 MR. WHEELER: To rebut the Defense argument
24 to this jury, what they've put on in opening statement
25 that this is a matricide, that the boy killed his

1 mother.

2 THE COURT: Which is to prove actions based
3 on the --

4 MR. WHEELER: It's not to prove actions.

5 THE COURT: Or the -- is there a
6 distinction between proving actions and disproving
7 actions?

8 MR. WHEELER: It's to prove the nature of
9 the relationship. The opinion of a good relationship
10 has nothing to do with acts. This is not a specific act
11 we're talking about. They're the ones that are talking
12 about specific acts and they want to put on evidence
13 that he's a bad kid. We have to rebut that he's a
14 murderer. The opinion of the good relationship between
15 mother and son, "I've seen them, I've seen them
16 together, and he loved his mother very much," what act
17 is in that? 404(A) does not apply.

18 THE COURT: But what --

19 MR. PARKS: But what's the purpose of it if
20 it doesn't go to the ultimate act? It's irrelevant.

21 MR. WHEELER: It's absolutely relevant. It
22 rebuts the Defense that he's a murderer. If we don't
23 get this evidence in, then the Defense is left with the
24 ability to mislead this jury that this is a bad boy with
25 the State having no ability to rebut that by showing a

1 close, good relation with his mother.

2 MR. PARKS: We have never said this is a
3 bad boy. Now, that has -- and, frankly, do not intend
4 to.

5 MR. WHEELER: If you kill your mom, you're
6 a bad boy.

7 MR. PARKS: You did a bad thing.

8 MR. WHEELER: We've got to rebut that.

9 MR. PARKS: Judge -- well, can I --

10 MR. WHEELER: We've got to rebut that.
11 It's illogical to say that the State can't -- to let the
12 Defense get in the courtroom and say he's a
13 mother-killer, but the State doesn't get to rebut that
14 he's a mother-killer and with a lot of evidence that
15 that's a good relationship.

16 MR. PARKS: But you assume, Jim, that the
17 mere fact that a person has a good relationship as
18 perceived by someone else actually has any relevance
19 whatsoever that happened on that particular occasion.
20 That's why the rule say that you cannot bring a
21 character trait to show that a person acted in
22 conformity with it on a particular occasion.

23 MR. WHEELER: I didn't say character trait.
24 I said they have an opinion of the relationship under
25 701, a different rule.

1 MR. PARKS: It's a character trait.

2 MR. WHEELER: It's not -- this is not a
3 specific act. And the court made clear that the
4 character of the victim under 38.36 gets to come into
5 it.

6 MR. PARKS: If it is relevant.

7 MR. WHEELER: A deteriorating marriage is
8 at issue in this case. That home and what was going on
9 in that home is at issue in this case.

10 THE COURT: Well, I think most of what
11 you're planning on presenting is going to come down to,
12 again, to some sort of -- something I'm going to have to
13 deal with at the time it's there. Most of it's going to
14 be involved with the balancing of the 403.

15 The Court is still of the opinion that 701
16 and 404(A) would not let you get into someone's
17 testimony about -- someone else's testimony about what
18 the relationship was between Austin and his mother. If
19 you want to go ahead and tender some things on that and
20 then we can deal with it or if you want to deal with at
21 the time you --

22 MR. WHEELER: We're going to wait and deal
23 with it at the time, Your Honor.

24 THE COURT: All right. If you'll just
25 approach and let me know, then we can send the jury out

1 and you can make your bill do whatever we need to.

2 Is there -- are there any other areas that
3 y'all wanted take up here in advance?

4 MR. WHEELER: Now, the boy's relationship
5 with his father -- with his stepfather.

6 THE COURT: I don't see why it wouldn't
7 be -- in other words, I don't see why there would be
8 sort of blank opposition. That's going to be subject to
9 all the normal considerations dealing with evidence.

10 MR. WHEELER: Sure, okay. I want to offer
11 again, and I'd like to outside the presence of the jury
12 and reoffer it in front of the jury, the bank records
13 that I offered previously, State's Exhibit 67, as well
14 as the other two exhibits which are State's Exhibit 68
15 and State's Exhibit 70.

16 THE COURT: Why don't we take those up one
17 at a time and make whatever record you want to here
18 while we don't have the jury and I'll hear what the
19 problems were, because at this point, I no longer recall
20 what's -- are all three of those -- what are those
21 numbers?

22 MR. WHEELER: State's 68 and State's 70.

23 THE COURT: All right. State's 68 and 70
24 have not been admitted previously --

25 MR. WHEELER: And State's --

1 THE COURT: -- hadn't been tendered
2 previously and 67 wasn't admitted. Let's deal with
3 State's 67 first because that was tendered and not
4 admitted. What was the objection on that?

5 MR. PARKS: Relevance, if I recall
6 correctly. There's no objection to hearsay because
7 they're under affidavit.

8 MR. WHEELER: They're properly
9 authenticated.

10 THE COURT: So what are these now?

11 MR. WHEELER: These are the bank records
12 demonstrating the financial condition of Jason Payne and
13 Nichole Payne at the time of death.

14 THE COURT: I think -- I may be mistaken,
15 but my recollection was that I felt that at that point,
16 there wasn't a sufficient basis for it. You've got me
17 into the insurance at this point and the Court's
18 inclined to admit them, but if the Defense has got some
19 other things you want to raise before I do that, I'll be
20 happy to hear them. Anything --

21 MR. PARKS: Judge --

22 THE COURT: Any reason why they wouldn't be
23 relevant?

24 MR. PARKS: Yeah.

25 THE COURT: It's basically 403?

1 MR. PARKS: It's basically 403. The
2 problem that I have with it, frankly, Judge, is this:
3 This is a manufactured motive, is all I can say, and the
4 fact that there was -- assuming that it shows that there
5 was a low balance in a bank account at the time of this
6 offense, goes to show no ultimate issue to be determined
7 by the jury. It's just not relevant because it is a
8 microcosm of the truth, if you will.

9 Basically, what they're saying is, and to
10 me, it's a mind-boggling concept, that this was an
11 offense that was committed by a person because he was
12 dead broke when their own evidence shows that he had
13 more than a quarter-of-million dollars of assets free
14 and clear, and it's just in opportunity for them to try
15 to manufacture what they perceive to be a motive,
16 because there's not going to be any real evidence to
17 that.

18 All they're going to do is put this in and
19 then argue that this must have been for financial reason
20 because they were broke, which I guess would probably
21 give a motive to a great percentage of people in Wood
22 County to kill their spouses. It just has no -- it goes
23 nowhere. It has no relevance. If it were tied to
24 something other than a State's theory, then, perhaps, it
25 would be relevant, but it's no more than just dumping

1 something into the record so they can argue that it must
2 have been some, although they can't do anything other
3 than speculate that, perhaps, it was so, if that makes
4 any sense to the Court.

5 THE COURT: Well, it does, and it's the
6 problem you always run into with 403. Number one, it
7 is -- you know, it's -- it's relevant to the State's
8 theory that, you know, there was an insurance policy and
9 that the State has raised. It's certainly relevant.

10 In balancing the prejudicial -- of course,
11 the State wouldn't be seeking to admit it if it didn't
12 have some evidentiary impact. That's the reason for
13 using this evidence in this sort of situation. The
14 Court doesn't find this kind of evidence in itself to be
15 terribly inflammatory. It is whatever it is. And
16 that's what juries are here for, is it to weigh these
17 things. And so to keep it out under 403, the Court
18 thinks would be erroneous and where there is -- it's not
19 standing alone, it's part of a scheme where the State
20 has already introduced some and has indicated that
21 intends to be putting in more and has more, be putting
22 it that fits that same pattern, the Court feels it's
23 appropriate to allow it in, so I'm going to admit 67.

24 (State's Exhibit 67, admitted.)

25 Now, what is 68?

1 MR. WHEELER: Those are also personal bank
2 records from different banks. 68 is from Citizen First
3 Bank. It's the account of Jason and Nichole Payne.

4 (State's Exhibit 68, offered.)

5 THE COURT: Anything different in regard to
6 that?

7 MR. PARKS: No, same objection.

8 THE COURT: Same objection, okay. I'll
9 overrule that objection and admit 68.

10 (State's Exhibit 68, admitted.)

11 MR. WHEELER: And 70 is Jason and Nichole
12 Payne's account records from Bank Texas.

13 (State's Exhibit 70, admitted.)

14 THE COURT: And same --

15 MR. PARKS: Same objection.

16 THE COURT: All right. Then I'll admit
17 that as well.

18 (State's Exhibit 70, admitted.)

19 MR. WHEELER: Okay. I apologize for
20 sitting down.

21 So the status of the marital relationship
22 is subject to individual objections, but we're going to
23 put the evidence on?

24 THE COURT: If -- if nothing is per se
25 to --

1 MR. WHEELER: Financial status is in
2 subject to individual objections?

3 THE COURT: Yes, sir.

4 MR. WHEELER: With regard to state of mind
5 evidence, the statements by Nichole Payne to others are
6 subject to the state of mind and needs to get a ruling?

7 THE COURT: Provided they relate back to
8 the relationship between her and the Defendant. Again,
9 that's something -- they're not automatically per se
10 excluded.

11 MR. WHEELER: And the testimony about the
12 relationship that Taylor had with his mother, right now
13 we'll have to approach on each individual circumstance
14 and have a hearing outside the presence of the jury?

15 THE COURT: Yes. I'll be happy to work
16 with you on a record on that.

17 MR. PARKS: I think that gets us through
18 the issues.

19 THE COURT: Anything else that the needs to
20 be heard or --

21 MR. PARKS: (Moving head side to side).

22 THE COURT: All right. I think we've got
23 our jury coming. I should have had them come in sooner,
24 but I anticipated we were going to have witnesses on the
25 stand. So they're supposed to here at 10:30, so we'll

1 be in recess until 10:30.

2 (Recess taken from 9:49 to 10:31.)

3 THE COURT: On the record in 20,529, State
4 vs. Jason Payne. Let the record reflect counsel for the
5 State, counsel for the Defendant, and the Defendant is
6 present. The jury is not present. It's my
7 understanding that all the jurors have arrived.

8 Is the State ready to proceed?

9 MR. WHEELER: Ready.

10 THE COURT: Is the Defendant ready to
11 proceed?

12 MR. PARKS: Defense is ready.

13 THE COURT: Very well. Bring them on in.

14 (Jury enters courtroom.)

15 THE COURT: Let the record reflect the jury
16 has returned to the courtroom.

17 The State may call its next witness.

18 MR. WHEELER: The State calls Texas Ranger
19 Philip Kemp.

20 (Witness enters courtroom.)

21 THE COURT: Come on around and raise your
22 right hand.

23 (Witness sworn.)

24 THE COURT: Please have a seat.

25 RANGER PHILIP KEMP,

1 having been first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. WHITLEY:

4 Q. State your name for the record.

5 A. My name is Philip Kemp.

6 Q. I'll ask you, sir, how are you employed?

7 A. I'm a Texas Ranger with the Department of
8 Public Safety.

9 Q. And how long have you been so employed?

10 A. I've been employed with the Department of
11 Public Safety for approximately 23 years, seven of which
12 as a Texas Ranger.

13 Q. Tell the jury your training and experience that
14 qualifies you to hold that position.

15 A. I graduated from the DPS academy in the
16 position of a State Trooper. Attended many courses
17 throughout my career as a trooper and as a highway
18 patrol sergeant in criminal investigations and traffic
19 investigations. Upon the promotion to the Texas
20 Rangers, I attended courses on crime scene
21 investigations, homicide investigations, sexual
22 assaults. I am currently an instructor in the Texas
23 Rangers advanced crime scene schools.

24 Q. Let me direct your attention back to December
25 the 11th, 2007, and ask if you were so employed on that

1 date?

2 A. Yes, sir, I was.

3 Q. And if you would, tell the jury, please, how
4 you became involved in this particular case.

5 A. I had been contacted by the Wood County Sheriff
6 Office CID, Lieutenant Miles Tucker. He had advised me
7 that he had two dead bodies at a residence and requested
8 assistance with the scene investigation.

9 Q. And did you, in fact, go to that scene?

10 A. Yes, sir, I did.

11 Q. And can you tell the jury where it was located?

12 A. It was on Highway 37, just north of Quitman in
13 Wood County.

14 Q. Approximately, what time did you arrive?

15 A. About 11:30 in the morning.

16 Q. And if you would, sir, please tell the jury
17 what you first observed when you arrived on the scene?

18 A. You are talking about the layout of the house
19 and --

20 Q. Yeah.

21 A. The house was set off the road just a little
22 bit. You had to drive up a small hill to get to the
23 house. As you drove to the house, parking generally was
24 on, I guess you would say, the south side of the
25 residence. The front door faced to the west; two-story

1 house, frame house, wood frame house.

2 Q. And who was present when you arrived there?

3 A. Lieutenant Tucker was there. I believe
4 Sergeant Lain with the Sheriff's Office was there as
5 well as uniformed officers with the Sheriff's Office.

6 Q. And what were you requested to do at the scene?

7 A. Provide assistance with the scene, the
8 evaluation of the scene, locating evidence, and in
9 interviewing witnesses afterwards.

10 Q. And did you, in fact, have a walkthrough of the
11 crime scene?

12 A. Yes, sir, I did.

13 Q. And if you would for me, describe to the jury
14 what you observed during that walkthrough?

15 A. As I was led through the house, when you walk
16 in is the living room area. Immediately to the left,
17 which would be, I believe, on the north side of the
18 house, there was a bedroom that faced the
19 north -- northwest corner.

20 In that room, there was a slay bed type of
21 bed, and on the bed, I observed the body of Nichole
22 Payne? She was laying on the -- I believe on the left
23 side of the bed towards the window. She was laying on
24 her right side dressed in gray warmups with a pillow
25 between her knees.

1 The blankets and everything on top of her
2 had been pulled back to the foot of the bed. I noticed
3 a large amount of blood on the pillow area, on the
4 headboard, on the floor towards the window, as well as
5 blood and brain matter on the pillow in front of her as
6 well as on the floor.

7 Q. Tell us where you went next.

8 A. After that, we walked south through the living,
9 dining room, laundry room into the garage, which had
10 been changed into a bedroom for Mr. Wages. Walked down
11 a couple of steps in that room. There was a sheet
12 hanging on the north side of that room and a bed just to
13 the south of that. There were weights in the room and a
14 piece of carpet on the floor, stereo and such.

15 Laying across the foot of the bed in a
16 north direction was the body of Mr. Wages. I noticed he
17 was wearing just general clothes; no shoes, but socks,
18 pants, a hoodie. There was a large amount of blood by
19 his head on the bed and also on the floor next to the
20 footboard.

21 Q. If you would, please, Ranger, step down and
22 point on the photographs the observations you made there
23 at the scene.

24 A. As I said, this is a living room going into the
25 bedroom. This is the slay bed that Ms. Payne was on.

1 This is the position that she was in at the time. Her
2 head, we noticed -- I noticed a large bloody area here.
3 This is all the blood that was on the bed as well as the
4 brain matter and the blood from the head. There's also
5 blood on the wall, and these pictures show it up just on
6 the floor as well. There was brain matter from this
7 wound. [Indicating].

8 As you walk through the kitchen, this goes
9 through the laundry room. This backdoor here is
10 the -- is the door into the garage. As you walk down in
11 through there, there's the bed. Here's the sheet that
12 was hanging up and here is the body of Mr. Wages.
13 [Indicating].

14 At the time I got there, the rifle had
15 already been moved and secured and made safe, but the
16 body had been left in this general position. There's
17 the amount of blood that was on the bed and there was
18 also some on the floor, and this was the wound I had
19 seen from the observation of Mr. Wages. [Indicating].

20 Q. In regard to, I believe, State's Exhibit 51 and
21 53, did you observe any biological material, blood
22 tissue on the floor in front of the body?

23 A. No, sir.

24 Q. Did you observe any blood or tissue on the
25 ceiling?

1 A. No, sir. There was none on the ceiling. There
2 was also none on this sheet that was hanging up behind.

3 Q. And was there any on the floor behind the bed?

4 A. I don't recall if there was behind the bed. I
5 do recall some here on the west side of the bed.

6 [Indicating].

7 Q. If you will, note on State's Exhibit 50.

8 A. Up here. [Indicating].

9 Q. In that area that you just pointed behind the
10 bed, was there my biological material in that location?

11 A. No, sir.

12 Q. Are you familiar with the term, "blowback"?

13 A. Yes, sir, I am.

14 Q. If you would, tell the jury your understanding
15 of what blowback is?

16 A. When -- anything with any kind of liquid,
17 especially human blood --

18 Q. Go ahead and take your seat.

19 (Witness complies.)

20 THE WITNESS: When a person is shot and the
21 bullet immediately enters, there's going to be a tearing
22 of the skin, and when that skin comes back, there's a
23 little bit of blood that will come back towards the
24 weapon or towards the person or whatever, whoever shot
25 the weapon. There will be a little bit of high velocity

1 splatter or misting that comes backwards.

2 Q. (BY MR. WHITLEY) If you would, assume that
3 Austin Taylor Wages was seated on the bed in
4 approximately this position. [Indicating]. I'm
5 demonstrating with the stick. Would you expect to find
6 some type of biological material on the floor based on
7 your training and experience?

8 A. Yes, sir, I would.

9 Q. Would you expect to find some type of
10 biological material behind the body?

11 A. Yes, sir, I would.

12 Q. And where would you expect to find that?

13 A. In the direction of the bullet which would be
14 upward toward the ceiling.

15 Q. And if was not sufficient force to reach the
16 ceiling, would you find some on the floor?

17 A. Correct, gravity would take over and it would
18 drop down.

19 Q. And you say you did not observe any such matter
20 on the floor of the room there?

21 A. Correct.

22 Q. Did you find anything else in that room, based
23 on your training and experience, that you thought was
24 inconsistent with the theory that Austin Taylor Wages
25 shot himself?

1 A. Well, for one, if he were sitting in an upright
2 position, there would be blood, I would assume, on top
3 of the footboard, and I don't believe there was any up
4 on the top part. Had he been laying down, I would
5 assume -- and as I said, the rifle had been moved prior
6 to my arrival, but in viewing the photos, I would
7 assume, knowing that Austin Taylor Wages was right
8 handed, that his left hand would be somewhere on the
9 rifle as it's shot. It would still be on top of the
10 rifle and not underneath it.

11 Q. Did you find anything unusual about the
12 position of the rifle as you viewed it in the
13 photographs?


14 A. I would assume that because of the recoil, that
15 it would wind up somewhere else other than straight in
16 between his legs. The position there indicated he would
17 be sitting up when that would happen.

18 Q. You found that odd?

19 A. Yes, sir, I did.

20 Q. Now, what exactly did you do in assisting
21 Lieutenant Tucker at the scene?

22 A. We conducted a search of the rest of the house.
23 We -- as they were loading the bodies and we were
24 walking, at one point when I was walking out of the
25 house, I noted additional blood, two blood stains on the

1 the front door leaving the house; one on the screen, one
2 on the floor. The Sheriff's Office collected the 
3 evidence, but once at the Sheriff's Office and I was
4 leaving for the evening, I took possession of the
5 evidence that was there to be transferred to the DPS
6 lab.

7 Q. All right. Approximately, give us an estimate
8 of the number homicide scenes you have investigated?

9 A. Investigated and assisted with just in the
10 Rangers?

11 Q. In your career.

12 A. Oh, approximately 20 or 30.

13 Q. And as a Ranger, how many have you been the
14 lead investigator in?

15 A. It's hard to say with the word "lead" because
16 our primary role is assistant. As a lead, we're
17 investigating officer shootings. As assisting as the
18 only Ranger involved in our investigations, there's been
19 at least a dozen or more.

20 Q. Were any of those suicides?

21 A. Some of them were, yes, sir.

22 Q. Approximately, how many?

23 A. About a third of those.

24 Q. Were the wounds inflicted in those particular
25 cases, were they noncontact or contact wounds?

1 A. Both.

2 Q. Would you explain that, please?

3 A. Some of them were -- there was someone, for
4 instance, that was a shotgun suicide and it was from a
5 distance, and I just recently investigated one that was
6 close-contact .22 rifle shot to the head.

7 Q. Does the wound inflected here appear to be a
8 close-contact wound?

9 A. It appears to be somewhat close because of the
10 stippling pattern, but I would -- in many, many years of
11 deer hunting and working these kinds of investigations,
12 I would assume that a high caliber rifle would leave a
13 small hole going in and a large hole going out.

14 Q. Is that what you observed in this case?

15 A. It is not.

16 Q. What do you find unusual about this wound?

17 A. It's large going in and large coming out.

18 Q. Based on your training and experience, is there
19 any way to explain that based on your training and
20 experience?

21 A. It appears it was from a different range and it
22 might not have even been that weapon that was used.

23 Q. Did you have an opportunity to closely observe
24 the deceased's feet?

25 A. I did.

1 Q. Did you note anything unusual about them?

2 A. He was wearing socks. And one of the things I
3 wanted to look at and didn't note was if the socks were
4 tucked in in any way where he might have been using his
5 toes to pull the trigger.

6 Q. Did you find that inconsistent with the theory
7 of suicide?

8 A. Well, I found it inconsistent if he would have
9 been using his toes to get that extra range, yes.

10 Q. Now, I take it -- I believe you participated in
11 the interview of the Defendant; is that correct?

12 A. That's correct.

13 Q. And that occurred at the Wood County Sheriff's
14 Department?

15 A. Yes, sir.

16 Q. Did he give you any information about a
17 settlement he received for personal injuries?

18 A. Yes, sir, he did.

19 Q. What was that information?

20 A. He had stated that about seven months prior, he
21 had received a settlement of about \$900,000 for, I
22 believe, an accident.

23 Q. Did he tell you how much of that \$900,000 he
24 actually received?

25 A. I don't believe so.

1 Q. How did he describe his relationship with his
2 wife, then wife and then deceased, Nichole Payne?

3 A. He said it was fine, that they had a few fights
4 every now and then. In fact, I believe they had one the
5 night before this happened.

6 Q. How did he describe their financial condition?

7 A. It was not good. They had already run through
8 the entire money that he received on the settlement. It
9 was almost gone. He was not employed. He said he was
10 just helping her with her business raising pigeons or
11 doves to release at weddings.

12 Q. Did you ask him whether or not he checked on
13 the bodies?

14 A. Yes, sir.

15 Q. And what did he respond?

16 A. He said he did not.

17 Q. And yet, he told the 911 operator he found that
18 they were shot; is that correct?

19 A. Yes, sir.

20 Q. How would you describe his demeanor during --

21 MR. KING: I'm going to object. The jury
22 has seen the video themselves. That's the best
23 evidence. They can make that themselves.

24 MR. WHITLEY: He was there two feet away
25 from him --

1 MR. PARKS: See, that's the 701 issue --

2 MR. WHITLEY: Judge, I'm going to object to
3 both attorneys participating. Mr. King --

4 THE COURT: Let me ask to you approach on
5 that.

6 (Bench.)

7 MR. WHITLEY: Let's, first of all, we ought
8 establish the court rules if the lead counsel is
9 entitled to do the objecting. Mr. King initiated the
10 objection. I'm going to object to Mr. Parks jumping in.

11 MR. PARKS: That's fine.

12 THE COURT: Very well. So your objection
13 is best evidence?

14 MR. PARKS: Best evidence.

15 MR. WHITLEY: May I respond to that?

16 THE COURT: Yes, sir.

17 MR. WHITLEY: He was present. He
18 personally observed it. We observed the tape that shows
19 him sitting with Jason and him with his head down and
20 mumbling, which we can't understand --

21 MR. PARKS: Do not shout --

22 MR. WHITLEY: -- half of what was said, so
23 I don't think it is the best evidence.

24 MR. KING: 701, Your Honor.

25 THE COURT: Overrule the objection.

1 (Open court.)

2 Q. (BY MR. WHITLEY) Ranger, you may answer that
3 question. Do you remember what it was?

4 A. Can you repeat it for me?

5 MR. WHITLEY: Let me ask the court reporter
6 to read back that last question.

7 THE COURT REPORTER: Question: "How would
8 you describe his demeanor during --," then Mr. King
9 interrupted and objected.

10 Q. (BY MR. WHITLEY) Would you describe his
11 demeanor during the interview?

12 A. Somewhat distracted. He would take long times
13 to answer the questions. We would be far past the
14 topics before he would come back. I noted that he
15 would -- he had his fingers tapping and rubbing on his
16 head as if concerned.

17 Q. Based on your training and your experience,
18 what you observed at the scene, did you consider it
19 consistent with a murder/suicide?

20 A. No, sir.

21 Q. Did anything you observed at the scene
22 contradict or did you find inconsistent with what
23 Lieutenant Tucker found?

24 A. No, sir.

25 MR. WHITLEY: I'll pass the witness.

1 MR. PARKS: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. KING:

4 Q. Ranger Kemp, my name is Larry King. How are
5 you doing this morning?

6 A. Good, sir.

7 Q. Jason Payne told you about his financial
8 circumstances, that they were not good at that time?

9 A. That's correct.

10 Q. Do you know what he meant by that?

11 A. No, sir.

12 Q. Did he tell you that the personal injury that
13 they had recovered, the money, was for his personal
14 injury?

15 A. I believe it was an accident he was involved
16 in.

17 Q. Okay. So what they recovered, that was result
18 to an injury to him?

19 A. That's correct.

20 Q. What was the weather like December 11, 2007,
21 when you went out to that house?

22 A. It started out -- it was cloudy that day. I
23 don't recall if it was extremely cold, but I know later
24 on in the evening, a cold front came through. There was
25 a pretty good thunderstorm that came through later on

1 that evening and it got pretty cold.

2 Q. Do you know what the temperature was at
3 9:00 that morning?

4 A. No, sir, I don't.

5 Q. Was it below a comfortable T-shirt temperature?

6 A. I don't recall. I wear long sleeves and a tie
7 every day, so...

8 Q. When you were looking at the room that you
9 found Taylor Wages in, what was the outside wall -- what
10 did the outside wall consist of?

11 A. Which outside wall?

12 Q. The outside of that room.

13 A. On the outside of the house?

14 Q. Yeah, the -- yes.

15 A. I believe just white, the regular siding.

16 Q. Was one of the walls of the room that Taylor
17 Wages was found in a garage door?

18 A. Yes, it was.

19 Q. Okay. So that's a thin metal door?

20 A. I don't recall what it was made of.

21 Q. Do you recall there being gaps in the material
22 that you could look out of?

23 A. Of the material for the garage door?

24 Q. That's correct.

25 A. I don't recall.

1 Q. Now, who is Noel Martin?

2 A. He's a crime scene investigator for the Smith
3 County Sheriff's Office.

4 Q. Do you know of your own personal knowledge that
5 he occasionally does work for Wood County?

6 A. I believe he has in the past. I know I've used
7 him several times.

8 Q. They called him over because of his expertise
9 in scene reconstruction, blood splatter, and general
10 knowledge of as a criminalist?

11 A. Yes, sir.

12 Q. They have used him many, many times?

13 A. I can't answer what how many times they've used
14 him.

15 Q. But you've worked with him several times
16 yourself?

17 A. Yes, sir, I have.

18 Q. Did you examine Taylor Wages when you came?

19 A. I'm not sure what you mean.

20 Q. Did you examine the body? Did you look at the
21 body?

22 A. Yes, sir I did.

23 Q. Did you touch the body?

24 A. No, sir, I did not.

25 Q. Not even with gloves?

1 A. No, sir.

2 Q. Was there any evidence of rigor mortis?

3 A. I don't recall. The funeral home personnel,
4 while we were upstairs, had already removed or put him
5 in a body bag to remove him.

6 Q. Do you remember telling Noel Martin that you
7 didn't see any evidence of rigor mortis at the time?

8 A. I don't recall that.

9 Q. Could you have told him that?

10 A. It's possible.

11 Q. You say you wanted to look at the socks, but
12 you didn't get around to it. It just slipped your mind?

13 A. No, sir, I looked at the socks.

14 Q. Did you see anything out of the ordinary from
15 the socks?

16 A. Not that I recall.

17 Q. How thick were the socks? How thick did they
18 appear to be?

19 A. They just appeared to be normal cotton socks.

20 Q. Were they athletic socks or the socks you would
21 wear with light shoes?

22 A. That I don't recall.

23 Q. Okay. You didn't see any indentations in the
24 socks, did you?

25 A. That's correct.

1 Q. You are aware that any movement of the foot
2 could have straightened out that indentation?

3 A. It could have, yes.

4 Q. And that would -- that could have occurred
5 either before or after it happened?

6 A. Correct.

7 Q. You said you didn't see any blood on the floor
8 in front of Taylor Wages; is that correct?

9 A. That's correct.

10 Q. Have you read Noel Martin's report?

11 A. No, sir, I have not.

12 Q. Were you surprised that he reported
13 Bluestar -- let me ask you: What is Bluestar?

14 A. Bluestar is a chemical that reacts to human
15 blood. In very dark situations, it will glow blue.

16 Q. Do you have to use an ultraviolet light?

17 A. No, sir, you don't have to. When it has a
18 reaction, it turns light blue.

19 Q. Would you be surprised, then, if Noel Martin
20 reported that there was indications of atomized human
21 blood in front of Taylor's body as shown up by Bluestar?

22 A. Would I be surprised?

23 Q. Yes.

24 A. No, sir.

25 Q. A copper jacket was found in the room or you

1 observed in the room, did you not?

2 A. Yes, sir.

3 Q. What is a copper jacket or what was this copper
4 jacket?

5 A. I believe it was the copper jacket around the
6 bullet that had penetrated Mr. Wages' head.

7 Q. So the actual bullet that comes out of the
8 cartridge that's fired by the gun consists of what?

9 A. Led and a copper jacket around it, if it's made
10 that way.

11 Q. All right. Is that the kind of bullet that
12 appeared to be there? There were two live rounds, were
13 there not, that was ejected from the gun as reported to
14 you?

15 A. Yes, sir.

16 Q. Are those the kind of bullets that have copper
17 jackets?

18 A. I don't recall if they had or not. I would
19 assume they did. I don't recall if they did or not.

20 Q. Okay. Was there a led component to the copper
21 jacket that you found that you observed?

22 A. No, sir.

23 Q. That's an integral part to that type of bullet,
24 is it not?

25 A. It's part of it, yes.

1 Q. If it's not there, it would have gone
2 somewhere?

3 A. Yes, sir.

4 Q. There was no indication of an exit from the
5 room for any bullet, was there?

6 A. Not that I recall.

7 Q. Fragments of led were found within the head of
8 Austin Taylor Wages, were there not?

9 A. I don't recall if there was or not.

10 MR. WHITLEY: I believe I'm going to object
11 to that evidence. There was no evidence of fragments
12 found in the wound.

13 THE COURT: Sustained.

14 MR. KING: I believe fragments of the
15 bullet was found in the head as testified to by the
16 medical examiner.

17 THE COURT: Let me ask you to approach.

18 (Bench.)

19 MR. KING: It was testified by the --

20 THE COURT: I don't recall, but you have
21 read the reports, the autopsy reports. Do they talk
22 about --

23 MR. WHITLEY: There's nothing in the
24 autopsy report that I'm aware of that says led fragments
25 were found in the head of Austin Taylor Wages.

1 MR. KING: Okay.

2 THE COURT: All right.

3 (Open court.)

4 MR. WHITLEY: Judge, was my objection
5 sustained?

6 MR. KING: Your Honor, may I approach the
7 photographs?

8 THE COURT: Yes, sir.

9 It was sustained.

10 Q. (BY MR. KING) This is the entry wound, is it
11 not, Ranger? [Indicating].

12 A. Yes, sir.

13 Q. Have you seen other pictures of this entry
14 wound?

15 A. No, sir.

16 Q. Does there appear to be tearing of the skin
17 around the entry wound?

18 A. Yes, sir.

19 Q. Do you know what that's called, that phenomenon
20 is called?

21 A. The tearing around the wound?

22 Q. Yes.

23 A. (No response).

24 Q. Okay. Why were you concerned with indentations
25 of the socks of Austin Taylor Wages?

1 A. As I said earlier, if the toes were used to
2 pull the trigger, being inside the trigger guard, it
3 would have been tucked in and it would give some kind
4 of --

5 Q. You're not saying that the toe would have to be
6 all the way inserted into the trigger guard to activate
7 the trigger?

8 A. No, sir.

9 MR. KING: Pass the witness, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. WHITLEY:

12 Q. Defense counsel asked you about Noel Martin and
13 you responded that you had used him several times?

14 A. Yes, sir.

15 Q. In this case, did you agree with Noel Martin's
16 observations and conclusions that this was a
17 murder/suicide?

18 MR. KING: Objection, Your Honor. He
19 testified that he didn't --

20 THE COURT: The objection is he hadn't
21 testify -- he hadn't read the report and --

22 MR. WHITLEY: He was present at the scene.
23 We know what Noel Martin's conclusions are.

24 THE COURT: -- his knowledge of
25 Mr. Martin -- I'll sustain at this time.

1 MR. WHITLEY: May we approach?

2 THE COURT: Yes, sir.

3 (Bench.)

4 THE COURT: And just for clarity sake, my
5 understanding is Mr. King objected that Mr. Kemp had
6 said that he hadn't read the report. Now, I --

7 MR. WHITLEY: Well, he knows what his
8 conclusions were, that it was a murder/suicide, Judge.
9 He is aware of that. I asked if he agreed with that.

10 THE COURT: Well, if you establish -- I
11 think he does know, but -- all right. I'm going to go
12 ahead and change my ruling. Yes, sir.

13 (Open court.)

14 THE COURT: Mr. Whitley, go ahead and ask
15 that question.

16 Q. (BY MR. WHITLEY) You know that Noel Martin has
17 concluded that this was a murder/suicide?

18 A. Yes, sir.

19 Q. That Austin Taylor Wages shot his mother and
20 killed himself?

21 A. Yes, sir.

22 Q. You are aware of that?

23 A. Yes, sir.

24 Q. Do you agree with that conclusion?

25 A. I felt like it was a double murder.

1 Q. And this is what you observed at the scene
2 based on your training and experience?

3 A. Yes, sir.

4 Q. You're entitled to your own opinion, aren't
5 you?

6 A. Yes, sir.

7 Q. Now, I believe you told Defense counsel, also,
8 that you never touched the body of Austin Taylor Wages?

9 A. Correct.

10 Q. So then what is rigor or rigor mortis?

11 A. It's a stiffening of the body especially with
12 the extremities to the arms, legs, toes first.

13 Q. And have you seen it in other dead bodies?

14 A. Yes, sir.

15 Q. I take it, then, if you never touched this
16 body, you were able to determine, yes or no, if there
17 was rigor?

18 A. That's correct.

19 Q. It would be unlikely you told Noel Martin that?

20 A. I don't recall saying anything about that.

21 Q. Now, if you would, again, tell us what Bluestar
22 is.

23 A. It's a chemical agent. When you use it and you
24 spray around, even any minimum amount of blood, it
25 reacts to it, creates a chemical reaction where it glows

1 a blue color.

2 Q. So if there was any biological material, blood
3 tissue visible on the floor and supposedly Bluestar
4 detected a minimum amount, would that not be just as
5 consistent with a person sitting, being shot from a
6 distance, the small amount of blood coming forward on
7 the floor?

8 A. It could, yes, sir.

9 Q. As opposed to be leaning over with a gun at his
10 throat or at his lip in the position he would be
11 directly over a place where you would expect to find
12 blood?

13 A. That's correct. I would expect to see a whole
14 lot more of that.

15 Q. So you find that inconsistent with a
16 murder/suicide?

17 A. Yes, sir.

18 MR. WHITLEY: I pass the witness.

19 RECROSS-EXAMINATION

20 BY MR. KING:

21 Q. What is livor mortis?

22 A. I believe livor mortis is the settling of the
23 fluids of the body toward the -- as the body -- all the
24 fluids inside the body toward the back end of the body.

25 Q. Sounds like you're not totally sure of that?

1 A. That's correct.

2 Q. Did you see any livor mortis or settling of the
3 fluid in Taylor Wages?

4 A. No, sir, that I recall.

5 Q. Did you see any in any photographs where you
6 can detect that phenomenon?

7 A. In this case?

8 Q. In this case.

9 A. Not that I recall.

10 Q. How long does it normally take for rigor mortis
11 to set in?

12 A. It's --

13 MR. WHITLEY: Judge, I object unless he has
14 personal knowledge. That calls for a medical.

15 MR. KING: They've been treating him as an
16 expert.

17 (Bench.)

18 MR. WHITLEY: Just because he's seen it in
19 other bodies in his career doesn't mean he has knowledge
20 for it to set in. That calls for a medical conclusion,
21 I think. I think the medical examiner has already
22 addressed that.

23 THE COURT: I have no doubt that he has.
24 He has been asked questions like someone -- I mean, he's
25 been presented as an expert in crime scenes and teaching

1 courses on it. I think it would be legitimate to ask
2 him that question, so I overrule the objection.

3 (Open court.)

4 MR. KING: You can answer the question.

5 THE WITNESS: There's not a set amount of
6 time. It's dependent on the climate. It's dependent
7 upon the amount of clothing recovered and such.

8 Q. (BY MR. KING) You haven't had any formal
9 education in splatter training?

10 A. I have a 40-hour course, the basic course.

11 Q. You consider yourself to be an expert?

12 A. No, sir.

13 MR. KING: Pass the witness.

14 REDIRECT EXAMINATION

15 BY MR. WHITLEY:

16 Q. Are you familiar with the term lividity?

17 A. Yes, sir.

18 Q. What's lividity?

19 A. It's a rigidness to the body.

20 Q. Did you -- again --

21 A. If --

22 Q. I may have missed what your answer was to the
23 term of lividity.

24 A. If I may, lividity is actually the settling of
25 the fluids down as opposed to livor mortis.

1 Q. So the rigor is the stiffness and lividity is
2 the settling; is that correct?

3 A. Yes, sir.

4 MR. WHITLEY: I'll pass the witness, Judge.

5 RECROSS-EXAMINATION

6 BY MR. KING:

7 Q. Ranger Kemp, when you talked about the
8 lividity, is that only in the joints?

9 A. No. At some point, the entire body becomes
10 stiff, but then it passes after a while.

11 MR. KING: Pass the witness, Your Honor.

12 MR. WHITLEY: I have nothing further,
13 Judge.

14 THE COURT: Thank you, sir. You may step
15 down.

16 MR. WHITLEY: May we approach?

17 THE COURT: Yes, sir.

18 (Bench.)

19 MR. WHITLEY: I don't anticipate the
20 Ranger -- he's under subpoena for the Defense. If they
21 want to hold him, that's fine with me; otherwise, I'm
22 assuming he's here in --

23 MR. KING: Judge, I have no way of knowing.

24 THE COURT: So you do? Okay.

25 MR. WHITLEY: Okay.

1 THE COURT: Call your next witness.

2 MR. WHEELER: Before we call the next
3 witness, Your Honor, I'm going to offer in front of the
4 jury evidence already admitted in a previous hearing.

5 The State offers State's Exhibit 67, which
6 is the records from the Commercial Bank of Texas; State
7 offers State's Exhibit 68, records from Citizens First
8 Bank; and State offers State's Exhibit 70, records from
9 the Bank Texas.

10 THE COURT: Those have been admitted.

11 MR. WHEELER: And permission to publish?

12 THE COURT: Yes, sir.

13 MR. WHEELER: In regard to State's
14 Exhibit 67, included in this is a copy of the settlement
15 check received by Jason and Nichole Payne on April 24th,
16 2007, with a memo, "Payne, Jason - client's portion,"
17 signed by Jeff Badders, attorney, for \$331,195.

18 State calls Richard Hawthorne.

19 THE COURT: Richard Hawthorne.

20 (Witness enters courtroom.)

21 THE COURT: Yes, sir, Mr. Hawthorne, if
22 you'll come on over. You were sworn earlier, were you
23 not?

24 THE WITNESS: Yes, sir.

25 THE COURT: Just go ahead and have a seat.

1 And let the record reflect.

2 RICHARD HAWTHORNE,

3 having been first duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. WHEELER:

6 Q. Good morning.

7 A. Good morning, sir.

8 Q. There's a lot of noise around. Let's wait
9 until it quiets down.

10 A. Yes, sir.

11 (Pause in the proceedings.)

12 Q. (BY MR. WHEELER) Would you please state your
13 name for the jury?

14 A. Richard Hawthorne.

15 Q. Mr. Hawthorne, how are you currently employed?

16 A. I'm retired.

17 Q. How are you related to Nichole Payne?

18 A. I'm her father.

19 Q. How are you related to Taylor Wages?

20 A. Grandfather.

21 Q. Could you please describe for the jury,
22 briefly, what you've done for a living?

23 A. Well, I spent -- I spent four years in the
24 military back in the '70s. Then I went to school and I
25 got a degree in elementary education and I taught Sixth

1 Grade for four years, and then I became an elementary
2 principal and then I became high school principal, all
3 at the same school, and then I transferred to another
4 school and became -- at the time, it was a K-through-12
5 school, so I was in charge of everything, and as it
6 grew, they finally added an elementary, and I stayed
7 there until 2002 when I retired.

8 Q. What certifications do you hold with the Texas
9 education agency?

10 A. I have a certificate of elementary education, I
11 have a Master's Degree in mid management, and then I
12 had -- to go the mid management degree, you get the
13 degree, but then you still have 15 hours more to take.
14 I believe it was 15. It have been 21 to become a
15 principal.

16 Q. Which school districts did you work with?

17 A. In 26 years, I worked at two school districts;
18 16 years in Wells, Texas, between Lufkin and Alto, until
19 '02, I worked at Martinsville between Nacogdoches and
20 Center.

21 Q. Where were you on December 11, 2007, at about
22 9:00 a.m. in the morning?

23 A. Well, I don't remember when I left that day,
24 but I had gone hunting.

25 Q. Who called your family to tell you that your

1 daughter Nichole Payne had passed away?

2 A. Well, at the time, I didn't know. I was
3 leaving the woods at 4:00 in the afternoon and my wife
4 tried to call me. I knew I didn't have a signal and I
5 was only about a mile from the house, so I just went
6 home. And when I got there, she told me what had
7 happened, but she didn't tell me how she had heard, and,
8 you know, at the time we did not discuss how she had
9 heard, but he did later.

10 Q. Now, let's talk a little bit about this
11 relationship between Jason Tad Payne and Nichole Payne.
12 Your daughter Nichole was married Jason Tad Payne,
13 correct?

14 A. Correct.

15 Q. When were they married, approximately?

16 A. Approximately? Oh, gosh. Approximately -- I'm
17 trying to think when my grandson's birthday is. I can't
18 think.

19 Q. Well, it's not meant to be a math test. About
20 when did you first meet Jason Payne?

21 A. Probably the late '90s.

22 Q. And about how long after you first met him, did
23 your daughter and he marry, roughly?

24 A. Best of my knowledge, she knew him two weeks.

25 Q. Now, the Jason Tad Payne that your daughter had

1 a relationship with and that she married, is he in the
2 courtroom today?

3 A. Yes, sir.

4 Q. Could you point to him and identify him by an
5 article of clothing he's wearing, describe his clothing?

6 A. He's sitting right there, has on, I believe, a
7 pink shirt; brown, I don't know if it's a suit or sports
8 coat [indicating].

9 MR. WHEELER: Your Honor, may the record
10 reflect that he's identified the Defendant as Jason Tad
11 Payne?

12 THE COURT: That request is granted.

13 Q. (BY MR. WHEELER) When Jason Payne and your
14 daughter got together, where did they first live?

15 A. At 10151 County Road 1798, Nacogdoches.

16 Q. Now an address doesn't say much. How far from
17 your house?

18 A. From my house to her house was approximately a
19 mile.

20 Q. Who owned the house that Jason Payne and
21 Nichole Payne were living in?

22 A. Myself and my wife.

23 Q. And how many years did Nichole Payne live in
24 that house with Jason Payne, approximately?

25 A. Approximately? Maybe 12 years.

1 Q. In that time, how was Jason Payne employed?

2 A. He worked for -- the main thing I remember,
3 sir, is he worked for a glass company installing glass.

4 Q. Did you expect he and your daughter to pay rent
5 to you?

6 A. Well, some.

7 Q. Did they?

8 A. They did some of the time.

9 Q. And the bills at the house, who paid those over
10 that about a decade long period, a little over?

11 A. Well, most of them, they paid, but I don't know
12 how many occasions -- a friend of mine worked for the
13 Deep East Texas Electric Company and called me on the
14 phone, and it was his job to --

15 MR. KING: We're going to object to
16 hearsay.

17 THE COURT: Sustained.

18 MR. WHEELER: I'll move on.

19 Q. (BY MR. WHEELER) Now, how did you learn that
20 Nichole and Jason planned to move from the house that
21 you provided?

22 A. How did I learn?

23 Q. How did you learn about that?

24 A. Well, they had received a settlement in an
25 insurance claim, and when they received their

1 settlement, they began looking, and I knew they were
2 looking.

3 Q. Did you learn -- did you discover why they were
4 moving to Wood County?

5 A. I didn't know why. My daughter just said they
6 loved the house.

7 Q. Without going into what she said, okay, you had
8 a conversation with your daughter about the move, right?

9 A. Correct, sir.

10 Q. Do you remember about when they moved?

11 A. It would have been in the Summer of -- it had
12 to have been '07.

13 Q. So in the Summer of 2007, roughly six months
14 before Nichole and Taylor died, right?

15 A. Approximately, yes, sir.

16 Q. How often did you see your daughter and your
17 grandson while they lived next to you?

18 A. Well, I saw my grandson quite a bit and --

19 Q. Could you give a frame of reference to the
20 jury? Daily? Weekly? Monthly?

21 A. Usually three or four times a week.

22 Q. And your daughter, approximately how often did
23 you see her when she lived close to you?

24 A. Probably, at least a minimum of twice a week.

25 Q. And how often did you speak, first, to Nichole,

1 approximately, do you recall, either by telephone or any
2 other communication medium?

3 A. Well, she usually called for my wife.

4 Q. Okay. And did you talk to your grandson
5 regularly?

6 A. Yes, sir.

7 Q. All right. Now, after the move from
8 Nacogdoches -- that's where y'all were?

9 A. Yes, sir.

10 Q. So Quitman, how often did you see Taylor for
11 the rest of his life?

12 A. Well, I made several trips up here bringing
13 furniture and then he came down for two weeks that
14 summer. I don't remember what time of the summer.

15 Q. And after that summer trip, how often did you
16 see Taylor?

17 A. Well, the frequency slowed down, but --

18 Q. Well, you're going to have to describe to the
19 jury when you say this frequency slowed down after that
20 summer, what did it slow down to? About how often did
21 you see or talk to Taylor after that?

22 A. Probably at least once a month.

23 Q. So you went from steady contact weekly to
24 talking to him once a month toward the end of his life?

25 A. Yes, sir.

1 Q. And with regard to your daughter, once they
2 moved from Nacogdoches to Quitman, what about the
3 contact with her?

4 A. She would call. And as I said, they normally
5 called my wife, you know, but we met them outside of
6 Tyler and they were down there, and that should have
7 been in late August.

8 Q. Yes, sir.

9 A. And then that may have been the last time I saw
10 Nichole.

11 Q. So you didn't see her again in the final four
12 months of her life?

13 A. I don't think so.

14 Q. All right.

15 MR. WHEELER: Your Honor may I approach?

16 THE COURT: Yes, sir.

17 MR. WHEELER: Thank you.

18 Q. (BY MR. WHEELER) Mr. Hawthorne, I'm going to
19 hand you what's been marked as State's Exhibit 22.
20 Without showing it to the jury, can you identify that?

21 A. Yes, sir, that's my grandson Austin Taylor
22 Wages.

23 Q. Is that a fair and accurate depiction of your
24 grandson Austin as he appeared at or near the time of
25 his death?

1 A. Yes, sir.

2 Q. Okay.

3 MR. WHEELER: State offers State's
4 Exhibit 122.

5 (State's Exhibit 122, offered.)

6 MR. KING: No objection.

7 THE COURT: It's admitted.

8 (State's Exhibit 122, admitted.)

9 Q. (BY MR. WHEELER) I'm going to hand you what's
10 been marked as State's Exhibit 123. Can you identify
11 that, without showing it to the jury?

12 A. Yes, sir. That's my daughter Nichole and
13 Taylor when he was a baby.

14 Q. Is that a fair and accurate depiction of your
15 daughter?

16 A. Yes, sir.

17 MR. WHEELER: State offers 123.

18 (State's Exhibit 123, offered.)

19 MR. KING: No objection.

20 THE COURT: Admitted.

21 (State's Exhibit 123, admitted.)

22 MR. WHEELER: Permission to publish.

23 THE COURT: Yes, sir.

24 Q. (BY MR. WHEELER) So that is Nichole and
25 Taylor, right?

1 A. Yes, sir.

2 Q. All right. I'm going to let the pictures
3 circulate for a second and then we'll resume.

4 A. Yes, sir.

5 (Pause in the proceedings.)

6 Q. (BY MR. WHEELER) Now, with regard to this
7 settlement that you've described, did Nichole make you
8 aware of how the house was purchased in Quitman?

9 MR. KING: Objection, Your Honor; hearsay.

10 THE COURT: Sustained.

11 Q. (BY MR. WHEELER) What other new things did you
12 see Nichole and Jason have after this settlement was
13 received in April of 2007?

14 A. Well, the house.

15 Q. And?

16 A. They bought themselves each a used car, but it
17 was two- or three-year-old used cars, and they bought
18 his mother the same kind of car.

19 Q. Could you describe for the jury the vehicles
20 you saw in the possession of these three folks?

21 A. I don't know the year model, but a Dodge extra
22 cab, four-wheel drive is what Jason drove. My daughter
23 drove a silver Toyota 4Runner, and they bought his
24 mother a -- I believe it was Ford Expedition. I believe
25 it was pearl-looking.

1 Q. Did they have anything else, any other large
2 purchases that you were personally familiar with?

3 A. Yes, sir. They found a boat on the Internet
4 and my daughter asked me if I would go to see it with
5 her. I believe it was --

6 Q. Without going into what she said --

7 A. Okay.

8 Q. -- did you see them with a boat?

9 A. Yes, sir.

10 Q. What kind of boat was it? Could you describe
11 it to the jury, please?

12 A. I'm not sure the exact brand. I think it was
13 Skeeter, about a 20-foot, 22-foot Skeeter with a 200
14 Yamaha.

15 Q. So after the settlement of approximately
16 \$330,000, their portion of it, they purchased a house,
17 and you saw them with three cars and a boat --

18 A. Yes, sir.

19 Q. -- right?

20 Did you note tension between Jason Payne
21 and your daughter Nichole at or near the time of her
22 death?

23 A. Well, it seems like he was getting more
24 controlling. He didn't want her to --

25 MR. KING: Objection, Your Honor;

1 nonresponsiveness.

2 MR. WHEELER: You've got to answer
3 precisely the question I'm asking.

4 Q. (BY MR. WHEELER) Did you notice tension
5 between those two?

6 A. Yes, sir.

7 Q. Now, in the entire time that they were in
8 Quitman, did Jason have a job?

9 A. No, sir.

10 Q. Do you and your wife have a bird business as
11 well?

12 A. No, sir.

13 Q. Do you have a daughter-in-law that has a bird
14 business as well?

15 A. Yes, sir.

16 Q. Are you familiar with those birds?

17 A. I've seen them.

18 Q. Now, you went on that trip in August, right?

19 A. Sir?

20 Q. You went on that trip in August, right, that
21 you described to the jury? In August 2007 --

22 A. Right.

23 Q. -- you took a trip?

24 Who went with you on this trip?

25 A. Taylor.

1 Q. Anybody else go with you?

2 A. I'm not sure. Shawn -- and I don't know

3 Shawn's last name -- may have gone with us.

4 Q. So Taylor and a friend went with you on a trip?

5 A. Correct.

6 Q. Where did y'all go?

7 A. If it's the trip I remember, me and Shawn and

8 Taylor went to Holly Lake, which is near here, and I

9 took my bass boat, and I told them the weekend was

10 theirs, the week was theirs, whatever they wanted to do.

11 Q. Let me ask you this question: Taylor and his
12 friend in August going on this trip with you, did Taylor
13 have specific music he wanted to listen to on this trip?

14 A. I'm an MPR fan, and the radios, if I'm driving,
15 it's on my channel.

16 Q. Were you with Taylor at a time when he listened
17 to music?

18 A. Yes.

19 Q. What kind of music did he like?

20 A. On one trip he was with us, he had a CD of the
21 movie, "Oh Brother, Where Art Thou?," and three songs he
22 wanted to hear over and over was, "Down to the River to
23 Pray," and "I'll Fly Away".

24 Q. And?

25 A. Excuse me.

1 Q. It's all right.

2 A. And, "Hardrock Candy Mountain".

3 Q. That's what he liked to listen to?

4 A. Yes, sir.

5 Q. There you go. [Indicating].

6 A. Thank you, sir.

7 Q. You bet.

8 Down in Nacogdoches -- well --

9 MR. WHEELER: May I approach, Your Honor?

10 THE COURT: Yes, sir.

11 MR. WHEELER: Thank you.

12 (Bench.)

13 MR. WHEELER: Now, I'm going to want to get

14 into what he observed between his mother and this boy in

15 Nacogdoches and how many times he saw them together,

16 whether they were happy or not when they were together,

17 and I wanted to approach before I asked those questions.

18 MR. KING: Judge, we've already been over

19 our objections to that. We would renew those

20 objections.

21 THE COURT: And do you have anything else

22 you want to ask before you get into it or do I need to

23 send the jury out at this time?

24 MR. WHEELER: I've got to have him I.D. the

25 photograph after he passed away and that's going to have

1 an emotional effect.

2 MR. PARKS: So we will stipulate to the
3 autopsy photographs, that they purport to be --

4 MR. KING: Yeah, there's not any doubt.

5 MR. WHEELER: There's something --

6 MR. PARKS: You don't have to do it.

7 MR. KING: You don't have to do it.

8 MR. WHEELER: No, really --

9 MR. PARKS: We will stipulate to the
10 identity of the people who were autopsied as being --

11 MR. KING: Nichole Payne and Taylor Wages.

12 MR. PARKS: Yeah.

13 MR. WHITLEY: I wouldn't show --

14 MR. WHEELER: I don't want to show him the
15 pictures. That's why I prefer if we can stipulate.

16 THE COURT: That is what -- that is
17 stipulated. And I'll just say before the jury --

18 MR. WHEELER: I'm not going to show the
19 picture for the next area. I'm going to move into about
20 what he observed in regard to his mother and the boy.

21 THE COURT: So how long do you anticipate
22 that's going to take?

23 MR. WHEELER: The questions I'm going to
24 ask will last maybe two or three minutes.

25 THE COURT: I'll just send them out very

1 briefly.

2 MR. WHEELER: Okay.

3 (Open court.)

4 THE COURT: Ladies and gentlemen, let me
5 ask you to remember your prior instructions and be
6 available in the jury room. Please go with the bailiff
7 at this time.

8 (Jury exits courtroom.)

9 THE COURT: Let the record reflect that the
10 jury has left the courtroom.

11 Yes, sir. Mr. Wheeler, you're wanting to
12 make a bill on this or --

13 MR. WHEELER: Yes, sir.

14 THE COURT: -- profer at this point.

15 MR. WHEELER: That's it because we have an
16 oral motion in limine that's being granted, I wanted to
17 ask the questions and get the answers and let the Court
18 rule.

19 THE COURT: Yes, sir.

20 BILL OF EXCEPTION

21 BY MR. WHEELER:

22 Q. (BY MR. WHEELER) Did you have the opportunity
23 to observe Taylor and his mother on few or many
24 occasions when they lived near you in Nacogdoches?

25 A. Probably daily.

1 Q. And how would you characterize that
2 relationship?

3 A. Taylor thought his mother hung the moon and she
4 thought the same of him.

5 Q. Did you see any episodes of tension between
6 Taylor and his mother?

7 A. Never.

8 Q. Okay.

9 MR. WHEELER: Your Honor, for those
10 purposes I intend to ask. Those are the only questions.

11 MR. KING: We renew our previous objections
12 to that line of questioning.

13 THE COURT: And pursuant to Rule 404(A),
14 the Court feels it's not proper evidence and I sustain
15 the objection.

16 MR. WHEELER: We would then ask to offer
17 for the limited purpose for showing this is the
18 witness's perception of the relationship with no other
19 reasons. I mean that's a limited purpose, offered to
20 show his perception of the relationship between mother
21 and son.

22 THE COURT: And the Court feels it would be
23 irrelevant for those purposes and have the same
24 position. Did you wish, then, to present it as a bill?

25 MR. WHEELER: Yes, sir. Comes now the

1 State of Texas, by and through her district attorney,
2 makes this bill of exception. The State offers each
3 question and each answer as a separate bill.

4 THE COURT: That is received.

5 MR. WHEELER: This concludes the State's
6 bill of exceptions.

7 THE COURT: Are you ready for the jury to
8 come back?

9 MR. WHEELER: I am, Your Honor.

10 THE COURT: Let them come back in.

11 (Jury enters courtroom.)

12 THE COURT: Let the record reflect the jury
13 has returned to the courtroom.

14 You may ask your next question.

15 FURTHER DIRECT EXAMINATION

16 BY MR. WHEELER:

17 Q. Did you have an opportunity to observe the
18 relationship between Jason Payne and your grandson
19 Taylor Wages?

20 A. Yes, sir.

21 Q. Did he spend a tremendous amount of time with
22 him, his stepson?

23 A. Well, they lived in the same house.

24 Q. And did you see anything that was out of the
25 ordinary in their relationship?

1 A. No, sir.

2 Q. With regard to Jason Payne and your daughter
3 Nichole Payne, did you have an opportunity to observe
4 the relationship existing between him and your daughter
5 Nichole?

6 A. Yes, sir.

7 Q. Did you observe them together on a few or many
8 occasions?

9 A. Many.

10 Q. And did you observe anything out of the
11 ordinary in his relationship with her?

12 A. Is that a "yes" or "no"?

13 Q. Did you observe anything out of the ordinary in
14 the relationship between he and his wife?

15 A. Occasionally.

16 Q. What did you personally observe?

17 A. He didn't want us having contact with our
18 daughter.

19 Q. How was this expressed to you?

20 A. By my daughter.

21 MR. KING: Objection, Your Honor; hearsay.

22 MR. WHEELER: Response is 803(3), state of
23 mind of the daughter.

24 THE COURT: Overruled.

25 Q. (BY MR. WHEELER) How did your daughter

1 characterize her relationship with Jason Payne to you?

2 A. He didn't want us to talk to her even on the
3 telephone.

4 MR. KING: I'm sorry, Your Honor. May we
5 approach?

6 THE COURT: Yes, sir.

7 (Bench.)

8 MR. KING: We're going to object on the
9 right of confrontation. We don't have Nichole here to
10 confront.

11 THE COURT: Well --

12 MR. KING: It doesn't --

13 MR. WHEELER: And the State's response is
14 that this is testimony on the nature of his prior
15 testimony statement. This is not -- [inaudible] -- so
16 it's admissible.

17 MR. PARKS: That's the whole purpose of
18 asking the question.

19 THE COURT: Well, the Court doesn't believe
20 that the confrontation applies when an allegation is at
21 issue as to whether or not the person who provided the
22 statements being made is alleged who kept her from being
23 available to make those statements. In other words, in
24 a situation such as this, the Court does not believe
25 that the confrontation applies.

1 MR. KING: So is the Court allowing this
2 for a limited purpose or for all purposes?

3 THE COURT: What limited purposes you are
4 suggesting?

5 MR. WHEELER: The State is not offering it
6 for a limited purpose. We're offering it under 803, Sub
7 (A), the hearsay exception, the then existing state of
8 mind.

9 MR. KING: Then that's a relevance issue if
10 it was sufficient in the past. I mean, it's got to be
11 tied to --

12 THE COURT: Well, it certainly would be in
13 terms of -- the Court finds it would be irrelevant.
14 Then you've got the 40 approximate issues -- of course,
15 taking that into consideration, certainly it's highly
16 prejudicial, but it's highly relevant if you've got
17 allegations in regard to a murder and someone trying to
18 keep away contact. It's very prejudicial, but it's very
19 relevant. The Court feels your objection should be
20 overruled.

21 MR. PARKS: Just so the record is clear,
22 it's overruled to the confrontation?

23 THE COURT: Yes, sir.

24 MR. PARKS: Okay.

25 (Open court.)

1 Q. (BY MR. WHEELER) Did you ever have the
2 opportunity to observe the Defendant, Jason Tad Payne,
3 interacting with your daughter Nichole and Taylor while
4 Nichole and Taylor were together?

5 A. Yes.

6 Q. And --

7 MR. WHEELER: May I ask to approach again,
8 Your Honor?

9 THE COURT: Yes, sir.

10 (Bench.)

11 MR. WHEELER: Now, this is -- I'd better
12 ask this question outside the presence of the jury.

13 MR. KING: Fine with me.

14 THE COURT: I'm going to go ahead and let
15 them go to lunch.

16 MR. WHEELER: Okay.

17 (Open court.)

18 THE COURT: All right. Ladies and
19 gentlemen, I do need to take another matter up and I'm
20 going to go ahead and let you take your lunch break at
21 this time. I'll ask you to remember your prior
22 instructions. If you're going out, wear your juror
23 badges, and be available in the jury room at 1:00.
24 Please go with the bailiff at this time.

25 (Jury exits courtroom.)

1 THE COURT: All right. Let the record
2 reflect the jury has left the courtroom.

3 You may ask those questions.

4 BILL OF EXCEPTION.

5 BY MR. WHEELER:

6 Q. (BY MR. WHEELER) How did you perceive the
7 interaction of your grandson Taylor and Nichole in the
8 presence of Jason Payne?

9 A. It was okay. I mean, I didn't see anything out
10 of line.

11 Q. Did you observe those two together in Jason
12 Payne's presence on few or many occasions?

13 A. Many.

14 Q. And how did the two act together in the
15 presence of Jason Payne?

16 A. Basically the same as they did out of his
17 presence.

18 Q. Which was?

19 A. Loving.

20 MR. WHEELER: Those are the questions I
21 intend to ask, Your Honor, and that goes directly to the
22 condition of the mind of the accused in regard to his
23 relationship with the two when they're together.

24 THE COURT: What's the relevance?

25 MR. WHEELER: Well, it's relevant in

1 several ways: The first way, the most important way
2 it's relevant is it rebuts the assertion of the Defense
3 that the young man killed his own mother, so it has a
4 tendency to disprove that allegation, so on the
5 relevance basis, that's the relevance.

6 THE COURT: Which goes on -- the -- the
7 Court's concerned on the 404(A). I'll sustain it. I
8 take the same position. However, I think that's
9 directly in 404 and I'm not aware of any other evidence
10 that it goes to.

11 MR. WHEELER: Well, the only other way
12 would be under 701, his lay opinion in regard to the
13 relationship of the two in the presence of Jason Payne.

14 THE COURT: Well --

15 MR. WHEELER: I need to make a bill, Your
16 Honor.

17 THE COURT: Yes, sir.

18 MR. WHEELER: Comes now the State of Texas,
19 by and through her criminal district attorney, makes
20 this bill of exception. The State offers each question
21 and each answer as a separate bill in regard to its
22 bill.

23 THE COURT: It is so received.

24 MR. WHEELER: This concludes the State's
25 bill of exception.

1 THE COURT: With the jury having departed
2 for lunch, we may take our lunch break then. We'll be
3 in recess until 1:00 and we'll reassume at that time.

4 (Luncheon recess taken from 11:56 to 1:01.)

5 THE COURT: Back on the record in
6 20,529-2008, State vs. Jason Tad Payne. Let the record
7 reflect counsel for the State, counsel for the
8 Defendant, and the Defendant is present.

9 Is there State ready?

10 MR. WHEELER: One matter. Other that,
11 we're ready, Your Honor.

12 THE COURT: Very well.

13 MR. WHEELER: I wanted to ask the Court --
14 there's no decision. It's still good law out of the
15 Court of Criminal Appeals. It says this: "When an
16 appellant is permitted to attack a deceased, the State
17 should be then permitted, if it can do so, to introduce
18 proof to rebut such evidence. The State has the right
19 to meet such proof by showing that the general
20 reputation of character of deceased was that of a quiet,
21 peaceful, and law-abiding, not the reverse."

22 We have an opening statement that says that
23 Taylor murdered his mother coupled with significant
24 cross-examination evidencing that he murdered his mother
25 than committed suicide. My question is this: Are we

1 going to be permitted to put on testimony in regard to
2 the reputation of Taylor Wages for being a peaceful,
3 nonviolent young man, if they're familiar with that
4 reputation, without going into specific acts?

5 THE COURT: Defense's response to that?

6 MR. PARKS: Well, I guess the first thing I
7 would say in response to that is I don't believe it
8 could be characterized as attacking the decedent when
9 Defense proposes that this case happened exactly as the
10 original State's expert says that it did.

11 And let me get over here to the right
12 article. You know, the law doesn't say that you can
13 just throw in reputation or character willy-nilly.
14 That's got to be done in response to some relevant
15 issue. You know, I guess, it's just -- these are murky
16 key grounds. It's whatever the Court thinks would be
17 relevant.

18 I would frankly tell you that I don't see
19 how having a reputation for being peaceful and law
20 abiding would be relevant -- generally would be relevant
21 to the issue at hand, which I suppose it's the State's
22 position that a peaceful and law-abiding person wouldn't
23 commit suicide, and I don't see the connection there,
24 but with respect to that, I'll say 401 and 402.

25 MR. WHEELER: And briefly, my response

1 would be: What can be more violent than accusing
2 somebody of murdering their own mother? We want to put
3 on reputation testimony with regard to this boy that he
4 is a peaceful and nonviolent.

5 MR. PARKS: Under 701, Judge, that is an
6 inference. It is an inference that he did not have a
7 state of mind that would cause him to do this, and
8 that's the very thing 701 says people cannot opine
9 about, and if they can't opine about it, that seems to
10 me that it does nothing but calls for speculation.

11 MR. WHEELER: That misleads the Court
12 because opinion testimony, lay opinion testimony and
13 reputation in the community are completely different
14 things. A basis for reputation is drawn from contacts
15 within the community, and a person can testify about
16 reputation without opining. This is reputation for
17 being peaceful and nonviolent and rebuts a defensive
18 theory which has been put to this jury which has been
19 supported by cross examine at the stage of this trial
20 that he murdered his mother.

21 And lastly, for purposes of the record,
22 I've put on reputation testimony with regard to persons'
23 peacefulness many times before and opposing counsel has
24 heard that testimony before. He's been called a murder
25 of his mother, a matricide in front of this jury, and it

1 needs to be rebutted. And if we can't go into specific
2 acts and reputation unrebutted, otherwise, we leave
3 unrebutted the assertion that he's capable of murdering
4 his mother and that misleads this jury.

5 MR. PARKS: Well, now listen, capable is an
6 interesting word. You know, it's not about -- I'm just
7 going to sit down.

8 THE COURT: Well, certainly, if -- clearly,
9 if there are any self-defense claims, there's no
10 question that that would be something that -- in
11 order -- if the Defendant is claiming was acting in self
12 defense, there would be no question you could put on
13 such testimony.

14 On the issue being raised by the Defense,
15 that's one of the things that is puzzling about this
16 trial as any I have ever seen, that they certainly, you
17 know, mentioned it. I don't know that they raised it.
18 It's something that's kind of there. Opined is one of
19 the working theory, you know, by the State's experts in
20 regard to this or it's that or it's something else.

21 I think given the fact that it's there and
22 it can't be avoided, I think it's in a different
23 category with the relationship with his mother. I think
24 reputation testimony is something that is generally more
25 admissible. I'm going to allow you to go into his

1 reputation for being peaceful and law abiding.

2 MR. WHEELER: Okay. For purposes of the
3 record, I want to make it clear that we can go into just
4 his reputation for being peaceful and nonviolent?

5 THE COURT: Yes, sir.

6 MR. WHEELER: Okay. Thank you.

7 THE COURT: Are you ready to proceed?

8 MR. WHEELER: State's ready, Your Honor.

9 THE COURT: If you'll bring Mr. Hawthorne
10 back and then bring the jury in.

11 (Witness enters courtroom.)

12 (Jury enters courtroom.)

13 THE COURT: Let the record reflect the jury
14 has returned.

15 Counsel, whenever you're ready, you may
16 proceed.

17 MR. WHEELER: Thank you, Your Honor.

18 FURTHER DIRECT EXAMINATION

19 BY MR. WHEELER:

20 Q. Mr. Hawthorne, are you familiar with Taylor
21 Wages' reputation when he was living there next to you
22 within his community for being a peaceful and a
23 nonviolent person.

24 MR. KING: Objection, Your Honor; improper
25 predicate.

1 THE COURT: Overruled.

2 Q. (BY MR. WHEELER) Are you familiar with his
3 representation for being a peaceful and nonviolent
4 person?

5 A. Total --

6 Q. I mean, are you just familiar with it?

7 A. Oh, extremely.

8 Q. Was his reputation for being a peaceful and
9 nonviolent person good or bad?

10 A. Good.

11 MR. WHEELER: Pass the witness.

12 CROSS-EXAMINATION

13 BY MR. KING:

14 Q. Mr. Hawthorne, you are aware that Jason Payne
15 and Nichole Payne had bought three vehicles; is that
16 correct?

17 A. Yes, sir.

18 Q. Were you aware that they had bought another
19 vehicle as well?

20 A. Well, they had asked me to buy Taylor --

21 Q. Were you aware of it, sir?

22 A. Yes.

23 Q. Did they buy one for Taylor?

24 A. Yes.

25 Q. Okay. Now, Nichole Payne and Jason Payne had

1 two children of their own, did they not?

2 A. Yes, sir.

3 Q. And that was Remington Payne and Jackson Payne?

4 A. Yes, sir.

5 Q. Where are Remington and Jackson now?

6 A. They live with me.

7 Q. And your wife Sherry?

8 A. Yes, sir.

9 Q. Okay. And that was done in a separate civil
10 lawsuit, was it not?

11 A. Can I add just a little bit to it?

12 Q. Well, do you know?

13 MR. WHEELER: I think I'm going to object.

14 Objection; relevance.

15 MR. KING: May we approach, Your Honor?

16 THE COURT: Yes, sir.

17 (Bench.)

18 MR. KING: Judge, this goes to show reason
19 he would have to say bad things about Jason Payne.

20 THE COURT: Well --

21 MR. WHEELER: Do I need to make a response,
22 Your Honor?

23 THE COURT: Yes, sir.

24 MR. WHEELER: The State's response is that
25 going into another civil proceeding is not relevant.

1 The findings that was put on are not at issue. The fact
2 that another lawsuit even exists is not relevant. If we
3 want to move into where these children live may be
4 relevant, but other than that, the fact of another
5 lawsuit, the fact of any kind of CPS involvement,
6 anything like that I think is completely irrelevant.

7 THE COURT: Is that an ongoing lawsuit at
8 this time?

9 MR. KING: It's on appeal, Judge.

10 THE COURT: Certainly not to go into the
11 details -- the fact that exist. You can go into the
12 fact of what it concerns in general.

13 MR. KING: Okay.

14 MR. WHEELER: Okay.

15 (Open court.)

16 Q. (BY MR. KING) Mr. Hawthorne, that lawsuit
17 established you and Sherry Hawthorne as the managing
18 conservators of Remington and Jackson, did it not?

19 A. Yes, sir.

20 Q. Faye Payne, the mother of Jason Payne, has
21 supervised visitation once a month with those children;
22 is that correct?

23 A. Yes, sir.

24 Q. All right. And that's about all she has?

25 A. She has weekly phone calls.

1 Q. Okay. Are you and Sherry Hawthorne afraid that
2 if Jason Payne gets out of jail, he will come back and
3 ask for his kids back?

4 A. Sure, I am.

5 Q. Now, there's another lawsuit, civil lawsuit
6 pending, is there not, in federal court? Are you aware
7 of that, sir?

8 MR. WHEELER: I'm going to object to
9 relevance again, Your Honor. We're here. The fact of
10 the existence of a different lawsuit has nothing do with
11 the essential elements for capital murder.

12 THE COURT: For the same reasons, I'll
13 overrule.

14 MR. WHEELER: Thank you, Your Honor.

15 Q. (BY MR. KING) You are aware of that lawsuit?

16 A. No, sir.

17 Q. You are not aware?

18 MR. WHEELER: Objection. He's got no
19 personal -- may I have a running objection which he has
20 no personal knowledge of --

21 THE COURT: Sustained.

22 MR. KING: Okay.

23 Q. (BY MR. KING) Were you aware that you and
24 Sherry Payne [sic] were claiming that the \$100,000 to
25 the second beneficiary --

1 MR. WHEELER: Objection; relevance. Fay
2 Payne is not the issue in this case.

3 THE COURT: Overruled.

4 Q. (BY MR. KING) Is that correct, sir?

5 A. Could you repeat it? I didn't --

6 Q. Were you aware that your wife has claimed that
7 that money --

8 MR. WHEELER: Now, "Are you aware that your
9 wife claimed," objection; no personal knowledge.

10 THE COURT: Well, if you can answer as to
11 whether he's aware.

12 Q. (BY MR. KING) You are aware that your wife has
13 claimed that Fay Payne was a accomplice to the alleged
14 murder?

15 A. No.

16 Q. You didn't know that?

17 A. Sir?

18 Q. You didn't know that?

19 MR. WHEELER: Objection; repetitious.

20 THE COURT: Sustained.

21 Q. (BY MR. KING) You said there was
22 some -- Taylor Wages had some favorite songs and you
23 named them?

24 A. Yes, sir.

25 Q. Did he also like, "Getting Away with Murder,"

1 by Pappa Roach?

2 A. Not to my knowledge.

3 Q. "Suicide notes and Butterfly Kisses" by Atreyu?

4 A. No, sir.

5 Q. "As I lay dying," Frail Words Collapse?

6 A. No, sir.

7 Q. "Through the Eyes of the Dead," by Bloodlust?

8 A. No, sir.

9 Q. "Conducting From the Grave, Trials of the
10 Forsake," by EP?

11 A. No, sir.

12 Q. Bullet for my Valentine, "The Poison"?

13 A. No, sir.

14 Q. The Agony Scene, "Darkest Red"?

15 A. No, sir.

16 Q. Psycho Sick -- we couldn't think of the title.

17 A. Say the first word.

18 MR. WHEELER: That's probably enough.

19 Objection; relevance.

20 THE COURT: Objection to relevance is
21 overruled.

22 MR. WHEELER: And the second objection,
23 there's been no proper predicate laid for the
24 authenticity to those items.

25 THE COURT: I'll sustain as to that.

1 MR. WHEELER: I do need to ask for an
2 instruction, Your Honor, that the jury disregard those
3 questions.

4 THE COURT: Let me ask counsel to approach
5 on that.

6 (Bench.)

7 THE COURT: I'm asking to you approach so
8 you don't misunderstand, I'm going to deny that. You
9 can't wait halfway through the list and --

10 MR. WHEELER: Well, I wanted to get it -- I
11 appreciate it.

12 (Open court.)

13 MR. KING: Pass the witness, Your Honor.

14 MR. WHEELER: Did he pass?

15 THE COURT: Yes, sir.

16 REDIRECT EXAMINATION

17 BY MR. WHEELER:

18 Q. Taylor's brother, Danny, listened to that kind
19 of music, didn't he?

20 A. Yes, sir.

21 MR. WHEELER: Pass the witness.

22 MR. KING: No questions.

23 THE COURT: All right. Thank you, sir.
24 You may step down.

25 (Witness exits courtroom.)

1 MR. WHEELER: State calls Sarah Hawthorne,
2 Your Honor.

3 May Richard Hawthorne be released, Your
4 Honor?

5 THE COURT: Let me ask counsel to approach.
6 (Bench.)

7 THE COURT: Counsel is asking Richard
8 Hawthorne be released?

9 MR. KING: No.

10 THE COURT: And by that I would ask -- I
11 know you got caught by surprised. I'd rather not have
12 not in front of the jury.

13 MR. WHEELER: I don't agree. I don't like
14 it either. Sorry.

15 MR. KING: I'm sorry, I didn't understand.

16 THE COURT: Asking whether Richard
17 Hawthorne can be released. I said no.

18 (Open court.)

19 THE COURT: Sarah Hawthorne.

20 (Witness enters courtroom.)

21 THE COURT: Yes, ma'am. Ms. Hawthorne, you
22 were sworn earlier?

23 THE WITNESS: I don't think so.

24 (Witness sworn.)

25 SARAH HAWTHORN,

1 having been first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. WHEELER:

4 Q. Good afternoon.

5 A. Hi.

6 Q. For purposes of the record and for the jury,
7 would you please state your full name?

8 A. Sarah Ann Hawthorne.

9 Q. Sarah, where do you currently reside?

10 A. Nacogdoches, Texas.

11 Q. For the purposes of the record, are you
12 physically comfortable?

13 A. Physically comfortable?

14 Q. No? Why not?

15 A. Just, it's been a hard day.

16 MR. WHITLEY: Judge, I'm having a hard time
17 hearing. Would you ask her to speak up?

18 THE COURT: You're going to need to keep
19 your voice up.

20 Q. (BY MR. WHEELER) How are you related to
21 Nichole Payne?

22 A. She was my sister-in-law.

23 Q. Who was your husband?

24 A. Jason Hawthorne.

25 Q. How was he related to Nichole Payne?

- 1 A. That was his sister.
- 2 Q. Where is Jason now?
- 3 A. He is now deceased.
- 4 Q. With regard to the biological children of Jason
5 Payne and Nichole, what were their full names?
- 6 A. Remington Coal Payne and General Jackson Payne.
- 7 Q. General Jackson Payne and Remington Coal Payne?
- 8 A. Yes, sir.
- 9 Q. Okay. With regard to Nichole, did you have an
10 opportunity to discuss the marital relationship that she
11 shared with Jason Tad Payne?
- 12 A. Yes, sir.
- 13 Q. On a few or many occasions?
- 14 A. Many.
- 15 Q. How did you communicate with her?
- 16 A. Most of the time it was by phone, a few times
17 through email, and a few visits.
- 18 Q. The Jason Tad Payne to whom Nichole was married
19 to, is he in the courtroom today?
- 20 A. Yes, sir.
- 21 Q. Could you point to him and identify him by an
22 article of clothing he's wearing?
- 23 A. He's wearing a black jacket.
- 24 Q. What else?
- 25 A. And a striped tie.

1 Q. Could you point to him?

2 A. (Witness complies).

3 MR. WHEELER: Let the record reflect that
4 the witness has identified the Defendant.

5 THE COURT: That request is granted.

6 Q. (BY MR. WHEELER) When was the last time you
7 talked to Nichole Payne about her marriage to Jason Tad
8 Payne?

9 A. The night before she died.

10 Q. Was it in person or by telephone?

11 A. It was by phone.

12 MR. KING: Your Honor, I didn't hear the
13 answer to the previous question.

14 THE WITNESS: The night before.

15 THE COURT: And I'll just encourage you to
16 be sure to speak up.

17 THE WITNESS: Okay.

18 Q. (BY MR. WHEELER) Where were you when this
19 conversation took place?

20 A. I was at home in Nacogdoches.

21 Q. Did she identify to you from where she was
22 calling?

23 A. I can't recall. I would assumed she was at
24 home.

25 Q. What did she tell you about the nature of her

1 relationship with Jason Tad Payne?

2 MR. PARKS: Your Honor, I believe we would
3 re-urge those objections previously stated.

4 THE COURT: And those objections are
5 overruled.

6 MR. WHEELER: You may answer.

7 THE WITNESS: I'm sorry, could you repeat
8 it again?

9 Q. (BY MR. WHEELER) What did you discuss with her
10 in regard to her relationship with Jason Tad Payne?

11 A. That she wanted a divorce and that he had
12 threatened to kill her.

13 Q. Was she emotional at that time?

14 A. She was upset and --

15 Q. Prior to this, had you met with her in person
16 in regard to divorcing Jason Tad Payne?

17 A. On August 25th.

18 Q. Where did this take place, this event?

19 A. At Posadas in Tyler.

20 Q. Who was present?

21 A. My mother and I.

22 Q. What events occurred that led up to the
23 decision to meet with Nichole Payne in August about her
24 marriage to Jason Tad Payne?

25 A. She had called me and said she wanted a divorce

1 and my mother and I --

2 MR. PARKS: Your Honor, that's not
3 responsive.

4 THE COURT: I'll sustain.

5 MR. PARKS: May we have a running objection
6 to this testimony?

7 THE COURT: Well --

8 MR. PARKS: A running objection to any
9 testimony regarding what she was told by Nichole or any
10 other person?

11 THE COURT: Yes, sir, you may.

12 Q. (BY MR. WHEELER) Okay. Why do you remember
13 the date?

14 A. Because she was scared.

15 Q. Did you make a note of that date?

16 A. Mentally.

17 MR. KING: Judge, I cannot hear her.

18 THE COURT: Let me try doing this: Raise
19 it up a little more. I'd encourage you to get a little
20 closer.

21 Q. (BY MR. WHEELER) How close were you and
22 Nichole?

23 A. She was my best friend.

24 Q. How frequently did you talk with her after she
25 moved to Quitman?

1 A. At least on a weekly basis when she was allowed
2 to talk.

3 Q. How frequently did you talk to her or see her
4 prior to her move to Quitman?

5 A. August 25th was the last time I went to see
6 her.

7 Q. Well, I need you to listen to my question
8 carefully.

9 A. Okay.

10 Q. Can you hear me?

11 A. Yes, sir.

12 Q. How often did you talk to her or see her prior
13 to her moving to Quitman?

14 A. Prior? Weekly talking to her and sometimes it
15 would be weekly and monthly depending how much time I
16 had off to actually go out and visit.

17 Q. What do you do for a living?

18 A. He installs windshield --

19 Q. Not him. What do you do?

20 A. I'm a graphic artist.

21 Q. Could you describe for the jury your
22 educational background?

23 A. High school graduate.

24 Q. And for whom do you work now?

25 A. I work for Foretravel Motorcoach.

1 Q. Your husband, what did he do?

2 A. He worked at Pizza Hut and did security
3 contracts.

4 Q. And prior to that, what did he do?

5 A. He worked for -- he did different security
6 contracts for different companies.

7 Q. And his military service, what did he do?

8 A. He was --

9 MR. PARKS: Objection; relevance.

10 MR. WHEELER: I've got to establish the
11 relationship between this woman and Nichole Payne and
12 her family, Your Honor.

13 THE COURT: Well, you need to get there on
14 her husband real quick.

15 MR. WHEELER: Okay.

16 Q. (BY MR. WHEELER) What was his military
17 background?

18 A. He was Navy Seal.

19 Q. This family, did you develop a relationship
20 with your husband's sister over time?

21 A. Yes, sir.

22 Q. Did that relationship grow during the time of
23 your relationship?

24 A. Yes, sir.

25 Q. During this time after she met Jason Tad Payne,

1 did you discuss the marriage with her regularly?

2 A. In the very beginning when I saw
3 inconsistencies.

4 Q. And did you continue to talk with her over time
5 about the marital relationship?

6 A. Yes, sir.

7 Q. You talk about the intimate details of the
8 relationship?

9 A. Some of it, yes, sir.

10 Q. Okay. In August of 2007, you met with Nichole
11 and who else?

12 A. My mother.

13 Q. And?

14 A. A waitress.

15 Q. And you?

16 A. Yes, sir.

17 Q. At what restaurant?

18 A. Posadas.

19 Q. Who initiated that meeting?

20 A. Nichole.

21 Q. How did she make contact with you to initiate
22 that meeting?

23 A. By phone.

24 Q. When you talked to her on the phone, what did
25 she tell you was going on in her relationship with Jason

1 Tad Payne?

2 MR. PARKS: Judge, we would object to that
3 under 403. Whatever might have been going on in August
4 is only relevant to what might have happened in
5 December.

6 MR. WHEELER: And with regard to recall,
7 Your Honor, you understand our position under 38.36.

8 THE COURT: And under 403, I'm going to
9 overrule that objection.

10 MR. WHEELER: Okay.

11 Q. (BY MR. WHITLEY) I can't remember the
12 question, so I'm going to ask it again: What did she
13 tell you about her relationship with Jason Tad Payne in
14 that phone call?

15 A. That she wanted to divorce.

16 Q. And your response was what?

17 A. Wanted to talk her out of it.

18 Q. Okay. So what did you do then?

19 A. We spent the day together. She didn't talk
20 about it.

21 Q. And then you went to Posadas before or after?

22 A. After.

23 Q. And what did she tell you about her marriage at
24 Posadas?

25 A. That she was wanting a divorce and he had

1 threatened her to burn her alive in the house.

2 Q. Now, you and your mother were there, right?

3 A. Yes, sir.

4 Q. Did you continue to try to talk her out of
5 getting a divorce?

6 A. No.

7 Q. What did you do next?

8 A. We begged her to cancel her life insurance
9 policy, change her will, and to get out of the house.

10 Q. How did that meeting end?

11 A. She begged me in the parking lot to avenge her
12 if something happened to her.

13 MR. KING: We couldn't hear it.

14 THE COURT: She begged me to avenge her if
15 something happened to her, if she died.

16 Q. (BY MR. WHEELER) And then what happened?

17 A. She got in her car and drove home.

18 Q. How many times did you talk with her after that
19 meeting in August of 2007?

20 A. It was at least weekly.

21 Q. Did she continue to talk with you about her
22 relationship with Jason Tad Payne?

23 A. Yes.

24 Q. Did she characterize that relationship in a
25 positive or negative light?

1 A. Negative.

2 Q. When she talked to you on the phone in those
3 last few months of her life, at any time did she
4 indicate where she was calling you from?

5 A. Sometimes it was from her closet. Sometimes it
6 was from --

7 MR. PARKS: Judge, we will object to that
8 unless she knows of her own personal knowledge.

9 MR. WHEELER: We are offering this first to
10 state of mind and --

11 THE COURT: If she was told, she can state
12 what she was told.

13 Q. (BY MR. WHEELER) Did she tell you where she
14 was calling from?

15 A. Yes. She would call from her closet and she
16 also told me once she was calling from where the creek
17 was in the back of their property.

18 Q. Did she talk to you about her sexual
19 relationship with Jason Tad Payne?

20 A. Yes, sir.

21 Q. When did this conversation take place,
22 approximately?

23 MR. PARKS: Judge, we renew those
24 objections. That has to do with her state of mind that
25 is --

1 THE COURT: Let me ask y'all to approach.

2 (Bench.)

3 THE COURT: And just so I've got some idea
4 what you're anticipating asking --

5 MR. WHEELER: They weren't having sex until
6 right before she was killed. They had sex one time,
7 that she had stopped having sexual relations, and the
8 State doesn't view that as a good marital relationship
9 or a normal marital relationship he expressed to the
10 police when interviewed.

11 THE COURT: All right. And --

12 MR. PARKS: Our position is this is
13 degenerated into a trial by innuendo and slander and
14 it's not relevant and any evidence it might generate is
15 greatly outweighed by the prejudicial effect.

16 THE COURT: Well, certainly -- certainly,
17 it's relevant. I'm not sure how many it adds to the
18 fact that they wanted to divorce and the threats. Let
19 me send the jury out.

20 MR. WHEELER: All right.

21 (Open court.)

22 THE COURT: All right. Ladies and
23 gentlemen, let me ask you to remember your instructions,
24 and we'll take a little early recess. Be available at
25 1:50, so please go with the bailiff at this time.

1 (Jury exits courtroom.)

2 THE COURT: Let the record reflect the jury
3 has left the courtroom.

4 And, counsel, briefly develop this
5 testimony so I can get a better idea of 403 --

6 MR. WHEELER: Yes, sir.

7 Q. (BY MR. WHEELER) In the telephone
8 conversations while Nichole was living in Quitman and
9 after August, did she discuss her sexual relationship
10 with Jason Tad Payne with you?

11 A. Yes, sir.

12 Q. Did she discuss that relationship in person or
13 by telephone?

14 A. By phone.

15 Q. What did she tell you about the sexual
16 relationship she had?

17 A. The night before she died, they had sex for the
18 first time since they've lived in Quitman, that
19 Saturday.

20 MR. WHEELER: That's all I'm going to ask,
21 Your Honor.

22 MR. PARKS: Your Honor --

23 THE COURT: Yes, sir.

24 MR. PARKS: -- can we approach?

25 (Bench.)

1 MR. PARKS: Just not to say this to the
2 whole crowd: If that is all it's going to be to this, I
3 wouldn't have any particular problem with it. I don't
4 think it's either relevant or irrelevant to the issue
5 except for what I believe the State will try to draw
6 from that, that there was some significance that this
7 was, I've heard it characterized as goodbye sex. That
8 comes from nowhere.

9 MR. WHEELER: That comes from nowhere?
10 That's out of Nichole's mouth.

11 MR. PARKS: Well --

12 THE COURT: I think that -- I think
13 certainly the testimony has much more limited evidence
14 than I thought initially, and I think under 403, I am
15 going to go ahead and keep it out.

16 MR. WHEELER: Okay.

17 (Open court.)

18 THE COURT: All right. I think that's all
19 we need to take up outside the presence of the jury, and
20 they're getting to take a little break after lunch, so
21 we'll be back, then, at 1:50.

22 MR. WHEELER: Okay.

23 (Recess from 1:43 p.m. to 1:52 p.m.)

24 THE COURT: Back on the record in Cause
25 20,529, State vs. Jason Tad Payne. Counsel for the

1 State, counsel for the Defendant, and the Defendant is
2 present. The jury is not.

3 Is the State ready to proceed?

4 MR. WHEELER: State's ready.

5 THE COURT: Is the Defendant ready to
6 proceed?

7 MR. PARKS: Defendant is ready.

8 THE COURT: If you'll ask Ms. Hawthorne to
9 come back. Yeah, we need Ms. Hawthorne to come back.

10 (Witness enters courtroom.)

11 THE COURT: Go ahead and bring the jury in.

12 (Jury enters courtroom.)

13 THE COURT: Let the record reflect the jury
14 has returned to the courtroom.

15 Whenever you're ready, Mr. Wheeler, you may
16 proceed.

17 MR. WHEELER: Thank you, Your Honor.

18 Q. (BY MR. WHEELER) Ms. Hawthorne, where did you
19 reside in 2007?

20 A. Nacogdoches, Texas.

21 Q. Nacogdoches? Did you say Nacogdoches?

22 A. Yes, sir.

23 Q. All right. Have you had an opportunity to hear
24 persons in that community discuss the reputation of
25 Taylor Wages for being a peaceful and nonviolent person?

1 A. Yes, sir.

2 Q. What was that reputation?

3 A. That he was very sweet, kind boy.

4 MR. PARKS: Objection; nonresponsive.

5 THE COURT: I'll sustain.

6 MR. PARKS: Ask the jury -- no, I'll
7 withdraw it.

8 MR. WHEELER: May I approach, Your Honor?

9 THE COURT: Yes, sir.

10 (Bench.)

11 THE COURT: You can ask if it's good or
12 bad.

13 MR. WHEELER: Here's what I wanted to ask,
14 a question of this witness: I'm going to ask if she's
15 identified -- if she is afraid of him. Before I ask
16 that in front of the jury, I wanted to --

17 MR. PARKS: That's absolutely prejudicial.

18 MR. WHEELER: Right.

19 MR. PARKS: It has no relevance if she's
20 afraid.

21 THE COURT: I think it would get into 403
22 problems.

23 MR. WHEELER: That's why I wanted to come
24 up before I asked the question.

25 MR. PARKS: Thank you. I appreciate it.

1 (Open court.)

2 MR. WHEELER: Pass the witness, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. PARKS:

5 Q. Ms. Hawthorne, my name is Doug Parks. I've got
6 a few questions for you. I don't expect I'll have a
7 lot. Just relax so far as you're able to, okay?

8 A. Yes, sir.

9 Q. Now, you understand that I represent Mr. Payne
10 and that I have some duties and obligations in that
11 regard?

12 A. Yes, sir.

13 Q. Part of that is to test your testimony in the
14 way of cross-examination. Do you understand --

15 A. Yes, sir.

16 Q. -- what this is about?

17 Let me start at the end your testimony:
18 The last question that was asked of you by Mr. Wheeler
19 was whether or not you knew -- that you had talked to
20 other people in the community and knew Taylor's
21 reputation for being peaceful and law abiding. Explain
22 to me how that happened. Did you go around asking
23 people, say, what is Taylor's reputation?

24 A. Volunteered as peaceful.

25 Q. I'm sorry?

1 A. Volunteered.

2 Q. People would come and say, I want you to know
3 that Taylor was peaceful and law abiding?

4 A. He was my nephew and they missed him.

5 Q. I understand that. You're telling the members
6 of the jury that people would just come up to you and
7 tell you his reputation in the community was for being
8 peaceful and law abiding?

9 A. Yes, sir.

10 Q. Okay.

11 MR. WHITLEY: Judge, I believe he's
12 misquoting the reputation. It's peaceful and
13 nonviolent, not peaceful and law abiding?

14 THE COURT: Yes, sir.

15 MR. PARKS: That's not what the question
16 was, Judge.

17 Q. (BY MR. PARKS) But either way, whether it's
18 peaceful and law abiding or peaceful and nonviolent,
19 people would come up to you and say, gosh, I just wanted
20 to let you know, Ms. Hawthorne, that your nephew was
21 peaceful and nonviolent?

22 A. They elaborated more than that, but it was
23 always very, very positive.

24 Q. As far as you know, did Nichole Payne have a
25 vehicle while she was here in Wood County, living here

1 in Wood County?

2 A. Yes, sir.

3 Q. You were good friends with her?

4 A. Yes, sir.

5 Q. If she had gotten in that vehicle and driven
6 from Wood County over to Nacogdoches and sought
7 sanctuary with you, would you have given it to her?

8 A. Yes, sir.

9 Q. So she had a place to go if she really wanted
10 to leave?

11 A. Yes, sir.

12 Q. She had the means of leaving if she really
13 wanted to leave?

14 A. Yes, sir.

15 Q. Now, after any of these conversations that you
16 had with Nichole, did you ever pick up the phone and
17 call the police and report that dire and drastic threats
18 were being made to her?

19 A. She did not ask me to and I --

20 Q. The answer to the question is either yes or no,
21 Ms. Hawthorne?

22 A. Oh, no.

23 Q. You either called or you didn't?

24 A. No, I did not.

25 Q. As far as you know, did she ever pick up the

1 phone and call the police? Either yes or no.

2 A. Can you be more specific with your question?

3 Q. Yes. To your own personal knowledge, did
4 Nichole ever call the police and say that Jason was
5 threatening her life?

6 A. Not that I'm aware of.

7 Q. Did you ever record by any means any of these
8 telephone conversations that you had with Nichole so
9 that we could play them to a jury?

10 A. No, I did not.

11 Q. And in fairness, Ms. Hawthorne, there is no way
12 we could test what you say she said to you. You could
13 say just about anything you wanted to. There's no way
14 we would know any different. Isn't that fair to say?

15 A. Sorry. Restate that again.

16 Q. The question is: There is no way for us to
17 test what you've said. I mean, you can say that Nichole
18 said anything to you whatsoever and we wouldn't have
19 anyway of knowing whether that was true or not?

20 A. True.

21 Q. Did Nichole ever -- well, let me ask you this:
22 Do you know who Todd Wages is?

23 A. Yes.

24 Q. Who is that?

25 A. That is Nichole's exhusband.

1 Q. Did Nichole ever tell you that Todd Wages had a
2 hit out on her?

3 A. Not that I'm aware of it.

4 Q. Did you ever speak with your husband, Jason?

5 A. Yes.

6 Q. Did you ever speak with Jason about any
7 conversations like that that he may have had with
8 Nichole?

9 A. I don't remember.

10 Q. Do you remember the interview that you had with
11 Miles Tucker, the police officer?

12 A. Yes.

13 Q. Was Jason in there with you at the same time?

14 A. Yes.

15 Q. The two of you interviewed together?

16 A. Yes.

17 Q. Do you recall whether or not Jason said
18 anything to Lieutenant Miles Tucker about Todd Wages
19 having a hit out on Nichole?

20 MR. WHEELER: I'm going to object to
21 hearsay first, and I don't think she was present during
22 the interview with Jason Payne.

23 THE COURT: As to the objection -- I'll
24 sustain as to the objection.

25 MR. PARKS: I'm not talking about the

1 interview with Jason Tad Payne. I'm talking about with
2 she and her husband. Our position goes to state of mind
3 of Nichole.

4 THE COURT: Sustained.

5 Q. (BY MR. PARKS) Ms. Hawthorne, you've testified
6 to the jury here this afternoon that at some point in
7 time, Nichole told you that if anything happened to her,
8 that you should avenge her. Is that what you said?

9 A. That is correct.

10 Q. She begged you to avenge her?

11 A. That is correct.

12 Q. Is that what you're doing now?

13 A. Yes.

14 MR. PARKS: No further questions, Your
15 Honor.

16 MR. WHEELER: Nothing further, Your Honor.

17 THE COURT: Thank you Ma'am. You may step
18 down.

19 (Witness exits courtroom.)

20 THE COURT: Call your next witness.

21 MR. WHEELER: State calls Ken Heitman.

22 THE COURT: Ken Heitman.

23 (Witness enters courtroom.)

24 THE COURT: Yes, sir. If you'll come on
25 over to the witness stand. Were you sworn previously?

1 Were you sworn?

2 THE WITNESS: No, sir.

3 THE COURT: All right. Let me get you to
4 raise your right hand.

5 (Witness sworn.)

6 THE COURT: Please have a seat.

7 MARSHALL HEITMAN,

8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WHEELER:

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. Would you please state your name for the jury?

14 A. Marshall Heitman.

15 Q. Mr. Heitman, how were you employed in late
16 2007?

17 A. I'm a retired general contractor. I own a
18 piece of property out on 154.

19 Q. Did you do any buying --

20 A. Yes.

21 Q. -- selling, and trading in motorboats?

22 A. Yes, sir.

23 Q. Did you have an opportunity in late 2007 to
24 have discussions with Jason Payne about a boat?

25 A. Yes, sir.

1 Q. The Jason Payne that you discussed a boat with,
2 is he in the courtroom today?

3 A. Yes, sir.

4 Q. Could you point to him and identify him by his
5 clothing?

6 A. No -- I'm sorry, by his clothing?

7 Q. Yes, sir, or any means. Do you see him in the
8 courtroom?

9 A. I honestly -- two years, I can't remember his
10 face.

11 Q. What he looks like?

12 A. No, sir.

13 Q. Do you remember having dealings with Jason
14 Payne about a boat?

15 A. Yes, sir.

16 Q. Do you remember going to his house?

17 A. Yes, sir.

18 Q. Do you remember approximately where that house
19 was located?

20 A. On Highway 37, like you're going to Winnsboro,
21 on the right side up on the hill.

22 Q. Could you describe the color of the house?

23 A. No, not really. I didn't pay that much
24 attention to it.

25 Q. Let me ask you this question: I'm showing you

1 what's been as marked State's Exhibit 2. Is that the
2 house?

3 A. Yes, sir.

4 Q. So you went to this house?

5 A. Yes, sir.

6 Q. And that's the house that's been previously
7 identified in State's Exhibit 2 as Jason Payne's house.
8 The man who lived in that house, did he discuss a boat
9 purchase with you?

10 A. Yes, sir.

11 Q. Now, who initiated the contact with you about
12 the boat?

13 A. I have a sign out on 154 that I buy boats and
14 barges and he made a call to my house off of that sign.
15 He was parked right across the street or by the sign.
16 He wanted to show me a boat he needed to sell.

17 Q. When did he make this contact with you
18 approximately?

19 A. It was on October the 31st, 2007.

20 Q. How do you know it was around Halloween around
21 2007?

22 A. Well, the main thing was the whole deal had to
23 come down in one day. It was -- he talked to me that
24 day.

25 Q. Who made the decision that it had to be handled

1 in one day?

2 A. He did.

3 Q. How did he indicate he needed to conduct a
4 transaction in one day?

5 A. First what he did, he come by -- he called. I
6 told him where I lived, right across the street, and he
7 come over.

8 Q. Then what happened?

9 A. I took a look at his boat to see it.

10 Q. Did he bring the boat?

11 A. He had the boat with him, yes.

12 Q. Could you describe for the jury what the boat
13 was he brought to you?

14 A. It's a Ranger 2001, single consol. It had 200
15 Yamaha on it.

16 Q. What was the value of that boat?

17 A. When he showed it to me, it was a little bit
18 more too new a boat, but when I looked at it and went in
19 the house and looked up AD&D to find out what the value
20 was, basically the loan value.

21 Q. What was the loan value?

22 A. Somewhere around \$18,000.

23 Q. Now, let me ask you this question: With regard
24 to this boat, on that day when he came to you, did he
25 tell you what he did for a living?

1 A. Told me he was a guide.

2 Q. When you say, "guide," what kind of guide?

3 A. Fishing guide.

4 Q. Said he was a fishing guide and he brought you
5 his boat to sell?

6 A. Yes.

7 Q. Were you prepared to pay \$18,000 for that boat?

8 A. No.

9 Q. Why did you say he was in such a hurry to
10 liquidate that boat?

11 A. At the time he asked would I be interested in
12 it. I asked him approximately what he thought the
13 value -- what he wanted for it.

14 Q. What did he say?

15 A. \$16,000.

16 Q. And then what happened?

17 A. And I told him, I said, well, I didn't really
18 want to spend that much money on one. I didn't want it
19 at that point. I said, I'm not willing to give \$16,000
20 for it, I might be considering 15 or so, something in
21 that area, but I said I really wanted to think about it
22 because I told him on Monday morning -- I'd rather call
23 him Monday morning to make sure that I would give him
24 cash for it and he left.

25 Q. Did he take the boat with him when he left?

1 A. Yes.

2 Q. What happened next?

3 A. I'd say probably 10:30 in the morning,
4 something like -- now, this -- we're talking about
5 probably at the house between 8:30 and 9:00 the first
6 time. He called me back at 10:30 or 11:00 and said he
7 really needed to sell this boat.

8 Q. Did he tell you why?

9 A. He just said that he needed to buy another
10 boat, that he wanted to buy -- I believe it was in
11 Texarkana.

12 Q. And then what happened?

13 A. I told him I said, well, I don't know if I want
14 to give \$15,000 for it. Well, he said, I need the money
15 today; if I don't have the money today, I'd have to -- I
16 need to be in Texarkana, that another fellow was coming
17 to buy the boat he wanted to buy and he wanted it. And
18 asked him at the time, I said, what's wrong with it, I
19 can't find nothing wrong with this boat. He said this
20 other boat is two years newer, so...

21 Q. What did you do?

22 A. I told him, I said, well, if -- when do you got
23 to have the money? He said, today, right now. He told
24 me, can you give me the money right now. I said, yes, I
25 can, but I said, I'm not willing to pay that much money.

1 If you want me to give it to you today, I'll give you
2 \$13,000 for it today, cash.

3 Q. So you offered \$13,000 on this boat with a loan
4 value of \$18,000?

5 A. Yes.

6 Q. What did he do?

7 A. He said he had to talk it over with his wife.
8 Wasn't 15 minutes later he called me back, he says, can
9 I meet you at the bank, I've got to be in Texarkana with
10 this money. I said okay.

11 Q. When he said, can we meet at the bank, what was
12 he wanting you to do at the bank?

13 A. Give him the money.

14 Q. Did you?

15 A. What we did, we went to his bank, went -- I'm
16 sorry, went to my bank and I have not -- he had his
17 papers for the boat. He brought it out to the house and
18 we went to the bank together. And I first took a
19 traveler's check, but he wanted a cashier's check. I
20 had it made out to him, so we went to his bank. He
21 wanted to go to the Bank of Texas.

22 Q. Yes, sir.

23 A. We went to the Bank of Texas. I went with him
24 with the cashier's check and he -- so we signed the
25 papers. He signed the papers. We had them notarized

1 and everything, the boat papers there, so he had the
2 cash and that's where I left him.

3 Q. So you went with Jason Payne --

4 A. From my bank in Mineola.

5 Q. -- to Bank Texas?

6 A. To Bank Texas.

7 Q. Which was his bank?

8 A. Yes.

9 Q. And the Bank Texas records ought to indicate
10 the deposit the amount?

11 A. Yes.

12 Q. Now, a few days later, you went over to his
13 house, didn't you?

14 A. Yes, sir.

15 Q. Why did you go to his house?

16 A. Well, in the process -- everything was in such
17 a speed-up mode, I had forgot to get -- Texas requires
18 on a boat trailer that you have to -- the prior owner
19 has to sign it, sign the trailer to get licensed, so I
20 went to his house, my wife and I both went to his house
21 to get him to sign the papers for the trailer of that
22 boat.

23 Q. And when you went to his house, did you see a
24 new boat from Texarkana?

25 A. No, sir.

1 MR. WHEELER: Pass the witness.

2 CROSS-EXAMINATION

3 BY MR. PARKS:

4 Q. Mr. Heitman, do you still have that boat?

5 A. No, sir.

6 Q. Are you sure it was a Ranger and not a Skeeter?

7 A. I'm sorry, just a second. I got the title
8 right with here me. I need my glasses. You realize I
9 buy and sell boats just periodically. I don't know
10 -- you're right, it's a Skeeter 201; got Texas 2664-ALS

11 Q. Is a Ranger a little bit more expensive boat
12 than a Skeeter?

13 A. Right.

14 Q. When you looked up the loan value, were you
15 looking up a Skeeter or a Ranger?

16 A. No, a Skeeter because that Ranger is somewhere
17 in the neighborhood of \$30,000.

18 Q. So we're talking about the same kind of boat --

19 A. Same boat.

20 Q. -- than -- okay.

21 All right. So was the boat free and clear?

22 A. Yes, sir, as far as I know it was, and I paid
23 them at the bank and they gave me the papers to sign.

24 Q. There was no indication it --

25 A. He didn't give me an indication he owed on it,

1 no, and that's maybe why I had to take the money and
2 stuff go to his bank, but they had -- he had the papers
3 when they notarized them, and I have a copy right here.

4 Q. Anything wrong with a guy wanting to sell a
5 boat that you know of? That's his --

6 A. I guess no. Not necessarily, no.

7 Q. And as a buyer and seller of boats, does it
8 really make you any difference why a person wants to
9 sell their boat?

10 A. I was a little amazed because this boat was
11 perfect. There was absolutely nothing wrong with the
12 boat and asked him what's wrong with it. I couldn't
13 find anything wrong with it, you know, because -- as a
14 buyer and he said he wanted a two-year -- two-year -- a
15 newer boat, same kind.

16 Q. Mr. Heitman, you know, without your judgments
17 about that, I guess, you buy boats and sell boats?

18 A. That's just a sideline, sir.

19 Q. But you do it?

20 A. Yes.

21 Q. To make a profit, don't you?

22 A. Yes, sir.

23 Q. And you like to buy a boat for as little as
24 possible?

25 A. Right.

1 Q. Regardless of why, that's really not your
2 concern?

3 A. Not necessarily.

4 Q. And it's really not your concern what they
5 intend to do with the money?

6 A. No, sir.

7 Q. You like to buy it as cheap as you can to sell
8 it as much as you can?

9 A. That's right.

10 Q. And you buy boats, maybe not as a living?

11 A. No.

12 Q. From time to time you buy boats from people
13 that are -- that you believe you can get more money for
14 them or you wouldn't buy them?

15 A. Right.

16 Q. This all took place on October the 31st?

17 A. Same day.

18 Q. Halloween?

19 A. Same day.

20 Q. That's all the questions I have.

21 REDIRECT EXAMINATION

22 BY MR. WHEELER:

23 Q. And how much would that boat cost new?

24 A. That boat rigged out like it was, it would be
25 somewhere in the \$30,000 bracket. Ranger, same boat,

1 rigged out, \$52,000.

2 Q. So the Skeeter would be \$30,000?

3 A. Somewhere in that area.

4 MR. WHEELER: All right. Pass witness.

5 RECROSS-EXAMINATION

6 BY MR. PARKS:

7 Q. Mr. Heitman --

8 A. Yes, sir.

9 Q. -- what difference would it make how much that
10 boat cost new? You weren't buying it new, were you?

11 A. No, sir, but --

12 Q. If I go down to buy a brand-new car, what
13 happens to it when I drive it home?

14 A. It loses value, sir.

15 MR. PARKS: Okay. No more questions.

16 MR. WHEELER: Nothing further.

17 THE COURT: May this witness finally be
18 excused?

19 MR. WHEELER: Yes, please.

20 THE COURT: Any objection?

21 MR. PARKS: No.

22 THE COURT: Thank you, sir. You're free to
23 go.

24 THE WITNESS: Thank you.

25 THE COURT: Call your next witness.

1 MR. WHEELER: State calls Sherry Hawthorne.

2 MR. PARKS: May we approach, Your Honor?

3 THE COURT: Yes, sir.

4 (Bench.)

5 MR. PARKS: So as far as I can tell,
6 Ms. Hawthorne has never been listed as a witness in this
7 case.

8 MR. WHEELER: Really? I thought we had
9 given her notice on more than one occasion and have her
10 under subpoena, so...

11 THE COURT: Well, just a second. Wait just
12 a moment.

13 MR. WHEELER: May we approach, Your Honor?

14 (Bench.)

15 MR. WHEELER: We'll need a brief recess.

16 THE COURT: All right.

17 (Open court.)

18 THE COURT: Ladies and gentlemen, let me
19 ask you to remember your prior instructions and, I
20 guess, just be stay available in the jury room if you
21 would. Please go with the bailiff at this time.

22 (Jury exits courtroom.)

23 THE COURT: Let the record reflect the jury
24 has left the courtroom.

25 MR. WHEELER: Jerry's going to get the

1 letter.

2 (Pause in the proceedings.)

3 MR. KING: Sorry, Judge. We're just going
4 on the list they've given us last --

5 MR. WHEELER: Henry, we can call another
6 witness while Jerry's looking for that letter for the
7 Defense. We can keep going, I don't mind.

8 THE COURT: That be fine. Do you think
9 it's going to take a while?

10 MR. WHEELER: He's going through his trial
11 notebook. I don't know. I know the jury's waiting.
12 We've got other --

13 THE COURT: Why don't we try doing that and
14 if we --

15 MR. WHEELER: That be fine.

16 THE COURT: Just go back and bring the
17 ladies and gentlemen back in.

18 (Jury enters courtroom.)

19 THE COURT: Let the record reflect the jury
20 has returned to the courtroom.

21 You may call your next witness.

22 MR. WHEELER: I'm going to call William
23 Burge briefly and then we'll move on.

24 MR. KING: What did you say?

25 MR. WHEELER: William Burge.

1 (Witness enters courtroom.)

2 THE COURT: Yes, sir. Officer Burge, just
3 go ahead and take a seat. And you were sworn earlier,
4 were you not?

5 THE WITNESS: Yes, sir.

6 THE COURT: Just go ahead and have a seat.

7 MR. WHEELER: May I approach, Your Honor.

8 DEPUTY SERGEANT WILLIAM BURGE,
9 having been first duly sworn, testified as follows:

10 FURTHER DIRECT EXAMINATION

11 BY MR. WHEELER:

12 Q. (BY MR. WHEELER) I'm going to hand you what's
13 been marked State's Exhibit 124. Can you identify it?

14 A. Yes, sir.

15 Q. What is it?

16 A. It's a photograph of the television
17 entertainment center, if you will, inside the male
18 victim's bedroom.

19 Q. Is that a fair and accurate depiction of Taylor
20 Wages' room at or near December 11, 2007?

21 A. Yes, sir.

22 Q. Okay. Thank you.

23 MR. WHEELER: State offers State's 124.

24 (State's Exhibit 124, offered.)

25 MR. PARKS: No objection.

1 THE COURT: State's 124 is admitted.

2 (State's Exhibit 124, admitted.)

3 MR. WHEELER: Pass the witness.

4 MR. PARKS: No questions, Your Honor.

5 THE COURT: Thank you, sir.

6 MR. WHEELER: State calls Jacob Montalvo.

7 (Witness enters courtroom.)

8 THE COURT: If you'll come over here, right
9 over here. Let me get you to raise your right hand.

10 (Witness sworn.)

11 THE COURT: Please have a seat.

12 Yes, sir.

13 JACOB MONTALVO,

14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WHEELER:

17 Q. Mr. Montalvo, would you please state for the
18 jury your full name?

19 A. My name is Jacob Montalvo.

20 Q. Did you know Taylor Wages?

21 A. Yes, sir.

22 Q. What name did he go by when you knew him here
23 in Quitman?

24 A. Austin.

25 Q. Did you go to his house on or around December

1 11, 2007?

2 A. Yes, sir.

3 Q. Who was with you?

4 A. Just me and sometimes my friend, Alex.

5 Q. Now, about how many days prior to Austin's
6 death were you in that house?

7 A. Maybe a day or two from the incident.

8 MR. KING: I'm sorry, I didn't hear the
9 response.

10 THE COURT: Maybe a day or two from the
11 incident.

12 MR. WHEELER: May I approach, Your Honor?

13 THE COURT: Yes, sir.

14 Q. (BY MR. WHEELER) I'm going to hand you a
15 photograph. It's been marked as State of Texas 124. Do
16 you recognize this?

17 A. Yes, sir.

18 Q. What is it?

19 A. It's his bedroom.

20 Q. Now, this system here, there's a CD down there.
21 Is that a Keith Urban CD?

22 A. Yes, sir.

23 Q. Were you familiar with the kind of music that
24 Taylor listened to?

25 A. Yes, sir.

1 Q. Did he listen to death metal?

2 A. No, sir.

3 Q. Speed metal?

4 A. No, sir.

5 Q. Did he listen to suicide rap?

6 A. No, sir.

7 Q. What kind of music did Taylor listen to?

8 A. Anywhere between electronic music, alternative,
9 and rock.

10 Q. When you were over at that house, did you spend
11 the night?

12 A. Yes, sir.

13 Q. Did you see Jason Payne in that house?

14 A. Yes, sir.

15 Q. Did you see Nichole Payne in that house?

16 A. Yes, sir.

17 Q. Had you been to the house in Quitman on a few
18 or many occasions?

19 A. Just every now and then, usually after school
20 if he was able to have visitors over.

21 Q. Were there any rules that Jason Payne laid down
22 for you that last time you were at the house overnight?

23 A. A curfew when we got back from the movies and
24 not to run around the house at night.

25 MR. KING: I'm sorry, Your Honor, I --

1 THE COURT: Could you repeat that, please.

2 THE WITNESS: Just to be at the house at a
3 certain curfew before we went to sleep and not to walk
4 around the house at night.

5 Q. (BY MR. WHEELER) What did he talk to you
6 specifically walking around the house at night?

7 A. He told both of us that we should not walk
8 around the house because he would mistake us breaking in
9 and shoot us and that was the reason for not walking
10 around the house.

11 Q. And with regard to the property, did he have
12 any rules about the property?

13 A. Nothing -- didn't really state anything exactly
14 like that.

15 Q. Okay. He didn't say anything about wandering
16 around on the property?

17 A. No, sir.

18 Q. Okay. Let me ask you this question: Did you
19 walk around on that property with Austin just prior to
20 his death?

21 A. Yes, sir.

22 Q. While you were wandering on the property, did
23 you see anything out of the ordinary?

24 A. Dug up holes that were pretty deep.

25 Q. Could you describe how long, how wide, and how

1 deep those holes were?

2 A. To me, it seemed like they were graves about
3 ready to be dug.

4 MR. PARKS: Your Honor, that is totally
5 nonresponsive to the question.

6 THE COURT: And I'll sustain.

7 Q. (BY MR. WHEELER) I need you to answer the
8 question that I asked. How wide, how long, and how deep
9 were those holes that you and Austin discovered?
10 Estimate --

11 A. Half the table right there you're on.

12 Q. Now, did Austin respond emotionally when he saw
13 those holes?

14 A. No, he just said it was kind of strange.

15 MR. PARKS: Your Honor --

16 Q. (BY MR. WHEELER) Did you have the opportunity
17 to observe Jason's relationship -- Jason Payne's
18 relationship with Austin?

19 A. He was just very quiet.

20 Q. The answer is either "yes" or "no."

21 MR. PARKS: It's nonresponsive.

22 THE COURT: I'll sustain.

23 Q. (BY MR. WHEELER) I'm going to instruct you
24 again that you can only answer the question that I'm
25 asking you, okay?

1 A. Yes, sir.

2 Q. My question was: Did you have the opportunity
3 to observe the relationship between Jason Payne and your
4 friend, Austin Taylor Wages?

5 A. Yes, sir.

6 Q. Were they close?

7 MR. PARKS: Your Honor, objection; 701,
8 calls for a conclusion.

9 THE COURT: And I'll sustain.

10 Q. (BY MR. WHEELER) Did you see the two talk to
11 each other when you were in the house?

12 A. Not very often.

13 Q. When you were over at the house, was Jason
14 Payne there all the time?

15 A. No.

16 Q. Well, could you describe how often Jason Payne
17 was gone when you were over there?

18 A. Gone pretty often.

19 Q. Did you Jason Payne say why he was gone?

20 A. Hunting.

21 Q. Did Austin hunt?

22 A. No, sir.

23 Q. Did Austin handle guns?

24 A. No, sir.

25 Q. Did you have the opportunity, along with your

1 friends, to know Austin's character for being peaceful
2 and nonviolent?

3 A. Yes, sir.

4 Q. Was he good or bad?

5 A. Could you --

6 Q. Was his reputation for being peaceful and
7 nonviolent good or was it bad?

8 A. It was good.

9 Q. In your conversations with Austin near the end
10 of his life, what were Austin's plans for the future?

11 A. College.

12 Q. How do you know that?

13 A. Because the first thing he ever asked me was
14 where to apply for all those scholarships.

15 Q. And where did he want to go to college?

16 A. He wanted to go SFA.

17 Q. And where is that?

18 A. Nacogdoches.

19 Q. Did you have the opportunity to see Nichole's
20 relationship with her husband, Jason?

21 A. No, not at a very good level.

22 Q. Did you have personal knowledge whether that
23 marriage was in good shape?

24 MR. PARKS: Your Honor -- I'll withdraw.

25 Q. (BY MR. WHEELER) Did you have personal

1 knowledge to know whether their marriage was in good
2 shape?

3 A. I'm not really sure.

4 Q. Okay. Were you familiar with the sleeping
5 arrangements in that house that last time you were there
6 just before Taylor died -- Austin died?

7 A. What do you mean?

8 Q. Who slept in what room?

9 A. We both slept in the basement.

10 Q. That garage room?

11 A. Yes, sir.

12 Q. Where did Jason Payne sleep?

13 A. I'm assuming upstairs since I'm not really
14 allowed to go through the house.

15 Q. Was the house in disarray or was it well put
16 together? Was it something that was neatly decorated?

17 A. A lot of it looked like moving was required but
18 wasn't done.

19 Q. That was in December?

20 A. Yes, sir.

21 Q. And they moved in and you first met Austin
22 when?

23 A. When he started his new school. He was a
24 junior.

25 MR. WHEELER: Okay. Pass the witness, Your

1 Honor.

2 THE COURT: Yes, sir.

3 CROSS-EXAMINATION

4 BY MR. PARKS:

5 Q. Jacob, my name is Doug Parks. If I ask you
6 something you don't understand, you're free to ask me to
7 restate it, okay?

8 A. Yes, sir.

9 Q. Now, you first met -- you called him Austin?

10 A. That's correct, sir.

11 Q. What do they call him at home?

12 A. From what I was aware, he was referred to as
13 Taylor, but he told me and everyone else just to call
14 him Austin. That's what he preferred.

15 Q. Okay. I appreciate that. That wasn't exactly
16 what I asked you, but at home, how did his mother refer
17 to him?

18 A. Taylor.

19 Q. And his dad?

20 A. Taylor.

21 Q. So he was Taylor at home, Austin at school?

22 A. Yes, sir.

23 Q. And he preferred that?

24 A. Yes, sir.

25 Q. Okay. And you first met him when he came to

1 school as a junior from Nacogdoches?

2 A. Yes, sir.

3 Q. So that would have been, what, the end of
4 August, first part of September?

5 A. Around September.

6 Q. Okay. Were you all in the same grade?

7 A. No, I was one year above him. I was a senior
8 and he was a junior.

9 Q. Okay. But y'all got friendly there at school
10 at some point in time after he started there, right?

11 A. He was very shy at first.

12 Q. How long did it take him to warm up to people?

13 A. It took him a while because people were very --
14 just because he was new, a lot of people weren't very
15 eager. One day he started talking to me and I talked
16 back to him.

17 Q. So as time passed -- he was pretty much ignored
18 by other people because he was new?

19 A. Yes, sir.

20 Q. And ultimately, he got up enough courage to
21 approach you and speak to you?

22 A. Yes, sir.

23 Q. And would that have been, what, a few weeks
24 after he started school?

25 A. Somewhere's in there.

1 Q. And ultimately, y'all became friends?

2 A. Yes, sir.

3 Q. Okay. And you started visiting over at his
4 house from time to time?

5 A. That's correct.

6 Q. That would be after school, usually?

7 A. Yes, sir.

8 Q. Okay. Now, how many times did you actually
9 spend the night over there, Jacob?

10 A. Like two or three times.

11 Q. Two or three, okay. Now, I don't want any
12 confusion. The prosecutor asked you if you went to his
13 house on or about December 11th, 2007. And that means
14 something to lawyers, but it might not to anybody else.
15 You're not telling this jury that you went to that house
16 on the day he was found, are you?

17 A. No, the day before.

18 Q. Was the day before or the day before that?

19 A. The day before.

20 Q. The 10th?

21 A. I'm not really sure on the day.

22 Q. Well, you wouldn't have spent the night on the
23 10th there, would you?

24 A. I was going to on that one day, but he wasn't
25 able because he was really busy.

1 Q. But you didn't spend the night with
2 him -- that's the question I had -- on the 10th?

3 A. Yes, sir.

4 Q. Do you think you spent the night with him on
5 the 9th?

6 A. Yes, sir.

7 Q. Okay. Now, you've told us that Mr. Payne
8 wanted you guys home by a certain time and he had a
9 curfew for you?

10 A. Yes, sir.

11 Q. Did you find that to be oppressive?

12 A. No, I felt that was a pretty normal thing.

13 Q. Okay. And he cautioned y'all not be walking
14 around in the dark in the night for fear he would
15 mistake you for burglars; isn't that correct?

16 A. Yes, sir.

17 Q. Did you find that to be unreasonable?

18 A. I only felt it unreasonable until I heard a
19 remark in the morning.

20 Q. I'm sorry, I didn't hear you.

21 A. I only found it until he made a remark in the
22 morning about it.

23 Q. At the time you heard it, whenever he said,
24 hey, I don't want you guys up here in the house in the
25 middle of the night walking around, did you think that

1 was unreasonable at the time?

2 A. No, not at the time.

3 Q. Okay. You and Taylor found some holes in the
4 ground, you've told us. When was that?

5 A. That was, like, maybe the time we were cleaning
6 around and his little family was outside.

7 Q. So the whole family was outside. Y'all were
8 cleaning up the yard and you stumbled onto these holes
9 in the ground?

10 A. Yes, sir.

11 Q. Were they on the Payne property, do you know?

12 A. I'm not really sure on jurisdiction of the
13 house, so I don't really know.

14 Q. Did you notice if there were old bricks or
15 anything that indicated that these holes were at the
16 location where an old house may have once been?

17 A. I'm not really sure on that.

18 Q. You didn't pay any attention to that, I'm
19 assuming?

20 A. Yes, sir.

21 Q. You just saw the holes in the ground?

22 A. Yes, sir.

23 Q. Well, did they look like new holes or old
24 holes?

25 A. They looked like new holes.

1 Q. Were you concerned at the time that these
2 things were graves? I mean, did you go running and say.
3 Look, my God, somebody has dug graves in the ground?

4 A. No. There was a path and we were exploring
5 different things around. That was one thing we ran into
6 it.

7 Q. I'm sorry?

8 A. That was one thing we ran into while we were
9 walking around.

10 Q. Looking for arrowheads?

11 A. No, just looking at different things.

12 Q. I misunderstood you.

13 A. Could you restate that?

14 Q. What?

15 A. Could you restate that, though?

16 Q. I'm sorry, Jacob. I didn't understand a word
17 you said.

18 A. I'm not sure what you're wanting me to say.

19 Q. I don't want you to stay any particular thing,
20 just whatever the truth is.

21 THE COURT: If you don't lean so close, it
22 might -- don't get right on top of the microphone.

23 Q. (BY MR. PARKS) I just want to make sure:
24 About a week or so before December 11, 2007, you and
25 Taylor found these holes in the ground?

1 A. Yes, sir.

2 Q. Did you bring them to anybody's attention at
3 all?

4 A. No.

5 Q. What makes you think they looked like new holes
6 to you?

7 A. The way they were dug up so neatly.

8 MR. PARKS: May I approach?

9 THE COURT: Yes, sir.

10 Q. (BY MR. PARKS) Jacob, let me show you what has
11 been marked as Defendant's Exhibit 22, 21, 20, and 18.
12 And ask if that appears -- if you can recognize those
13 photographs?

14 A. Yes, sir.

15 Q. What do those appear to be?

16 A. They look like graves to me.

17 Q. The holes that you saw?

18 A. Yes, sir.

19 Q. Okay.

20 MR. PARKS: Offer --

21 (Defendant's Exhibits 18, 20, 21 and 22,
22 offered.)

23 MR. WHEELER: I don't have objection.

24 THE COURT: That would be Defendant's 18,
25 20, 21, and 22 are admitted.

1 (Defendant's Exhibits 18, 20, 21 and 22,
2 admitted.)

3 Q. (BY MR. PARKS) This is 22. Is that one of the
4 holes you're talking about?

5 A. Yes, sir.

6 Q. Okay. And that appears to be a grave?

7 A. Yes, sir.

8 Q. Why is that?

9 A. Just the way it's shaped.

10 Q. Because it's long and narrow?

11 A. Yes, sir.

12 Q. And now, let me ask you Jacob: Have you ever
13 given any thought to if a person put a body in that
14 grave, what they would cover it up with?

15 A. No, I don't think about things like that.

16 Q. I see. And this is also Defendant's Exhibit
17 No. 21. That's one of the holes that you saw?

18 A. Not that one -- no. The one I saw was the
19 other size.

20 Q. How many holes did you see?

21 A. Just that one to me that looked like a grave.

22 Q. Okay. Whether or not this looked like a grave,
23 did you see that hole?

24 A. No, sir.

25 Q. You did not see that hole?

1 A. Not that one, sir.

2 Q. You only saw one hole?

3 A. Yes, sir.

4 Q. A total of one?

5 A. Yes, sir.

6 Q. So these other holes that's have been admitted
7 into evidence weren't there at the time you saw it?

8 A. No, sir, I didn't see those.

9 Q. Okay.

10 THE COURT: Those were -- all.

11 MR. PARKS: Those were all admitted.

12 THE COURT: Okay.

13 Q. (BY MR. PARKS) When you testified on direct a
14 while ago, Jacob, and the prosecutor asked if you had
15 seen holes out there, you answered that you had seen
16 holes. Was it a mistake?

17 A. What do you mean?

18 Q. Well, "holes" would indicate more than one
19 hole. Did you see more than one hole?

20 A. I guess hole is proper, I guess.

21 Q. Well, enough about holes in the ground. You
22 also testified that Austin did not handle guns?

23 A. Yes, sir.

24 Q. Never?

25 A. Yes, sir.

1 Q. Ever?

2 A. Yes, sir.

3 Q. In his life?

4 A. I don't know about his life because I knew him
5 only so long.

6 Q. And you were with him always?

7 A. Not always, after school sometimes.

8 Q. So he might have handled guns at a time you
9 weren't with him?

10 A. I wasn't familiar with him hunting at all.

11 Q. See, Jacob, you left us the impression that he
12 never ever touched a gun and I'm trying to find how much
13 information you really have about that. He didn't take
14 a gun to school with him, did he?

15 A. No, sir.

16 Q. And that's when you saw him most was at school?

17 A. Not mostly. Outside of school because we went
18 to the movies a lot.

19 Q. You saw him -- I just want to make sure we're
20 clear. You are telling this jury you saw him more
21 outside of school, then?

22 A. Yes, I saw him outside. We only had one class
23 together.

24 Q. Okay. And so this would be after school?

25 A. Yes, sir.

1 Q. Okay. You spent the night over there a couple
2 of times. So the rest of it would be when you were over
3 after school for a period of time, right?

4 A. Yes, sir.

5 Q. And during that period of time, y'all didn't
6 handle guns?

7 A. No, sir.

8 Q. Okay. And that's the extent of your knowledge
9 about his handling guns, isn't it?

10 A. Yes, sir.

11 MR. PARKS: That's all the questions I
12 have.

13 REDIRECT EXAMINATION

14 BY MR. WHEELER:

15 Q. You said something about he made a remark in
16 the morning?

17 A. Yes, sir.

18 Q. And that concerned the rule about not going out
19 of your room at night, didn't it?

20 A. Yes, sir.

21 Q. What was the remark that was made in the
22 morning?

23 A. The remark being said to Austin which was
24 directed back at me was clearly this: "I noticed Jacob
25 didn't go out the side or made any noise. Maybe he

1 should have made some more noise."

2 Q. Who said that?

3 A. Jason Payne.

4 MR. WHEELER: Pass the witness.

5 RECROSS-EXAMINATION

6 BY MR. PARKS:

7 Q. All right. Let's try it again, Jacob: Slowly
8 and distinctly so I can understand it, what is it that
9 you're saying that he said that didn't make any sense to
10 you?

11 A. That he told Austin, he said -- he directed at
12 me was, "I noticed Jacob didn't make any noise at all in
13 the house. Maybe he should have made some more noise."

14 MR. PARKS: Okay. I don't have any more
15 questions.

16 MR. WHEELER: I don't either. Nothing
17 further, Your Honor. He may be released?

18 MR. PARKS: I have no objection.

19 THE COURT: Thank you, sir. You're free to
20 go.

21 MR. WHEELER: We would call Samantha
22 Pennington.

23 (Witness enters courtroom.)

24 THE COURT: Come on over and you were sworn
25 earlier, were you not?

1 THE WITNESS: Sir?

2 THE COURT: Have you been sworn in?

3 THE WITNESS: No, sir.

4 THE COURT: Raise your right hand.

5 (Witness sworn.)

6 THE COURT: Please have a seat.

7 SAMANTHA PENNINGTON,

8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. WHEELER:

11 Q. Hello.

12 A. Hello.

13 Q. Would you please state your name to the jury?

14 A. [Inaudible].

15 THE COURT: When you give your answers, I

16 want you to talk to the back person on the back row on

17 each end so we can hear you, okay?

18 THE WITNESS: (Moving head up and down).

19 Q. (BY MR. WHEELER) Can you do that?

20 A. Yes, sir.

21 Q. Ms. Pennington, how old you are?

22 A. I'm 18 years old.

23 Q. Where do you go to school?

24 A. Quitman.

25 Q. What grade are you in?

1 A. I'm a senior.

2 THE COURT: I'm going to need you --

3 Q. (BY MR. WHEELER) Have you ever testified in a
4 courtroom before?

5 A. No, sir.

6 Q. Okay. Well, did you know Austin Taylor Wages?

7 A. Yes, sir, I did.

8 Q. How did you know Austin Taylor Wages?

9 A. I had two classes with him in school.

10 MR. KING: Louder.

11 Q. (BY MR. WHEELER) How did you know --

12 A. I had two classes with him in school.

13 Q. There you go. All right. This is State's
14 Exhibit 122. Who is that in the photograph?

15 A. That's Austin Taylor Wages.

16 THE COURT: Sorry, you're going to have to
17 speak a little louder and slower.

18 THE WITNESS: It's Austin Taylor Wages.

19 Q. (BY MR. WHEELER) It's Austin Taylor Wages?

20 A. Yes, sir.

21 Q. Is that your friend?

22 A. Yes, sir.

23 Q. When did you first meet Austin?

24 A. It was closer to the beginning of school. I
25 don't know what month, but --

1 Q. It was closer to when?

2 A. Beginning of school.

3 Q. So at the beginning of the school year in 2007,
4 you first met Austin?

5 A. Yes, sir.

6 Q. And where did you meet him?

7 A. In class.

8 Q. Where did he sit?

9 A. Beside me to my left.

10 Q. Did y'all talk?

11 A. Yes, sir.

12 Q. On a few or many occasions?

13 A. All the time.

14 Q. Did he ever talk to you about Jason Payne?

15 A. No, sir, he didn't.

16 Q. Did you ever go to his house?

17 A. No, sir, I did not.

18 Q. Did you just visit with him at school as a
19 friend?

20 A. Yes, sir.

21 Q. Let me ask you this question: Did he have a
22 reputation at school for being peaceful and nonviolent?

23 A. Yes, sir, he did.

24 Q. Were you familiar with that reputation?

25 A. Yes, sir, I was.

1 Q. Was his representation good or bad?

2 A. It was very good.

3 Q. All right.

4 MR. WHEELER: Pass the witness.

5 MR. PARKS: We have no questions.

6 MR. WHEELER: May she be released?

7 MR. PARKS: No objection.

8 THE COURT: You're released as a witness.

9 (Witness exits courtroom.)

10 MR. WHEELER: Thank you. Next we call Alex
11 Hoggard.

12 (Witness enters courtroom.)

13 THE COURT: You were sworn earlier, were
14 you not? Didn't I swear you in?

15 THE WITNESS: Yes, sir.

16 THE COURT: Just go ahead and have a seat.

17 ALEX HOGGARD,

18 having been first duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WHEELER:

21 Q. Okay. We can hear now. Would you please state
22 your name for the jury?

23 A. Alex Hoggard.

24 Q. How are you currently employed?

25 A. I'm in the U.S. Army and I'm a construction

1 worker.

2 Q. Do you know Austin Taylor Wages?

3 A. Yes, I knew him.

4 Q. Was he a friend of yours?

5 A. Yes.

6 Q. The Austin Taylor Wages that you knew -- I'm
7 showing you what's been marked as State's.

8 Exhibit 122 -- is this your friend?

9 A. Yes, it is.

10 Q. Did you ever visit his house?

11 A. Yes, I did.

12 Q. Do you recall any rules when you stayed there
13 overnight that Jacob Payne had?

14 A. No.

15 Q. Let me ask you this question: Do you know
16 Austin's reputation --

17 A. He was --

18 Q. -- now, let me finish -- for being peaceful and
19 nonviolent?

20 A. Yes.

21 Q. Among you and his friends, was his reputation
22 good or bad?

23 A. It was good.

24 Q. Did you happen to have the opportunity, when
25 you were at that house, to see the interaction between

1 Austin Taylor Wages and Jason Tad Payne?

2 A. Yes.

3 Q. Let me ask you this question: Did they have a
4 close relationship?

5 MR. PARKS: Your Honor, Rule 701; calls for
6 a conclusion.

7 THE COURT: Sustained.

8 Q. (BY MR. WHEELER) Did you have the opportunity
9 to observe the relationship between Nichole Payne and
10 Jason Thad Payne?

11 MR. PARKS: Same objection, Your Honor.

12 Q. (BY MR. WHEELER) Did you have the opportunity
13 to observe it?

14 THE COURT: Overruled.

15 Q. (BY MR. WHEELER) Did you have the opportunity
16 to observe their relationship?

17 A. Yes, I did.

18 Q. Would you characterize that relationship or --

19 MR. WHEELER: Since I see Defense counsel's
20 already on his feet, I'll move along.

21 THE COURT: Yes, sir.

22 MR. WHEELER: Pass the witness.

23 MR. PARKS: I have no questions of this
24 witness.

25 THE COURT: Thank you, sir. You're finally

1 excused.

2 (Witness exits courtroom.)

3 MR. PARKS: Your Honor, may I approach the
4 bench?

5 THE COURT: Yes, sir.

6 (Bench.)

7 MR. PARKS: I want to lodge an objection
8 about the State asking questions that they withdrew an
9 objection just to see me object in the presence of the
10 jury after the Court has already ruled these issues --

11 THE COURT: That's record. It's not
12 appropriate conduct.

13 (Open court.)

14 MR. WHEELER: State calls Ms. Hamrick.

15 (Witness enters courtroom.)

16 THE COURT: Yes, ma'am, if you'll come on
17 around, and when you get to the witness stand, raise
18 your right hand.

19 (Witness sworn.)

20 THE COURT: Please have a seat.

21 DANA HAMRICK,
22 having been first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. WHEELER:

25 Q. Good afternoon.

1 A. Hello.

2 Q. Would you please state your name for the jury?

3 A. Dana Hamrick.

4 Q. How are you currently employed?

5 A. I'm the school counselor for Quitman High
6 School.

7 Q. How were you employed on or about December 11,
8 2007?

9 A. Quitman High School counselor.

10 Q. Could you please describe for the jury the
11 training and experience that you have received to be
12 certified by the State of Texas as a counselor in a
13 secondary school?

14 A. Well, I taught -- I was a certified teacher
15 from 1990 to 1999. I have a Master's Degree in school
16 counselling from UT Tyler, and I took a test to become
17 certified as a school counselor, all grades K through
18 12.

19 Q. Now, in 2007, as counselor for Quitman High
20 School, were you familiar with a student named Austin
21 Taylor Wages?

22 A. Yes.

23 (Interruption in the proceedings.)

24 MR. WHEELER: For purposes of the record,
25 may it reflect that a siren is blaring outside.

1 THE COURT: The record shall so reflect.

2 MR. WHEELER: Thank you.

3 THE COURT: All right.

4 Q. (BY MR. WHEELER) Let me show you what's been
5 marked as State's Exhibit 122. Is this a fair and
6 accurate depiction of Austin Taylor Wages?

7 A. Yes.

8 Q. Okay. Did you have an opportunity to visit
9 personally with Austin?

10 A. Yes.

11 Q. And overtime, did you have the opportunity to
12 see him interact with other students on campus?

13 A. Yes.

14 Q. First question with regard to that interaction:
15 Were you able to form an opinion as to his reputation --

16 A. Yes.

17 Q. -- among his peers for being peaceful and
18 nonviolent?

19 A. Yes.

20 Q. And was that reputation good or bad?

21 A. It was a good bad. He was a peaceful.

22 MR. PARKS: Your Honor, she's answered the
23 question.

24 THE COURT: Yes, sir.

25 Q. (BY MR. WHEELER) Were you -- do you have

1 personal knowledge of how he performed at school?

2 A. Yes.

3 Q. And did you have an opportunity to review the
4 records before you came to court today?

5 A. Yes.

6 Q. Was his performance good or bad?

7 A. Good.

8 Q. Did you have an opportunity to review his
9 attendance?

10 A. Yes.

11 Q. Was his attendance good or bad?

12 A. Good.

13 Q. Did he have friends?

14 A. Yes.

15 MR. WHEELER: Your Honor, may we approach?

16 THE COURT: Yes, sir.

17 (Bench.)

18 MR. WHEELER: Here's the question I
19 propose: In your opinion, based on your training and
20 experience, was he a well-adjusted child?

21 MR. PARKS: That is a professional opinion,
22 I suppose. You asked her about the training. She
23 hasn't been designated as an expert witness. We had no
24 reason she would be called upon to give --

25 THE COURT: It is an expert question. I'll

1 sustain that question.

2 MR. WHEELER: Okay.

3 (Open court.)

4 MR. WHEELER: Pass the witness.

5 MR. PARKS: May I have just a moment, Your
6 Honor?

7 THE COURT: Yes, sir.

8 (Pause in the proceedings.)

9 MR. PARKS: No questions.

10 THE COURT: Thank you, Ma'am.

11 MR. WHEELER: May this witness finally be
12 excused, Your Honor?

13 MR. PARKS: I have no objection.

14 THE COURT: Thank you, Ma'am. You're free
15 to go.

16 THE WITNESS: Thank you.

17 (Witness exits courtroom.)

18 MR. WHEELER: May I approach?

19 THE COURT: Yes, sir.

20 (Bench.)

21 MR. WHEELER: May I have a break, please?

22 THE COURT: Yes, sir.

23 MR. WHEELER: Thank you.

24 (Open court.)

25 THE COURT: All right. Ladies and

1 gentlemen, let me ask you to remember your prior
2 instructions and be available in the jury room at 3:20.
3 Please go with the bailiff at this time.

4 (Jury exits courtroom.)

5 THE COURT: All right. We're in recess
6 until 3:20.

7 (Recess taken from 3:08 to 3:20.)

8 THE COURT: Back on the record, then, in
9 20,529-2008, State vs. Jason Tad Payne. Let the record
10 reflect counsel for the State, counsel for the
11 Defendant, and the Defendant is present. Let the record
12 reflect jury is not present.

13 I understand we need to take about five
14 minutes to put some matters on outside the presence of
15 the jury.

16 MR. WHEELER: We pursuant to the motion, we
17 need to put on some testimony from Dmitri Nobles.

18 THE COURT: Very well. If you'll bring him
19 in. Has he been sworn in or do you know?

20 MR. WHEELER: No, Your Honor, he will need
21 to be sworn in.

22 (Witness enters courtroom.)

23 THE COURT: Let me ask you to raise your
24 right hand and let me swear you in.

25 (Witness sworn.)

1 THE COURT: Please have a seat.

2 BILL OF EXCEPTION

3 BY MR. WHEELER:

4 DMITRI NOBLES,

5 having been first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. WHEELER:

8 Q. Please state your name.

9 A. Dmitri Nobles.

10 Q. How you currently employed?

11 A. I'm a professional poker player.

12 Q. Do you know Nichole Payne?

13 A. Yes.

14 Q. How do you know her?

15 A. She and I dated.

16 Q. In 2007, did Nichole Payne make contact with
17 you?

18 A. Yes, sir.

19 Q. How?

20 A. By telephone.

21 Q. What did she say to you?

22 A. She gave me a call and told me how she got my
23 phone number and said that -- you know, she
24 started -- we had a two-hour conversation.

25 Q. After that initial conversation, did you remain

1 in contact with her?

2 A. Yes.

3 Q. Do you know approximately when that
4 conversation took place?

5 A. The first --

6 Q. The first --

7 A. I'm going to say the end of August. I'm not
8 exactly sure.

9 Q. Approximately, August 2007?

10 A. Yes.

11 Q. Did you, then, begin to correspond by
12 electronic mail?

13 A. Yes, sir.

14 Q. Did you also have telephone conversations?

15 A. Yes, sir.

16 Q. Did she discuss with you her relationship with
17 Jason Tad Payne?

18 A. Yes, sir.

19 Q. How did she describe her relationship with
20 Jason Tad Payne?

21 A. She told me that -- you know, it was a long
22 conversation but, in turn, she just said, you know, all
23 the things she had been through, that they got a lot of
24 money and she had been more unhappy in her life.

25 Q. When did she tell her she was unhappy?

1 A. That was within a few weeks of our
2 conversation.

3 Q. After she told you she was unhappy, did she
4 tell you anything else about the relationship with Jason
5 Tad Payne?

6 A. Yes, sir.

7 Q. What did she tell you?

8 A. I asked her if she thought -- I asked her if
9 Taylor still remembered me and she said she wasn't sure,
10 and I asked her about some pictures and stuff that we
11 had and she said that she didn't have them anymore, and
12 I asked why and she said, because we got into a lot of
13 fights about those pictures, and she said if Jason ever
14 found out that she dated a black guy, he would kill her.

15 Q. Did she talk to you about the relationship with
16 Jason further?

17 A. Yes, sir.

18 Q. Did she talk to you about their sexual
19 relationship?

20 A. Yes, sir.

21 Q. Did you discuss that via electronic
22 communication or by telephone?

23 A. Most of them by telephone.

24 Q. What did she tell you about the sexual
25 relationship to Jason Tad Payne?

1 A. She said that it had been probably between six
2 or eight months since they had sex.

3 Q. And did she tell you that she was contemplating
4 divorce?

5 A. Yes.

6 Q. How did the communication come to an end?

7 A. Well, I got an email that said -- that was
8 uncharacteristic of her.

9 Q. How was it uncharacteristic?

10 A. You know, from all the conversations, the email
11 said that Jason -- it said -- I don't know exactly how
12 it read, but it was stating that she was happy in her
13 relationship, not to ever contact her again, and she was
14 sorry that she ever contacted me.

15 Q. Did you believe this was authored by someone
16 other than Nichole Payne?

17 A. Definitely.

18 Q. And that was based on what?

19 A. Based on all the other conversations that we
20 had before.

21 Q. So in the exchange of letters, this was a
22 letter that was out of the ordinary?

23 A. Yes.

24 Q. Okay. Authorship of that last letter, that's
25 based on your perception of prior communications?

1 A. Yes, sir. Yes, sir.

2 MR. WHEELER: Pass the witness, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. PARKS:

5 Q. Mr. Nobles, is it?

6 A. Yes, sir.

7 Q. Where do you live, Mr. Nobles?

8 A. I live in Cypress, Texas.

9 Q. When did you and Nichole date?

10 A. We dated in -- I want to say from '95 until 98,
11 '99.

12 Q. Was that before she met Jason Payne?

13 A. She met -- she met Jason during the time she
14 and I were dating.

15 Q. Had y'all broken up when she married Mr. Payne?

16 A. Yes.

17 Q. How long had y'all been broken up?

18 A. I really don't know because I don't know when
19 they got married.

20 Q. If we had testimony that they married two weeks
21 after they met, would that give you any help in
22 determining that?

23 A. Well, if they got married two weeks after they
24 met, I'm going to have to say I was still seeing her.

25 Q. And she had Taylor when you were seeing her?

1 A. Yes.

2 Q. From her previous relationship?

3 A. Yes, sir.

4 Q. Mr. Wages, did he know?

5 A. I didn't know about him.

6 Q. Did he know?

7 A. Yes, sir.

8 Q. At the time y'all were dating?

9 A. Yes.

10 Q. Now, you've indicated that you got this email.

11 Do you have it?

12 A. No, sir, I sure don't.

13 Q. Have you turned it over to the District

14 Attorney's Office?

15 A. Yes, sir. I gave it to Mr. Tucker.

16 Q. When did you do that?

17 A. As soon as I found out about the murder.

18 Q. Okay. So how did you -- you saved that email?

19 A. Yes.

20 Q. Is it still saved on your computer?

21 A. No, sir.

22 Q. So you made -- just printed a copy of it?

23 A. I forwarded him a copy.

24 Q. Forwarded him a copy, okay.

25 A. There were several different mail exchanges.

1 Q. So when did you get this email, as best you can
2 recall, this happy-in-the-relationship email?

3 A. I got that email, I'm going to say, some time
4 early November would be my guess. I don't know the
5 exact date.

6 Q. And since it was different in tone from your
7 prior conversations and emails, it is your supposition
8 that it was authored by someone else?

9 A. Yes, sir.

10 Q. That's going to be your testimony, as you
11 understand it?

12 A. Yes, sir.

13 MR. PARKS: That's all the questions I
14 have, Judge.

15 THE COURT: You can go on out. Oh, I
16 guess, the --

17 MR. WHEELER: Well, you've heard what he's
18 got to say, and, of course, we would like to have all of
19 it, but I understand the Court's prior rulings. I also
20 understand the predicate problems, so that leaves us
21 with -- and for purposes of the record, I've never seen
22 those emails and they have never been forwarded to me by
23 any entity. I don't know if those emails exist.

24 Now, the relationship existing between the
25 accused and the deceased, he can testify to the

1 telephone conversations he had. With regard to her
2 plans of getting a divorce, that can go to the state of
3 mind, her state of mind. And then with regard to the
4 sexual relationship, we say it shows a deteriorating
5 relationship, a dicy relationship as best.

6 Finally, with regard to her comments to him
7 about if, "he knew we were together," there would be a
8 death, hers, her -- the fear of the Defendant. We
9 believe that goes to her then existing state of mind at
10 the end of her life, and the unhappiness comments. So
11 we've got unhappiness, her fear of death based on the
12 prior relationship, plans to seek a divorce, and I think
13 those are the admissible portions of the testimony.

14 MR. PARKS: Okay. I'm not sure about the
15 business about the sexual relations. The Court's
16 already ruled on it, or are you re-offering?

17 MR. WHEELER: We're offering it for
18 purposes of the record and letting the Court rule on it.

19 THE COURT: And -- well, I'm sorry. Go
20 ahead and finish what you were going to say.

21 MR. PARKS: You know, much of everything
22 else that he's got to be accumulative to what we've
23 already heard, repetitious, but chiefly, we object to
24 his talking about the sexual relations between those two
25 parties, about which he knows nothing other than what

1 he's been told in all this email stuff.

2 THE COURT: Well, certainly, regarding the
3 sexual relationship between them, that prior ruling was
4 based on the pejorative element being so great, that the
5 variance between -- the relevance between the pejorative
6 element is going to be so great if you couldn't
7 establish that he knew about the relationship. And
8 apparently, the only bases for that is the fact that
9 there's an email received that says, we're great, we're
10 getting along great, and he's assuming -- he didn't use
11 the words, but obviously assuming that Mr. Payne had
12 found out and had sent that. That's a leap the
13 Court -- I don't know that the Court can make. It's as
14 easily be -- you know, something working the other
15 direction and maybe should have been handed over, I
16 think -- under any circumstances that I don't think it's
17 appropriate to go into their sexual relationship. The
18 fact that they talked and that she talked about
19 contemplating divorce, you know, again, it goes -- it
20 goes to state of mind and I think you can talk about
21 that and being unhappy, but -- yes, sir.

22 MR. PARKS: And specifically, I didn't -- I
23 wasn't real articulate in my objections about that, but,
24 of course, our position is with respect to the fear of
25 death portion, that's what he's talking about with him

1 saying Jason --

2 THE COURT: I don't know how you get into
3 the fear of death without getting into the sexual
4 relationship. That's the problem. That's based on the
5 fact they're having an affair and that only becomes
6 relevant if the Defendant knew that they were having an
7 affair and --

8 MR. WHEELER: Well, the testimony, as I
9 understood it -- and pardon me, Your Honor -- was that
10 if he -- it was within the context of photographs that
11 the two had together and from a previous relationship
12 and those photographs were gone and the response that
13 was out of this witness, "If he discovers that I've had
14 a relationship with an African-American, then he'll kill
15 me." It wasn't the current affair. It was the past
16 relationship.

17 THE COURT: And I stand corrected, but I
18 still think -- not only solves the problem because we
19 got into a real bad 403 problem there. If you've got
20 that without, again, being able to establish that he
21 knew about it, then the relevance gets to be awfully,
22 awfully thin. The pejorative impact remains great. The
23 balance begins to be the problem. If you want to put
24 him on -- go into those other things, the fact they had
25 conversations and she talked about being unhappy and

1 talked about contemplating divorce, that's fine. I
2 think when we're getting into the rest of it, we've got
3 problems.

4 MR. WHEELER: Now, I need to visit with my
5 witness so I can make it clear what the Court's ruling
6 is.

7 THE COURT: Yes, sir.

8 MR. WHEELER: With regard to the matters
9 we're not able to go into, I would like to offer that as
10 bill.

11 THE COURT: Yes, sir. That's received.

12 MR. WHEELER: The State of Texas, by and
13 through her District Attorney, makes this following bill
14 of exception: With regard to the testimony of Dmitri
15 Nobles, we offer each question and answer as a separate
16 bill. This concludes the State's bill. Thank you.

17 THE COURT: The Court understands that that
18 would include anything that isn't admitted into evidence
19 when he actually --

20 MR. WHEELER: Can I have about five
21 minutes?

22 THE COURT: Can you do that in the couple
23 minutes?

24 MR. WHEELER: I'll do the best I can.

25 THE COURT: They're wondering what in the

1 heck we're doing now.

2 MR. WHEELER: Sure.

3 (Pause in the proceedings.)

4 THE COURT: All right. Back on the record.

5 Counsel for both sides are present. The Defendant is

6 present. The jury is not present.

7 Is the State ready to proceed?

8 MR. WHEELER: State's ready.

9 THE COURT: Then bring the ladies and
10 gentlemen in.

11 (Jury enters courtroom.)

12 THE COURT: All right. Let the record
13 reflect the jury has returned to the courtroom.

14 The State may call its next witness.

15 MR. WHEELER: State calls Dmitri Nobles.

16 THE COURT: If you'll come on over and have
17 a seat.

18 THE WITNESS: Yes, sir.

19 THE COURT: And let the record reflect the
20 witness previously was sworn.

21 DMITRI NOBLES,

22 having been first duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. WHEELER:

25 Q. Good afternoon, Mr. Nobles.

1 A. Hello.

2 Q. Would you please state your name for the jury?

3 A. Dmitri Nobles.

4 Q. How are you currently employed?

5 A. I'm a professional poker player.

6 Q. Have you been on national television?

7 A. Yes.

8 Q. Which program?

9 A. ESPN.

10 Q. With regard to this case, do you know Nichole
11 Payne?

12 A. Yes, sir.

13 Q. When did you first meet Nichole Payne?

14 A. I met Nichole back in 1995, I believe it was.

15 Q. And when did you cease to have communication
16 with Nichole Payne?

17 A. I'm going to say some time in '98 or '99.

18 Q. What town were you living in at the time you
19 were friends with Nichole Payne?

20 A. Nacogdoches, Texas.

21 Q. Where do you live now?

22 A. I live in Cypress, Texas, which is northwest of
23 Houston.

24 Q. Later in 2007, did Nichole Payne make contact
25 with you?

1 A. Yes, sir.

2 Q. How did she initiate contact with you?

3 A. A phone call.

4 Q. When you talked to her on the telephone, did
5 she -- how long did she talk to you?

6 A. We had about a two-hour conversation.

7 Q. Did you recognize her voice?

8 A. Yes, sir.

9 Q. I'm showing you what's been marked as State's
10 Exhibit 123. Who is this?

11 A. That's Nichole.

12 Q. Is that a fair and accurate depiction of
13 Nichole Payne?

14 A. Definitely.

15 Q. When you talked to her on the phone during that
16 two-hour conversation, did she discuss with you any
17 details concerning her marriage to Jason Tad Payne?

18 A. Yes, sir.

19 Q. How long or when did she make this contact with
20 you?

21 A. She made this contact with me about -- I'm
22 going to say about two and a half months before she was
23 deceased.

24 Q. When she talked to you, did she give you any
25 idea about her emotional attitude toward the marriage?

1 A. Yes.

2 Q. What was her attitude toward the marriage?

3 A. She said she was as unhappy as she ever had
4 been in life.

5 Q. Did she have any plans in regard to her
6 marriage to Jason Tad Payne?

7 A. Yes.

8 Q. What were her plans she told you?

9 A. She was getting divorced.

10 MR. WHEELER: Pass the witness.

11 CROSS-EXAMINATION

12 BY MR. PARKS:

13 Q. Mr. Nobles, you and Nichole were seeing each
14 other after her divorce from Todd Wages?

15 A. Yes, sir.

16 Q. And before she married Mr. Payne?

17 A. Yes, sir.

18 Q. And then, I guess, what, you all lost touch
19 with each other for a time and she reinstituted the --

20 A. Yes, sir.

21 Q. Some time in August or September of 2007, would
22 that be about, right?

23 A. It's somewhere around that area. I'm not real
24 specific on the dates, but it was real close to the time
25 that she --

1 Q. Was it just this one phone call or did you
2 continue to visit?

3 A. Yes, sir, there were more than one phone call.

4 MR. PARKS: Thank you, sir. That's all the
5 questions I have.

6 REDIRECT EXAMINATION

7 BY MR. WHEELER:

8 Q. I do have one question: When did your
9 communication with Nichole end?

10 A. I received an email.

11 Q. When?

12 A. It was, I'm going to say, some time in the
13 beginning of November.

14 MR. WHEELER: Okay. Thank you. Nothing
15 further, Your Honor.

16 MR. PARKS: Nothing further.

17 THE COURT: Thank you. You may go ahead
18 and step down.

19 THE WITNESS: Yes, sir.

20 MR. WHEELER: May he be finally excused,
21 Your Honor?

22 MR. PARKS: I have no objection.

23 THE COURT: You're released as a witness.

24 THE WITNESS: Thank you.

25 (Witness exits courtroom.)

1 MR. WHEELER: State calls Preston Bridges.

2 (Witness enters courtroom.)

3 THE COURT: Mr. Bridges, just come on over
4 and have a seat.

5 And let the record reflect the witness
6 previously was sworn.

7 You were sworn earlier?

8 THE WITNESS: No.

9 (Witness sworn.)

10 THE COURT: Please have a seat.

11 PRESTON BRIDGES,

12 having been first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. WHEELER:

15 Q. Good afternoon.

16 A. Good afternoon.

17 Q. Would you please state your name for the jury?

18 A. Preston Bridges.

19 Q. How are you currently employed?

20 A. Retired.

21 Q. Where do you live?

22 A. County Road 4116, about two-and-a-half miles
23 outside of Quitman here, east.

24 Q. Does your property abut the property of Jason
25 Tad Payne?

1 A. Where I live don't, but I have property that
2 does about their property.

3 Q. Approximately, how much property do you have
4 that adjoins Jason Payne's property?

5 A. About 14 acres.

6 Q. How long has that property been in your family?

7 A. Early 1900s.

8 Q. Now, at some point, did it come to your
9 attention that there were some holes on that property?

10 A. Yes, sir.

11 Q. I'll hand you some pictures that have been
12 identified as Exhibits 83, 82, 81, 80, 79, 78, 77, 76,
13 75. Can you identify these pictures?

14 A. Yes, sir. They're very similar. It appears to
15 be the same holes.

16 Q. Now, this piece of property that has those
17 holes on it, has that ever been a homesite?

18 A. No, sir.

19 Q. How do you know?

20 A. I didn't -- what?

21 Q. How do you know?

22 A. As I said, that property has been in my family
23 since the early 1900s, and I've owned it for 15 years
24 and I was born and raised on the farm that included all
25 this property, and I know for 67 -- 70 years, no home

1 has before been near that.

2 Q. That particular location, how was it used?

3 A. Pasture. I remember shredding in high school
4 with a horse-drawn mower and my father as well.

5 Q. Did Jason Tad Payne ever approach you about
6 purchasing this property?

7 A. Yes, he did.

8 Q. Did he approach you along with his wife?

9 A. Yes, they did.

10 Q. The Jason Tad Payne that approached you about
11 purchasing this property, is he in the courtroom today?

12 A. I believe so.

13 Q. Could you point to him and identify him by the
14 clothing he's wearing?

15 A. Tan shirt, brown coat, tie. [Indicating].

16 MR. WHEELER: Your Honor, may the record
17 reflect that he's identified the Defendant?

18 MR. PARKS: We can see that that's Jason
19 Payne.

20 THE COURT: Without objection, I'll go
21 ahead let the record so reflect.

22 MR. WHEELER: Must have not been paying
23 close enough attention.

24 Q. (BY MR. WHEELER) Let me ask you this question:
25 How did the subject of purchasing the property coming

1 up?

2 A. I was shredding the -- I have two sections. I
3 was shredding along the highway, the fence road.

4 Q. Yes, sir.

5 A. And he and his wife came out and asked would I
6 mind shredding from their property line. I said, no, I
7 wouldn't. I went ahead and proceeded to shred that
8 part. They told me their plans and asked me would I be
9 willing to sell that property. I said I wouldn't --

10 Q. Now, you said you were retired. What did you
11 used to do for a living?

12 A. Wood County National Bank vice president.

13 Q. How many years were you with the bank?

14 A. 19 years.

15 Q. When they proposed purchasing that land that
16 adjoined them, did you have further conversations with
17 them about the land?

18 A. Well, that afternoon he asked me would I sell
19 it. I told him I would -- I think I told him what I
20 wanted for it. Him and his wife wanted to buy the
21 property and wanted to know if I would finance it and I
22 said --

23 Q. What was your response?

24 A. I said, yes, I would consider financing it, but
25 I would want to know their financial position and what

1 they could afford a month on it, and they did not know
2 at that time.

3 Q. What did you learn about their financial
4 condition that gave you pause?

5 A. Well, at that time, they said -- I advised them
6 to go home and figure out what they could afford, what
7 the income was, what they could afford, and he and his
8 wife came over to my house that evening and visited with
9 us a couple, three hours.

10 Q. What was their information in regard to their
11 finances?

12 A. Well, at the time, the proposition they offered
13 to me where they could -- wanted me to carry "X" number
14 of months, no income, and then I think that was probably
15 July, August, during this visit. It seemed after the
16 first year before they could start paying and I said I
17 wouldn't be interested in doing anything like that.

18 Q. Was that the end of the negotiations and the
19 discussions about the purchase of the property?

20 A. That was the last time I saw either one of
21 them.

22 MR. WHEELER: Okay. Thank you. Pass the
23 witness.

24 CROSS-EXAMINATION

25 BY MR. KING:

1 Q. Do you recall approximately when was that,
2 Mr. Bridges?

3 A. It's probably July, August. I was shredding
4 the pasture that Summer, so I don't remember what month
5 it was.

6 Q. Okay. Did you ever find any bodies in those
7 holes?

8 A. No, sir.

9 Q. Were those holes big enough to take a body?

10 A. Yes, sir, they were.

11 MR. KING: Pass the witness, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. WHEELER:

14 Q. Were those holes made by animals or natural
15 forces?

16 A. It was mechanically or physically dug.

17 Q. How do you know that?

18 A. The size of them and way the walls were, as
19 deep as they were.

20 Q. You have experience in digging holes?

21 A. Well, yes, I have.

22 Q. What did you do in the past?

23 A. Farm boy.

24 Q. And?

25 A. Digging postholes.

1 Q. And?

2 A. And I've helped my father dig graves before.

3 MR. KING: Your Honor, we would consider
4 he's an expert in holes.

5 THE COURT: Let move along.

6 MR. WHEELER: I would be willing to
7 stipulate he's a hole expert, you bet. Pass the
8 witness.

9 MR. KING: No questions, Your Honor.

10 THE COURT: May he finally be excused?

11 MR. KING: Yes, sir.

12 MR. WHEELER: Yes, Your Honor.

13 THE COURT: You're free to go.

14 (Witness exits courtroom.)

15 MR. WHEELER: And we'll call Kyle Bridges.

16 (Witness enters courtroom.)

17 THE COURT: Yes, sir. If you'll come on
18 around, and when you get here, get you to raise your
19 right hand.

20 (Witness sworn.)

21 THE COURT: Please have seat.

22 KYLE BRIDGES,

23 having been first duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. WHEELER:

1 Q. Would you please state your name for the jury?

2 A. Kyle Bridges.

3 Q. Kyle, how old are you?

4 A. 15.

5 Q. Are you familiar with a piece of your
6 granddaddy's, Preston Bridges, property that adjoins the
7 property of Jason Tad Payne?

8 A. Yes, sir.

9 Q. Have you been on that property on a few or many
10 occasions?

11 A. Many.

12 Q. Did you have a chance or did you come across
13 some strange holes on that property?

14 A. Yes, sir.

15 Q. Could you describe for the jury the holes you
16 came across on that property?

17 A. There was two of them and the biggest -- there
18 was a big one and a smaller one. The biggest one was
19 probably seven-foot deep and four-foot wide and about
20 ten-foot long. The smaller one was about five-foot wide
21 about a foot-and-a-half deep and two-foot wide.

22 Q. Those holes that you found, were they freshly
23 dug?

24 A. I couldn't say.

25 Q. Was the dirt fresh?

1 A. I couldn't say. I don't know.

2 Q. Let me ask you this question: When did you
3 find them?

4 A. I found them about the week of Thanksgiving.
5 It was about two -- it was Monday or Tuesday before
6 Thanksgiving Day.

7 Q. So you found them in late November of 2007,
8 right?

9 A. Yes, sir.

10 Q. You had been across that little patch before,
11 hadn't you?

12 A. Yes, sir.

13 Q. How recently before the discovery of those
14 holes had you been through that area?

15 A. Within the last two months.

16 Q. And within the two months before the end of
17 November, did you see those holes in that area?

18 A. No, sir.

19 Q. Now, when did you decide to finally tell
20 somebody that you had seen those holes in that area?

21 A. I think I told my parents the day after the
22 incident.

23 Q. And have you been back to that area since?

24 A. Yes, sir.

25 Q. Those holes still there?

1 A. Yes, sir.

2 MR. WHEELER: Pass the witness.

3 CROSS-EXAMINATION

4 BY MR. PARKS:

5 Q. Kyle, if I understand you, apparently, the
6 holes would have been dug some time between September
7 and the time you found them in late November?

8 A. Yes, sir.

9 Q. Of course, you don't know who dug those holes?

10 A. No, sir.

11 Q. One was only a foot-and-a-half deep, about?

12 A. Yes, sir, about a foot-and-a-half deep.

13 MR. PARKS: That's all I have. Thank you.

14 REDIRECT EXAMINATION

15 BY MR. WHEELER:

16 Q. When did you tell your family about those
17 holes?

18 A. The day after or the day of the incident.

19 Q. Did you have occasion where the entire Bridges
20 family was together soon thereafter?

21 A. Yes, sir. I told my grandparents Christmas
22 Eve, I guess.

23 Q. Were your relatives there at that time?

24 A. Yes, it was my family and my grandparents.

25 Q. Anybody on that property admit digging those

1 holes?

2 A. No, sir.

3 MR. WHEELER: Pass the witness.

4 MR. PARKS: No further questions.

5 THE COURT: Thank you, sir. You're finally
6 excused as a witness.

7 (Witness exits courtroom.)

8 MR. WHEELER: State calls Todd Wages.

9 (Witness enters courtroom.)

10 THE COURT: Mr. Wages, if you'll come
11 around and let me get you to raise your right hand.

12 (Witness sworn.)

13 THE COURT: Please have a seat.

14 BRENT TODD WAGES,

15 having been first duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. WHEELER:

18 Q. Mr. Wages, would you please state your name for
19 the jury, your full name?

20 A. Brent Todd Wages.

21 Q. Mr. Wages, how are you currently employed?

22 A. I work for Forrest Pharmaceuticals. I'm a
23 pharmaceutical rep.

24 Q. How are you related to Austin Taylor Wages?

25 A. He's my son.

1 Q. I want to show you what's been marked as
2 State's Exhibit No. 121. Can you identify it?

3 A. It's my son.

4 Q. Is this how he appeared -- is this a fair and
5 accurate representation of your son around December
6 of 2007?

7 A. Yes, sir.

8 Q. All right. Where was he living in December
9 of 2007?

10 A. Here in Quitman, Texas.

11 Q. Where were you living?

12 A. Flint, Texas.

13 Q. How far was your home from his home here?

14 A. About an-hour-and-30-minute drive.

15 Q. I'd like you to tell the jury how you learned
16 that your boy had died.

17 A. I had -- I was in Muncie, Indiana, at my
18 father's wife's funeral and had driven home and gotten
19 in about 3:00 in the morning, the next morning, and my
20 wife told me when I got in about 3:00 that morning.

21 Q. Did Jason Payne tell you or any of the other
22 relatives that your boy or his mother had died?

23 A. No, sir. No, we learned -- my wife learned of
24 it from --

25 MR. PARKS: Objection to hearsay.

1 THE COURT: Sustained.

2 Q. (BY MR. WHEELER) All right. Now, I'm going to
3 ask you this question just straight out because it's
4 come up here in the courtroom: Did you pay for a hit
5 man to kill Nichole Payne?

6 A. No, sir. No, sir.

7 Q. Now, let's talk about your boy and that
8 relationship: You and Nichole Payne met when?

9 A. 1990.

10 Q. How old were you when you met her?

11 A. I was 20 years old, I believe.

12 Q. And how old was she?

13 A. She was 18. I mean, I don't remember exactly,
14 somewhere around 20 and 18, 21 and 18, something like
15 that.

16 Q. What year was Taylor born?

17 A. 1991.

18 Q. Y'all were pretty young to have a new baby,
19 weren't you?

20 A. We were two stupid kids.

21 Q. Your relationship broke down, didn't it?

22 A. Yes, sir.

23 Q. Where did she choose to carry on with her life?

24 A. She continued to live in Nacogdoches, Texas,
25 where we both had lived.

1 Q. And after your divorce, you entered into a
2 custody arrangement, didn't you?

3 A. Yes, sir.

4 Q. Pursuant to that custody agreement, what kind
5 of visitation did you have with your boy, Taylor?

6 A. I saw Taylor every other weekend.

7 Q. Did you exercise your visitation?

8 A. Yes, sir, I did.

9 Q. Now, this relationship with Nichole, post
10 divorce, it had bumpy moments, didn't it?

11 A. Yes, sir, it did.

12 Q. Did you meet your financial obligations with
13 your son?

14 A. Every single month.

15 Q. And did you see your son on a regular basis?

16 A. Yes, sir, I did.

17 Q. When did your visitation with Taylor start to
18 get more sporadic?

19 A. When he became, probably, 12 years old, 11 or
20 12 years old. He didn't want to come some weekends.
21 Some weekends he would come and some weekends he
22 wouldn't come. He had friends. It became sporadic
23 about 11 or 12 years old.

24 Q. When he came to your home, did you make it
25 clear that that was his home?

1 A. Yes, sir, I did.

2 Q. And did he know that until he died?

3 A. Yes, sir, he did.

4 Q. How did he know it?

5 A. Because I told him.

6 Q. Now, when's the last time you saw your boy?

7 A. Last time I physically saw him was Christmas
8 1996.

9 Q. What happened?

10 A. His mother called me and said that Taylor
11 wanted -- or needed to come to my house. I went and
12 picked him up and he stayed with me for two or three,
13 four days and took him home.

14 Q. Did you say '96?

15 A. Yes, sir. Well, it could have been '97. There
16 during the Christmas break, '96, '97.

17 Q. That was after she had begun her relationship
18 with Jason Tad Payne, wasn't it?

19 A. Yes, sir.

20 Q. Was the reason she said to come pick him up --
21 I withdraw that question.

22 Okay. Did you continue to talk with your
23 boy?

24 A. Over the phone, yes, sir.

25 Q. For the rest of his life?

1 A. Up until they moved to Quitman, yes, sir.

2 Q. What happened after they moved to Quitman with
3 regard to your contact with your son, Taylor?

4 A. I was never personally told that they moved to
5 Quitman. No one called me and told me they moved to
6 Quitman. They just moved to Quitman. I think that I
7 ran into Richard and Sherry in Nacogdoches and asked
8 them -- I think they told me -- I don't really remember
9 exactly how I learned they moved to Quitman. I was
10 never given a telephone number. I was never given. I
11 had no idea where their home was in Quitman.

12 Q. When you learned they had moved to Quitman, did
13 you attempt to initiate contact with your son?

14 A. Not personally through him, but I did through
15 the school.

16 Q. Now, the jury needs to know that. As a product
17 of divorce, did you have some trouble keeping tabs on
18 what was going on with your son at school?

19 A. Yes, sir, I did.

20 Q. To keep up your son at school, what did you do?

21 A. I would make phone calls to the counselor and I
22 would make appointments to go see him. That's how I got
23 his grades. That's how I got how he was doing in
24 school.

25 Q. Did you keep up with your boy throughout his

1 academic career by making regular contact with the
2 counselor?

3 A. Yes, sir, I did. That's how I got his grades.

4 Q. Did you make contact with the counselor here in
5 Quitman?

6 A. Yes, sir, I did.

7 Q. Did you keep tabs on him here?

8 A. Yes, sir, I did.

9 Q. Now, when was the last time you talked to your
10 boy on the phone? Did you talk to him any when he was
11 Quitman?

12 A. No, sir.

13 Q. When he moved to Quitman, all your
14 communication stopped?

15 A. Yes, sir.

16 Q. Okay. Nichole did contact you in the last
17 couple of months of her life, didn't she?

18 A. Yes, sir.

19 Q. How did she communicate with you, by what
20 medium?

21 A. She would send me a postcard.

22 Q. You paid your child support through the Child
23 Support Division of the Attorney General's Office; isn't
24 that correct?

25 A. Yes, sir. It's always been coming straight out

1 of my checks.

2 Q. Well, what was she telling you in those
3 postcards?

4 MR. PARKS: Objection.

5 MR. KING: Hearsay, Your Honor.

6 THE COURT: Well, let me have y'all
7 approach.

8 (Bench.)

9 THE COURT: And, you know, at this point in
10 time -- what in the postcard?

11 MR. WHEELER: It's state of mind with
12 regard to her financial condition, writing him directly
13 because of her -- with regard to the financial
14 situation.

15 MR. PARKS: I object to relevance, Your
16 Honor.

17 THE COURT: Well --

18 MR. WHEELER: And the State's response is
19 the financial conditions are in front of the jury.

20 THE COURT: I think it is. I'm going to
21 overrule that objection.

22 (Open court.)

23 Q. (BY MR. WHEELER) Did she describe her
24 financial condition in the postcards she sent to you?

25 A. I really don't know how to answer that, you

1 know. She never said, we're dead broke, send me money.

2 It was, we need money.

3 Q. Okay. Just so the jury knows, your obligations
4 were being met how?

5 A. Up until -- up until December of that year, it
6 was -- it's deducted straight from my paycheck. I never
7 saw the money. It went straight to the Attorney
8 General's Office and they paid her.

9 Q. How much were you paying each month?

10 A. 6 or \$700 a month.

11 Q. Okay.

12 A. I really don't remember the exact amount.

13 Q. And when you found out about Taylor and what
14 had happened, did you make arrangements for him?

15 A. Yes, sir, I did.

16 MR. WHEELER: Pass the witness.

17 CROSS-EXAMINATION

18 BY MR. KING:

19 Q. Was there any talk about Austin Taylor Wages
20 coming to live with you in the last few years?

21 A. Taylor and I had many conversations about him
22 coming to live with me.

23 Q. Is that what you wanted?

24 A. Yes, sir, that was very much what I wanted.

25 Q. And she was resistant to the idea?

1 A. I'm sorry, I didn't hear you.

2 Q. She was resistant to that idea? She didn't
3 want that to happen?

4 A. That was true up until the last time he came to
5 my house.

6 Q. In '96?

7 A. '96 or first of '97, yes, sir.

8 Q. All right. Did you have visitation with the
9 child?

10 A. Yes, sir.

11 Q. You never -- for 10 years, you didn't go to
12 court to try to see your son?

13 A. He was six years old. I sued for full custody
14 of him.

15 Q. Did you get it?

16 A. No, I didn't.

17 Q. And that was just it?

18 A. No, sir. I saw him pretty regularly up until
19 he turned 11 or 12 years old.

20 Q. And then from '96 or 7, up until the time he
21 died, you did nothing to try to see him?

22 A. Up until 2001 or 2002, I continued seeing him.

23 Q. I'm sorry, I thought you said the last time you
24 saw him was in 1996 or 1997?

25 A. I'm sorry, that would have been -- the last

1 time I saw him was in 2006 or 2007. I apologize.

2 Christmas 2006 or 2007.

3 Q. You confused me.

4 A. I confused myself, sorry.

5 MR. KING: Pass the witness, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. WHEELER:

8 Q. So the last time you saw your boy was about a
9 year before he died?

10 A. He was 15 years old.

11 Q. And you had seen him regularly throughout his
12 whole life up until then?

13 A. Yes, sir.

14 MR. WHEELER: May I approach, Your Honor?

15 THE COURT: Yes, sir.

16 (Bench.)

17 MR. WHEELER: I believe the door has been
18 opened by the prior questions out of Mr. King with
19 regard to the relationship between the boy and his
20 mother, and I want to ask the question why this boy
21 chose to stay with his mother now that the question has
22 been asked with the Defense about that relationship.

23 MR. KING: First place, Your Honor, I
24 believe he testified that he had not seen the child
25 since 1996. Then he -- either 1996 or 1997. I just

1 wondered about that, but he corrected me, and I had no
2 further questions once I understood there was a
3 relatively normal child -- seeing the child. I don't
4 think that's an opening the door for anything.

5 MR. WHEELER: I think when you start to
6 make inquiries between mother and son, this boy
7 desperately wanted to stay with her mother to protect
8 her, and that's going to be the testimony that's
9 elicited --

10 MR. PARKS: It's not when the question is
11 based on erroneous testimony.

12 THE COURT: And I think there was a real
13 question that was raised by mistake and his time didn't
14 make sense, and I don't -- I don't really think that was
15 opening the door, so I'm going to deny that.

16 MR. WHEELER: Thank you.

17 (Open court.)

18 Q. (BY MR. WHEELER) Without going into specifics,
19 did you have the opportunity to observe the relationship
20 between Nichole Payne and her son, Taylor?

21 A. Yes, sir.

22 Q. And you continued to see this young man on a
23 regular basis? So the jury's not confused, you didn't
24 have a gap from 1996 until 2006 where you didn't see or
25 talk to your boy for 10 years, did you?

1 A. No, sir, I just got the '96 and 2006 messed up.

2 Q. You had your regular visits?

3 A. Yes, sir.

4 Q. And you exercised those visits up until 2006?

5 A. Yes.

6 Q. And then contact with your boy was reduced
7 dramatically in that last year of his life --

8 A. Yes, sir.

9 Q. -- right?

10 Now in 2005, 2006, did he come to your home
11 in Tyler --

12 A. Yes, sir.

13 Q. -- in Flint?

14 A. Yes, sir.

15 Q. Is that a nice home?

16 A. Yes, sir.

17 Q. Stable home?

18 A. Yes, sir.

19 Q. Was he aware that in that home, he had a place
20 and he could come any time?

21 A. Yes, sir, he had his own room.

22 Q. And you made that clear to him, didn't you?

23 A. Yes, sir.

24 MR. WHEELER: Okay. Pass the witness, Your
25 Honor.

1 MR. KING: No questions, Your Honor.

2 THE COURT: Thank you, sir.

3 (Witness exits courtroom.)

4 MR. WHEELER: Your Honor, 4:15 on the 26th
5 of January, the State rests.

6 MR. KING: May we approach, Your Honor?

7 THE COURT: Yes, sir.

8 (Bench.)

9 MR. KING: Experts are scheduled for
10 9:00 a.m. in the morning. They were not available to be
11 here today, at least Mr. Hueske wasn't.

12 MR. WHEELER: We're 45 minutes from the
13 close of business today.

14 THE COURT: What I'm going to do is going
15 to go ahead and release the jury. If anybody has any
16 legal arguments you want to make, don't wait until in
17 the morning. Let's do it now, and we'll start testimony
18 in the morning.

19 MR. WHEELER: Thank you, Your Honor.

20 (Open court.)

21 THE COURT: Ladies and gentlemen, let me
22 ask you to remember your prior instructions; you know,
23 don't talk to one another or anyone else, don't let
24 anybody talk to you, don't listen to any news
25 broadcasts, and be available in the jury room at

1 9:00 a.m. in the morning. We're going to go ahead and
2 take your evening recess at this time, then we should be
3 able to get started right on time at that point. So
4 please go the bailiff at this time.

5 (Jury exits courtroom.)

6 THE COURT: All right. Let the record
7 reflect that the jury has left the courtroom.

8 And so, if there are any legal matters that
9 need to be taken up before I ask the Defendant whether
10 it wishes to call any witnesses, which I think I know
11 the answer to, but then let's go ahead and take them up
12 at this time.

13 MOTION FOR INSTRUCTED VERDICT

14 BY MR. PARKS:

15 May it please the Court. After the State
16 of Texas has rested its case-in-chief, the Defendant
17 moves for an instructed verdict of not guilty in this
18 matter. We make that motion for the following reasons:
19 The State has wholly and completely failed to bring any
20 credible evidence before this jury connecting Jason Tad
21 Payne to the commission of the death of either of the
22 complainants alleged in the State's indictment. There
23 are no eyewitnesses to that alleged --

24 (Interruption in the proceedings.)

25 THE COURT: Yes, sir.

1 MR. PARKS: -- connecting to the Defendant
2 to any such occurrence. There was no DNA or other
3 physical evidence connecting this Defendant with either
4 of those two occurrences. Frankly, the State's case so
5 far has been based wholly and completely on supposition
6 and suspicion.

7 Their case, through Captain Miles Tucker,
8 does not connect this Defendant to any offense. It is
9 based solely and wholly upon his belief that Jason Payne
10 committed this offense without being able to point out
11 from the physical evidence what would cause him to
12 believe that other than his belief that he smelled
13 gunpowder in Nichole's bedroom and did not in Taylor's
14 bedroom without taking into consideration any of the
15 environmental issues which the State's own witnesses
16 stated would need to be take into consideration. He
17 also based that on his having touched Nichole and found
18 her to be warmer than Taylor without taking into
19 consideration any of the environmental issues that their
20 own witness, Tom Bevel, stated, at least in his
21 testimony, would be needing to be taken account of.
22 It's simply supposition.

23 What I found it to be odd was the just of
24 his testimony; I had never seen a scene like that where
25 it had been a suicide, ergo, it must not have been a

1 suicide, which is nothing in the world but speculation
2 and supposition on his part. Nothing and the evidence
3 found at the scene connects Jason Tad Payne to those.

4 Mr. Bevel testified to what he testified
5 to. Mr. Ernest testified to what he testified to. It's
6 Mr. Bevel's belief that in all likelihood, Taylor was
7 killed before Nichole without being able to state any
8 reason why he thinks that other than the touchings and
9 smellings of Miles Tucker. No reasonable jury could
10 believe that that was an adequate basis for rendering an
11 opinion such as the one he rendered.

12 With respect to Mr. Ernest, to the extent
13 that his testimony is relevant to the issue, it spoke
14 pretty much totally to whether or not Taylor could have
15 pulled the trigger with his finger, and there's no
16 restriction why that suicide could not have been done
17 with his foot. The only response to that, I guess, is
18 the fact they didn't find a crease in his sock, which
19 does not tell us anything.

20 And I would suggest to the Court, the
21 quality of the State's case is -- a lack of quality, I
22 should say, in the State's case is underlined by the
23 fact that we have now heard, I don't know, how many
24 potential theories for a motive: Financial? Maybe, may
25 be not. Holes in the ground may be graves? Maybe,

1 maybe not. Evidence, I suggest to the Court, that only
2 have meaning if a jury ascribes to that evidence by
3 speculation that it is what the State says it is; by
4 example, holes in the ground do not equate to graves
5 just simply because there were holes in the ground
6 unless the jury wants to surmise or suppose they're
7 graves. It's meaningless to have holes in the ground
8 dug some time by someone is what they are, but it is --
9 it is indicative of the case that the State has brought.

10 We respectively suggest to the Court under
11 the teachings of -- [inaudible] -- no reasonable jury
12 could find Mr. Payne guilty of this offense, that the
13 evidence is insufficient, both insufficient as a matter
14 of fact and law. We move the Court for an instructed
15 verdict.

16 THE COURT: Does the State wish to make a
17 response?

18 MR. WHITLEY: I will respond briefly,
19 Judge.

20 Apparently, Mr. Parks chooses to ignore the
21 circumstantial evidence that is present in this case.
22 Obviously, we don't have a smoking gun. We don't have
23 an eyewitness to this killing.

24 I would submit to you that the shootings
25 took place in the Defendant's home. The Defendant

1 admits to being present on or about the time the
2 killings occurred. His explanation to the officers who
3 arrived on the scene is inconsistent and contradictory.

4 The blood of Nichole Payne, which was
5 described as bright red, is reasonable deduction from
6 that that it was fresh blood, was found in the
7 Defendant's truck at or near the time the bodies were
8 found. His home indicated no sign of forced entry. The
9 two people in the home were both deceased. He is the
10 only other person, other than two children, who would
11 have had access to the home.

12 He lied about the status of his marriage to
13 the officers who investigated it. He lied about the
14 financial condition to the officers. They point to the
15 lack of physical evidence, which can easily be explained
16 by the Defendant using gloves or wiping down the gun.

17 We know that Nichole Payne believed her
18 marriage was in trouble. She was unhappy. She was
19 contemplating divorce. There was a life insurance
20 policy of \$100,000 on her and \$10,000 on the child.
21 When asked and made claim to the proceeds, Defendant was
22 asked to give a written -- give an oral statement which
23 he refused. All of these are circumstantial evidence
24 leading up to the conclusion that he is the only logical
25 one. She was on medication for depression, and the

1 evidence shows that they had dissipated the
2 \$300-some-odd in the insurance proceeds that they had
3 received.

4 We have take all these circumstances as
5 circumstances and let the jury decide what these
6 circumstances mean. Council can poo-poo all he wants
7 to. That's what 12 people are for. They have listened
8 attentively. We submit the Court should not summarily
9 kick the State out of court. This jury had to able to
10 make a decision.

11 THE COURT: Thank you. All right. Motion
12 for directed verdict is denied.

13 And unless there's anything else, we'll be
14 in recess until 9:00 a.m. in the morning.

15 (Proceedings recessed.)
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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 9 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
)
)
VS.) WOOD COUNTY, TEXAS
)
)
)
JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 5

On the 27th day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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CRIMINAL DISTRICT ATTORNEY

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- AND -

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 4 JANUARY 27, 2010

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6 DEFENDANT'S

NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
7	4 Photograph	51	51	9
	5 Photograph	55	56	9
8	6 Photograph	55	56	9
	7 Photograph	55	56	9
9	8 Photograph	55	56	9
	15 Photograph	17	17	9
10	16 Photograph	17	17	9
	23 Photograph	84	84	9
11	24 Test-fired Styrofoam Head			
12	(RETAINED BY DISTRICT CLERK)	68	69	9
13	25 Test-fired Styrofoam Head			
14	(RETAINED BY DISTRICT CLERK)	68	69	9
15	26 Piece of test denim with bloodstains			
16	(RETAINED BY DISTRICT CLERK)	86	87	9
17	27 Soot test-fire exemplar at 4 inches			
18	(RETAINED BY DISTRICT CLERK)	146	147	9
19	28 Soot test-fire exemplar at 6 inches			
20	(RETAINED BY DISTRICT CLERK)	146	147	9
21	29 Soot test-fire exemplar at 2 inches			
22	(RETAINED BY DISTRICT CLERK)	146	147	9
23	30 Soot test-fire exemplar at 8 inches			
24	(RETAINED BY DISTRICT CLERK)	146	147	9
25				

1 CHRONOLOGICAL INDEX - CONT'D
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5 EXHIBIT INDEX

6 DEFENDANT'S

7 NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
8 31	Soot test-fire exemplar			
9	at 10 inches			
10	(RETAINED BY			
11	DISTRICT CLERK)	146	147	9
12 32	Soot test-fire exemplar			
13	at 12 inches			
14	(RETAINED BY			
15	DISTRICT CLERK)	146	147	9
16 33	Test-fire exemplar			
17	at 6 inches			
18	(RETAINED BY			
19	DISTRICT CLERK)	157	157	9
20 34	Test-fire exemplar			
21	at 11 inches			
22	(RETAINED BY			
23	DISTRICT CLERK)	157	157	9
24 35	Test-fire exemplar			
25	at 8 inches			
	(RETAINED BY			
	DISTRICT CLERK)	157	157	9

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

2 THE COURT: Let me get on the record, then,
3 in Cause 20,529-2008, State vs. Jason Tad Payne. Let
4 the record reflect counsel for the State, counsel for
5 the Defendant, and the Defendant is present. The jury
6 is not present. The state has rested.

7 Is the Defense ready to proceed?

8 MR. KING: Yes, Your Honor.

9 THE COURT: State ready to proceed?

10 MR. WHEELER: State's ready, Your Honor.

11 THE COURT: Very well. Bring them in.

12 (Jury enters courtroom.)

13 THE COURT: Let the record reflect the jury
14 has returned to the courtroom.

15 The Defendant may call its first witness.

16 MR. KING: Faye Payne, Your Honor.

17 (Witness enters courtroom.)

18 THE COURT: Mrs. Payne, let me get you to
19 come over to the witness stand, and when you get there,
20 let me get you to raise your right hand.

21 (Witness sworn.)

22 THE COURT: Please have a seat.

23 Yes, sir.

24 FAYE PAYNE,

25 having been first duly sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MR. KING:

3 Q. Mrs. Payne, how are you doing this morning?

4 A. I'm fine.

5 Q. Okay. How are you related to Jason Payne?

6 A. I'm his mother.

7 Q. Where do you live, Mrs. Payne?

8 A. In Logansport, Louisiana.

9 Q. Where is that?

10 A. Where is that from here? It is right on the
11 Sabine River. Like, from Texas, cross over the bridge
12 and you're in Louisiana.

13 Q. Okay. Do you recall when Jason and Nichole got
14 married?

15 A. Yes.

16 Q. When was that?

17 A. In 2000, I think. It was in January.

18 Q. They lived for a while in Nacogdoches?

19 A. Yes.

20 Q. Then they moved to Quitman?

21 A. Yes, sir.

22 Q. In 2007?

23 A. Yes.

24 Q. Let's talk a little bit about 2007. That
25 didn't turn out to be too good a year for your family?

1 A. No, it didn't.

2 Q. Did you spend any time with Nichole and Jason
3 during that year?

4 A. Yes.

5 Q. When did you -- where did you spend time with
6 them?

7 A. When they came to Quitman, I came with them.

8 Q. And that was when?

9 A. In -- I think it was April 2007.

10 Q. All right. And how long were you with them?

11 A. I stayed with them until I left in October.

12 Q. What was the purpose of that?

13 A. Of leaving? Of going?

14 Q. No, coming and staying with them.

15 A. Nichole asked me to come and help her watch the
16 kids where I could pick them up after school and --

17 Q. They were setting up a new household?

18 A. Right.

19 Q. And you did that?

20 A. Yes.

21 Q. What did your days consist of while you were
22 here?

23 A. Get up in the mornings. Jason would get them
24 up, the kids, and carry them to school. After he left
25 out, I would get up. Usually, I'd get dressed. I

1 walked. I walked around the property for usually about
2 an hour. By the time I got through or something, Jason
3 would get home with Remington, and then Remington liked
4 Dora, so we'd come in -- in the house and watch Dora.

5 Q. What is Dora?

6 A. Cartoon.

7 Q. And where was Nichole at this time?

8 A. Nichole slept late.

9 Q. And stayed up late, I assume?

10 A. Yes.

11 Q. What would a typical day be for Jason? What
12 would he do on a typical day?

13 A. Take the children to school, and while
14 Remington was watching Dora, he usually would go up and
15 take care of the birds and do whatever he did outside
16 with the birds. He just do with the birds at that time.

17 Q. How many birds did they have at that time?

18 A. Oh, gosh, 30. I'm not sure.

19 Q. They used these as a part of their business?

20 A. Right.

21 Q. All right. So he'd take care of the birds and
22 Nichole would still be sleeping?

23 A. Yes. She usually got up about 10:30, 11:00,
24 something like that.

25 Q. What did she do when she got up?

1 A. Eat breakfast and get dressed, I guess, and --

2 Q. Okay.

3 A. I can't really remember.

4 Q. Did she do anything with the birds?

5 A. Uh-huh. She would go out and like sell ads for
6 the birds.

7 Q. Did you ever help her with that?

8 A. Uh-huh.

9 Q. How did you help her?

10 A. We would take different sections. Like, one
11 time, I went to Tyler and, like, go to funnel homes and
12 things like that and give them cards of what we did, and
13 she would go to flower shops and things. I'm not sure
14 where she went. She was a good seller.

15 Q. Making them aware of what you did?

16 A. Uh-huh.

17 Q. Did anyone go with her?

18 A. I don't know if -- I don't know. I don't know
19 when I left. I'm not sure. I think she usually went by
20 herself. Most of the time, she went by herself because
21 I only went one time to Tyler.

22 Q. She had her own vehicle?

23 A. Right.

24 Q. She had her own cellphone?

25 A. Right. She usually went by herself.

1 Q. What would y'all do in the evening?

2 A. I mean, at night in the evening --

3 Q. Yes, ma'am.

4 A. -- or the afternoon?

5 Eat supper and watch television.

6 Q. Just a fairly typical American --

7 A. Yeah.

8 Q. -- household?

9 Where did you sleep in the house?

10 A. Downstairs, in the bedroom that was downstairs.

11 Q. That was the bedroom that's off the living
12 room?

13 A. Yes, off the living room.

14 Q. Where did Jason and Nichole sleep?

15 A. They slept upstairs.

16 Q. Who slept with them?

17 A. All of them. Jason, Nichole, Jackson Remington
18 done all slept together.

19 Q. Where was Taylor?

20 A. At night you mean?

21 Q. Yes, ma'am.

22 A. He'd be in his bedroom, usually.

23 Q. And his bedroom was out in the garage?

24 A. In the garage.

25 Q. How did he come to be sleeping in the garage?

1 A. He wanted it and Nichole basically wanted it.

2 Q. A way to have his own room?

3 A. Yeah, uh-huh.

4 Q. He had his T.V.?

5 A. He had everything there, television and --

6 Q. CDs and whatnot?

7 A. Uh-huh.

8 Q. During the evening, did Taylor spend time with

9 the family or did he stay in his room?

10 A. He mostly stayed in his room.

11 Q. Ever seen Taylor shoot a gun?

12 A. Yes, sir.

13 Q. How many times?

14 A. Lots of times.

15 Q. What kind of guns would he shoot?

16 A. Everything.

17 Q. Ever see him shoot long guns?

18 A. That's all he ever shot. I never seen him

19 shoot anything small.

20 Q. What did Jason and Nichole like to do for fun?

21 A. They went fishing a lot.

22 Q. Nichole liked to fish?

23 A. Oh, yes, she loved to fish.

24 Q. Do you ever recall an incident where Nichole

25 was injured fishing?

1 A. Yes.

2 Q. When was that?

3 A. Probably some time in October, towards the
4 middle or end of October.

5 Q. Did they still have their boat at that time?

6 A. Uh-huh.

7 Q. What do you know about that incident?

8 MR. WHEELER: Objection; relevance.

9 THE COURT: Overruled.

10 MR. KING: What --

11 MR. WHEELER: Objection; hearsay.

12 MR. KING: I asked her what she knew,
13 Judge.

14 THE COURT: Overruled.

15 MR. WHEELER: May I take the witness on
16 voir dire?

17 THE COURT: Yes, sir.

18 VOIR DIRE EXAMINATION

19 BY MR. WHEELER:

20 Q. Who was the source of the information you
21 received?

22 A. Nichole.

23 MR. WHEELER: Objection; hearsay.

24 THE COURT: Sustained.

25 FURTHER DIRECT EXAMINATION

1 BY MR. KING:

2 Q. In regard to the incident you talked about, did
3 you observe anything ABOUT Nichole that was out of the
4 ordinary?

5 A. Yes.

6 Q. What did you observe?

7 MR. WHEELER: Objection --

8 THE WITNESS: A bandage on her neck.

9 Q. (BY MR. KING) Did you subsequently come to
10 learn what had happened to her?

11 A. Yes, sir.

12 Q. What was that?

13 A. She had been fishing --

14 MR. WHEELER: Objection; hearsay.

15 MR. KING: Family history, Your Honor.

16 MR. WHEELER: Not when it's discussing a
17 particular incident to prove of the matter asserted.
18 That is not.

19 THE COURT: Sustained.

20 Q. (BY MR. KING) What do you believe happened?

21 A. She got hooked with a fishhook.

22 MR. WHEELER: May I have a running
23 objection to this line of questioning, Your Honor, on
24 the basis of hearsay?

25 THE COURT: Yes, sir.

1 Q. (BY MR. KING) You believe she went to the
2 hospital over that incident?

3 MR. WHEELER: Objection, Your Honor --

4 THE WITNESS: Yes.

5 MR. WHEELER: -- the basis is hearsay.

6 Q. While you were living with Nichole and Jason,
7 did you have occasion to see some holes in the ground?

8 A. Yes, sir.

9 MR. KING: May I approach the witness, Your
10 Honor?

11 THE COURT: Let me ask counsel to approach
12 the bench.

13 (Bench.)

14 THE COURT: I think I know the answer to
15 this, but I've got someone here who was a witness. I
16 think she was finally excused, but I just wanted to make
17 sure. That's the realtor --

18 MR. WHEELER: She is finally excused.

19 MR. PARKS: I think so.

20 THE COURT: All right.

21 (Open court.)

22 Q. (BY MR. KING) Mrs. Payne, let me hand you
23 what's been marked as State's Exhibits 83, 82, 81, 80,
24 79, 78, 77, 76, and 75, and ask you if you recognize
25 what's shown in those photographs?

1 A. Yes.

2 Q. What are they?

3 A. Holes.

4 MR. KING: May I publish these, Judge?

5 THE COURT: Yes, sir.

6 Q. (BY MR. KING) Are those the holes we were
7 talking about?

8 A. Yes.

9 Q. Where were those holes?

10 A. They were across -- down the back of the yard,
11 across the back, in the woods.

12 Q. Okay. Do you know how those holes came to be
13 in existence?

14 A. Yes.

15 Q. How did they come to be in existence?

16 A. My oldest son and Taylor dug them.

17 Q. Did you see that yourself?

18 A. Yes, I did.

19 Q. How did you come to see that?

20 A. They had went -- Taylor and Jackson had come
21 back to get shovels and went back up, so when Remington
22 woke up, we went back there.

23 Q. You saw Billy --

24 A. Taylor --

25 Q. -- your older son --

1 A. -- dug the holes.

2 Q. Okay. Do you know why they were digging the
3 holes?

4 A. Yes, sir.

5 Q. Why is that, Ma'am?

6 A. What our family did is kind of silly. We
7 would, like, their whole life go to -- if we see
8 something, we'd dig for it. We found -- we'd dig for
9 arrowheads. That's what we did for fun on the weekends.
10 We had -- my son had a metal detector and he'd hunt for
11 things. That's what he did.

12 Q. Was that primarily Billy's hobby?

13 A. Yes, sir.

14 Q. Did he find anything?

15 A. Oh, yeah. He found a jar one time that had
16 some quarters in it, dug -- buried in the ground, and we
17 found lots of arrowheads and arrow copper pots and
18 things, broken things like that.

19 Q. After the tragedy on December 11, 2007, did you
20 take some of Nichole and Jason's things in your
21 possession?

22 A. After?

23 Q. Specifically, I'm talking about Taylor's truck?

24 A. Oh, yes, sir.

25 Q. What did you do with that truck?

1 A. Carried it to my house.

2 Q. In Logansport?

3 A. Yes, sir.

4 Q. Why was that?

5 A. We didn't want to leave it over there. We
6 didn't know that many people. We didn't want to leave
7 it by the highway.

8 Q. When you got it to Logansport, what did you do
9 with it?

10 A. Parked it in my yard.

11 Q. Then what happened? What did you do?

12 A. With the truck?

13 Q. Yeah.

14 A. Drove it ever so often where it would keep the
15 motor up, things like that.

16 Q. Did you ever have occasion to clean the truck
17 up?

18 A. Yes, Billy cleaned the truck up.

19 Q. Were you there when that was going on?

20 A. Yes, sir.

21 Q. What did you find in the truck?

22 A. We found what's called CDs under the front
23 seat.

24 MR. WHEELER: May I approach, Your Honor?

25 THE COURT: Yes, sir.

1 (Bench.)

2 MR. WHEELER: Now we've just received
3 testimony that Billy was the one who cleaned the truck,
4 not Faye Payne, so she doesn't have personal knowledge.
5 I need to take her on voir dire, but one of the issues
6 is that Billy is a convicted felon and I'm going to ask
7 questions about that, so if we need to have a little
8 hearing outside the presence of the jury, I need to do
9 that before I go into this --

10 MR. KING: Given the relevance -- given the
11 evidence --

12 MR. WHEELER: Well, the relevance is he
13 planted the CDs to protect his brother.

14 MR. PARKS: Because he could see for sure
15 y'all are going to talk about, "Oh, Brother, Where Art
16 Thou"?

17 MR. WHEELER: We haven't established a time
18 when that occurred, and, you know, the CPS matter was
19 ongoing from the very beginning. Absolutely, there was
20 a reason for him to make it look like Jason was not
21 involved in the boy's death.

22 MR. PARKS: That is nothing but rank, pure
23 speculation to make that jump because he has a
24 conviction that he planted the CDs.

25 MR. WHEELER: I have a body of evidence

1 that has been -- that we can get into by Faye Payne
2 wanting to have these children at all cost. If we want
3 to go down that road and turn it into a child custody
4 trial, we can, but the fact there was no security on the
5 truck, we've got a convicted felon when there's
6 allegation to remove children in CPS.

7 MR. PARKS: Confront --

8 MR. WHEELER: If you're going to stop, that
9 will be fine.

10 THE COURT: Let me just say this: In
11 regard to the first issue you raised, Mrs. Payne said
12 she was present at the time this was done, so under
13 those circumstances, what's your basis for wanting to
14 take her on voir dire?

15 MR. WHEELER: That's not what I heard. I
16 heard her say that was Billy cleaned out the truck and
17 she repeated what Billy had found.

18 THE COURT: She said he cleaned out the
19 truck and she was then asked whether she was present and
20 she said, "Yes".

21 MR. WHEELER: At this time, then, we need
22 to clean that up first because that's --

23 THE COURT: Then I'll ask Mr. King to clean
24 that up. All right.

25 (Open court.)

1 Q. (BY MR. KING) Mrs. Payne, were you present at
2 the time Billy was cleaning up the truck?

3 A. Yes, sir.

4 MR. KING: May I approach the jury, Your
5 Honor?

6 THE COURT: Yes, sir.

7 MR. KING: Pass the witness, Your Honor.

8 MR. WHEELER: We have no questions of the
9 Defendant's mother.

10 THE COURT: Thank you, Ma'am. You may step
11 down.

12 (Witness exits courtroom.)

13 THE COURT: Call your next witness.

14 MR. KING: Kim Henderson, Your Honor.

15 (Witness enters courtroom.)

16 THE COURT: Ms. Henderson, if you'll come
17 on over here to the jury box or the witness stand,
18 rather.

19 THE WITNESS: Thank you.

20 THE COURT: When you get there, let me get
21 to you raise your right hand.

22 (Witness sworn.)

23 THE COURT: Please have a seat.

24 KIM HENDERSON,

25 having been first duly sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MR. KING:

3 Q. Good morning, Ms. Henderson?

4 A. Good morning.

5 Q. How are you related to the Payne Family?

6 A. Jason is my cousin.

7 Q. Okay. Where do you live?

8 A. In Logansport, Louisiana.

9 Q. What do you do for a living?

10 A. I'm a church treasurer/secretary at First

11 Baptist Church in Logansport.

12 Q. Okay. On December 11, 2007, did you have an

13 occasion to see Jason Payne?

14 A. Yes, sir.

15 Q. What was the -- what was the occasion that led

16 you to see him?

17 A. Actually, he called for me to come pick him up

18 or to meet with him.

19 Q. Where were you?

20 A. I was actually in Tyler at the time.

21 Q. Did you pick him up?

22 A. Yes, I did.

23 Q. About what time of the day was that?

24 A. I would say close to 5:30, probably, because it

25 was kind of getting dusty and it was heavily raining at

1 the time, so it was cloudy and all.

2 Q. What did you observe about Jason at the time
3 you picked it him?

4 A. Very emotional, just to pieces, you know. When
5 I got out of the car, I went to him immediately and
6 grabbed him and held him for a while, not understanding
7 why it all happened.

8 Q. Were you already aware at that time that
9 something happened to Nichole and Taylor?

10 A. At that time, yes, sir.

11 Q. How did you happen to know that?

12 A. Why?

13 Q. Yes, ma'am.

14 A. My aunt was put into the hospital at that time.

15 Q. Who is your aunt?

16 A. Faye Payne.

17 Q. Why she was in the hospital?

18 A. Because when she got the phone call that
19 something had happened --

20 MR. WHEELER: I'm going to object to
21 relevance, Your Honor.

22 THE COURT: Overruled, but --

23 MR. KING: I'll move on.

24 Q. (BY MR. KING) So she happened to be in the
25 hospital in Tyler?

1 A. Yes, sir.

2 Q. You got a call from Jason?

3 A. Yes.

4 Q. Came to see him?

5 A. Yes.

6 Q. What did y'all do then?

7 A. We immediately sit there in the park where I

8 went to meet him in his truck, and as upset as he was, I

9 realized he didn't need to be driving, so I said, let me

10 drive, we'll go back to the Tyler.

11 Q. Did he have a flat effect?

12 A. Oh, no. He was very, very emotional, upset

13 because -- I mean, I couldn't calm him down.

14 Q. To your knowledge, were you the first family he

15 had seen since the incident occurred?

16 A. As far as on his side, yes, that I know.

17 Q. Where were the kids at that time?

18 A. At that time, I really wasn't sure where they

19 were. I just got into --

20 Q. You subsequently find out?

21 A. And I later found out that --

22 MR. WHEELER: I'm going to object to

23 hearsay, Your Honor, in regard to what she discovered

24 later.

25 THE COURT: Sustained.

1 Q. (BY MR. KING) Do you know where the kids are
2 now?

3 A. Yes, sir, I do.

4 Q. Whose custody are they in?

5 A. They're actually with their other grandparents,
6 Richard and Sherry.

7 Q. Hawthorne?

8 A. Hawthorne, yes, sir.

9 Q. How long have they been there?

10 A. They've been there all since this happened.

11 MR. KING: Pass the witness, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. WHEELER:

14 Q. No one in your entire family called Nichole
15 Payne's mother to tell her she had been murdered that
16 day?

17 A. I don't know that answer.

18 Q. No one in your entire family called Nichole
19 Payne's father that his daughter had been murder on that
20 day?

21 A. I don't know the answer to that question.

22 Q. And at the same time, nobody in your entire
23 family that you observed or was in your presence called
24 Taylor Wages' father, Todd Wages, and told him his son
25 had been murdered?

1 A. I don't have an answer to that because I don't
2 know.

3 Q. Well, you were present with members of the
4 family. Did anybody call?

5 MR. PARKS: Judge, he's assuming facts not
6 in evidence.

7 THE COURT: Overruled.

8 Q. (BY MR. WHEELER) You may answer.

9 A. Okay. Actually, would you restate that since
10 we had -- please, sir --

11 Q. The question was: Did anybody that you
12 were -- that was in your presence call Taylor Wages'
13 daddy or Nichole Payne' daddy or Nichole Payne' mamma?

14 A. I really don't know because I -- at that time,
15 was trying to take care of my aunt. I was at the
16 hospital at that time.

17 MR. WHEELER: I pass the witness.

18 MR. KING: No further questions, Your
19 Honor.

20 THE COURT: Thank you, Ma'am.

21 THE WITNESS: Thank you.

22 MR. KING: May this witness finally be
23 excused?

24 THE COURT: Any objection?

25 MR. WHEELER: No, sir.

1 THE COURT: You're finally excused, Ma'am.

2 You may go or stay.

3 (Witness exits courtroom.)

4 MR. KING: Daniel Ashworth.

5 THE COURT: Mr. Ashworth, if you'll come
6 around, please, sir, over here, and when you get there,
7 I need for you to raise your right hand.

8 (Witness sworn.)

9 THE COURT: Please have a seat.

10 DANIEL ASHWORTH,

11 having been first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. KING:

14 Q. Mr. Ashworth, where do you reside?

15 A. I live in Crete, Illinois.

16 Q. Where is that?

17 A. About 45 minutes from Chicago.

18 Q. Okay. How are you related to Nichole Payne?

19 A. She adopted me in '98.

20 Q. And at that time, she actually changed your
21 name to Wages?

22 A. Wages, yes.

23 Q. Okay. But you go by Ashworth?

24 A. When I moved back to Crete, Illinois, in 2007,
25 I changed it back to Ashworth.

1 Q. All right. After you were adopted, you lived
2 with Nichole?

3 A. Yes, eight years.

4 Q. Did you also live with Jason Payne?

5 A. Yes, sir.

6 Q. How long were you with Nichole and Jason
7 together?

8 A. I believe they got married in 2000, so two
9 years after being adopted, she married him.

10 Q. And you were with him up until when?

11 A. 2007.

12 Q. What time in 2007?

13 A. My 17th birthday, I got a train ticket to go up
14 to Chicago.

15 Q. You have relatives up there?

16 A. Yes.

17 Q. Who is?

18 A. Me and my blood brother. I got adopted, so I
19 moved up there with him.

20 Q. How are you employed?

21 A. Sir?

22 Q. You are employed?

23 A. Oh, yes.

24 Q. What do you do?

25 A. I work at Balmoral. It's a horse racetrack

1 where they ride around in a horse carriage.

2 Q. Do you ride the horses?

3 A. I do the data entry. I do stuff on the
4 computer.

5 Q. Okay. When is your birthday?

6 A. March 25th, 1990.

7 Q. That's when you left Wood County. You were
8 here?

9 A. Well, I left there -- I left Nacogdoches March
10 16th, but upon arriving, because it's a whole day being
11 on the train, I got in Chicago March 25th.

12 Q. You didn't live in Wood County?

13 A. No, I lived in Nacogdoches. They moved to Wood
14 County.

15 Q. Did you ever visit?

16 A. I came the Summer of '07.

17 Q. How long did you stay there?

18 A. Just the month of July.

19 Q. All right. And while you were here, you lived
20 in the house?

21 A. Yes.

22 Q. All right. You saw their -- what they were
23 doing --

24 A. Yes.

25 Q. -- during the day, during the evening?

1 A. Uh-huh.

2 Q. Did you pal around with Taylor?

3 A. Yeah.

4 Q. What did y'all do?

5 A. There or?

6 Q. During the summer?

7 A. During the summer?

8 Q. A typical day.

9 A. We played a lot of video games.

10 Q. What did y'all like to play?

11 A. Final Fantasy. It's the old Mario Cart Racing.

12 Q. Did you have some music of your own?

13 A. Yes.

14 Q. Did Taylor have music of his own?

15 A. Yes.

16 Q. What happened to the music that you had when
17 you went back to Chicago?

18 A. When I left to go to Chicago, I had probably
19 about two backpacks of my stuff, and one of the first
20 things I grabbed was all my CDs. Then I grabbed all my
21 clothes and grabbed a couple of other things I like. I
22 took all my CDs because I like to have all my music with
23 me.

24 Q. So any of the CDs that were left there would
25 have belonged to someone in the house?

1 A. Yes.

2 Q. Didn't go to Chicago?

3 A. Right.

4 Q. All right. How would you characterize your
5 relationship with Jason Payne?

6 A. It was awesome. He treated me like a son.

7 Q. What did you call him?

8 A. Dad.

9 Q. Did you ever hear Jason and Nichole arguing?

10 A. No, not nothing too intense, just normal
11 marriage stuff, I guess. I mean --

12 Q. Are you married?

13 A. No, no. I don't plan to be.

14 Q. Seem pretty normal to you?

15 A. Yes.

16 Q. Did you ever feel that Nichole was held
17 prisoner or oppressed there?

18 A. No.

19 Q. What would she do during the day?

20 A. She did a lot of shopping for flowers because
21 she liked flowers. She drove around a lot to try to
22 find stuff for her doves, like Hobby Lobby, for flowers
23 or fancy antique cages or whatever, so, I mean, she
24 drove around quite a bit.

25 Q. There were guns around the house, were there

1 not?

2 A. Yeah, we -- yeah, we lived in Texas.

3 Q. You get teased about that in Chicago?

4 A. Yes. Born with a gun in your hand.

5 Q. Do you know if Taylor was familiar with
6 firearms?

7 A. Yes, sir.

8 Q. How do you know that?

9 A. Because we both shot guns.

10 Q. What kind of guns did you shoot?

11 A. 12-gauge, .45, .30-30, .22, beebee guns.

12 Q. He was a little bit younger than you?

13 A. One year. Yeah, '99 or whatever.

14 Q. You were a part of this family --

15 A. Yes.

16 Q. -- for many, many years?

17 A. Yes.

18 Q. Has anyone from law enforcement or the D.A.'s
19 Office or the Texas Rangers talked to you about this
20 case?

21 A. No.

22 Q. You were subpoenaed by them?

23 A. Well, some guy walked up to me and said I was
24 served by the State. That guy [indicating].

25 Q. So you would have been around Taylor Wages at

1 least eight years?

2 A. Yes, sir.

3 Q. What was your relationship -- what was Jason
4 Payne's relationship with Taylor?

5 A. He treated us both the same. He fathered us
6 his whole life. I mean, if we did something bad, we got
7 punished. If we did something good, we were rewarded.

8 MR. KING: Pass the witness, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. WHEELER:

11 Q. Now, you haven't had any contact with Todd
12 Wages in the last, say, year, have you?

13 A. I never really talked to Todd Wages.

14 Q. And, in fact, you wouldn't know what efforts
15 have been made to find you?

16 A. No.

17 Q. You don't have a clue how hard people have been
18 looking for you, have you?

19 A. I wouldn't be that sure. All they have to do
20 is contact my mom because my mom knew where I was and
21 she knew my phone number.

22 Q. Nichole Payne was your mom and she wasn't alive
23 anymore.

24 A. Okay.

25 Q. That's not so easy if we have to trace your

1 adoptive history then locate your biological mother and

2 then find you; isn't that --

3 A. I never knew my biological parents.

4 Q. So -- all right. But you have no idea how hard

5 anybody tried to find you, do you --

6 A. I guess not. I wouldn't --

7 Q. -- until you showed up in the courtroom here

8 today?

9 And you never contacted law enforcement,
10 did you?

11 A. Nope.

12 Q. Okay. Now, you listen to bands like Killswitch

13 Engage?

14 A. Uh-huh.

15 Q. Linkin Park?

16 A. Uh-huh.

17 Q. Alexisonfire?

18 A. (Moving head up and down).

19 Q. Is that correct?

20 A. Yes, sir.

21 Q. That's the kind of music you listen to?

22 A. Yes, sir.

23 Q. And have for several years?

24 A. Yes, sir.

25 Q. Let's see. And as far as -- other than the one

1 visit that you had that you described to the jury, you
2 were never in the home in April until Nichole Payne
3 died?

4 A. No, except for July.

5 Q. Okay. That business that your mother was in,
6 that is a business of providing birds for different
7 ceremonies, right?

8 A. Yes, sir.

9 Q. And you were around that business for a while,
10 weren't you?

11 A. When it first started going.

12 Q. So you know they're white homing pigeons, not
13 doves?

14 A. Yes, I do.

15 Q. And she was feeding pigeons, not doves?

16 A. Okay. Yes.

17 Q. And that's a business her family was in?

18 A. Yes.

19 Q. And her sister-in-law, Sarah?

20 A. She tried getting into it to help
21 advertisement, market it, whatever.

22 Q. That was Nichole's business?

23 A. Yes.

24 MR. WHEELER: Pass the witness.

25 REDIRECT EXAMINATION

1 BY MR. KING:

2 Q. Were you familiar with the kind of music that
3 Taylor listened to?

4 A. Sir?

5 Q. You are familiar with the kind of music that
6 Taylor listened to?

7 A. Yes, sir.

8 Q. Would that be such things as "Getting Away With
9 Murder" by Pappa Roach?

10 A. Uh-huh.

11 Q. "Suicide Notes and Butterfly Kisses"?

12 A. Yes, that's Atreyu.

13 Q. Okay. "As I Lay Dying" and "Through the Eyes
14 the Dead," thing likes that.

15 A. Uh-huh.

16 Q. What kind of music is that? What's it called?

17 A. Metal, Heavy Metal. Some of it's Scream Metal,
18 I guess, so...

19 Q. Do you listen to the same kind of music?

20 A. Yes, sir.

21 MR. KING: Pass the witness, Your Honor.

22 MR. WHEELER: I don't have any further
23 questions.

24 THE COURT: Thank you, sir. You may step
25 down.

1 MR. PARKS: Can he be excused?

2 MR. WHEELER: Subject to recall. We may
3 need him.

4 THE COURT: You'll need to stay available.
5 Call your next witness.

6 MR. KING: Noel Martin.

7 (Witness enters courtroom.)

8 THE COURT: Officer Martin, just come on
9 around to the witness stand. Have you been sworn in
10 yet?

11 MR. KING: I have not, Your Honor.

12 THE COURT: Let me get you to raise your
13 right hand.

14 (Witness sworn.)

15 THE COURT: Please have a seat.

16 NOEL MARTIN,

17 having been first duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KING:

20 Q. Good morning.

21 A. Good morning.

22 Q. This is just a little unusual for me. I don't
23 think I've ever called you as a witness before.

24 A. I believe this is the first time, Mr. King.

25 Q. I've certainly seen you in the courtroom many

1 times.

2 A. Many times.

3 Q. What is your present occupation?

4 A. Currently, I'm employed as a crime scene
5 investigator with the Smith County Sheriff's Department.

6 Q. You're a criminalist?

7 A. Correct.

8 Q. What do criminalists do?

9 A. Basically, my duties are to respond to,
10 investigate, document, collect evidence in cases
11 involving major felony crimes and to process evidence,
12 do fingerprint comparisons, bloodstain panel analysis,
13 shooting reconstruction, and other forms of forensic
14 type of investigations.

15 Q. What is your education and formal training in
16 that area?

17 A. Formal education, I have a high school
18 education. I do have some college. I do not have a
19 degree. I have many, many continuing education type of
20 classes associated in forensic investigations, crime
21 scene reconstructions, of which I continue to attend.

22 Q. Okay. You've already been certified as an
23 expert for this court, have you not?

24 A. Yes, I have.

25 Q. As a matter of fact, you have actually attended

1 courses taught by Mr. Bevel?

2 A. Yes, I have.

3 Q. And he's here --

4 A. Yes.

5 Q. -- as one of the other experts?

6 Do you have any teaching experience or
7 mentoring experience?

8 A. I do. I'm a certified instructor. I have a
9 TCLOSE license. I teach crime scene investigation at
10 the police academy. I also teach intermediate crime
11 scene search. I've taught classes with other bloodstain
12 pattern experts; in particular, Bob Henderson and I
13 taught a class at the Texas Department of Public Safety
14 in Austin. I've taught fingerprint comparison classes
15 where you're taught to make fingerprint identifications
16 and several others.

17 Q. Okay. Are you a member of any professional
18 organizations in that regard?

19 A. I'm a member of the Smith County Peace Officers
20 Association and a member of the East Texas Police
21 Officers Association, but as a member of any forensic
22 type of associations, no.

23 Q. Okay. Do you attend continuing education
24 classes of any kind?

25 A. I do.

1 Q. Did you have an occasion on the 11th day of
2 December, 2007, to come to Wood County to assist the
3 peace officers in a case?

4 A. I did. Basically, the way that came about, I
5 received a phone call -- I believe it was from Texas
6 Ranger Philip Kemp who asked me to come up and assist in
7 an investigation involving the death of two individuals.
8 In particular, he wanted me to do a bloodstain pattern
9 analysis at a crime scene.

10 Q. All right. After you got the call, what did
11 you do?

12 A. First thing I did was contact my supervisor,
13 which brought a call advising him of the situation. Got
14 his approval, checked in service, and drove up here to
15 the Sheriff's Office and met with the detectives and
16 Ranger Kemp.

17 Q. You're from Wood County, are you not?

18 A. Yes, I am.

19 Q. You've been a peace officer here in Wood
20 County?

21 A. I did. In fact, this is where I started my
22 career.

23 Q. Okay. In the past -- I'm not talking about
24 December 11, 2007, but prior to that -- had you worked
25 cases in Wood County?

1 A. As a deputy for Wood County or other cases?

2 Q. As a criminalist.

3 A. Both.

4 Q. Is it infrequent for them to call you or
5 frequent for them to call you?

6 A. I haven't worked a whole lot of cases since I
7 left ten years ago or so. They do call me from time to
8 time to assistant in investigations, whether it's doing
9 crime scene work or fingerprint work, just whatever. It
10 doesn't happen frequently, but it does happen from time
11 to time.

12 Q. Have you been retained by the Wood County
13 District Attorney's Office recently in other cases?

14 A. Yes, one.

15 Q. All right. What was that?

16 A. There was a shooting reconstruction involving a
17 homicide investigation.

18 Q. Did you wind up testifying for them?

19 A. I did.

20 Q. So after you received permission to come to
21 Wood County from your supervisor, what did you do?

22 A. Drove up here, met with the officers at the
23 Sheriff's Office, was briefed as to what they had and
24 what, if anything, in particular they wanted me to do at
25 the scene. We then drove to the crime scene, which was

1 located on Highway 37 North, about a mile outside of
2 town.

3 Q. What did you see when you got there?

4 A. When I arrived there, the scene was secured
5 with both crime tape, I believe. There were officers
6 present. Of course, I did an initial walk-through and
7 looked at the scene to see what was there and what type
8 of equipment would be needed to do what they asked and
9 basically began my investigation.

10 Q. Okay. You haven't heard any of the testimony
11 in this case, have you?

12 A. No.

13 Q. Okay. What was the first thing -- after your
14 walk-through, what was the first thing that you took
15 upon yourself to accomplish?

16 A. I believe the first thing I did was take
17 photographs of the scene as it appeared when I arrived.

18 Q. Then what happened?

19 A. After that, conducted a bloodstain pattern
20 analysis of the bedroom where I was told where the
21 female victim was located when she was allegedly shot.

22 Q. Did you have any equipment with you?

23 A. I did.

24 Q. What kind?

25 A. I have a truck assigned to me which is full of



1 all kinds of forensic equipment. I have pretty large
2 projectors, protractors, all kinds of chemicals,
3 alternate light sources, just a menagerie of forensic
4 type of equipment.

5 Q. What did you do and what tests did you perform
6 in the bedroom where she was found?

7 A. Basically, it was visually inspect it,
8 photograph it, doing an initial evaluation of what was
9 needed, what I needed to do. In this particular part of
10 the house, we did what is called a probable point of
11 origin of the blood splatter, which, in this case,
12 involved stringing bloodstains, and basically, this is
13 to determine what kind of blood there was in that room
14 and the probable point of origin. We also used a laser
15 to reconstruct the trajectory of a defect in the
16 hall -- in the wall, which was consistent with the
17 bullet impact.

18 Q. Were you able to recover a bullet?

19 A. No, not in that particular area. The bullet
20 went through and through out into the yard. We did a
21 search of the area where it should have been with a
22 metal detector and we never did find anything.

23 Q. You were able to approximate the angle of fire
24 into Nichole's head, though, were you not, or were you?

25 A. Basically, yeah, the laser shows the trajectory

1 or the reverse trajectory.

2 Q. Did you do a scene reconstruction in that
3 bedroom?

4 A. Yes.

5 Q. What were your -- what were your conclusions in
6 regard to that?

7 A. In Nichole's bedroom, my conclusions were and I
8 am of the opinion she was shot with a firearm as she was
9 asleep in the bed. The wound was, according to the
10 autopsy, near or a contact wound, the round went through
11 and through, and it all occurred right there in that
12 bedroom, and the bloodstain was also consistent with
13 that as well.

14 Q. How close was the muzzle of the weapon to
15 Nichole when it was fired?

16 A. Contact or near contact.

17 Q. When you say, "near contact," what -- what
18 range are you talking about?

19 A. Anywhere from millimeters to anything less than
20 an inch.

21 Q. All right. So very -- very close or actually
22 touching the head?

23 A. Yes.

24 Q. Okay. What led you to that conclusion?

25 A. Several things: Number one, being the autopsy

1 report. I reviewed the autopsy report. Number two, the
2 extensive damage to the victim's head as a result of the
3 gunshot. The amount of spatter would be consistent with
4 it as well. The trajectory, also, would be a factor.
5 Those things in whole.

6 Q. Was there a great deal of blood produced in the
7 room --

8 A. Yes, there was.

9 Q. -- evacuated from the body and --

10 A. Yes.

11 Q. Could some of that blood had gotten onto the
12 weapon that caused the wound to Nichole?

13 A. Absolutely.

14 Q. Okay. Were you able to determine what type of
15 weapon caused that wound?

16 A. No, not forensically or scientifically. No
17 bullet was recovered. There was, however, another
18 .30.30 caliber shell casing that was found in the house.

19 Q. Where was that?

20 A. Based -- based -- it was in the other bedroom
21 where the young man was found. Based on those things
22 alone, I was of the opinion that it was the .30.30 rifle
23 that was recovered that was responsible for her death as
24 well.

25 Q. Was there blood on that weapon?

1 A. Yes, there was.

2 Q. Now, after you examined -- well, let me back up
3 just for a second: You didn't come to all of these
4 conclusions just right there standing in the bedroom
5 looking at the corpse, did you?

6 A. No, sir.

7 Q. What is the process that you go through to make
8 that determination?

9 A. Crime scene reconstruction, which I did in this
10 case, is usually the last thing that is done. There's
11 reasons for that; number one being that we need all of
12 the forensic testing to be done, we need all of the
13 investigative portions of the case to be completed in
14 order -- in order to get an opinion of all the facts,
15 all the evidence. In other words, you don't want to do
16 it first because it's premature and it will lead to
17 erroneous opinions.

18 Q. After you left Nichole's bedroom, where did you
19 go?

20 A. After I completed the bloodstain analysis in
21 Nichole's bedroom, I went to the bedroom where the young
22 man was found and repeated the same process with the
23 exception of we didn't -- I didn't string any blood
24 spatter there. There weren't any patterns that was
25 sufficient for stringing. The only thing I did

1 different in that room versus the room Nichole was found
2 in is we applied a chemical blood reagent, Bluestar or
3 luminol, as it's referred to, to look for latent blood
4 or blood that wasn't visible.

5 Q. Did you find any blood?

6 A. I did.

7 Q. Where was that?

8 A. It was located next to the bed frame. I
9 believe that would be the south or east side of the
10 room. It would be toward the door, the garage door on
11 the carpet.

12 Q. And that blood was not visually apparent?

13 A. No. That's what we refer to atomized blood or
14 fine misting blood that's associated with a gunshot
15 wound. It's not visible, latent blood visible.

16 Q. Did you subsequently do some testing on the
17 situation in Taylor's bedroom?

18 A. I did.

19 Q. What kind of testing did you do?

20 A. The chemical tests, of course the visual, and
21 the photography is pretty much the extent of the testing
22 at the scene. Now, I did some follow-up after the fact
23 when I had the rest of the information in regards to
24 other scientific testing that was done.

25 Q. What else did you do at the scene?

1 A. At the scene, that's pretty much it.

2 Q. Okay. Now, afterwards, you go back and you
3 think about it and you decide on what additional
4 information you needed?

5 A. Right.

6 Q. How do you go about obtaining that information?

7 A. Basically, when the information is provided
8 through the District Attorney's Office or through the
9 sheriff's office or from other sources, normally what I
10 like to do is get an entire case packet which includes
11 everything associated with the case, every report.

12 Q. What did you review?

13 A. What did I review?

14 Q. What did you review in regard to this case?

15 A. Photographs, forensic reports generated by the
16 Texas Department of Public Safety, forensic reports
17 generated by -- I have them on there. There's several.
18 Crime scene photographs taken by myself, taken by other
19 officers prior to my arrival, reviewed interviews that
20 were conducted by the Sheriff's Department; Of course,
21 autopsy reports, other reports generated by other
22 experts.

23 Q. Okay. And did you also do some testing?

24 A. I did.

25 Q. What kind of testing did you do in regard to

1 Taylor?

2 A. I did gunshot residue testing where I fired a
3 similar type of weapon, a model 94 Winchester .30-30, I
4 believe, with a 20-inch barrel into mannequin heads,
5 Styrofoam mannequin heads, and I also did bloodstain
6 drying testing to determine how long bloodstain
7 typically dry on particular surfaces. Also, did testing
8 on blue denim to show 90-degree blood drops versus blood
9 drops at different angles.

10 Q. As a result of all of your work, including
11 testing, do you have an opinion as to the cause of death
12 for Taylor Wages?

13 A. I do.

14 Q. What is that opinion?

15 A. Self-inflicted gunshot wound.

16 Q. All right. Now, how did you come to that
17 determination?

18 A. In this case, there were many things, and I'm
19 probably going to have to look at my report because
20 there's a lot of information here. Is that okay?

21 Q. Do you have that with you?

22 A. Yes, I do. Bear with me just a minute, sir.

23 Q. Sure.

24 (Pause in the proceedings.)

25 THE WITNESS: I have several pages of

1 things that I considered in forming that opinion.

2 Q. (BY MR. KING) All right. We've already talked
3 about some of those things, have we not?

4 A. Yes, sir, we have.

5 Q. Is there anything that we've left out that you
6 think the jury would need to know?

7 A. The bloodstains present on the firearm would be
8 one thing that I used. The bloodstains present on the
9 clothing of the -- of the male victim --

10 Q. Hold on there just a second. Let's talk for a
11 minute about the bloodstains on the firearm. Why is
12 that significant?

13 A. It tells me a lot of information.

14 Q. In this particular case, what does the --

15 MR. KING: May I approach the witness, Your
16 Honor?

17 THE COURT: Yes, sir.

18 Q. (BY MR. KING) Let me hand you what's been
19 marked Defendant's Exhibit No. 4 and ask you if you can
20 identify that?

21 A. Yes, sir, I can.

22 Q. What -- does that accurately depict and does it
23 show --

24 A. Yes, it does.

25 Q. What does it show?

1 A. This is a photograph that I reviewed that was
2 provided to me by the Sheriff's Department from Wood
3 County of the muzzle of a .30-30 rifle which has reddish
4 brownish stains consistent with blood. There's several
5 things in this photograph that are important.

6 THE COURT: You are tendering that?

7 MR. WHEELER: No objection.

8 MR. KING: We'd offer what's been marked as
9 Defendant's Exhibit No. 4.

10 (Defendant's Exhibit 4, offered.)

11 THE COURT: All right. Defendant's Exhibit
12 No. 4 is admitted.

13 (Defendant's Exhibit 4, admitted.)

14 Q. (BY MR. KING) Let's see, we don't have a chip
15 on that. Let me hold this for the benefit of the jury
16 and show them what you're talking about there.

17 A. Certainly. In this particular photograph, in
18 what I considered to be important in this case, is the
19 distrubution of the bloodstain on the muzzle of the
20 firearm itself and the area where the blood should be
21 that there isn't any blood; in particular, this area
22 here [indicating]. The blood itself is important in
23 reference to the way it flows down the muzzle of the
24 rifle, and it's still pretty much in somewhat of a
25 liquid state. The area here which is devoid of blood,

1 there should be blood here [indicating]. You have blood
2 all the way down to here, but in this area, there's not
3 any, and also there's an area here that's consistent in
4 appearance with a smudged type of fingerprint
5 [indicating].

6 MR. KING: May I publish this to the jury,
7 Your Honor?

8 THE COURT: Yes, sir.

9 Q. (BY MR. KING) What do the blood patterns in
10 this picture tell you, the blood -- the blood on the
11 rifle or the material that appears to be blood on the
12 rifle and the -- and the places where there's -- where
13 it is lacking in blood, what does that tell you, if I
14 can get it out?

15 A. Certainly.

16 Q. What does that tell you?

17 A. Basically, the blood that's located on the
18 muzzle of the rifle and the lack of blood where the
19 blood should be or void, that it's commonly referred to,
20 on that particular rifle is consistent with the way the
21 rifle was found on the scene. In other words, on the
22 rifle at some point; namely, when one of the gunshots
23 occurred, that the blood flow on the muzzle is
24 consistent with the rifle's location when it was
25 discovered. In other words, it wasn't moved.

1 Q. Is this -- okay. And what is the significance
2 of that?

3 A. It's something we would consider from looking
4 at a self-inflicted gunshot wound or suicide versus
5 homicide scenes whether or not staging is present.

6 Q. And what is staging?

7 A. It's where an individual, for lack of a better
8 definition, stages a scene to make us think something
9 other than what happened occurred.

10 Q. Do you have an opinion as to whether or not
11 that happened here?

12 A. Yes, I do.

13 Q. What is that opinion?

14 A. I saw no evidence of any staging whatsoever at
15 this scene.

16 Q. Is that blood flow pattern consistent with what
17 you see in the photograph?

18 A. It is.

19 Q. Do you believe that's the aspect that the body
20 wound up in after the gunshot was fired?

21 A. Yes.

22 Q. Do you believe Taylor Wages shot himself?

23 A. I do.

24 Q. Was he holding the weapon -- could you
25 determine whether he was holding the weapon with one or

1 both hands when the gunshot was fired?

2 A. Based on, there again, the other scientific
3 reports, the positive reports from DPS with gunshot
4 residue on his hands, the void there, it's my opinion
5 that he was holding the muzzle or near muzzle of the
6 rifle with one hand. It would be the strong hand or the
7 right hand.

8 Q. What is the significance of a strong hand?

9 A. That's consistent with suicide with gunshot
10 wounds where the individual usually holds the muzzle of
11 the rifle with the strong hand.

12 Q. Is it safe to say you've seen other examples of
13 suicide?

14 A. Many.

15 Q. How many of these would you have seen in your
16 career as a criminalist?

17 A. Oh, my gosh. Suicides?

18 Q. Well, gunshot wounds?

19 A. Hundreds.

20 Q. How do you think the weapon was being held?

21 A. It was -- in my opinion, the weapon was being
22 held somewhat in a 45-degree angle with the butt resting
23 on the floor.

24 Q. There has been some testimony that this weapon
25 should not have wound up as it is in the photographs of

1 the scene?

2 MR. KING: May I approach the witness
3 again?

4 THE COURT: Yes, sir.

5 Q. (BY MR. KING) Let me hand you what is marked
6 Defendant's Exhibit 7, 6, 5, and 8 and ask you if you
7 can identify those?

8 A. Yes, sir, I can.

9 Q. Do those photographs accurately depict what
10 they show?

11 A. Yes. There again, these were provided to me by
12 the Wood County Sheriff's Department as photographs of
13 the scene as it appeared upon their arrival. This is
14 not the way I saw it when I arrived. Things had been
15 moved.

16 Q. And you used these photographs in reaching your
17 conclusions?

18 A. I did.

19 THE COURT: You're tendering those?

20 MR. KING: Yes, Your Honor.

21 (Defendant's Exhibits 5, 6, 7 and 8,
22 offered.)

23 MR. WHITLEY: No objection.

24 THE COURT: Defendant's Exhibit 5 through 8
25 are admitted.

1 (Defendant's Exhibits 5, 6, 7 and 8,
2 admitted.)

3 Q. (BY MR. KING) No. 6 may, indeed, be the most
4 full-bodied image. There seems to be some controversy
5 whether or not Taylor committed suicide and the weapon
6 wound up in that position; is that correct, or would
7 you -- okay. Let me strike that.

8 We have no reason to believe that that's
9 not exactly as the body was found?

10 A. None whatsoever.

11 Q. That's how it was portrayed to you?

12 A. Right.

13 Q. By the sheriff's personnel?

14 A. Correct.

15 Q. Okay. Is that consistent with your opinion?

16 A. It is. I don't see anything there that would
17 indicate any signs of staging whatsoever.

18 Q. What do you look for in staging?

19 A. Basically, in this particular case -- of
20 course, each crime scene is different depending on the
21 circumstances of the particular crime. In this
22 particular case, in Austin's death, I looked for the
23 distrubution of the bloodstains, the distrubution of the
24 shell casings within the room, the location where the
25 projectile was found, the bloodstains on the bed

1 themselves, the saturated blood or the pooled blood
2 after the fact.

3 The impact spatter, if any, would be
4 something that I looked at, and in this case, there was,
5 and I did look at that and other things. After the
6 forensic testing come in would be things that I looked
7 at which would be whether or not there was gunshot
8 residue on the victim's hand. Range of fire would be
9 something that we would consider, blood that isn't
10 visible even when we used chemical processing to see the
11 misted blood, and just a general overview of the whole
12 area; torn clothing, stippling on the hands or gunshot
13 residue consistent with what was found on the face, if
14 it was a defensive situation, which was not present in
15 this particular case.

16 Q. Can you say with any certainty whether this was
17 the scene where Taylor Wages died?

18 A. Absolutely I believe this is where this has all
19 occurred.

20 Q. Couldn't have been shot somewhere else and
21 brought to this place?

22 A. No.

23 Q. Why? Is it possible that that happened?

24 A. In this case, no. You can't stage high
25 velocity blood spatter. It's uncontrollable. It's

1 something you cannot do. Even me with my knowledge, I
2 could not stage a blood spatter scene.

3 Q. There's just too much stuff there?

4 A. Right, too many variables, too many things out
5 of control.

6 Q. Let me go back one step: Do you have any idea
7 why the gun didn't wind up in the floor? That's back to
8 my original question about the aspect of the gun.

9 A. Not really. It just ends up where it ends up.
10 I've seen them in many, many different positions. It's
11 not uncommon to see them that way. It's not uncommon
12 seeing them laying on the floor. It's not uncommon to
13 see them pointed away from the victim. It's not
14 uncommon to see them just about any position that you
15 really -- you know, when gunshots happen, people don't
16 die instantly. There's involuntary muscle movements.
17 There's all kinds of factors here. The gun is simply
18 where it is.

19 Q. So you're confident that this was not staged?

20 A. Absolutely.

21 Q. Do you have an opinion whether or not Taylor
22 Wages shot himself, actually activated the trigger of
23 the gun and produced the explosion that propelled a
24 bullet through his head?

25 A. Whether he intentionally activated the trigger

1 or whether the trigger went off as a result of him
2 positioning the rifle, which was also a possibility that
3 I considered, I couldn't tell you with 100-percent
4 certainty. What I do know is that the gun was in that
5 area in that position. Mr. Wages was seated on the bed
6 when that gun discharged.

7 Q. Do you have an opinion as to whether or not
8 Taylor Wages could have fired this weapon?

9 A. Oh, absolutely. I believe he did fire the
10 weapon. Whether he did it purposefully or whether it
11 was accident, I couldn't -- you know, it could have
12 happened either way.

13 Q. All right. How do you come to that conclusion?

14 A. The totality of all the evidence that is
15 present within the scene to include the high velocity
16 impact splatter on his hand.

17 Q. Did you do any testing, dry firing of the
18 weapon?

19 A. I did.

20 Q. All right. Tell us about that testing. How
21 did you test?

22 A. I took the rifle and simply tried to recreate
23 what I thought the evidence was showing me and whether
24 or not it would have been possible for an individual to
25 shoot themselves at a distance of zero to 20 inches is

1 basically what I was able to do.

2 Q. All right. How tall are you?

3 A. I'm six-foot.

4 Q. Okay. That's a little bit taller than Taylor
5 Wages?

6 A. Yes, sir.

7 Q. Anyone else dry fire the weapon?

8 A. Certainly. I had several of my partners and
9 another detective at the sheriff's office who are
10 different sizes than I am, one a lot smaller, and we
11 were all able to accomplish the same thing.

12 Q. Did you measure any of that testing to the arm
13 length as set out in the autopsy report of Taylor Wages?

14 A. Did I measure the arm lengths of the officers?
15 No.

16 Q. Were any of your test participants obviously
17 smaller than Taylor Wages?

18 A. Yes.

19 Q. Were they able to successfully fire the weapon?

20 A. Yes.

21 Q. How did they do that?

22 A. The one officer that was smaller than Wages
23 actually manipulated the trigger with his, of course,
24 his weak hand, thumb, activating the safety and pulling
25 the trigger. He was able to do that up to eight inches

1 away from the face. I'm the only one that actually
2 tried to manipulate the rifle using my foot, which was
3 easy to do.

4 Q. Did you have to use both feet?

5 A. No, just one foot.

6 Q. How did you get around the safety, the lever
7 safety that has to be depressed?

8 A. It's really, really light. You can depress it
9 up against your leg, you can depress it with your foot
10 at the same time you're activating the trigger. It's
11 really easy to defeat.

12 MR. KING: May I approach, Your Honor?

13 THE COURT: Yes, sir.

14 MR. KING: May I use State's Exhibit
15 whatever it is? The gun is State's Exhibit No. 64.

16 THE COURT: Yes, sir.

17 Q. (BY MR. KING) Officer, let me ask you to hold
18 State's Exhibit 64.

19 MR. WHITLEY: I would feel more comfortable
20 if the officer cleared that weapon.

21 THE WITNESS: And I was certainly going to
22 clear that.

23 (Witness complies.)

24 THE WITNESS: It is clear.

25 Q. (BY MR. KING) Could you close the breech of

1 the weapon and show the jury how difficult it is to
2 depress the safety mechanism?

3 A. Sure.

4 (Witness complies.)

5 THE WITNESS: That's basically defeating
6 the safety.

7 Q. (BY MR. KING) Could you depress that safety
8 mechanism from any point from the trigger guard?

9 A. Yes, sir, from here all the way to here
10 [indicating].

11 Q. Did you have -- you didn't test the pound of
12 pressure that is necessary to depress that, did you?

13 A. No. That would be something that the firearms
14 examiner would do. I would rely on his reports for
15 that.

16 Q. Is it actually a lot easier to do that than it
17 is to pull the trigger?

18 A. To look at the reports?

19 Q. No, no. I'm sorry. To depress the -- is it
20 easier for to you depress the safety mechanism than it
21 is to actually pull the trigger?

22 A. Yeah, they're both easily manipulated and the
23 safety is easily defeated.

24 Q. Okay. Can you show us how you believe Taylor
25 Wages activated this weapon --

1 A. Certainly.

2 Q. -- to shoot himself?

3 A. Something in the neighborhood of this would be
4 consistent with the gunshot wound, the distance, and the
5 bloodstain at the crime scene, the void on the muzzle of
6 the firearm, the bloodstain on his hand, the bloodstain
7 on his clothes, the subsequent rifle falling into the
8 position that it's at now. The trigger is easily
9 defeated [indicating].

10 Q. You were able to do that at what ranges from
11 the muzzle to your --

12 A. With my hand, out to eight inches. With my
13 foot, up to 20. And I don't believe he did it with his
14 foot, although it is possible.

15 MR. KING: I'm sorry, Your Honor. This
16 just occurs to me --

17 Q. (BY MR. KING) Again, with the weapon, Officer,
18 how was the weapon grasped with the weak hand or the
19 strong hand?

20 A. In my opinion, it would have been held
21 something to this effect, which would be consistent with
22 the blood that's present on the victim's hands, the high
23 velocity blood splatter as a result of the gunshot wound
24 [indicating]. Also, the trajectory would be consistent
25 with the wound track as described by the medical

1 examiner.

2 Q. Did you actually do any testing on the range
3 issues?

4 A. Yes, I did.

5 Q. What kind of testing did you do?

6 A. I fired the -- fired a weapon similar to that
7 which was a 94 Winchester .30-30 rifle at linen cloth,
8 which was done by other experts, and I also fired this
9 rifle at the angle of trajectory as noted by the medical
10 examiner into mannequin heads which is consistent to a
11 human head with the curvatures and whatnot. I didn't
12 want to fire it into a flat surface. That wouldn't be
13 accurate.

14 Q. Let me back up. Did you use the same kind of
15 ammunition that was found at the scene?

16 A. I did.

17 Q. Do you have the results of your testing with
18 you?

19 A. I do.

20 MR. KING: May I approach the witness, Your
21 Honor?

22 THE COURT: Yes, sir.

23 MR. KING: Could we see --

24 THE COURT: Let me go ahead and use this
25 time to take a break. We'll be doing it pretty soon.

1 So ladies and gentlemen, let me ask you to remember your
2 instructions. Be available in the jury room at 10:40.
3 Please go with the bailiff at this time.

4 (Jury exits courtroom.)

5 THE COURT: All right. The jury has left.
6 We'll be in recess.

7 (Recess from 10:26 to 10:42.)

8 THE COURT: Get back on the record in Cause
9 20,529, State vs. Payne. Let the record reflect counsel
10 for the State, counsel for the Defendant, and the
11 Defendant is present. The jury is not present.

12 Is the Defense ready to proceed?

13 MR. KING: Yes, Your Honor.

14 THE COURT: Is the State ready to proceed?

15 MR. WHEELER: State's ready, Judge.

16 THE COURT: Bring them in.

17 (Jury enters courtroom.)

18 THE COURT: All right. Let the record
19 reflect the jury has returned to the courtroom.

20 Mr. King, whenever you're ready, you may
21 proceed.

22 MR. KING: Thank you, Your Honor.

23 Q. (BY MR. KING) Officer Martin, you did some
24 tests as a part of your analysis of the situation?

25 A. Yes, I did.

1 Q. You used at least two different mediums?

2 A. I did.

3 Q. Medium being the target?

4 A. Right.

5 Q. What did you use?

6 A. Basically, I used linen cloth for the first
7 series. I used Styrofoam heads that you buy at the
8 beauty supply shop, for a lack of a better term.
9 They're used for ladies to put their hair pieces on.

10 Q. Why did you use two different mediums?

11 A. Number one, I wanted to recreate the testing
12 that was done by other firearms experts. In particular,
13 when I did this testing, Mr. Bevel had done some, and I
14 wanted to also do testing that I felt was more accurate
15 using the angle of the trajectory and the curvature type
16 surface which would be consistent with a person's head.

17 Q. Okay. What were the results of the flat target
18 tests?

19 A. The results were that the rifle that I used
20 produced patterns of gunshot residue that were
21 consistent with what I saw in the photographs from
22 anywhere from four inches out to eight inches plus or
23 minus two inches either way.

24 Q. All right. That was -- and that told you what?

25 A. That the rifle was fired anywhere from four

1 inches to eight inches away from the victim's face.

2 Q. All right. And did you use that same
3 methodology on the Styrofoam head targets?

4 A. Yes, I did.

5 Q. You brought some of those targets with you, did
6 you not?

7 A. Yes, I did.

8 MR. KING: May I approach the witness, Your
9 Honor?

10 THE COURT: Yes, sir.

11 Q. (BY MR. KING) Let me hand you what has been
12 marked as Defendant's Exhibit 25 and ask you if you can
13 identify that?

14 A. I can.

15 Q. What is that?

16 A. It's the Styrofoam head that I used to test
17 fire the .30-30 rifle to determine what kind of
18 stippling pattern would appear at a given distance.

19 Q. What distance was that particular head fired
20 at? What was the distance between the muzzle and the
21 head on that particular target?

22 A. The distance from muzzle to target on this
23 particular shot was at a 45-degree angle. In other
24 words, the rifle was pointed at a 45-degree angle with
25 an upward trajectory, slightly left to right, was three

1 inches.

2 Q. That was how far the muzzle was away from the
3 target?

4 A. Right. The muzzle being here, the target being
5 here, three inches [indicating].

6 MR. KING: May I publish this to the jury,
7 Your Honor?

8 THE COURT: Has that been tendered?

9 MR. KING: I'm just going to set it
10 right --

11 MR. WHITLEY: No objection.

12 THE COURT: All right.

13 Q. (BY MR. KING) Let me hand you what's been
14 marked as Exhibit 24 and ask you if you can identify
15 that?

16 A. I can. It would be the second -- the second
17 head that I -- or Styrofoam head that I used in the
18 distance testing when I fired the .30-30 rifle.

19 Q. And the gun -- from the muzzle to the target
20 distance on this one, how far was the rifle away?

21 A. Four inches.

22 MR. KING: Your Honor, let me offer what's
23 been marked State's Exhibit 24 and 25 into evidence,
24 please.

25 (Defendant's Exhibits 24 and 25, offered.)

1 MR. WHITLEY: That's 25, the foam head?

2 MR. KING: Yes.

3 THE COURT: Yes.

4 MR. WHITLEY: I have no objection.

5 THE COURT: That's admitted.

6 (Defendant's Exhibits 24 and 25, admitted.)

7 Q. (BY MR. KING) What the significance of those
8 two targets?

9 A. The significance is to show the soot and
10 stippling residue deposited by the 20-inch barrel,
11 .30-30 rifle of the same model and type that was
12 collected as evidence in this case.

13 Q. On a target that approximates a human head?

14 A. Correct.

15 Q. The bullet, did the bullet pass through these
16 targets?

17 A. Yes, it did on both.

18 Q. All right. The targets weren't blown up?

19 A. No.

20 Q. Why is that?

21 A. Because a noncontact type of gunshot wound or
22 not a close distance wound does not produce gas
23 pressures which causes targets to explode.

24 Q. Distinguishing from what had happened in
25 Nichole's case?

1 A. Right, that would be similar. Nichole's was a
2 contact or near contact wound where gases were involved;
3 Austin's was not.

4 Q. All right. Are these targets consistent with
5 your estimates of the range in muzzle to target?

6 A. Yes.

7 Q. Now, you said there was stippling. We've heard
8 what stippling is, and you said there was soot. Are any
9 one of those particular items important in the
10 determination you're making?

11 A. Yes, they are, with the soot being more
12 important than the stippling in this particular case.
13 In the photographs of the victim, the autopsy
14 photographs, there is a complete soot pattern where
15 there is not a complete stippling pattern. In other
16 words, the stippling is off the face and not complete.
17 The soot pattern or soot ring, in my opinion, is present
18 and intact.

19 MR. KING: May I approach again, Your
20 Honor?

21 THE COURT: Yes, sir.

22 Q. (BY MR. KING) Let me hand you what's been
23 marked as State's Exhibit No. 112 and admitted into
24 evidence. Is that one of the pictures you used to
25 exemplify that?

1 A. Yes, it is.

2 Q. Show the jury, if you would, the soot patterns
3 that you're talking about?

4 A. Sure. It would be this -- this pattern right
5 in this area here, [indicating].

6 Q. And the stippling pattern?

7 A. The stippling is going to be the individual
8 strikes from the grains of the unburnt powder that
9 exited the muzzle [indicating].

10 Q. Okay. Based on what you saw, the materials
11 that you were furnished, the photographs and whatnot,
12 which of those mannequins, Exhibits 24 or 25, exhibited
13 the closest approximation to the patterns that you
14 detect on Taylor Wages' body?

15 A. Actually, they're pretty -- pretty close to the
16 same, 25 being closer to the pattern there, and there
17 again, given a limited amount of testing done, you know.
18 I certainly could have fired more rounds, but I didn't.

19 Q. And how far away was the muzzle from the target
20 on Defendant's Exhibit No. 25?

21 A. Four inches.

22 Q. Why is the soot as or more important than the
23 stippling?

24 A. In this particular case, we have a complete
25 soot pattern to use as a standard to compare to;

1 whereas, the stippling pattern is incomplete, in my
2 opinion, due to the fact that the hole -- I mean, it's
3 possible for some of the grains of powder to have not
4 ended up on the face; therefore, providing an incomplete
5 pattern. It's an unknown, yes.

6 Q. They just pass by the face?

7 A. Right.

8 Q. What does an elliptical soot deposit indicate?

9 A. An elliptical soot deposit in this particular
10 case would be consistent with an upward trajectory. In
11 other words, it's not a 90-degree impact or a
12 straight-on in this manner. It would be more consistent
13 with an elliptical or upward trajectory which would be
14 consistent with the path of the bullet in the autopsy
15 report.

16 Q. All right. Do you have any idea why there is
17 no standard target in your area of expertise in the --
18 in the science?

19 A. No gunshot residue testing?

20 Q. In gunshot residue testing?

21 A. It's been my experience in the past in gunshot
22 residue testing is not an exact science. I mean,
23 there's a lot of variables. We don't know what the
24 powder charge was. I mean, there's not an exact
25 science. There's a lot variables. You can glean some

1 information and determine whether it's a contact
2 midrange or long range or near contact type of wound,
3 but as far as giving an exact distance, I don't think
4 that can be done. I don't think it's possible.

5 Q. You can approximate -- you can get within
6 parameters?

7 A. Right. Plus or minus four inches would be a
8 good standard. And in my experience and, you know,
9 training, I simply allude to gunshot residues that a
10 rifle or a firearm will deposit gunshot residue out to a
11 given distance before it ceases to give gunshot residue
12 anymore.

13 Q. If you heard the medical examiner testify that
14 beyond 12 inches, the soot is simply not detectible or
15 not present, would you agree with that --

16 A. Yes.

17 Q. -- statement?

18 Why is that?

19 A. It simply doesn't travel that far.

20 Q. All right. Do either of those two targets or
21 do the two targets exemplify that proposition?

22 A. Yes.

23 Q. Okay. One's fainter than the other?

24 A. Right.

25 Q. The firing of test rounds can give different

1 results between each shot?

2 A. Sure.

3 Q. And is that partly based on the atmospheric;
4 the barometric pressure, the temperature, the humidity,
5 the wind, everything?

6 A. Absolutely. There's a lot of variables that
7 come into play when you're dealing with gunshot residue.
8 Powder burns differently from -- one cartridge doesn't
9 burn exactly the same as -- there's lots of variables.

10 Q. Which is basic physics?

11 A. Exactly.

12 Q. In regard to atmospherics, when you visited the
13 scene out at the Payne residence that morning, what time
14 did you get there?

15 A. When I arrived on the scene, it was
16 approximately -- I'm going to say 7:00ish in the
17 evening.

18 Q. So do you remember what kind of day it was?

19 A. I do.

20 Q. What kind of day was it?

21 A. It was raining and cold that night.

22 Q. What was it that morning?

23 A. To be honest with you, I don't remember. I
24 just remember what it was doing when I got there.

25 Q. Was it cooler or hot?

1 A. I believe it was a little warmer that morning.

2 Q. Did you have --

3 MR. KING: May I approach the witness, Your
4 Honor?

5 THE COURT: Yes, sir.

6 Q. (BY MR. KING) Let me hand you what's been
7 marked as Defendant's Exhibit 15 and Defendant's
8 Exhibit 16 and ask, if you can, if you recognize those
9 photographs?

10 A. Yes, I do.

11 Q. All right. Do they accurately depict what they
12 show?

13 A. They do.

14 Q. What do they show?

15 A. Basically, they're what I would refer to as
16 midrange crime scene photographs depicting the room of
17 the victim as it was found when the police arrived.

18 Q. That was Taylor Wages?

19 A. Yes.

20 MR. WHITLEY: I have no objection.

21 MR. KING: Offer what's been marked as
22 Defendant's Exhibits 15 and 16.

23 (Defendant's Exhibits 15 and 16, offered.)

24 THE COURT: Those are admitted.

25 (Defendant's Exhibits 15 and 16, admitted.)

1 Q. (BY MR. KING) In Defendant's Exhibit 16, it
2 shows the body and the room as you saw it. Did you make
3 these photographs?

4 A. No, sir, these were taken prior to my arrival.

5 Q. Okay. And 16 shows one wall of that room; is
6 that correct?

7 A. It does.

8 Q. Is that a garage door, essentially?

9 A. Yes, it is.

10 MR. KING: May I publish these to the jury?

11 THE COURT: Yes, sir.

12 (Pause in the proceedings.)

13 THE COURT: Did you want to continue?

14 MR. KING: I'm sorry, Your Honor?

15 THE COURT: Did you want to go ahead and
16 ask him some more questions?

17 MR. KING: Well, I would rather that the
18 jury look at the photographs.

19 (Pause in the proceedings.)

20 Q. (BY MR. KING) Officer Martin, did you have
21 Miles Tucker's report available to you and --

22 A. Yes, I did.

23 Q. I believe he reported a strong smell of
24 gunpowder when he entered the home?

25 A. That would be accurate, yes.

1 Q. Was that of any particular significance to you?

2 A. Nothing other than he detected the smell of
3 what he believed to be gunpowder.

4 Q. There was not a gunpowder smell, apparently, in
5 the garage, according to that report?

6 A. Correct.

7 Q. Did that have a significance to you?

8 A. No. Basically, those were observations he
9 made. Certainly, I considered everything that was
10 presented, and I could see that, you know, based on the
11 locations and the build of the rooms where that would be
12 possible and I could also see other things present in
13 the room of Nichole's versus Taylor that would make that
14 also -- you know, also be of importance.

15 Q. Well, explain that. What do you mean by "other
16 things"?

17 A. Large volumes of blood and human tissue have a
18 strong metallic odor. You know, it --

19 Q. Could be mistaken --

20 A. -- could be mistaken for gunpowder.

21 Q. So it would either be present or not present?

22 A. Right.

23 Q. There was also a mention of rigor or rigor
24 mortis --

25 A. Yes.

1 Q. -- of Taylor Wages?

2 A. Yes.

3 Q. Would that be of significance?

4 A. Absolutely.

5 Q. What did you do to verify or discount that
6 possibility?

7 A. Basically, what I did, I reviewed all the
8 photographs looking for signs of early stages of
9 decomposition in Taylor; namely speaking, lividity would
10 be one thing I look for. Of course, you can't see rigor
11 in a photograph. I contact the Texas Ranger and asked
12 him the question, you know, was he aware of Mr. Wages
13 being in rigor mortis when he arrived. He answered, no,
14 he was not.

15 Q. Which Ranger was that?

16 A. Philip Kemp.

17 Q. Okay.

18 A. That was done at the direction of Texas Ranger
19 Kenny Ray who was present in the room at the time the
20 phone call was made. We were trying to clear up that
21 situation because Ranger Ray was doing a peer review of
22 my case.

23 Q. As of a side, has anyone else done a peer
24 review of this besides Ranger Ray?

25 A. Yes. Bobby Henderson with Henderson Forensics.

1 Joe Brasco who is practicing crime scene investigator,
2 Ranger Brent Davis who's looked at the case. I've
3 showed this to just about every detective who has any
4 experience in this matter to be sure we did not overlook
5 anything.

6 Q. Were you able to determine whether you had?

7 A. Yes.

8 Q. What was that determination?

9 A. No, we did not.

10 Q. Now, you knew there was a controversy about
11 this?

12 A. I did.

13 Q. They had actually submitted to Mr. Bevel for a
14 second opinion?

15 A. Yes.

16 Q. You had expressed the opinion you've expressed
17 to this jury to the District Attorney's Office, to Miles
18 Tucker. Was the Ranger present when you had that
19 meeting with all of the officers?

20 A. I don't believe the Ranger was present that
21 day.

22 Q. Who was there?

23 A. The best I can recall it was Brandon Baade, who
24 was an A.D.A. at the time, Miles Tucker, Jerry Hirsch.
25 I believe that was it. There might have been other

1 officers there, but I don't remember exactly.

2 Q. What did you tell them?

3 A. Basically what I told you today with the
4 exception of the firearm testing, which I did not do at
5 that time.

6 Q. How long did that meeting last?

7 A. A couple of hours.

8 Q. What was covered in that meeting?

9 A. Basically, everything we talked about --

10 MR. WHITLEY: I'm going to object to that.
11 It calls for hearsay.

12 Q. (BY MR. KING) What did you cover in that
13 meeting?

14 A. Basically everything we've covered today with
15 the exception of the additional firearm testing that was
16 done later.

17 Q. Were there questions about your report from --

18 A. Yeah.

19 Q. -- the people present?

20 A. Yes, they did. They had numerous questions.

21 Q. Did you respond to those questions?

22 A. I did.

23 Q. When was that?

24 A. Oh, my gosh.. Let me look in my report and I'll
25 give you the date? It was in June of 2008. I'm sorry,

1 it was July, late June, early July. I don't have the
2 exact date.

3 Q. Okay. Did you believe that you had answered
4 all of the questions that were pertinent to this issue?

5 A. I believe I did.

6 Q. And to your determination?

7 A. Yes.

8 Q. All right. Now, getting back to -- can you
9 explain to the jury just a little bit what rigor mortis
10 is?

11 A. Rigor mortis is the stiffness of the muscles in
12 the body that occurs after death. It normally sets in
13 three to four hours after the individual dies. It
14 starts in the jaw and goes to the extremities. It goes
15 in a reverse matter 72 hours later.

16 Q. So if Taylor Wages had rigor mortis, he would
17 have had to have been dead for --

18 A. At least --

19 Q. -- some time?

20 A. At least four hours, yes.

21 Q. If there was gunpowder residue or smell in
22 Nichole area but not in Taylor's, that would be
23 consistent with rigor mortis or with Taylor being shot a
24 significantly different time than Nichole?

25 A. Just the smell of gunpowder alone?

1 Q. Well, that and the rigor mortis and --

2 A. Oh, yeah.

3 Q. -- several different things?

4 A. If Taylor would have been in rigor mortis, yes,
5 it would have indicated that he was definitely dead
6 first.

7 Q. You had access to Tom Bevel's report, did you
8 not?

9 A. I did.

10 Q. And that's in part why you went to such lengths
11 to have the peer review?

12 A. Correct.

13 Q. Is there anything about your report or your
14 conclusions or your opinion that you want to change as a
15 result of the additional testing that's been done by the
16 State's witnesses?

17 A. Absolutely not.

18 Q. Did you -- when you tried to dry fire the
19 weapon with your feet, did you use socks?

20 A. Yes, I did. That's what the victim was clad in
21 when he was discovered, and I tried to recreate that
22 scenario, yes.

23 Q. What did you discover about socks in that
24 regard?

25 A. Basically what I discovered -- it took several

1 attempts -- that the rifle would discharge while you
2 were trying to get it into position to shoot -- to make
3 it fire. In other words, be commonly referred to as an
4 accidental discharge while trying to position in a
5 manner to shoot yourself.

6 Q. So you think it's actually possible that Taylor
7 Wages accidentally shot himself while he was trying to
8 commit suicide?

9 A. It's possible, and I considered that, yes.

10 Q. All right. Was there anything else about the
11 socks that were significant in regard to creasing caused
12 by the sock impacting the trigger or the trigger guard?

13 A. No, I didn't see anything like that, Mr. King.
14 The only thing I reviewed was the photographs of the
15 socks. I didn't actually see the socks themselves.

16 Q. Okay.

17 MR. KING: May I approach the witness, Your
18 Honor?

19 THE COURT: Yes, sir.

20 Q. (BY MR. KING) Let me hand you what's been
21 marked Defendant's Exhibit No. 23 and ask you if I can
22 identify that?

23 THE COURT: Number what?

24 MR. KING: 23.

25 THE WITNESS: Yes, I can.

1 Q. (BY MR. KING) Does that accurately depict what
2 it shows?

3 A. It does.

4 MR. WHITLEY: I have no objection, Judge.

5 MR. KING: I'd offer what's been marked
6 Defendant's Exhibit No. 23.

7 (Defendant's Exhibit 23, offered.)

8 THE COURT: That's admitted.

9 (Defendant's Exhibit 23, admitted.)

10 Q. (BY MR. KING) What is the significance of that
11 photograph to you, Officer?

12 A. To me, the only thing that is of significance
13 in that photograph would be the bloodstain located on
14 the thigh.

15 Q. Show that to the jury and point out the
16 bloodstain you're talking about.

17 A. It would be this stain right here, or stains
18 [indicating]. It's actually two.

19 Q. What is the significance of that stain?

20 A. Being a bloodstain analyst, it tells me several
21 things.

22 Q. What is that?

23 A. Directionality would be one and --

24 Q. What can you tell about the directionality of
25 that particular bloodstain?

1 A. That particular bloodstain struck the target,
2 which would be the thigh of the -- of Taylor, at a 90-
3 or near 90-degree angle, which means the blood source
4 was above that 90 degrees.

5 Q. Is that consistent with your theory of what
6 happened?

7 A. It is.

8 Q. All right. Did you do any testing of that
9 particular phenomenon?

10 A. Yes.

11 MR. KING: May I approach the witness
12 again?

13 THE COURT: Yes.

14 Q. (BY MR. KING) Let me hand you Defendant's
15 Exhibit No. 26. And I cannot help notice, Officer, that
16 there is a biohazard sticker on this package?

17 A. There is.

18 Q. Is there any danger of exposing ourselves or
19 the jury to dangerous pathogens or anything by opening
20 that package?

21 A. Basically, this is human blood that I obtained
22 from the blood bank for blood splattering testing.

23 Q. But in an abundance of caution, you put it on?

24 A. Yes, it's protocol for our evidence for all
25 blood products to be marked.

1 Q. That is, in fact, your blood splatter test
2 exhibit?

3 A. Spatter.

4 Q. Spatter, spatter. I also mispronounced that.
5 Would you take what's inside out and identify that,
6 please?

7 A. Sure. Basically what it is a piece of denim
8 from a pair a blue jeans that I simply put some
9 bloodstains on trying to recreate the stain that is
10 depicted in State's Exhibit 23.

11 Q. Is that an exhibit that you usually used and
12 created yourself?

13 A. This one?

14 Q. Yes.

15 A. Yes.

16 MR. KING: We would offer the contents of
17 Exhibit 23 [sic] into evidence, and I intend to put that
18 back.

19 (Defendant's Exhibit 26, offered.)

20 THE COURT: 26? This is the one you're
21 referring to?

22 MR. KING: I think it's 23.

23 THE COURT: It's 26.

24 THE WITNESS: Yeah, 26.

25 THE COURT: That's what you're tendering?

1 Any objection?

2 MR. WHITLEY: No objection.

3 THE COURT: Admitted.

4 (Defendant's Exhibit 26, admitted.)

5 Q. (BY MR. KING) Hold that up and tell the jury
6 what you're talking about.

7 A. Basically what I did is put bloodstains on the
8 surface of the blue denim, one at 90 degrees and one at
9 45 degrees to show the results of what the stains would
10 look like when you strike a target at 90 degrees and
11 when you strike a target at 45 degrees.

12 Q. Show them the 90-degree.

13 A. This stain here would be 90 degrees
14 [indicating]. As you notice, it's kind of circular in
15 appearance. The little satellite spatters are well
16 distributed around the outer surface which is shown as
17 blood dripping into the blood and simply splattering.
18 The other stain was at 45 degrees. These are very small
19 minute traces of blood. It's less than a cc where I
20 simply mashed the pipe out causing the blood to expel
21 under pressure which is kind of consistent with what
22 happens when a gunshot wound occurs. And this
23 particular stain is striking it at a 45-degree angle
24 causing more of an elliptical type of bloodstain, and
25 all the subsequent spatter falls in front of the stain

1 in the directionality in which the stain's going.
2 Everything will be going in that direction rather than
3 being circular and evenly distributed around the circle
4 itself.

5 Q. And that goes to your conclusion that the
6 victim was sitting up when he was shot?

7 A. Correct.

8 Q. I believe the first photograph that we used was
9 the end of the gun; is that correct?

10 A. Yes, I believe that's correct.

11 Q. It's Defendant's Exhibit No. 4?

12 A. Yes, sir, that's it.

13 Q. And you detected on that photograph what
14 appeared to be a smudge; is that correct?

15 A. Yes, there's a visible substance on the barrel,
16 top portion of the barrel that's consistent in
17 appearance with a smudged fingerprint.

18 Q. What is the significance of that?

19 A. It would show that friction reached in and came
20 in contact with the barrel.

21 Q. There is not an apparent smudge on the weapon
22 now --

23 A. I haven't -- oh, no, no.

24 Q. -- from looking at it just a moment ago?

25 A. No.

1 Q. What is -- do you know what the frequency of
2 recovered fingerprints or smudges from a weapon is in
3 any given crime scene?

4 A. I can tell you my experience on processing
5 firearms and I process hundreds a year, so...

6 Q. Okay. What is --

7 A. The success rate of firearms is less than ten
8 percent --

9 Q. Why is that?

10 A. -- for identifiable prints.

11 Q. Why is that?

12 A. Different factors; mishandling from people
13 recovering them, simply fingerprints don't transfer onto
14 firearm surfaces. There's all different kinds of
15 reasons why it doesn't happen.

16 Q. Packaging?

17 A. Yeah, that could be one.

18 Q. In travel with the weapon?

19 A. In transit. It moves around if it's not secure
20 in the packaging properly, you know. How it's packaged
21 whether it's been in a box or paper or plastic or
22 what-have-you, bearing on whether or not you can
23 successfully get fingerprints off a firearm.

24 Q. So it's not surprising that no fingerprints
25 were recovered from this particular firearm?

1 A. No -- no identifiable fingerprints. It's kind
2 of common. There are other things that you can do with
3 smudges.

4 Q. What did the report say about fingerprints on
5 the weapon?

6 A. I believe it said no identifiable fingerprints
7 were developed.

8 Q. Didn't say the weapon was wiped down?

9 A. I don't -- without looking at the report, I
10 don't know.

11 Q. Do you have that report with you?

12 A. I probably do. Would that be from the latent
13 division from DPS, the report?

14 Q. Austin. Yeah, Austin.

15 A. "There was no suitable latent prints on the
16 evidence," is what the reports says.

17 Q. Does that tell you whether the weapon was wiped
18 down?

19 A. No.

20 MR. KING: Pass the witness, Your Honor.

21 MR. WHITLEY: May I approach, Judge?

22 THE COURT: Yes, sir.

23 (Bench.)

24 MR. WHITLEY: I need to get these exhibits
25 set up in the courtroom for cross-examination. I

1 imagine it's going to be at least an hour of
2 cross-examination. Rather than get these exhibits
3 together in the presence of the jury, why don't we go
4 ahead and take an early lunch and get the courtroom set
5 up?

6 THE COURT: We're awful early. Can you --

7 MR. PARKS: No, I -- I would like to watch
8 from -- to set up his exhibits.

9 THE COURT: Okay.

10 (Open court.)

11 THE COURT: Ladies and gentlemen, I think
12 we'll use our time more efficiently if we go ahead and
13 take an early lunch break. Let me ask you to remember
14 your prior instructions. Again, particularly if you're
15 going out to eat, to wear your badges. Don't talk to
16 anyone about the case; don't let anyone talk to you. If
17 someone tries to talk to you about the case, report it
18 to the bailiff or me immediately. If you'll be back in
19 the jury room, then, at 12:30, we will proceed at that
20 time. Please go with the bailiff.

21 (Jury exits courtroom.)

22 THE COURT: All right. Let the record
23 reflect the jury has left the courtroom.

24 Anything else we need to deal with before
25 we recess?

1 (No response.)

2 THE COURT: All right. We're in recess
3 until 12:30.

4 (Recess taken from 11:25 a.m. to 12:29.)

5 THE COURT: Let me get back on the record
6 in 20,529-2008, State vs. Jason Payne. Let the record
7 reflect that counsel for the State, counsel for the
8 Defendant, and the Defendant is present. The jury is
9 not present. The State was just about to start
10 cross-examination.

11 MR. WHITLEY: One second, Judge.

12 THE COURT: All right. Is the State ready
13 at this time?

14 MR. WHEELER: State's ready.

15 THE COURT: Defendant ready?

16 MR. PARKS: Ready, Your Honor.

17 THE COURT: If you've got them all, bring
18 them in.

19 (Jury enters courtroom.)

20 THE COURT: Let the record reflect the jury
21 has returned to the courtroom.

22 Mr. Whitley, whenever you're ready, you may
23 begin.

24 CROSS-EXAMINATION

25 BY MR. WHITLEY:

1 Q. And so we meet again.

2 A. Good afternoon, Mr. Whitley.

3 Q. Well, I've always called you Noel. Is there
4 any reason to be formal about this?

5 A. No, sir.

6 Q. All right. I came in '85. Were you working
7 for the Sheriff's Office then?

8 A. I believe I started in '85 or '86.

9 Q. So we've been acquainted and actually worked
10 together for over 20 years?

11 A. Yes, sir.

12 Q. And it's usually the other way around, isn't
13 it?

14 A. It is.

15 Q. As a matter of fact, you testified about a case
16 that you were involved in, I believe, February of last
17 year?

18 A. Yes, sir.

19 Q. Bernard Kerr?

20 A. Correct.

21 Q. I prosecuted it?

22 A. Right.

23 Q. I called you as an expert witness?

24 A. Correct.

25 Q. And the jury promptly found him not guilty?

1 A. Yes, sir.

2 Q. So either I failed or you failed or something
3 went wrong somewhere?

4 A. True.

5 Q. Let me talk with you briefly about your
6 training and your experience. What was your duty when
7 you went to the Sheriff's Office approximately in '85,
8 '86?

9 A. Here in Wood County, I was a reserve officer
10 first. Got hired on regular and was a patrolman. From
11 there --

12 Q. What does a patrolman do?

13 A. Serve civil papers, answer calls, take reports,
14 put cows up, respond to domestic --

15 Q. Ride around in marked cars?

16 A. Right.

17 Q. And you were the first officer you'd get to a
18 scene from dispatch?

19 A. Correct.

20 Q. Your job is to secure the scene?

21 A. Right.

22 Q. And you call in the investigators?

23 A. Yes.

24 Q. How long did you do that?

25 A. Probably two years, three years.

1 Q. And at some point in time, you left to go to
2 the military, if I recall?

3 A. Yes.

4 Q. How long were you gone?

5 A. In the military, I can't remember exact dates.
6 I believe I left in '85, '86, '87, and come back in '88.

7 Q. And the reason your short stay was, if I
8 recall, in the military was they reneged on the contract
9 that they offered you?

10 A. Hardship discharged.

11 Q. And you came back to the Sheriff's Office?

12 A. I did.

13 Q. And in what capacity did you come back?

14 A. CID, straight to the Criminal Investigation
15 Division.

16 THE COURT: Mr. Whitley, you might want to
17 speak up.

18 MR. WHITLEY: I thought I was talking loud.

19 Q. (BY MR. KING) How that's?

20 A. Much better.

21 Q. And you recall you went to CID after your
22 return from the military?

23 A. Right.

24 Q. What did you do in CID?

25 A. Investigated crimes against children, major

1 felonies, misdemeanors, just about everything that --

2 Q. Everything in the Criminal Investigation
3 Division?

4 A. Right.

5 Q. Okay. How long did you stay there?

6 A. I can't recall. '80 -- several years. Seven
7 years, maybe, five years. I don't have the exact dates.

8 Q. Did that you involve any type of forensic
9 duties?

10 A. No -- well, I take that back. We did process
11 our own crime scenes.

12 Q. And then sent off whatever the evidence was for
13 analysis?

14 A. Right.

15 Q. Did you have any break in your service at the
16 Wood County S.O. before you went to Tyler?

17 A. Yes.

18 Q. Tell us about that.

19 A. Went to work in the diary business for about a
20 year. Didn't like it. Got out of it.

21 Q. Approximately, when did you go to Tyler, Smith
22 County?

23 A. 1999, October.

24 Q. What did you do when you first got there?

25 A. First got hired as a jailer, stayed there six

1 months, went straight into crime scene.

2 Q. Now, Smith County, that was 1999 or 2000?

3 A. 2000.

4 Q. So basically, you've been on the crime scene
5 investigation team for approximately nine years?

6 A. 10 years. Nine, 10 years.

7 Q. Certainly, you don't have 30 years' experience
8 that Tom Bevel does, do you?

9 A. I have 25 total years experience in law
10 enforcement, you know. During those years, I responded
11 and investigated crime scenes as well as other cases. I
12 don't have 30 years.

13 Q. Now, on the forensic end of it, you don't have
14 that, do you?

15 A. No.

16 Q. You recognize him as being an expert, don't
17 you?

18 A. I sure do.

19 Q. As a matter of fact, you take courses from him?

20 A. I have.

21 Q. Do you, likewise, recognize Richard Ernest?

22 A. I don't know Mr. Ernest.

23 Q. Now, you've heard the term reasonable minds can
24 differ?

25 A. Yes.

1 Q. And you agree with that?

2 A. I do.

3 Q. So you realize Tom Bevel disagrees with your
4 conclusions?

5 A. I do.

6 Q. Now, first of all, let me talk about Nichole
7 Payne. And you've seen these pictures, haven't you,
8 Noel?

9 A. Yes, I have.

10 Q. It doesn't make a forensic expert or a criminal
11 investigator with much experience to make the
12 determination that Nichole Payne basically had her
13 brains blown out?

14 A. Not at all.

15 Q. You went in there and I believe -- how long did
16 you stay in her room?

17 A. Couple of hours, maybe.

18 Q. You told us you took laser --

19 A. Trajectories, yes.

20 Q. -- trajectories?

21 Was that really necessary in view of what
22 you see in these pictures?

23 A. I believe any documentation of a crime scene is
24 necessary and you can't over document one. As we sit
25 here today, it's better to be able to articulate why you

1 did something versus why you didn't. I don't think you
2 can over process a scene, no.

3 Q. But that doesn't change what you view in these
4 pictures, does it?

5 A. No. It helps me articulate my answer so folks
6 will better understand it.

7 Q. Now, I believe you told us next you went into
8 Austin Taylor Wages' --

9 A. I did.

10 Q. -- bedroom, close quote?

11 Did you take the same laser trajectory
12 sightings that --

13 A. There nothing to laser process. There were no
14 bullet defects that I could use a trajectory rod or
15 laser on.

16 Q. How long did you spend in his area?

17 A. Specifically -- roughly, about the same amount
18 of time.

19 Q. Okay. Let me ask you if you would, Noel, to
20 set this chair up right here so the jury can see and we
21 can all see. Come down here and let me give you the
22 rifle.

23 (Witness complies.)

24 THE WITNESS: Is that okay?

25 MR. WHITLEY: Let me clear the rifle since

1 its been out of our sight.

2 THE WITNESS: It's clear.

3 MR. WHITLEY: Just have a seat.

4 (Witness complies.)

5 Q. (BY MR. WHITLEY) I guess, I should have come
6 around before I positioned you there, shouldn't I? If
7 you would, sir, based on your investigation, the
8 information you were furnished, would you take the
9 position that you concluded the rifle was fired from?

10 A. Something along this line [indicating].

11 Q. All right. Now, what is blowback?

12 A. Blowback?

13 Q. Yes, sir.

14 A. It's a lay term for back spatter.

15 Q. And what is back splatter -- spatter?

16 A. Back spatter is the blood that travels backward
17 toward the injury-causing device or from an entry
18 gunshot wound.

19 Q. And it falls -- in the position in which you
20 have demonstrated --

21 A. Right.

22 Q. -- it would have gone straight down?

23 A. Right.

24 Q. We agree upon that?

25 A. Pretty much, yes.

1 Q. And you demonstrated with a photograph up here
2 the Defense showed you -- there is it -- the top
3 right --

4 A. Right.

5 Q. -- over here. There is a small spot --

6 A. Right.

7 Q. -- up there. That's Defendant's Exhibit 23.

8 Now, you saw the massive amount of blood,
9 the biological material that's shown in State's
10 Exhibit 53 --

11 A. Uh-huh.

12 Q. -- 52, 51, 54, Defendant's 25?

13 Does it surprise you that there is no more
14 blood, brains, organic material on the floor and on the
15 pants than what these pictures reflect?

16 A. Not at all.

17 Q. Would you disagree, then, that Tom Bevel, who
18 saw the same pictures, found that significant?

19 A. I disagree. I found it significant as well.

20 Q. And reasonable minds differ, right?

21 A. Yes.

22 Q. Now, the track of the bullet was where?

23 A. The trajectory of the bullet?

24 Q. I call it track. You call it trajectory. The
25 path, whatever you want to call it.

1 A. The wound track. The wound track in the
2 autopsy report was --

3 Q. Yes.

4 A. -- front to back, upwards slightly left to
5 right.

6 Q. And you can see it from the photographs there
7 where the entry wound was demonstrated in State's
8 Exhibit 55, right?

9 A. Correct.

10 Q. So left side, the entry wound approximately
11 here and exit wound approximately here [indicating]?

12 A. Correct.

13 Q. You agree with that?

14 A. I do.

15 Q. Now, would you also agree that as long as the
16 gun is in the same position, it could be fired from any
17 particular location?

18 A. Sure, I do.

19 Q. So we're not locked into the position you've
20 demonstrated?

21 A. Based on the blood spatter and the blood that I
22 see in the photograph on the calf there and on this
23 portion of the leg, that pretty much locks into position
24 when the blood flow first started, yes, it does.

25 Q. Okay. Now, the blood on the weapon, let's talk

1 about that a minute. If I were to point this gun at
2 you, say, from an eight-inch distance --

3 A. Uh-huh.

4 Q. -- and your head was tilted back, that would
5 give you the same trajectory, right?

6 A. It would.

7 Q. Now, if that were the case and that was the
8 scenario that I've just mentioned and I fire, hit you,
9 where would you fall?

10 A. Where would I fall?

11 Q. Uh-huh.

12 A. Probably backwards.

13 Q. And rotated to your right?

14 A. Yes.

15 Q. In the position that the body's found?

16 A. It would be consistent with that, yes.

17 Q. Okay. Now, if I then put the gun right here
18 and laid it against it, would it be in the position the
19 gun on the top of the left hand?

20 A. Would be consistent with that?

21 Q. Yes.

22 A. I'm not sure what I'm -- would that be -- yeah,
23 that would be consistent with what you're describing, it
24 sure would.

25 Q. All right. Let me ask you: You found and were

1 given, what, two empty shell casings?

2 A. There were two found, yes, sir.

3 Q. And were any live rounds brought to you?

4 A. No, no live rounds.

5 Q. You would expect to find some type of
6 organic -- some evidence of it being handled, wouldn't
7 you?

8 A. Depends on the item. What -- are we talking
9 about the shell casings that had been fired?

10 Q. Yes.

11 A. Fired shell casings -- it's been my experience
12 and I've processed several of them in my career. I've
13 never found any usable organic material after they've
14 been ejected.

15 Q. You would have the same thing if the shooter
16 wear gloves, wouldn't you?

17 A. Sure.

18 Q. So you cannot rule out that the shooter wore
19 gloves?

20 A. There's no evidence that gloves were used. I
21 didn't see any documentation that indicated gloves.

22 Q. We have no fingerprints?

23 A. That's an assumption that someone wore gloves.

24 Q. It's a probability, isn't it?

25 A. Sure.

1 Q. It's a reasonable scenario?

2 A. It's an assumption, yes. There's no evidence
3 to support that.

4 Q. Now, if testimony was that Jason Payne, the
5 Defendant, handled that gun and fired that gun the day
6 before, both when he went hunting, according to the
7 testimony, and was practice shooting off his back
8 porch --

9 MR. PARKS: Your Honor, may he reassume the
10 witness stand so we can hear, if that's --

11 THE COURT: Yes, sir.

12 MR. PARKS: -- if that's necessary.

13 THE COURT: Yes, sir. If you'll come back
14 around.

15 THE WITNESS: Thank you, Your Honor.

16 Q. (BY MR. WHITLEY) -- he would have had to have
17 handled the gun in order to do that, wouldn't he?

18 A. Absolutely.

19 Q. And would you expect to find -- be surprised to
20 find his fingerprints on the gun?

21 A. Would I be surprised to find his fingerprints
22 on the gun? No.

23 Q. Would you be surprised if it had no
24 fingerprints on the gun when it went to the lab?

25 A. Would I be surprised? No.

1 Q. Would you be surprised that there's not any
2 smudge prints or evidence of someone handling the gun?

3 A. Would I be surprised to that effect? No.

4 Q. So you think it's perfectly consistent that
5 those prints or whatever was left on that gun
6 disappeared overnight?

7 A. It simply means it wasn't there. I mean, if
8 they didn't find it, it wasn't there.

9 Q. Now, back to the position that you
10 demonstrated, if that was the position that was -- that
11 Austin Wages was in, why don't you find back splatter
12 and blood on his hands, on his left hand?

13 A. There is back spatter on his hand on his right
14 hand.

15 Q. Now, you demonstrated that his left hand
16 pulling the trigger, right hand on the top; is that
17 correct?

18 A. Right, strong hand, correct.

19 Q. Left hand would be directly below his face?

20 A. Right.

21 Q. There's no blood on the left hand?

22 A. Not uncommon.

23 Q. Well, if he got it on his pants, you'd expect
24 it to be on pants, wouldn't -

25 A. Not necessarily.

1 Q. It --

2 A. It landed where it landed.

3 Q. You don't agree?

4 A. Not necessarily. I've even it both ways.

5 Q. Now, if your theory is correct, he was holding

6 the gun at the top of the barrel as you demonstrated --

7 A. Right.

8 Q. -- when he fired?

9 A. Correct.

10 Q. We have blood on his pants, correct?

11 A. Right.

12 Q. Why don't you find any blood on his right hand?

13 A. He does have blood on his right hand.

14 Q. Do you see any blood on the palm of his hand?

15 A. I see blood on his hand, yes, sir.

16 Q. If -- would you come over here, please?

17 (Witness complies.)

18 Q. (BY MR. WHITLEY) Look over here at Defendant's

19 Exhibit 8 and State's Exhibit 110.

20 A. Uh-huh.

21 Q. There is a total lack of blood on the interior

22 palm of his right hand?

23 A. Yeah, there's no blood on the palm.

24 Q. You wouldn't expect to see it there?

25 A. Not necessarily. There's blood there on the

1 palm. Depending on how it was that the blood --

2 [inaudible] -- from blood getting on it.

3 Q. Even though that barrel was as bloody as it
4 was?

5 A. Absolutely. The blood landed where it landed.
6 There's obviously blood on his hand that's inconsistent
7 with the blood on the bedspread.

8 Q. Now, tell us the difference between lividity
9 and rigor mortis.

10 A. Lividity is the pooling or settling of blood in
11 the lower extremities of the body which usually occurs
12 in 45 minutes after death and is fixed within four
13 hours.

14 Q. Okay. That was which?

15 A. Lividity or rigor mortis.

16 Q. What is rigor mortis?

17 A. Rigor mortis is simply the stiffness of the
18 body after death.

19 Q. How long does that take?

20 A. Four hours is usually when it starts, three to
21 four hours.

22 Q. Do you accept the report -- the report, the
23 Miles Tucker's report that he observed rigor mortis by
24 picking up the hand and trying to move it and he found
25 it stiff?

1 A. I don't -- now, there again, based on what I've
2 see in the photographs, I don't see any early stages or
3 signs of decomposition. There's no lividity present
4 where I would expect to see lividity in a case such as
5 this one.

6 Q. So you disagree, then, with Miles Tucker?

7 A. I sure do.

8 Q. And he was the officer on the scene and
9 personally testified that he picked the arm up of Taylor
10 Wages?

11 A. Two different opinions. I totally disagree
12 with what he says.

13 Q. How long have you known Miles Tucker?

14 A. 15 years.

15 Q. Do you consider him a good investigator?

16 A. I don't know. I haven't worked with Miles in
17 10 years, I don't know. He was a patrolman when I
18 worked with him.

19 Q. Now, you testified that one of your Styrofoam
20 heads -- where are those exhibits? Over here. This is
21 Defendant's Exhibit 24 and Exhibit 25. I believe you
22 stated 24 was fired from three inches?

23 A. Four.

24 Q. Four inches. And 25 from how far?

25 A. Three.

1 Q. Now, I see the -- what appears to be an
2 entrance wound?

3 A. Right.

4 Q. Is there an exit wound?

5 A. There is an exit.

6 Q. Where is the exit wound?

7 A. I have to get a trajectory rod. That stuff
8 collapses. The bullet fragment went through the
9 Styrofoam.

10 Q. Left no --

11 A. It's there.

12 Q. And these are what you used to make your
13 determination that this rifle was fired from three to
14 four inches?

15 A. That rifle I had used, that's what I did, same
16 make and model. Produced the same result.

17 Q. You did not use the same gun, did you?

18 A. No.

19 Q. Did you ask to see the same gun and use it to
20 test it?

21 A. In this particular case, I asked for a lot of
22 evidence that wasn't provided.

23 Q. Did you ask -- I believe I asked you if you
24 asked for this gun?

25 A. No.

1 Q. So the gun that you used to test fire and reach
2 the three to four inches distance was not the same gun
3 that was actually used in the killing?

4 A. No. Same make and model, same barrel length,
5 same ammo.

6 Q. Guns differ, don't they?

7 A. Sure, they do.

8 Q. Ammunition varies, too, doesn't it?

9 A. It does from lot to lot, shell to shell.

10 Q. So you used a different gun and different
11 ammunition to produce these results and you're telling
12 us that was an accurate three- to four-inch range?

13 A. Absolutely not. It's just basically a given
14 example with a plus or minus, I believe, of four inches,
15 six inches, something to that effect, and I also said
16 stippling is not an exact science and you can't
17 determine it. It's very inaccurate and not reliable.

18 Q. Now, you had the autopsy report when you test
19 fired these, did you not?

20 A. Did I have an autopsy report? I had one of the
21 autopsy reports. The other I gave back to Mr. Wheeler.

22 Q. In particular, did you have Austin Taylor
23 Wages' autopsy report?

24 A. No.

25 Q. You did not?

1 A. I do not have it at the time --

2 Q. Did you have it at the time you did your
3 investigation?

4 A. Yes.

5 Q. All right. Now, I believe that the medical
6 examiner stated on Page 5 that the range, 7 3/4ths
7 inches of maximum spread of stippling and soot on the
8 skin. What does that mean to you?

9 A. It means the maximum spread of the stippling
10 pattern on the skin.

11 Q. And on this Styrofoam Exhibit No. 25, if would
12 show how you construed and applied that spread to --

13 A. Observation only.

14 Q. You didn't use a ruler?

15 A. No.

16 Q. All right. You estimated?

17 A. No. It's not an exact science. Is it
18 consistent in appearance with what I saw in the crime
19 scene photographs, basically.

20 Q. Now, tell me your methodology in test firing
21 here.

22 A. How did I do it?

23 Q. Yes.

24 A. The heads were put parallel to the ground face
25 up. The rifle was fixed to a tripod. I had another

1 officer present that held a tape measure to the barrel
2 and we did it exactly to the distance, double checking
3 before the shot was fired. It was fired from a fixed
4 surface.

5 Q. Did you try and duplicate the
6 seven-and-three-quarter inch stippling spread that
7 the medical examiner observed?

8 A. On the stippling pattern, no.

9 Q. I believe you said in your report that the
10 gunshot pattern, residue patterns, commenting on the
11 stippling, are visible in Austin's face, confined to the
12 left side of the face. Do you recall that?

13 A. In the crime scene photographs. I didn't have
14 the autopsy photographs until a couple, three days ago.
15 That was well after the report was filed.

16 Q. That's not confined to the left side of the
17 face, is it? State's Exhibit 89 and --

18 A. No. At the time I wrote that report, I did not
19 have that particular photograph to view. I didn't get
20 to see the autopsy photographs until three days ago.

21 Q. But clearly, the autopsy photos say stippling
22 is all over the face, correct?

23 A. I agree with that, and I based mine solely on
24 the crime scene photographs which did not depict all of
25 it.

1 Q. So basically, you didn't have all the evidence
2 when you reached your conclusion, did you?

3 A. I didn't have that, no, but that in and of
4 itself was --

5 Q. I believe you answered that. Did you use a
6 density method in determining the distance from muzzle
7 to target?

8 A. Did not.

9 Q. Do you recognize that is a recognized and
10 approved method of determining distance?

11 A. This is the first I've heard of that method, in
12 this trial.

13 Q. You hadn't never heard of that before?

14 A. No.

15 Q. Okay. Was your recreating the firing to find
16 the muzzle to target distance, did you attempt to get a
17 seven-and-three-quarter-inch spread?

18 A. I did not. I did talk with Ed Hueske who is a
19 firearms expert and he did talk about that and he did
20 some testing, and I based part of my analysis on his
21 opinions. He is more qualified in shooting
22 reconstruction or stippling patterns than I, but we did
23 confer.

24 Q. Let me show you what's been marked for
25 identification, admitted as State's Exhibit 116,

1 represented to be the test results from Mr. Ernest.

2 Ever see anything like this before?

3 A. No, sir. That looks like it's been altered
4 with led from a pencil or something.

5 Q. Oh?

6 A. I don't know. I've never seen anything like
7 that. I've seen it done on linen cloth or other
8 materials, but never on clear plastic.

9 Q. Okay. You don't recognize that the methodology
10 used, the density method, do you recognize that
11 generally?

12 A. No. The first I've heard of that is when
13 Mr. Ernest testified to it up here. Like I said, I'm
14 not a stippling expert. I just simply recreated what I
15 observed. I mean, firing a gun at several distances is
16 not difficult.

17 Q. Now, you say you've never heard of the density
18 method?

19 A. No, not for stippling, I haven't.

20 Q. Would it surprise you that Tom Bevel, in his
21 first testing, used the spread method?

22 A. Would it surprise me? No, I believe that's
23 what he put in his report.

24 Q. And in this courtroom, he deferred to Richard
25 Ernest as being more accurate?

1 A. That's his opinion, yes.

2 Q. I take it, you don't share the same opinion?

3 A. I do not.

4 Q. And again, reasonable minds can differ?

5 A. Absolutely.

6 Q. Now, let's go back to your Bluestar testing?

7 A. Okay.

8 Q. There's no visible blood underneath that body,
9 is there?

10 A. No.

11 Q. On the front of it?

12 A. No, not under the body proper. There is blood
13 visible on the carpet near the bed.

14 Q. Say that again.

15 A. There was blood visible on the carpet near the
16 bed frame.

17 Q. Is that reflected in any pictures?

18 A. Sir?

19 Q. I said is it reflected in any of these
20 pictures?

21 A. Yes, I believe it is.

22 Q. Would you be so kind as to point it out to us?

23 A. Sure. Actually, this cover is blocking.
24 There's blood on the floor, which you can't see. There
25 are other photographs that show it better. There was

1 visible blood on the floor. There's no macrophotography
2 done to indicate what I saw [indicating].

3 Q. There's no visible blood in this area
4 [indicating]?

5 A. No, not in this particular photograph, no.

6 Q. Well, you would expect to see blood from the
7 back spatter?

8 A. And there was blood there from back spatter,
9 just not in that photograph.

10 Q. Well, if it's so invisible to the naked eye,
11 why didn't you Bluestar it?

12 A. Normally, when gunshots involving back spatter
13 that is atomized that turns into a mist like you spray
14 from an aerosol can, it falls to the ground and it only
15 travels a very small distance.

16 Q. But with all the blood and biological material
17 that's reflected in these pictures, can you explain why
18 there's none on the floor by the bed?

19 A. There was blood on the floor. It was
20 illuminated during the Bluestar treatment. There was
21 blood underneath the bed that's not visible in that
22 photograph.

23 Q. Well, this is a bloody scene, isn't it?

24 A. It's moderately bloody. I've seen a lot worse.

25 Q. And there's organic matter all over this bed,

1 isn't there?

2 A. Most of that is saturation stains that occur
3 after the decedent laid there and bled out.

4 Q. Yet, there's no visible blood on the floor?

5 A. There was no visible blood in that photograph.

6 Q. Did you find any visible blood on the ceiling?

7 A. No, I did not.

8 Q. That would be where the exit wound was,
9 wouldn't it?

10 A. Commonly known as forward spatter, yes.

11 Q. You would expect to see some forward spatter,
12 wouldn't you?

13 A. Not necessarily. There again, that stuff is
14 atomized and only travels a short distance. And
15 Mr. Bevel, in his book and his teachings, teaches us
16 that misted blood only travels 36 inches to 48 inches,
17 and I believe --

18 Q. And if it ran out of velocity, it falls
19 straight down?

20 A. It simply drops out of the sky, yes.

21 Q. And you would expect to find it on the rear of
22 the bed?

23 A. I would expect to find it over -- over the
24 event where the gunshot happened, which would be over
25 the victim's current location as is depicted in the

1 photographs.

2 Q. Would you find it unusual if Mr. Bevel
3 disagrees with you?

4 A. I sure would.

5 Q. And yet, he taught you blood spatter?

6 A. He sure did.

7 Q. And you mentioned GSR, gunshot residue?

8 A. Right.

9 Q. Did you find it unusual Austin Taylor Wages had
10 a small amount of GSR on his hands?

11 A. Do I find it unusual. No, I would expect to
12 see gunshot residue on his hands.

13 Q. Because there was a gunshot fired in his
14 presence?

15 A. Because his hand was near a gunshot, period.

16 Q. So that's really not helpful, is it?

17 A. Sure, it is. It places him near the muzzle of
18 the gun when it was discharged.

19 Q. Whether he did it or someone else did it --

20 A. Right.

21 Q. -- whoever the shooter was?

22 A. It's obvious to me who the shooter was.

23 Q. And again, reasonable minds differ, don't they?

24 A. Yes.

25 Q. It was not so obvious to your mentor?

1 A. I disagree with him.

2 Q. Even though he has some 27 years experience?

3 A. I've probably worked just as many bloody crime
4 scenes as he has, so I would say we're probably equal in
5 experience.

6 Q. I believe you testified hundreds?

7 A. Or more.

8 Q. And I believe he testified to thousand?

9 A. That's a lot of bloody crime scenes.

10 Q. Yes, it is.

11 A. And that's not counting suicides.

12 Q. Now, did you talk to Officer Lain that was at
13 the scene?

14 A. I requested all the reports that were written
15 by the deputies that were at the scene.

16 Q. Sir, that's not my question.

17 A. No, I did not.

18 Q. Did you talk to Officer Burge at the scene?

19 A. No, I did not.

20 Q. Did you talk to Miles Tucker?

21 A. Did I talk to Miles Tucker?

22 Q. Yes.

23 A. Indirectly, briefly, read his report.

24 Q. How do you talk to someone indirectly?

25 A. Over the phone.

1 Q. You're talking to him, aren't you?

2 A. Yeah.

3 Q. You're talking to him directly over the phone
4 line?

5 A. I talked to Miles Tucker, yes.

6 Q. How many?

7 A. Not many.

8 Q. You knew he did not agree with you, didn't you?

9 A. I did.

10 Q. Did you talk to Misty Burns who was on the
11 scene?

12 A. Did I talk to Misty Burns? No.

13 Q. Were you aware that the marriage of the
14 Defendant and Nichole Payne was in trouble?

15 A. No.

16 Q. Were you aware that he had threatened her life?

17 A. No.

18 Q. You didn't have that information, did you?

19 A. It was not provided to me, no.

20 Q. Had it mattered to you if you had that
21 information?

22 A. I would have considered it, yes.

23 Q. All right. And would it -- did you have the
24 information that there was a \$100,000 life insurance
25 policy on Nichole Payne and a \$10,000 life insurance

1 policy on Austin Taylor Wages?

2 A. No.

3 Q. Did you have the information when those
4 policies were issued?

5 A. Did I have the information? No, sir, I did
6 not. Everything that was provided to me was by the
7 Sheriff's Office at my request and I asked them for
8 everything and I assume they provided everything.

9 Q. Did you know that there was a personal injury
10 settlement of well over \$300,000 that they received
11 earlier that year?

12 A. No, sir.

13 Q. Did you know that they were out of money at the
14 time this happened?

15 A. No.

16 Q. Did you know they had run through the entire
17 \$300,000?

18 A. No.

19 Q. Coupled with that and with the life insurance
20 policy, would that have changed your opinion in any way?

21 A. Absolutely not. The physical evidence speaks
22 for itself.

23 Q. And again, reasonable minds differ, don't they?

24 A. They do.

25 MR. WHITLEY: I'll pass the witness, Judge.

1 MR. KING: May we approach?

2 THE COURT: Yes, sir.

3 MR. KING: The witness, I'm sorry.

4 THE COURT: Yes, sir.

5 REDIRECT EXAMINATION

6 BY MR. KING:

7 Q. Officer Martin, could you come up here so you
8 can kind of see this a little bit?

9 A. Sure.

10 THE COURT: And you can get out of the
11 chair if you need to.

12 THE WITNESS: I can see it, sir. Thank
13 you.

14 Q. (BY MR. KING) These photographs that were used
15 by Mr. Ernest, they show both soot and stippling, do
16 they not?

17 A. They do.

18 Q. Have you seen Mr. Ernest's test patterns?

19 A. Not before today, no.

20 Q. Would you be surprised or were you surprised to
21 note that his test firing targets did not have stippling
22 and did not have soot on them?

23 A. That I would be surprised. That's something
24 that needs to be considered, both the soot and the
25 stippling as a part of the distance testing on GSR.

1 Q. Now, Tom Bevel, as far as you know, did not go
2 to the crime scene?

3 A. As far as I know, he did not.

4 Q. And as far as you know, he did not have the
5 autopsy photographs either?

6 A. I don't know that, no. I'm not sure what
7 Mr. Bevel reviewed.

8 Q. Okay. At the meeting you had at the D.A.'s
9 office, the two-hour meeting you had at the D.A.'s
10 office, did Miles Tucker question you about your
11 conclusions?

12 A. He was present. He asked some questions. I
13 don't specifically recall what they were. It's been a
14 long time ago.

15 Q. But nothing that changed your opinion?

16 A. No.

17 Q. Did he have an opportunity to ask all the
18 questions he wanted to of you?

19 A. Absolutely, any time he wanted to.

20 Q. You actually saw blood on the floor at the
21 crime scene at the position just in front of where the
22 corpse is shown in the photographs?

23 A. Sure. Not only did I see it, I tested it with
24 the presumptive chemical found in Bluestar which was
25 positive. It's a chemical to look for micro images of

1 blood, presumptive test, which is standard operating
2 procedure when you're using illuminance materials
3 because of the false reactions.

4 Q. You're convinced there was blood there?

5 A. Yes.

6 Q. And it was consistent with your analysis of the
7 crime scene?

8 A. Sure.

9 Q. That's physical evidence, is it not?

10 A. It is.

11 Q. That's not antidotal evidence?

12 A. Right.

13 Q. Something somebody told you about what might or
14 might not have been going on in the life of Nichole
15 Payne and Jason Payne?

16 A. Correct, and basically, I based my analysis
17 solely on physical evidence.

18 Q. That's what a criminalist does?

19 A. Correct.

20 Q. What do you consider the most important things
21 in your analysis of this crime scene?

22 A. This particular scene, I have several of them
23 listed in my report. I'd be glad to read them. There
24 are many.

25 Q. Please.

1 A. Physical evidence that I considered and
2 reviewed: Nichole Payne had a gunshot wound to the back
3 of the head which was clearly not self-inflicted. The
4 wound is described in the autopsy report as being a
5 contact or near-contact wound to the back of the head,
6 front to back and upward. Nichole Payne was shot in the
7 back of the head while sleeping in her bed.

8 A bloodstain analysis and spatter pattern
9 and trajectory analysis of the bullet path based on one
10 bullet located on the west wall in that room was
11 consistent with the scenario that she was shot by
12 another individual. The probable point of origin for
13 the spatter pattern analysis was consistent with the
14 victim's injury in the location as it appeared in the
15 crime scene photographs. Early stages of rigor mortis
16 and discoloration associated with decomposition are
17 visible on the fingerprints of Nichole Payne in the
18 crime scene photographs.

19 Wood County Sheriff's Office reports filed
20 by deputies indicate the odor of gunpowder presence in
21 the room where Nichole was found. Tissue consistent in
22 appearance with brain matter was observed on the floor
23 and the surface of the bed. Large saturation
24 bloodstains and blood spatter were present in Nichole's
25 room on the walls and bed and floor. Nichole was

1 covered with bedding to the neck. Several areas of
2 bedding were saturated with blood. Wood County
3 Sheriff's Office reports state that Nichole was warm to
4 the touch.

5 A defect described as a bullet hole through
6 the wall was located on the west wall in Nichole's room
7 and was consistent in appearance with a bullet hole.
8 Trajectory rods and laser was used to determine the
9 bullet's trajectory. The trajectory of the bullet was
10 from east to west and across the bed with the exit to
11 the exterior of the dwelling. There is no sign of
12 struggle reported or seen in the room where Nichole was
13 found and no defensive wounds were visible on her body
14 during autopsy. A search of the yard where the bullet
15 might have struck the ground was conducted with the aid
16 of a metal detector. No bullet was recovered.

17 Austin Wages was found in his room with a
18 gunshot wound to the face, left of the mouth. The wound
19 track, according to the autopsy, was from left to right,
20 front to back, and upward. Gunshot residue patterns
21 commonly known as stippling are visible on Austin's
22 face, confined to the left side. Bloodstains located on
23 Austin's clothing, spattered on the bed, and blood flow
24 on the surface of the bed is consistent with Austin
25 having been in a seated position on the bed near the

1 headboard at the time he received the gunshot wound.

2 No signs of a struggle or fight were
3 present in his room or any other room of the dwelling
4 when examined in person or in any of the photographs.
5 No signs of rigor mortis are visible on the exposed skin
6 of Austin Wages in any of the crime scene photographs
7 that I viewed.

8 Investigative reports from the Wood County
9 Sheriff's Office state that a .30-30 shell casing was
10 located on the floor in Austin's bedroom in the general
11 area west of his feet. A .30-30 shell casing was
12 located in the chamber of the .30-30 rifle. A bullet
13 with base was recovered from the floor east of the twin
14 bed, a 30-caliber -- a .30-30-caliber. It measured a
15 diameter of 308-thousandths of an inch. Austin had socks
16 on his feet, no shoes. Austin was fully dressed. Large
17 saturation of bloodstains are visible on Austin's bed
18 consistent with his position.

19 I did not observe anything that would
20 indicate that he was moved or his body was positioned
21 after blood loss occurred. Bloodstains on Austin's
22 right hand are not consistent with the patterns that
23 appear on the bed. These stains are consistent with
24 patterns and voids on the rifle barrel with the right
25 hand having grasp the barrel when it was discharged

1 causing bloodshed.

2 Bloodstains on the .30-30 rifle are visible
3 near the muzzle and down the barrel of the muzzle -- or
4 down the barrel from the muzzle. Blood still in a
5 liquid state between the magazine and the barrel on the
6 front side is visible in the crime scene photographs.
7 Blood flow patterns located on the barrel of the .30-30
8 rifle and downward toward the stock are consistent with
9 the rifle being pointed upward when blood was deposited
10 on the barrel.

11 An area devoid of blood in an area where
12 blood should have been is visible just below the front
13 side of the top side of the barrel of the .30-30 rifle.
14 Smudges consistent with fingerprints are visible on the
15 barrel of the .30-30 rifle just below the front side in
16 the same area where the void is located.

17 No signs of staging were observed at the
18 scene or in any of the crime scene photographs.
19 Bluestar processing showed no latent blood on the carpet
20 of Austin's bedroom other than atomized stains below the
21 sidebar of the bed frame below Austin's position.
22 Bluestar processing showed numerous tiny circular stains
23 on the carpet at the edge of the bed in the area where
24 Austin's body was found.

25 No stippling, gunshot residue, or defense

1 wounds was observed on Austin's hands in the crime scene
2 photographs and no such injuries were noted in the
3 autopsy report. The .30-30 rifle was positioned between
4 Austin's leg in an upright position at an angle near or
5 greater than 45 degrees. The rifle was resting on the
6 palm side of Austin's left hand. No blood is visible on
7 Austin's left hand.

8 A single circular stain -- bloodstain is
9 visible on Austin's right hand that is consistent with
10 size, shape, and appearance with spatter commonly found
11 with a gunshot wound event. A small pool of blood was
12 located at the carpet at the foot of the bed consistent
13 with free-falling blood and blood dripping into blood
14 finding a small drip pattern on the floor. Bloodstains
15 consistent with spatter was observed on the interior
16 sides of the frames of the frame supports at the foot on
17 the west side of the frame from the footboard under and
18 around Austin's leg.

19 No suicide note was located at the scene.
20 Jason Payne had no visible blood on his clothing or
21 shoes that is mentioned in any case reports or depicted
22 in any photograph. A gunshot residue test kit was
23 performed on Jason Payne. Clothing was located in the
24 washer. Clothing was located in the drier. A small
25 white washcloth located in Jason Payne's vehicle had a

1 small circular contact bloodstains on its surface. It
2 appeared to be the size of a quarter in the photographs.

3 Q. Officer Martin?

4 A. Yes.

5 Q. Is there anything else in there that is of real
6 significance to you?

7 A. That's pretty much it.

8 Q. All right. Let me ask you this: One of the
9 items in that report, there is no blood or stippling on
10 the hands, on the palms of the hands?

11 A. Correct.

12 Q. What the significance of that?

13 A. If someone was about to shoot me in the face
14 with a rifle, I would throw my hands up, which is a
15 common response, and I would expect to see stippling on
16 the underside of the palms of the hands of the person if
17 that was the case.

18 Q. Wasn't there?

19 A. Wasn't there.

20 Q. There was an error in that, however, in regard
21 to stippling on the left side the face; is that correct?

22 A. Absolutely, and that was based solely on the
23 crime scene photographs. The stippling was -- is
24 obviously seen in the photograph entered into evidence
25 all over his face.

1 Q. Does that change your opinion any?

2 A. No.

3 Q. There was clothing in the washer and drier. I
4 believe that clothing was tested. If there had been
5 blood, if there had been human blood on that clothing,
6 would you have expected the washer and drier to get it
7 out?

8 A. In most cases, clothing that has been washed,
9 there is still traces of blood that are retrievable and
10 enough -- you know, I've done it in the past where we've
11 recovered blood from items that have been washed.

12 Q. Bluestar is really proud of that fact, are they
13 not?

14 A. Yes, they are.

15 Q. And they use it in their advertising?

16 A. Yes, they do.

17 Q. We have heard from Mr. Ernest that if a high
18 velocity blood splatter round was fired at a human head
19 as close as four inches, the head would explode?

20 A. I disagree with that.

21 Q. Why is that?

22 A. There's no gas pressure at that distance.

23 Q. Did your four-inch head explode over here?

24 A. No.

25 Q. Did your three-inch head explode?

1 A. No.

2 Q. And the bullet fragmented when it went through
3 these Styrofoam --

4 A. It has multiple exit points, yes, which would
5 indicate the bullet separated some time during its path
6 through the Styrofoam.

7 Q. Is that consistent with what happened in the
8 head of Austin Wages?

9 A. The -- from what I saw in the autopsy
10 photographs, I believe one photograph in particular was
11 an x-ray, showed a led storm which would be consistent
12 with a bullet fragmenting upon impact, yes.

13 Q. And a copper jacket was found, minus the led
14 bullet --

15 A. Right.

16 Q. -- at the crime scene?

17 A. Right.

18 Q. And that would also be consistent with that
19 fragmentation?

20 A. Correct.

21 MR. KING: Pass the witness.

22 MR. WHITLEY: Nothing further.

23 THE COURT: Thank you, sir. You may step
24 down. Subject to recall?

25 MR. KING: Yes, I think so.

1 THE COURT: All right. Ladies and
2 gentlemen, let's go ahead and take your first break
3 after lunch. Let me ask you to remember your
4 instructions and be available in the jury room at 1:40.
5 Please go with the bailiff at this time.

6 (Jury exits courtroom.)

7 MR. WHITLEY: May we approach, Your Honor?

8 THE COURT: Yes, sir.

9 Let the record reflect the jury has left
10 the courtroom.

11 Yes, sir.

12 MR. WHITLEY: Is Noel Martin being an
13 expert witness exempt him from the Rule?

14 THE COURT: Sure.

15 MR. KING: I assumed that. I just want to
16 make sure.

17 THE COURT: We'll be in recess, then, until
18 1:40.

19 (Recess taken from 1:27 to 1:42.)

20 THE COURT: On the record in 20,529, State
21 vs. Payne. Let the record reflect counsel for the
22 State, counsel for the Defendant, and the Defendant is
23 present. Jury is not present.

24 And let's see, the Defendant is ready to
25 call its next witness; is that correct?

1 MR. KING: That's correct, Your Honor.

2 THE COURT: You ready to proceed?

3 MR. KING: Yes.

4 THE COURT: Is the State ready to proceed?

5 MR. WHEELER: Ready, Your Honor.

6 THE COURT: Then bring them in.

7 (Jury enters courtroom.)

8 THE COURT: Let the record reflect the jury
9 has returned to the courtroom.

10 The Defendant may call its next witness.

11 MR. KING: Ed Hueske, Your Honor.

12 THE COURT: Mr. Hueske, let me get you to
13 raise your right hand.

14 (Witness sworn.)

15 THE COURT: Please have a seat.

16 Yes, sir.

17 MR. KING: Thank you.

18 EDWARD E. HUESKE,
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. KING:

22 Q. Professor Hueske, how are you employed?

23 A. I teach criminalistics at the University of
24 North Texas in Denton and I also consult on criminal and
25 civil matters and I also provide training to law

1 enforcement agencies throughout the United States and do
2 some work abroad.

3 Q. What are your particular areas of expertise?

4 A. My main area of expertise is crime scene
5 reconstruction with a specialty area of shooting
6 reconstruction.

7 Q. What education and formal training do you have
8 to take you to that area of expertise?

9 A. I have a Bachelor's Degree in chemistry from
10 Sam Houston State University and I also have a Master's
11 Degree in chemistry from Sam Houston State University.
12 Also, over the 36 years, I've been a practicing forensic
13 scientist. I have attended numerous specialized
14 forensic training classes, a large number of which were
15 put on by the Federal Bureau of Investigation at the FBI
16 Academy in Quantico, Virginia.

17 Q. How long have you been teaching?

18 A. I started teaching right out of graduate
19 school. I taught chemistry for two years at the college
20 level in my hometown at Glenn College and then I got
21 into the field of forensic science, but I continued to
22 teach. It's something that I enjoy very much, and so
23 over the years, I've taught at Weatherford college,
24 University of Texas at Arlington, Northern Arizona
25 University and then also Tulsa College and now

1 University of North Texas where I teach full time.

2 Q. Do you belong to any professional
3 organizations?

4 A. Yes. I am a fellow of the American Academy of
5 Forensic Science. I am a maritus member of the American
6 Society of Criminal Laboratory Directors. I'm a maritus
7 member of the Southwestern Association of Forensic
8 Scientists. I'm a member of the International
9 Association of Bloodstain Pattern Analysts. I'm a
10 member of the Association of Crime Scene Reconstruction,
11 and a distinguished member of the Association of Firearm
12 and Tool Mark Examiners.

13 Q. Are you published?

14 A. Yes. I've published books, articles, some, oh,
15 20 or 30 articles. Of course, at the University, that's
16 part of the responsibility. I engage students in my
17 criminalistics program in research and publish articles
18 with them as coauthors, and I've got several that have
19 been published and several that are pending publication
20 currently.

21 Q. You became involved in this specific case when
22 the Defense team hired you to do an analysis of this
23 case?

24 A. That's correct.

25 Q. And by "hired," I mean we're paying you for

1 doing this?

2 A. Yes.

3 Q. As are Mr. Ernest and Mr. Bevel?

4 A. Correct.

5 Q. By their respective employers?

6 A. Yes.

7 Q. Do you have personal knowledge of the facts of
8 this case?

9 A. Yes.

10 Q. What is it? Where did you gain that
11 information?

12 A. I gained that information from my review of the
13 materials that were provided to me including the Wood
14 County Sheriff's Office offense reports. I was
15 furnished copies of those. I was also furnished copies
16 of the photographs taken by the Wood County Sheriff's
17 Office and also by Detective Noel Martin, who has
18 previously testified. I was provided copies of the
19 autopsy reports on both victims and I was provided with
20 the reports of Mr. Bevel, Mr. Ernest, and Detective
21 Martin in addition to some other documents.

22 Q. Have you visited the scene of the occurrence?

23 A. Yes, I have.

24 Q. Have you made any scientific tests involved in
25 this case?

1 A. Yes, I have.

2 Q. What kind of testing have you done?

3 A. Well, the testing that I've done has focused
4 primarily on the stippling determination, and associated
5 with that, of course, are the soot residues that were
6 present on Mr. Wages around the entry wound site.

7 Q. Is that distance determination?

8 A. Correct, muzzle to -- muzzle to, in this case,
9 wound distance approximation.

10 Q. Why is that distance so important?

11 A. Well -- well in this case, of course, there is
12 a contention as to how the shooting occurred for Taylor
13 Wages and so it centers around whether or not it's
14 feasible for him to have shot himself, so
15 muzzle-to-wound distance is obviously a critical
16 conversation.

17 Q. What weapon did you use in your testing?

18 A. Actually, I used two weapons. I used the
19 evidence weapon once I finally obtained it. Initially,
20 I didn't have it, and so I happen to own a .30-30 model
21 94 Winchester carbine with a 20-inch barrel, so I
22 conducted tests using my own weapon. Then later, I used
23 another .30-30 carbine, 20-inch barrel, again a
24 Winchester, to do follow-up testing. So I've use a
25 total of three weapons including the incident weapon.

1 Q. Did you use the same type of ammunition as was
2 found at the scene of the crime?

3 A. Yes, I did.

4 Q. Did you also test or supervise the testing of
5 the dry firing of the weapon that was discovered in
6 Austin Taylor Wages' room?

7 A. Yes, I did. I had a somewhat reluctant
8 participant; namely, my wife, who did a little
9 reenactment for me using the weapon since she is a much
10 smaller stature than I am. So I had her position the
11 weapon, and, in particular, I was interested in whether
12 or not she could reach the trigger and disengage the
13 safety manually and with her feet, left foot or right
14 foot, and tried them all.

15 Q. Let's go in reverse order and take the dry
16 firing of the weapon first: In that test, did you think
17 to measure the length of your wife's arms, armpit to the
18 end of her fingers?

19 A. Yes, I did.

20 Q. What was the length?

21 A. If I recall correctly, I think it was like
22 24-and-a-half inches or something, a couple of inches
23 shorter than the deceased.

24 Q. Was she able to fire the weapon?

25 A. Yes.

1 Q. From what distance?

2 A. She could fire it manually up to about six
3 inches from the muzzle to the area of her mouth that
4 corresponded to the deceased. With her foot, that
5 expanded the distance out quite a bit further. I don't
6 have a specific measurement, but it was certainly within
7 the range that I had already determined would be the
8 maximum distance of fire, which is approximately 10
9 inches.

10 Q. Have you factored all the information that you
11 had been given into your analysis of this occurrence?

12 A. Yes, I have.

13 Q. Do you have an opinion of how Austin Taylor
14 Wages died?

15 A. Yes, I do.

16 Q. What is that opinion?

17 A. My opinion is that he was shot by himself, no
18 one else, while seated on the bed, feet on the floor, at
19 a muzzle-to-target distance between four and 10 inches.

20 Q. Okay. You've been present much of the
21 testimony throughout this trial, have you not, sir?

22 A. Yes, sir, I have.

23 Q. Have you heard anything here that changes your
24 opinion as expressed in your report?

25 A. No.

1 Q. Let's go on to the distance determination test
2 that you did. How did you conduct those tests?

3 A. As I indicated, I had occasion to use three
4 different rifles including the incident weapon that's in
5 evidence. I set up a test firing fixture which I've
6 used many times, and basically, it consists of
7 eight-foot tables. And my version of a bullet trap for
8 this type of testing consists of a long box packed with
9 waste thread material, and basically, it would stop the
10 bullet without it going into the back of the wall.
11 However, I do use a failsafe mechanism which consists of
12 two 25-pound bags of sand, so if I miscalculated, it
13 doesn't go through. I use -- since I'm typically
14 operating by myself, I use C-clamps to C-clamp
15 four-by-four pieces of wood.

16 And the way I set this up, I have a rest, a
17 rifle shooting rest that I place rifles in and then
18 strap them down in position so I don't hold them in my
19 hands and shoulder. Although there's nothing wrong with
20 that. It's just better for me because I'm operating
21 alone and I don't have anybody, you know, to see that
22 I'm maintaining the distance, so I have to do it this
23 way. I set it up and then I position this apparatus and
24 distance it and then I fire.

25 What I fire into is a polymer sheet called

1 Craft Paper that's available from places like Hobby
2 Lobby, Michael's, and so forth. One of the reasons that
3 I teach classes throughout the country is I learn things
4 from my students, and I think it was about 2003, I put
5 on a class in gunpowder and primer residues for the San
6 Diego County Crime Lab. I went out there and they paid
7 me to train their laboratory people. While I was there
8 and we were doing tests firings to collect this gunshot
9 residue, one of the guys in the class by the name of
10 Lance --

11 MR. WHEELER: I'm going to object, Your
12 Honor, to the narrative.

13 THE COURT: I'll sustain.

14 MR. KING: Okay.

15 Q. (BY MR. KING) What did your conversation with
16 Lance -- what did your conversation lead you to --

17 MR. WHEELER: Objection; hearsay.

18 MR. KING: Not for the truth of the matter
19 asserted, it's what he acted upon to --

20 THE COURT: I'll overrule that objection.
21 He may answer.

22 THE WITNESS: He presented me with some of
23 this Craft Paper and we tested it on the range, and I
24 found it to be a much better substraight than what I had
25 been using prior to that, so I adopted it and I've been

1 using that for the last seven years. I told him that
2 this was such a good idea, he ought to publish it and he
3 did so. It was published in the Journal of Tool Marks.
4 The advantage of that Craft Paper is --

5 MR. WHEELER: Objection; nonresponsive,
6 Your Honor.

7 Q. (BY MR. KING) What is the advantage of the
8 Craft Paper?

9 A. It will retain the soot deposits if the
10 muzzle-to-target distance is close enough to produce
11 soot as well as allow a visual of the result of the
12 powder striking the paper which is what creates
13 stippling, so you get two for the price of one. And the
14 Craft Paper holds together at close range shots where my
15 previous substraight tended to blow apart, so I consider
16 it the best that's out there for representing this
17 gunshot residue in the form of stippling and soot
18 deposits.

19 Q. Why is it important to have both the stippling
20 and the soot deposits represented in your test material?

21 A. Well, you want as much information as possible,
22 and at a fairly close-range gunshot, it's not just about
23 stippling, you've got soot deposits, and they are
24 distance dependent and, in fact, give a better picture
25 of the muzzle-to-target distance than the gunpowder

1 particles because, as Detective Martin has already
2 testified, this is not an exact science.

3 MR. WHEELER: May I have a running
4 objection to nonresponsiveness?

5 THE COURT: I don't know how I can --

6 MR. WHEELER: I'll object to each one of
7 answers when the question is asked.

8 THE COURT: Okay.

9 MR. KING: I forgot where we were.

10 THE COURT: Why don't you ask another
11 question.

12 MR. KING: Okay.

13 THE WITNESS: You asked me why it was
14 important to utilize both stippling and soot.

15 Q. (BY MR. KING) Okay. These are both materials
16 that are deposited at close-range gunshot fires on the
17 target of that fire; is that correct?

18 A. That is correct.

19 Q. What does soot tell us that stippling may not
20 tell us?

21 A. Well, again, they are in concert. It's not one
22 or the other. We want both if we can have them, but
23 given a choice, I'll take soot as more representative of
24 a muzzle-to-target distance because it changes with
25 distance in a more predictable way than the stippling.

1 MR. KING: May I approach the witness, Your
2 Honor?

3 THE COURT: Yes, sir.

4 Q. (BY MR. KING) Did you bring us some examples
5 of your subject targets?

6 A. Yes.

7 Q. All right.

8 MR. KING: May I borrow one of the State's
9 easels?

10 MR. WHEELER: Sure.

11 MR. KING: Thank you. Just step up
12 here -- well, let's see. These have not been marked.

13 (Exhibits marked for identification.)

14 Q. (BY MR. KING) You have in front of you what
15 has been marked Defendant's Exhibit 27 through 32. Are
16 those the actual targets that you tested your fire from?

17 A. Yes.

18 Q. Would you explain the difference between the
19 stippling and soot to the jury?

20 MR. WHEELER: Are you going to offer --

21 MR. KING: I'm sorry. I'm going to offer
22 those into evidence.

23 THE COURT: 27 through 32?

24 (Defendant's Exhibits 27 through and
25 including 32, offered.)

1 MR. WHEELER: The State has no objection,
2 Your Honor.

3 THE COURT: Defendant's Exhibit 27 through
4 32 are admitted.

5 (Defendant's Exhibits 27 through and
6 including 32, admitted.)

7 Q. (BY MR. KING) This is a shot fired at four
8 inches?

9 THE COURT: What number is that, Mr.
10 Hueske?

11 THE WITNESS: I'm sorry. This would be
12 Defendant's Exhibit 27, and it's obvious the dark area
13 is the soot. What's not visible, even fairly close, is
14 the stippling pattern. Now, as an example, I did the
15 same thing that Mr. Ernest did to all of his panels, I
16 did to a few, and I used a magnifying lens and a Sharpie
17 pen, very fine point, and I marked all of the
18 indentations, so now you see both the soot and the
19 stippling as here [indicating].

20 Q. (BY MR. KING) What exhibit is that?

21 MR. WHEELER: May we approach?

22 THE COURT: Let me --

23 THE WITNESS: This one has not been
24 admitted.

25 THE COURT: All right.

1 THE WITNESS: Sorry.

2 (Bench.)

3 MR. WHEELER: As we've heard previously, I
4 don't want to be bouncing up and down out of my chair.
5 I would like this witness to be instructed to answer the
6 question only asked so I don't have to keep jumping.
7 This is the fourth time I'm going to have to object to
8 it. He's just going on and on without answering the
9 question that's getting asked.

10 MR. PARKS: These are expert witnesses. We
11 all -- let him testify and get this over with.

12 MR. WHEELER: Not if it gets out of bounds.
13 He's starting to comment on --

14 THE COURT: Let me just explain what I
15 ruled earlier when you were asking. Running objections
16 can be used where the Court regularly is overruling them
17 and, you know, they're going to be overruled and you can
18 clearly lay out what -- it's going to the Court of
19 Appeals. It's got to be something to work on,
20 otherwise, I don't know how do it. And so I guess, you
21 know, if you feel like you need to object, you're just
22 going to need to do it.

23 MR. WHEELER: Here's my specific problem
24 with this line of what's happened here: He's
25 demonstrating this technique to this jury. That's fine.

1 He's demonstrating his results. That's fine. He's
2 offering a running commentary on the State's witness
3 which is not responsive. Now, I'd like those
4 compartmentalized so I have an opportunity to respond if
5 I need to.

6 MR. KING: Judge, I can clean that up by
7 simply asking him to do the -- telling me how to ask my
8 questions is a different matter, so --

9 MR. WHEELER: All right.

10 (Open court.)

11 Q. (BY MR. KING) While you're explaining to the
12 jury the components of your targets, comment on the
13 difference, if you will, between you and Professor
14 Ernest or -- not professor, I'm sorry, Mr. Ernest, his
15 own results, his own targeting, and what you had
16 observed, I believe.

17 A. Yes.

18 Q. All right. And he had an opportunity to look
19 at yours?

20 A. Yes.

21 Q. You didn't like his and he didn't like yours?

22 A. Well, okay. Yes, that's --

23 Q. Okay. Please comment while you're explaining
24 what you've got there the difference between yours and
25 his?

1 A. Well, the different is real simple: His
2 doesn't show the soot, which is, in my opinion, the most
3 important.

4 Q. Why doesn't his show soot?

5 A. Well, it's -- the substraight simply doesn't
6 retain the soot; for whatever reason, I don't know.
7 I've never used that material.

8 Q. There is no standard material that you use as a
9 target in this expertise, is there?

10 A. Well, there are certainly requirements for the
11 substraight used. There's no specific substraight, but
12 it must appropriately reflect the evidence.

13 Q. So it's simply leaving out one entire component
14 of the evidence that would be unacceptable to you as a
15 medium for this test?

16 A. Certainly unacceptable to me.

17 Q. Now, you were telling us that you had
18 duplicated Mr. Ernest's technique of covering the
19 stipple marks with ink or a pen; is that correct?

20 A. That's correct.

21 Q. What does that do for you?

22 A. Well, it allows you to visualize the overall
23 pattern.

24 Q. All right. To make it more visible?

25 A. Correct.

1 Q. You have to do that with a microscope or
2 magnifier of some kind?

3 A. Right. It's just a magnifying lamp.

4 Q. You can see the stipple when you hold it in a
5 certain light?

6 A. Right. You have to use oblique light, so I
7 have a gooseneck, high intensity lamp. I direct the
8 lamp and I'm looking through the magnifier and see all
9 the indentations and put a little dot, which is what I
10 assumed Richard did.

11 Q. One of his criticisms of your medium was that
12 some of the stippling material bounces off and doesn't
13 adhere to the Craft Paper you're using. Do you find
14 that to be a problem?

15 A. He's obviously never tried this. He's told me
16 as much. That doesn't happen.

17 Q. So you're capturing all of the stipples that
18 are projected by the gunshot?

19 A. I wouldn't say all, but the prominent ones that
20 we would expect to produce the stippling effect on human
21 skin, yes.

22 Q. You were confident that the method you're using
23 allows you to do an accurate distance test, at least
24 within the limits of the medium itself?

25 A. Well, within the limits of the methodology in

1 general.

2 Q. This is not a perfectly precise science, is it?

3 A. This is not a perfectly precise science, no.

4 Q. That's why we need humans to interpret the
5 results?

6 A. Correct.

7 Q. As a result of your test, what did you
8 determine to be the probable distance of the shot that
9 was fired that killed Austin Taylor Wages?

10 A. My determination shows between four and
11 10 inches.

12 Q. And that was certainly within the range of your
13 dry firing exercises?

14 A. Correct.

15 Q. Do you have an opinion of how the weapon was
16 actually fired?

17 A. One of two cases, yes.

18 Q. Could be either way?

19 A. Yes.

20 Q. Did you do any blood spatter analysis in regard
21 to this?

22 A. No.

23 Q. Okay. Did you make a determination of whether
24 suicide was more or less likely in this case?

25 A. Yes.

1 Q. And the result?

2 A. Suicide is more likely.

3 Q. What do you base that on?

4 A. Well, there are, again, a list of things
5 beginning with the trajectory of the shot through the
6 descendent's head, and that's supported both by the
7 wound track and the stippling present under the chin;
8 the -- I relied on Noel Martin's blood spatter analysis
9 and presence of blood spatter on the carpet he
10 identified using Bluestar, the chemical agent that
11 reacts with the hemoglobin in the blood; the bloodstain
12 that's visible on the right hand of the descendant's the
13 muzzle that's been described by Detective Martin which
14 positions the hand; the fact that Taylor Wages had his
15 shoes off; the results of my own testing that show that
16 it is certainly possible to either reach down with the
17 hand and activate the trigger at the muzzle-to-target
18 distances that I found and have given as a range of four
19 to 10 inches; the fact that I have over 36 years
20 experience and have seen suicides involving long guns
21 and people using their feet, their toes to fire their
22 weapons. All of that combined leads me to the
23 conclusion that this is a suicide and not homicide.

24 Also, I didn't mention it, but I concur
25 with the fact that most people confronted with a weapon

1 put their hands up. I don't like to base opinions on
2 negative evidence; meaning, things that are not there,
3 but it's something that has to be considered, and
4 certainly, in this instance, it's a bit important to
5 consider it along with the context of the things that
6 are there. The gunshot residue on the hands, while
7 certainly there are other ways of firing a gun, it's
8 certainly consistent with firing a gun by himself.

9 Q. And you mentioned using the toes to activate
10 the trigger and the safety device. Did you use
11 different -- was your wife wearing socks?

12 A. Yes.

13 Q. Did she wear different kinds of socks?

14 A. Yes, three different thicknesses ranging from
15 thin dress socks -- since my wife doesn't routinely wear
16 socks, I provided her men's dress socks, the thin
17 type -- a medium thickness type of sock, more like a
18 Gold Cup or something like that, and then a heavy thick
19 athletic or work type sock.

20 Q. Doctor, I can't help it, you got your wife to
21 look down the barrel of a rifle and wear men's socks?

22 A. Not easily.

23 Q. Did you learn anything about the way socks
24 crease when you activate a trigger while wearing men's
25 socks?

1 A. Yes.

2 Q. What did you learn?

3 A. Well, the socks certainly can produce a crease
4 and can retain a crease, but -- however, I asked her,
5 after you do this, let your foot come down to the floor,
6 don't wiggle your toes or anything, but that
7 action -- in other words, initially, I said, now just
8 pull your foot away, and, yeah, you can see a crease in
9 several cases, but when she simply let her foot fall,
10 the movement of her foot coming to the floor, the crease
11 would basically disappear.

12 Q. Did the socks leave any fibers on the trigger?

13 A. No visible fibers with the naked eye.

14 Q. Okay. Did you have an opportunity to look at
15 the actual socks that Taylor Wages was wearing that
16 evening --

17 A. Yes, I did.

18 Q. -- that morning?

19 What type of socks were they?

20 A. Well, I would describe them as half socks. In
21 other words, they were, you know, cut at the ankle kind
22 that are pretty popular when you wear jogging shoes and
23 tennis shoes, in general, and I would categorize them as
24 medium weight.

25 Q. Mr. Ernest uses a small rectangle to determine

1 the density of the stippling on the photograph as shown
2 on the photograph of Austin Taylor Wages. Do you agree
3 that that's an appropriate method of determining
4 density?

5 A. Of determining density of stippling
6 representation?

7 Q. Of stippling.

8 A. No.

9 Q. Why is that?

10 A. Well, this business of this production of
11 stippling, this is a random event. When the gunpowder
12 particles come out of the barrel, they're not going like
13 laser beams in a straight line. This is not
14 reproducible from shot to shot. You've got a variance
15 of pattern. That's why you need to complete the pattern
16 of the stippling along with the soot as your best
17 evidence, and you can't reproduce this. And to isolate
18 one particular area on a pattern -- I'm not sure these
19 are in evidence yet, but I could show you what I'm
20 talking about if they are.

21 Q. Are you talking about the Defendant's
22 Exhibit 27 through 32?

23 A. No, sir, these that are --

24 Q. I'm sorry. Up here on the corner?

25 MR. KING: I'm sorry, if I may, Your Honor.

1 Q. (BY MR. KING) Let me hand you what's been
2 marked as Defendant's Exhibit 33, 34, and 35. Are those
3 the actual samples of testing that you did, together
4 with highlighting the stipple points?

5 A. Yes, they are.

6 MR. KING: I would offer what's been marked
7 Defendant's Exhibit 33, 34, 35.

8 (Defendant's Exhibits 33, 34, and 35
9 offered.)

10 MR. WHEELER: Your Honor, we have no
11 objection.

12 THE COURT: All right. 33, 34, 35 are
13 admitted.

14 (Defendant's Exhibits 33, 34, and 35
15 admitted.)

16 Q. (BY MR. KING) Show the jury, then, if you
17 will, what you're talk about there.

18 A. This one first is -- well, it's not a
19 representation. This is the shot, but a representation
20 of the stippling where I've marked them with a pen in
21 the matter described. You can see the soot around the
22 margins, and then you see that there's no real
23 uniformity to the density.

24 In other words, if we select a spot right
25 here, they're very dense [indicating]. We can move to

1 different areas and we can find less dense. So you have
2 to look at the overall pattern, but this is a random
3 thing. The problem with saying, all right, we're going
4 to take this area, the most dense, and then we're going
5 to compare it, well, here's one at eight inches, the
6 pattern has expanded, and at the same time, if we go to
7 isolated areas, we can have density and then areas where
8 there's no apparent stippling and so forth. It's
9 varied. We go -- again, the pattern gets broader.
10 That's why we need a complete pattern. If we don't, we
11 need to rely the soot. The soot is changing. It's
12 obvious here. It's the soot that's the most important
13 evidence.

14 Q. On those actual targets that you have used, the
15 stippling pattern is actually wider than Austin Taylor
16 Wages' face?

17 A. Correct.

18 Q. So some of the stippling, if you fired from
19 that distance, would not even hit the face?

20 A. Correct.

21 Q. Now, rounds differ in the same batch, do they
22 not, the same lot?

23 A. Yes.

24 Q. Atmospheric pressure, barometric pressure,
25 humidity, temperature, all of those things go into the

1 kind of stippling that would be produced in --

2 A. Yes, this could have an effect, certainly.

3 Q. May be a very small effect, but it's an effect?

4 A. Correct.

5 Q. The random nature of each individual particle
6 of uncompletely [phonetic] burned gunpowder is going to
7 go where it will or God knows where in any given shot;
8 is that correct?

9 A. Right. It's the diameter of the pattern,
10 overall pattern that is the only thing that's pretty
11 much reliable.

12 Q. And that's just basic physics?

13 A. Right.

14 Q. You said in your report, "An apparent smeared
15 area is visible in a scene image at the line of
16 demarcation of blood on the barrel." I assume that's on
17 the rifle?

18 A. Yes.

19 Q. What was the significance of that?

20 A. Well, it's evidence of a smudged or smeared
21 fingerprint.

22 Q. What's the significance of no finding of
23 fingerprints by the Austin lab?

24 A. It's the norm.

25 Q. What would you say -- or do they know -- is

1 there any writings on what percentage of weapons turn up
2 with fingerprints?

3 A. Yes.

4 Q. And what would that be?

5 A. Well, it depends on the methodology.

6 Historically, less than 10 percent of the time we get
7 identifiable fingerprints. The key is identifiable,
8 okay? And more recently, there was a publication from
9 the Boston Police Department concerning on-scene
10 processing of fingerprints on firearms. I actually was
11 teaching a class in New Hampshire when I spoke directly
12 to the Boston people concerning this.

13 MR. WHEELER: Objection; nonresponsive.

14 MR. KING: Actually, he's answering the
15 question, Your Honor.

16 THE COURT: Overruled.

17 THE WITNESS: And I had asked the question
18 in class, as I do in all my classes: "What percentage
19 of the time do you get identifiable prints," expecting
20 to hear the 10 percent or less, and they said 35 percent
21 of the time, and I was very surprised and asked if they
22 had any statistics. They furnished them and ultimately
23 put out a publication. By processing at the scene, you
24 avoid loss of prints through handling when they're
25 packaged and shipped and moved around and so forth,

1 so --

2 MR. WHEELER: I'm going to object to the
3 narrative, Your Honor.

4 MR. KING: Okay.

5 Q. (BY MR. KING) That's another example of not
6 only the state of the art statistically, but an example
7 of you, as a professor, learning something from a
8 student?

9 A. Absolutely.

10 Q. What was the significance of there being no
11 soot under the chin but stippling under the chin?

12 A. It just didn't show up there.

13 Q. What was the significance of stippling under
14 the chin?

15 A. That indicates that the trajectory was upward
16 relative to the head.

17 Q. Not horizontally as it would be if you're
18 holding a rifle?

19 A. If the head is in the usual anatomical
20 position, that's correct.

21 Q. The horizontal position would also affect the
22 blood flow of the liquid blood on the rifle, would it
23 not?

24 A. Yes.

25 Q. Was the report that you did for us in your

1 analysis of this situation peer reviewed?

2 A. Yes, it was.

3 Q. By whom?

4 A. Max Courtney of the -- currently of the
5 Mansfield Texas Police Department.

6 Q. Is that becoming the accepted standard in your
7 field --

8 A. Yes.

9 Q. -- peer reviews?

10 A. Yes.

11 Q. Why is that?

12 A. Well, there was a scathing report by the
13 Academy of Sciences in 2008 taking criminalists,
14 forensic scientists to task about doing that, just
15 basically issuing reports with no review.

16 Q. This is meant to improve the profession?

17 A. Yes.

18 Q. What are the qualifications of the person you
19 had peer review this article?

20 A. Max Courtney actually --

21 MR. WHEELER: I'm going to object to
22 hearsay, Your Honor. He's available to testify.

23 MR. KING: If he knows, Your Honor.

24 THE COURT: If he knows the qualifications.

25 MR. WHEELER: The source of the

1 qualifications comes from Max Courtney himself. It's
2 hearsay.

3 MR. KING: Not necessarily, Your Honor.
4 This is common knowledge in the profession and it's also
5 available in all sorts of publications. He can also use
6 hearsay as an expert.

7 THE COURT: Just inquire on the basis.

8 MR. WHEELER: One more objection, Your
9 Honor; bolstering, which is improper under our rules of
10 evidence.

11 MR. KING: May we approach?

12 THE COURT: Yes, sir.

13 (Bench.)

14 MR. KING: Peer review is a good thing in
15 their profession, and if we're not going to be allowed
16 to point it out, then it seems that that's defeating an
17 improvement in the scientific basis that we're trying to
18 promote.

19 THE COURT: Do you want to address the
20 bolstering issue?

21 MR. KING: I'm just pointing it out to
22 prove that he's qualified to peer review.

23 MR. WHEELER: That's already been done.
24 That's repetition. That extensively makes my report
25 better can't be anything but bolstering his

1 qualifications in front of the jury. Going to the
2 hearsay information that is supplied to this man so you
3 can bolster his own report is improper.

4 THE COURT: Well, all right. I'll sustain.
5 Lets move along.

6 (Open court.)

7 Q. (BY MR. KING) Did Max Courtney receive any
8 compensation for doing the peer review on your article?

9 A. He does not, no.

10 MR. KING: Pass the witness, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. WHEELER:

13 Q. I want to begin with a common sense point:
14 This is a long stick. A rifle is a long stick. If
15 somebody comes at you with a long stick and they stick
16 it in your face, you are going to grab it? Is that
17 instinctive?

18 A. Perhaps.

19 Q. Somebody puts a hand on it, that's common
20 sense, isn't it?

21 A. Yes, sir.

22 Q. Regardless of the angle, if it's coming at your
23 face, you put your hand on it, right?

24 A. That would be -- that would be a likely
25 occurrence.

1 Q. Okay. Now, I want to go to where we have not
2 been in our discussion. I want to talk about Nichole:
3 Part of the information that was submitted to you had to
4 do with Nichole Payne, didn't it?

5 A. Yes, sir.

6 Q. And let's talk about Nichole Payne: There is
7 no dispute whatsoever that Nichole Payne was murdered by
8 a gunshot?

9 A. That's correct.

10 Q. She was murdered in her bed, wasn't she?

11 A. Yes.

12 Q. Now, were you aware that on the day that
13 Nichole Payne was murdered, her husband lied about his
14 marital relationship to authorities?

15 A. No, sir.

16 Q. And were you aware that on the day Nichole
17 Payne was murdered, that Jason Tad Payne lied about his
18 financial situation with his wife?

19 A. No, sir.

20 Q. Were you -- now you understand here's a man who
21 has a dead wife and he's lied about his marriage, he's
22 lied about his finances, and he hadn't called her
23 parents after she's dead; do you understand that?

24 A. Yes.

25 Q. After that happens, authorities discover -- and

1 this has been supplied to you -- that he was operating a
2 vehicle that morning that Taylor Wages was not in,
3 right?

4 A. Yes.

5 Q. And in that vehicle, was a rag that had Nichole
6 Payne's blood on it, according to DNA testing; do you
7 understand that?

8 A. Yes.

9 Q. And you received that information?

10 A. Yes.

11 Q. You also understand that that blood, according
12 to the officer that discovered it, was bright red,
13 right?

14 A. I'll take your word for it. I don't recall.

15 Q. Have you ever cut yourself shaving?

16 A. Yes.

17 Q. Me, too. Ever use a white towel to dab it up?

18 A. Yes.

19 Q. That blood, after you dab yourself after you've
20 shaved is bright red, isn't it?

21 A. Correct.

22 Q. It's common sense, isn't? It's common sense,
23 right?

24 A. Yes.

25 Q. And over time, over a long period of time, that

1 old blood that will dry up and get hard and crusty and
2 get old, right?

3 A. Well, it depends on whether the stain is
4 absorbed into the cloth or not as far as getting crusty
5 and so forth.

6 Q. Granted, okay. Well, I've got images of -- I
7 won't tell you what I've got images of. Anyway, you
8 know the difference between bright red blood and dried
9 old blood on sight? Common sense? You've got yourself
10 shaving --

11 A. What do you mean by "old"? How old is old?

12 Q. I'm not asking how old. You know the
13 difference between bright red blood and --

14 A. A visual difference, yes.

15 Q. Okay. Now, so we've got bright red blood on a
16 rag in that vehicle that morning and we've got some
17 bloody smudges on the door of the truck, but there
18 wasn't a sufficient sample to tell whose DNA that was --

19 MR. PARKS: Object -- well, withdrawn.

20 Q. (BY MR. WHEELER) Now, we also had the
21 information supplied to you that when officers arrived,
22 the door to that vehicle was open, right?

23 A. I don't recall that.

24 Q. And Officer Misty Burns -- that was supplied to
25 you -- that it's made clear that Jason Tad Payne is

1 leaving his two-year-old daughter and making his way in
2 the direction of that vehicle while officers are there,
3 right?

4 A. Again, I don't recall that specifically.

5 Q. In addition, there were clothes that were wet
6 that were in the washer, including a towel that matched
7 that bloody rag. That was supplied to you, wasn't it?

8 A. Yes.

9 Q. Now, just for the jury's sake, can you wash
10 gunshot residue out of clothes?

11 A. What kind of gunshot residue are we talking
12 about?

13 Q. We're talking about plain old gunshot residue.
14 It's easily washed out of clothes and --

15 A. I disagree with that. Metallic residue is
16 insoluble and can be retained for periods of time. I
17 have actually done research on the retention of metallic
18 residues and they will persist through significant
19 washes. It's not soluble. It's a metal.

20 Q. So in that case, as in all crime scenes,
21 there's always more that could have been done --

22 A. Certainly.

23 Q. -- right?

24 Well, I get that. I mean, in the most
25 complicated case in the world, there's always more that

1 can be done?

2 A. Always.

3 Q. Now, we know this, about keeping on with
4 Nichole, that he was asked what he did that morning, and
5 that information -- the interview of Jason Tad Payne was
6 supplied to you, wasn't it?

7 A. I'm sorry, would you repeat that.

8 Q. The interview of Jason Tad Payne was supplied
9 to you, wasn't it?

10 A. Yes, it was.

11 Q. So you know that when asked about his
12 whereabouts that morning, he said he was going to get
13 pigeon feed, then he wasn't; he was going to the park
14 and then he wasn't; and that he was going to make
15 contact with his wife and --

16 MR. KING: Your Honor, I'm going to object.
17 He's mischaracterizing.

18 MR. WHEELER: I'm not mischaracterizing one
19 thing.

20 MR. KING: May we approach?

21 (Bench.)

22 THE COURT: The problem you always get with
23 these recountings of what was said is unless you're
24 reading it off of the pages, it's never going to be
25 perfectly correct, so, you know -- and I don't -- you

1 know, you're asking me to rule on something without
2 having the transcript in front of me, so...

3 MR. KING: Okay.

4 MR. WHEELER: I'll read it off the
5 transcript.

6 MR. KING: Can we simply -- they have the
7 best memory.

8 THE COURT: I think that's the best way to
9 deal with it. All right.

10 (Open court.)

11 THE COURT: Ladies and gentlemen, I'm just
12 going to advise you that as to what was testified to or
13 what you heard off the interview that was in evidence is
14 something you heard and would just ask you to, you know,
15 to use that in determining whether or not the question
16 is or is not accurately reflected.

17 MR. WHEELER: Where are the autopsy
18 pictures? I beg the Court's leave to look for a State's
19 photograph. Well, it's one of those posters over there
20 [indicating].

21 Q. (BY MR. WHEELER) I'm going to show you what's
22 been marked as State's Exhibit No. 23. Can you identify
23 that?

24 A. The number?

25 Q. The picture itself. Do you know what it is?

1 A. That appears to be an autopsy photograph.

2 Q. And it's a photograph of Taylor Wages. It
3 includes the socks, right?

4 A. Yes.

5 Q. The bottom of the socks are dirty, aren't they?

6 A. I can't see the socks.

7 Q. I mean, there's dirt on the bottom of those
8 socks. It's clear?

9 A. I don't know whether that's just a reflection
10 off of that. If you look at that body bag, you see
11 light areas there. I don't think that looks dirty. It
12 looks the same to me.

13 Q. Okay. This is State's Exhibit No. 51 right
14 here [indicating]. Can you identify that?

15 A. Yeah, that's a scene photograph.

16 Q. Yes, sir. This is the boy, and he's got socks
17 on?

18 A. Correct.

19 Q. Socks got dirt on them?

20 A. I can't see the bottom of them, sir.

21 Q. Same socks?

22 A. Same perspective right there [indicating]. And
23 the socks are in evidence, too.

24 Q. He's walking around on that floor in the garage
25 on his bare feet except he's got his socks on, right?

1 A. I don't know whether he walked around or not.

2 Q. Well, he didn't just get put there, did he?

3 That's not your position, is it?

4 A. I don't know when his shoes came off or if they
5 were ever on.

6 Q. You don't know where the shoes were in that
7 house?

8 A. I don't recall any statement about where the
9 shoes were, no.

10 Q. You didn't talk to the officers about the shoes
11 being in the dining room?

12 A. No, I did not.

13 Q. But the shoes aren't in the photographs there,
14 and he had to get into that position, didn't he?

15 A. Correct.

16 Q. He had to walk across that floor?

17 A. Unless he threw the shoes off, like some of my
18 kids have done.

19 Q. Well, if he's walking on that floor there and
20 the gun -- were you aware of the analysis of the gun to
21 see if there were hairs on the gun?

22 A. Hairs on the gun?

23 Q. Did you look at the results of the testing by
24 the Department of Public Safety Lab to see if there were
25 hairs on that gun?

1 A. I recall that, yes.

2 Q. And you recall there weren't any on that gun?

3 A. I do.

4 Q. And you're talking to this jury about pulling
5 the trigger with that pair of dirty socks?

6 A. I don't know if they can be categorized as
7 dirty socks.

8 Q. Well, they have the socks to look at, don't
9 they?

10 A. Yes.

11 Q. And were you supplied with the information that
12 this Defendant admitted that he had fired that .30-30
13 weapon the day before?

14 A. I may have been. I don't recall it.

15 Q. There wasn't any stippling in that boy's wound,
16 was there, according to the autopsy report?

17 A. You mean powder particles?

18 Q. I mean stippling. That's what the medical
19 examiner -- there wasn't any stippling in the wound?

20 A. Stippling is abrasion.

21 Q. There wasn't anything at all inside that wound
22 according to the M.E., was there?

23 A. There was -- according to the autopsy report,
24 there was no powder inside the wound track.

25 Q. There wasn't any soot inside that wound, was

1 there?

2 A. Nothing in the autopsy report, no.

3 Q. So you don't have any soot in the wound and you
4 don't have any stippling in the wound, do you, in that
5 boy?

6 A. Again, I'm not sure what you're considering
7 stippling. Are we talking powder particles or the
8 effect of powder impacting and leaving an abrasion,
9 which is what stippling is?

10 Q. I'm talking about the gun being close enough
11 to --

12 A. Right, it wasn't a contact shot.

13 Q. It definitely was away from his face, wasn't
14 it?

15 A. That's correct.

16 Q. Without a doubt?

17 A. Correct.

18 Q. Now, wasn't any brains on the ceiling, was
19 there?

20 A. I don't know. None was in the report. I don't
21 have any photographs of it.

22 Q. There wasn't any bullet defect in the ceiling,
23 was there?

24 A. I didn't see any when I was at the scene and
25 none was reported.

1 Q. There wasn't any bullet defect behind the boy?

2 A. I didn't find any, no.

3 Q. And with regard to Noel Martin's testimony, all
4 of his testimony about blood testing was done after that
5 boy, his bloody clothes, and all that bloody bedding was
6 pulled across that area where he said there was blood?

7 A. I don't understand.

8 Q. You don't understand looking --

9 A. What you mean by --

10 Q. -- for blood --

11 MR. PARKS: Your Honor, may he answer the
12 question?

13 THE COURT: Absolutely.

14 Q. (BY MR. WHEELER) You don't understand looking
15 for blood in an area over which bloody bedding, bloody
16 corpse, and bloody clothing had been moved prior to your
17 testing?

18 A. Well, I don't know how it was moved. I would
19 assume just lifted up. You just said, "pulled across."
20 I didn't find anything in any of the information that
21 said the body was pulled across.

22 Q. Which means, of course, you don't know what
23 happened at that crime scene prior to Noel Martin's
24 analysis?

25 A. I don't know what happened for sure, no.

1 Q. Except this one fact: That that boy's body was
2 moved before Noel Martin got there and looked at it?

3 A. That is correct.

4 Q. I want to talk to you about what's called a
5 subdural hematoma. With regard to a subdural hematoma,
6 in a gunshot wound where there's fracturing in an exit
7 wound, wouldn't you expect any kind of bruising, which
8 is what a subdural hematoma is, that goes along the line
9 of the fracture?

10 A. I'm not qualified to answer that question.

11 Q. In your experience working crime scenes, have
12 you ever come across the situation where the subdural
13 hematoma or bruise did not run with the fracture but ran
14 in a way that was different and not consistent with the
15 fractures caused by the gunshot?

16 A. Not that I recall.

17 Q. And were you aware that none of Nichole Payne's
18 blood was on her boy's clothing?

19 A. That is correct.

20 Q. I want to talk to you a little bit about
21 your -- was is called a curriculum vitae here, which is
22 also known as a resume. You prepared a resume in this
23 case, didn't you?

24 A. Yes, sir.

25 Q. And you've testified about this resume before,

1 haven't you?

2 A. Yes, I have.

3 Q. You testified, in fact, in Oklahoma several
4 times about this resume, haven't you?

5 A. Yes, I have.

6 Q. You've indicated that you retired as the
7 supervising criminalist from the Arizona Department of
8 Safety, didn't you?

9 A. That's correct.

10 Q. That's not what happened?

11 A. I draw a retirement check every month, sir. I
12 retired.

13 Q. You were forced to leave that position, weren't
14 you?

15 A. No.

16 Q. According to the testimony that you gave in a
17 courtroom in Idabel, Oklahoma, under oath, you admitted
18 in court that you were forced to leave that position?

19 A. No, that's not right.

20 MR. WHEELER: Pass the witness, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. KING:

23 Q. The physical evidence speaks for itself, does
24 it not, Professor?

25 A. That is correct.

1 Q. You haven't added anything to the physical
2 evidence?

3 A. No.

4 Q. You don't know about the antidotal evidence
5 that Mr. Wheeler was asking you about?

6 A. No.

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

9 THE COURT: Yes, sir.

10 MR. KING: It will take me just a moment to
11 find. I believe it was put into evidence. May we take
12 a break?

13 THE COURT: Go ahead and find it.

14 Q. (BY MR. KING) Let me hand you what's been
15 marked as State's Exhibit 60. I believe this is the
16 towel with the bright red bloodstain. Would you
17 characterize that as bright red?

18 A. No.

19 Q. Show that to the jury.

20 A. (Witness complies).

21 Q. It looks like -- kind of like a dull orange to
22 me.

23 A. Yes.

24 Q. Does that appear to you -- does it appear to be
25 fresh or dried blood?

1 A. It appears to be dried blood.

2 Q. Whether or not there was soot in the entry
3 wound on Austin Taylor Wages, there was soot surrounding
4 the entry wound, was there not?

5 A. That's correct.

6 Q. And it completely surrounded it?

7 A. Correct.

8 Q. Now, one thing that we've been talking
9 about -- we've talked around -- we have, in some ways,
10 neglected Nichole Payne. We haven't talked about her
11 much. Why didn't you focus on her death?

12 A. Well, there was no real contention about the
13 circumstances of her death.

14 Q. You don't know who killed her?

15 A. No.

16 Q. You think you know who killed Austin Taylor
17 Wages?

18 A. Yes.

19 Q. Have you heard anything today that changes that
20 opinion?

21 A. No.

22 Q. You think Austin Taylor Wages killed himself?

23 A. Yes.

24 MR. KING: Pass the witness.

25 MR. WHEELER: I don't have any more

1 questions.

2 THE COURT: Thank you, sir. You may step
3 down --

4 MR. KING: Subject to recall.

5 THE COURT: -- subject to recall.

6 Ladies and gentlemen, let me ask you to
7 remember your prior instruction. We're going to take a
8 little break here. Be available in the jury room at ten
9 minutes after 3:00.

10 (Jury exits courtroom.)

11 THE COURT: Let the record reflect that the
12 jury has left the courtroom.

13 Let me ask counsel to approach.

14 (Bench.)

15 THE COURT: And, you know, if you don't
16 want to talk to me about this at this point, that's
17 fine. I'm just -- I don't know who you're planning on
18 calling next. If it were to be -- whether you were or
19 were calling -- take some matter outside the presence of
20 the jury, if that's going to be coming up before we take
21 our next, I don't know.

22 MR. KING: Honestly, Judge, I think we'll
23 make that determination in the next 13 minutes.

24 THE COURT: That be fine. If you'll just
25 let me know before I bring the jury back.

1 MR. KING: Thank you, Your Honor.

2 (Recess taken from 2:58 to 3:10.)

3 THE COURT: On the record in 20,529-2008,
4 State versus Jason Thad Payne. Let the record reflect
5 counsel for the State, counsel for the Defendant, and
6 the Defendant is present. The jury is not present.

7 I guess, is there anything we need to take
8 up before we bring the jury back in?

9 MR. PARKS: May we approach, Your Honor?

10 THE COURT: Yes, sir.

11 (Bench.)

12 MR. PARKS: Let me talk one more time with
13 Mr. Payne for a moment.

14 (Pause in the proceedings.)

15 MR. PARKS: Okay. That's fine. We do not
16 intend to call Mr. Payne.

17 THE COURT: I assume you want to put him on
18 the stand and visit with him about his right to testify?

19 MR. PARKS: However you want to do it. I
20 can make a statement from counsel table as to what I
21 advised him and I can inquire whether or not he
22 understands.

23 MR. KING: We do intend to call Tom Allen.

24 MR. WHEELER: No. We do not have
25 appropriate notice on Dr. Allen. We found out about him

1 less than a week before trial. We were supplied a
2 report after that. We have not had an opportunity to
3 conduct our testing with our own State's test.

4 MR. WHITLEY: He may be --

5 MR. PARKS: Hold on.

6 MR. KING: We're not calling him to
7 say -- we're calling him as a rebuttal witness on the
8 issue of whether Taylor was likely to commit suicide or
9 not.

10 MR. WHITLEY: Well, that's the same thing.

11 MR. KING: Why?

12 MR. PARKS: Y'all went into the kind of
13 guy --

14 MR. WHITLEY: I wanted to --

15 MR. WHEELER: We'd love to get into the
16 basis of the opinion. Then I want to call rebuttal
17 about how close he was to his mother.

18 MR. WHITLEY: Judge, we were told in
19 pretrial they weren't bringing him; therefore, we have
20 nobody to rebut.

21 THE COURT: And you were told to put on
22 testimony of that sort and I don't think under those
23 circumstances that --

24 MR. PARKS: Okay.

25 MR. KING: That's fine.

1 THE COURT: -- that qualifies. They should
2 have had notice on --

3 MR. PARKS: One other -- give us one more
4 minute.

5 THE COURT: Yes, sir.

6 (Pause in the proceedings.)

7 THE COURT: Let the record reflect the jury
8 is still not present.

9 Does the Defendant want to --

10 MR. PARKS: Yes, Your Honor. If the record
11 could reflect that I've had occasion today and
12 previously to today to discuss with Mr. Payne the law
13 with respect to, he as well as any defendant, testifying
14 in their trial, and I advised Mr. Payne if he wishes to
15 testify, it's a personal decision to him. No one can
16 keep him from testifying and he's certainly free to do
17 so.

18 I've also advised Mr. Payne if he wishes
19 not to testify, then there is no one who can make him
20 testify and that he is perfectly free to decline to
21 testify, that that's a personal decision for him to
22 make, however, certainly to rely on and take into
23 consideration under the advice of counsel. After
24 discussing all of these matters, Mr. Payne has advised
25 me it is his desire not to testify in his own behalf, to

1 exercise his right in that regard.

2 THE COURT: And, Mr. Payne, is there
3 anything about the advice of counsel gave you or his
4 description of what he's advised you that either you
5 didn't understand or do you want anything --

6 THE DEFENDANT: No.

7 THE COURT: You fully understand those
8 rights?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. Very well.

11 Just for scheduling purposes, does the
12 Defense intend to call any additional witnesses?

13 MR. KING: No, we're not -- we rest.

14 MR. PARKS: Can we talk about that?

15 THE COURT: Yes, sir, if you want to come
16 on --

17 MR. PARKS: I thought about -- since we're
18 going to rest, we might could go ahead -- I don't know
19 if the State's got rebuttal or not. If they do, fine.
20 We can hear it. If they don't, I'm wondering if we
21 might not could get the charge finalized this afternoon
22 and argue in the morning.

23 MR. WHEELER: He's been working on it, and
24 I might need --

25 MR. WHITLEY: We need a little time to

1 organize our thoughts, too.

2 MR. PARKS: Yeah, I'm certainly not
3 suggesting we argue it today.

4 MR. WHITLEY: Okay.

5 THE COURT: I don't want to be sending them
6 late in the afternoon.

7 MR. PARKS: That's fine.

8 THE COURT: But if we could get -- again, I
9 don't know if -- I'm not trying to -- if you've got
10 rebuttal testimony, we can --

11 MR. WHEELER: We're done.

12 THE COURT: Y'all are not going to have any
13 rebuttal? Okay. Then what I'll do, then, is bring them
14 back in and let everybody rest and ask them to return at
15 9:00 a.m.

16 MR. WHEELER: That's fine.

17 THE COURT: Then let me ask you to bring
18 the ladies and gentlemen back in.

19 (Jury enters courtroom.)

20 THE COURT: Let the record reflect the jury
21 has returned to the courtroom.

22 The Defendant may call its next witness.

23 MR. PARKS: Your Honor, the Defendant
24 rests.

25 THE COURT: Any rebuttal?

1 MR. WHEELER: The State closes.

2 THE COURT: The Defendant closes?

3 MR. PARKS: Close.

4 THE COURT: All right. Ladies and
5 gentlemen, what that means is that you have heard all
6 the evidence you're going to hear in this case, and I'm
7 going to need to work, with the advice of counsel, in
8 regard to preparing the Court's formal written
9 instructions or the Court's Charge for you and that's
10 going to take a little while.

11 And so what I'm going to do is go ahead and
12 recess for the afternoon and ask you to come back in the
13 morning and then we should be ready, then, at 9:00 a.m.
14 for me to read that charge to you, for you to hear the
15 argument of counsel, and then for you to begin
16 considering your verdict. So the same instructions
17 apply: Even though you've heard all the evidence, you
18 still need to be careful not to talk to anyone, don't
19 let anybody talk to you about anything that has do with
20 this case. If anybody attempts to, report it to the
21 bailiff or to me immediately. Avoid any newscasts that
22 might be out there or any information from any other
23 sources.

24 Report again directly to the jury room in
25 the morning. If you'll be there by 9:00 a.m., we should

1 be able to start then or very shortly thereafter.

2 Please go with the bailiff.

3 (Jury exits courtroom.)

4 THE COURT: All right. Let the record
5 reflect that the jury has retired.

6 And we will, then, stand at ease, and
7 whenever we have a proposed copy of the charge -- and if
8 everybody wants to be relaxed and take your coats off,
9 feel free. If no one has objection, typically what I do
10 on these charges is I simply visit with everybody off
11 the record first before we have a formal charge
12 conference on the record, and if y'all want do that in
13 chambers, that would be fine. And whenever we're ready,
14 we'll come on back in and put it on the record and visit
15 with how long you'll need and handle it in the morning.
16 We'll be in recess, then, at this time.

17 (Recess taken 3:20 to 3:59.)

18 CHARGE CONFERENCE

19 THE COURT: Let me get on the record in
20 Cause No. 20,529-2008, styled State of Texas versus
21 Jason Tad Payne. Let the record reflect counsel for the
22 State, counsel for the Defendant, and the Defendant is
23 present. The jury is not present.

24 I have visited with counsel informally in
25 chambers concerning the proposed charge. It's my

1 understanding that everyone's ready for the formal
2 charge conference, but just let me first inquire:

3 Is the State ready to proceed?

4 MR. WHEELER: State's ready.

5 THE COURT: Is the Defendant ready?

6 MR. PARKS: Ready.

7 THE COURT: Does the State have any
8 objections or corrections?

9 MR. WHITLEY: The State approves the charge
10 as submitted.

11 THE COURT: Use.

12 MR. PARKS: We do not, Your Honor.

13 THE COURT: All right. I should say
14 objections, additions, or corrections.

15 And just for the record, there were a
16 couple of grammar matters we talked about consisting of
17 one comma and one period and that has been
18 interlineated. No one has any objections to that?

19 MR. WHITLEY: No.

20 MR. PARKS: No, sir.

21 THE COURT: Then I'm going to ahead and
22 date and sign the proposed charge indicating it is the
23 Court's Charge, and this is at 4:01 p.m., on January 24,
24 2010.

25 We also discussed about how you're going to

1 break up the time up and how much time each side was
2 going to have. And I believe it's agreed that you are
3 requesting 30 minutes per side; is that correct?

4 MR. WHITLEY: That's correct.

5 MR. PARKS: I guess that's right, Judge.

6 THE COURT: Well, let me just add this to
7 it: That there was a little concern expressed by that
8 in regard that y'all, I know, have a lot of details to
9 cover. With the understanding that the Court would
10 give -- would be prepared to give some leeway if
11 necessary in regard to getting the matters covered, but
12 you can -- expecting the court can give more than five
13 minutes per side either way if it came to that.

14 MR. PARKS: That's fine. We'll make every
15 effort to keep it within 30 minutes. I think we can,
16 but I don't want to commit to --

17 THE COURT: And certainly, in the event
18 that the -- because the State's start out and doesn't
19 know where -- I guess, we would say in the
20 opening -- Mr. Whitley, I know you're going to -- if you
21 found you needed more time, give alert that you're going
22 to need more time than the 30 minutes, that you make
23 that known before the Defense starts and approach the
24 bench, and if they run over, whatever they run over,
25 again, up to the five minutes, I would simply add that

1 onto Mr. Wheeler's rebuttal times. Is that acceptable?

2 MR. WHITLEY: That's fair enough, Judge.

3 THE COURT: All right. Very well. Then
4 unless anybody has anything else, we will go ahead and
5 recess until 9:00 a.m. in the morning. Very well, we're
6 in recess.

7 (Proceedings recess.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 10 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS) IN THE DISTRICT COURT
)
)
VS.) WOOD COUNTY, TEXAS
)
)
JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

DAY 6

On the 28th day of January, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

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

2 THE COURT: On the record in 20,529-2008,
3 State vs. Jason Tad Payne let the record reflect counsel
4 for the State, counsel for the Defendant, and the
5 Defendant is present. The jury is not present.

6 Each side is going to have 30 minutes to
7 argue the case after we get through reading the charge.
8 What sort of notices does the State want?

9 MR. WHITLEY: Give me 15 minutes.

10 THE COURT: Let you know when you've used
11 15 minutes.

12 MR. WHEELER: May I know when two minutes
13 are remaining, Your Honor.

14 THE COURT: And the for the Defendant?

15 MR. PARKS: I'll be arguing. Let me know
16 when I have five minutes remaining.

17 THE COURT: All right. I don't know that I
18 need to say this, but it's emotional and grim as the
19 course of the trial is going, closing arguments are even
20 emotional, if nothing else because of the fact they
21 concentrate the pieces during the course of the trial.

22 Certainly, we have open trials and everyone
23 who wishes to be here has the right to be here. I just
24 need to remind everybody that with that comes
25 responsibility, too, you know, to show no emotion and

1 to, you know, either give no indication either by
2 physical actions or by audible means of any reaction to
3 what's being said. If that's going to be a problem,
4 then, you know, just step out until everything is fine,
5 then come back and come and go as long as it's done
6 quietly.

7 All right. Is the State ready to proceed?

8 MR. WHEELER: State's ready.

9 THE COURT: Defendant ready to proceed?

10 MR. PARKS: Defense is ready.

11 THE COURT: All right. Bring in the ladies
12 and gentlemen.

13 (Jury enters courtroom.)

14 THE COURT: Let the record reflect that the
15 jury has returned to the courtroom.

16 Ladies and gentlemen, at this time, I'm
17 going to read the Court's Charge and would encourage you
18 to pay close attention to that. Now, you don't have to
19 memorize it. It will be going into the jury room with
20 you, but it should still assist you in understanding the
21 argument of counsel and the decisions you're going to be
22 called on to make.

23 (Court's Charge read.)

24 THE COURT: Each side will have an
25 opportunity now to summarize the evidence and argue the

1 case to you for up to 30 minutes. The State will open
2 and then, because the burden of proof, will have the
3 opportunity to close.

4 Mr. Whitley, if you're ready to
5 proceed -- or do you need a little time to get some
6 stuff set up?

7 MR. WHITLEY: Judge, I'm ready.

8 THE COURT: You may proceed.

9 CLOSING ARGUMENT

10 BY MR. WHITLEY:

11 May it please the Court. Mr. Parks. I'm
12 having a senior moment. Mr. King. I haven't known you
13 but 20-something years.

14 Ladies and gentlemen of the jury, on behalf
15 of the citizens of the county, I would like to thank you
16 for your service as jurors. You've been here since last
17 Tuesday. You've been attentive, I know some of you have
18 been taking notes. In the years I've been doing this, I
19 have concluded that this second only to going to the
20 poles to vote, jury duty is the most important civic
21 duty, and I thank you for your service.

22 Now, you have heard testimony, beginning
23 since last Wednesday, and there's been a lot of evidence
24 that has been brought you to. I will not intentionally
25 try misquote any of it. I've also learned that 12 heads

1 are better than one, so collectively, use your 12 minds
2 to reach an interpretation of the evidence you heard.

3 With those words, let me go into what the
4 evidence has been over the last few days. We know
5 approximately two miles north of Quitman, Texas, on
6 December 11, 2007, two people were killed, brutally
7 murdered in this house. We know these pictures were
8 taken by the investigators as they walked through the
9 house. The purpose of this is so you can relate the
10 scene of these killings.

11 We know that when the officers arrived,
12 they walked through the residence, and in this bedroom
13 right here, they found this, the body of Nichole Payne;
14 the top of her head blown off, brains laying on the bed
15 and on the floor. That's what they found. Later after
16 some confusion, they went into the garage bedroom. What
17 do we found there? Found another body, 16-year-old
18 Austin Taylor Wages. What did they find? They found
19 this 16-year-old boy in this condition that's reflected
20 by these pictures. That's what this case is about. And
21 right up front, I believe I told you in the opening
22 statement that the State's theory in this case is that
23 the Defendant seated there with his attorney perpetrated
24 both of these murders.

25 What does the Defense say? It's a

1 murder/suicide. Austin Taylor Wages killed his mother
2 then killed himself. We know one thing for sure, one
3 fact for sure, the dead cannot defend themselves. The
4 dead cannot defend themselves. Who does? Well, I
5 suggest to you that the witnesses in this courtroom who
6 came in and testified about the physical evidence that
7 you've had, that has been brought to you, that's what we
8 have to look for.

9 Now, the one thing I said I wanted to talk
10 to you about is the evidence. I also want to talk to
11 you about is the lack of evidence what you haven't
12 heard. If Austin Taylor Wages, as he is accused of by
13 the Defense, killed his mother and killed himself, where
14 is the evidence of any animosity between Nichole Payne
15 and her son? Where is any evidence of him being a
16 disturbed young man? Where is any evidence that there
17 was a fight or any type of provocation that would cause
18 Austin Taylor Wages to brutally murder his mother and
19 then kill himself?

20 You heard from Grandmother/Mother Payne.
21 Did she tell you anything that would lead you to believe
22 that this was a disturbed young man capable of killing
23 his mother and killing himself? No, absolutely not.
24 You heard from his brother who had been in the home for
25 many, many years and only left that June, I believe, a

1 few months before this killing happened. Did Daniel
2 Ashworth tell you that this disturbed young man, that he
3 had an axe to grind with his mother, that there was any
4 reason to kill his mother and kill himself? No,
5 absolutely not. You heard nothing.

6 Now, if this young man were so disturbed
7 that he was suicidal and killed his mother, don't you
8 think it's reasonable that you would have heard
9 something, that you would have some evidence of his
10 disturbed mindset? You heard nothing, absolutely
11 nothing but a bold accusation that this young man cannot
12 defend himself against.

13 What do we know about this family? We know
14 it was a dysfunctional family most likely. You had
15 Nichole and her husband sleeping upstairs on a pallet.
16 You had Mother Payne sleeping in the bed downstairs. Is
17 that natural? No, absolutely not.

18 Now let's talk about December 11, 2007, for
19 a minute: You heard the 911 call. You heard the 911
20 call when this Defendant told the dispatcher that his
21 wife and son had been shot. When the officers arrived a
22 few minutes later, approximately 9:18, as I remember, he
23 goes directly in and finds one body. Another officer
24 arrives on the scene. He sends him out to ask the
25 Defendant where is the other body that was reported.

1 Wife and son had been shot. Where is the other body?
2 All is accounted for. Son's at school. Other son's in
3 Chicago. Why the confusion?

4 Still, he continues to look in the house.
5 Nobody. No other victim. Sends another officer out to
6 ask, Officer Lain it was. Finally, we determined that
7 Austin Taylor Wages lies dead in his bedroom. Why? I
8 don't know. That's an unknown.

9 Now, what else do we know? We know that
10 when he was interviewed by the police officers, Miles
11 Tucker and Ranger Kemp -- you saw it. You saw the
12 video. Two hours worth. I'm not even going to try to
13 summarize. It was mostly, "I don't know," mumble,
14 mumble, mumble; head down, ballcap on, sitting on his
15 hands.

16 We do know one thing, don't we? He lied.
17 He lied to the officers. Absolutely lied to them. Said
18 his marriage was good, I think he said. We know one
19 thing, that Nichole Payne was unhappy, the most unhappy
20 she had been in all of her life. She wanted to get a
21 divorce, that this Defendant had threatened to kill her
22 and threatened to burn her alive in her own house. Do
23 you remember that? Sarah Hawthorne told you that. One
24 of the conversations was the day before this Defendant
25 killed Nichole Payne and Austin Taylor Wages. Did you

1 see how emotional that young lady was? Absolutely
2 almost on the verge of crying.

3 We also know that these people were in
4 financial problems. You have the bank records. You're
5 free to look at them and take them to the jury room.
6 Citizens Bank statement dated 11-2-07 to 12-6-07; ending
7 balance, \$271.45 in the red, minus, overdrawn. October
8 the 17th, 2007, Bank Texas; ending balance as of 1-01-7,
9 \$199.

10 They're hurting. They need money. They
11 had run through a \$331,195 settlement on behalf of the
12 Defendant. What did they do with it? They bought a
13 house, \$215,000; bought him a truck, bought her a car,
14 and bought Mother Payne a car. How much money did they
15 make a month? What did Todd Wages tell you? They had
16 gotten \$150 an event when the birds were released. They
17 were in trouble. They were in financial trouble.

18 What else do we know? We know that in
19 June, they took out a life insurance policy of \$100,000
20 on Nichole and a \$10,000 rider on each of the children.
21 What else do we know about that life insurance policy?
22 When this Defendant sought to make a claim on it, he was
23 asked to give an oral statement. He refused. Why did
24 he refuse? If he had nothing to hide if he hadn't been
25 the shooter and the Defendant was afraid he was going to

1 trap himself, why would he refuse to give an oral
2 statement? No reason. We know also -- what we know is
3 a bloody rag with Nichole Payne's blood, fresh blood,
4 bright red blood was found in the Defendant's truck on
5 December 11, 2007, the day she was murdered.

6 Again, what kind of kid was this? You
7 heard nothing from the counselor that he was a disturbed
8 child or he was a misfit. What kind of grades was he
9 making? He had transferred in here, first semester of
10 his junior year, 86 in Algebra II; English, 74; PE, he
11 made a 100; in PA Spanish II, he was a little weak
12 there, 62; English, 87; Keyboarding, 85 -- I assume
13 that's something do with computers -- U.S. History, 74;
14 and Chemistry, 86. Is that indicative to each of you as
15 a disturbed child? Wouldn't you think just the
16 opposite, that a disturbed child, suicidal, so disturbed
17 and bent out of shape that he killed his mother and then
18 killed himself? Is that the kind of adjustment this kid
19 would make? Jackal and Hyde? No. No. That is a no.

20 This was a well-adjusted kid who made new
21 friends. You heard two of them come in here and tell
22 you, Montalvo and solider. They came in here and told
23 you his reputation for being a peaceful and peaceful and
24 nonviolent was good. They said he was a little shy. We
25 got that. Isn't that only natural a kid that is a

1 junior in high school with no friends? Took him a
2 little while to adjust. Look at those grades there.
3 Those are not the grades of a disturbed child.

4 Now, what's this case all about? I submit
5 to you it's turned to this and to this [indicating]. I
6 submit to you it's turned to this and to this
7 [indicating]. Jason Tad Payne should be held
8 accountable for his deeds. I want you to say by your
9 verdict guilty of capital murder.

10 THE COURT: Mr. Whitley, you've used 15
11 minutes.

12 MR. WHITLEY: I'm about to close, Judge.

13 Hold Jason Tad Payne, the Defendant,
14 accountable for his deeds. Hold him accountable for
15 turning Nichole Payne, his wife of some seven years,
16 into a bloody mess. Hold him accountable for taking the
17 life of a 16-year-old boy who never had a chance to
18 reach his prime of life. Hold him accountable for
19 denying Remington and Jackson -- they'll never be able
20 to say, "Mommy, I love you." She's dead. He should be
21 held accountable. By your verdict, say guilty and hold
22 him accountable. Thank you.

23 THE COURT: Thank you, Mr. Whitley.

24 Mr. Parks, if you're ready, you may
25 proceed.

1 CLOSING ARGUMENT

2 BY MR. PARKS:

3 If it please the Court. Mr. Wheeler.

4 Mr. Whitley.

5 I want to read two sentences: The burden
6 of proof in all criminal cases rests upon the state
7 throughout the trial and never shifts to the defendant.
8 The law does not require a defendant to prove his
9 innocence or produce any evidence at all.

10 Yet, the very first thing that Mr. Whitley
11 did was try to shift the burden of proof in this case
12 from this table to this table by commenting that we had
13 not brought you evidence that Taylor was a disturbed
14 young man and, therefore, prone to kill his mother and
15 himself.

16 And he knew what he was doing. Don't think
17 for a minute he was thinking that he could persuade you
18 people, you good people who swore your oath to a true
19 verdict according to the law and the evidence, to this
20 court of the law, and take the burden of proof from here
21 and put it over here [indicating].

22 And there's only one reason why he would
23 want you to do that. They don't have any evidence.
24 They never had any evidence. Not on December 11, 2007,
25 and not today. They have slurs. They have innuendos,

1 and they wish for you to speculate that Jason Tad Payne
2 did this because a determination was made on December
3 11, 2007, by Miles Tucker and Philip Kemp that Jason Tad
4 Payne did this. Didn't have any evidence of it, but
5 they made up their mind that he did it.

6 What's the evidence of that? This
7 interview. They took him straight over to the police
8 station for what they termed an interview, and I
9 respectively say to you, ladies and gentlemen, this is
10 plainly an interrogation. They have not given, not
11 Miles Tucker, not Philip Kemp, and not the District
12 Attorney's Office the slightest concern for the context
13 of that interrogation, not the slightest.

14 They don't take into consideration
15 what -- you know, I told you in my opening statement
16 that he was not prepared for that Tuesday, and he
17 wasn't. And I respectively suggest to you, ladies and
18 gentlemen, he has not been prepared at all for that
19 nightmare that followed and continues to today, and
20 hopefully today, by your verdict, you will end at least
21 that part of his nightmare.

22 They took him, Miles Tucker and Philip
23 Kemp, and kept him over there two hours. You heard that
24 interrogation. You know, there used to be a barber in
25 Dallas who had a saying often -- he had a radio show,

1 and very often, he would say about something or someone,
2 "You know, your actions are speaking so loud, I can't
3 hear what you're saying." And that applies perfectly to
4 that interview.

5 They say it was an interview. They say
6 they were just trying to find out what he knew. I
7 suggest to you, their actions were speaking way louder
8 than their words. He has been faulted -- faulted for
9 his emotional reaction after walking into the house and
10 finding what he found. They give him no consideration
11 to that. They pile slurs on him. He was lying. He
12 lied.

13 What did he lie about? He's got his wife
14 dead in that room, he's got his son dead in that room,
15 and they're wanting to talk to him about his marital
16 relationship with his wife. And what did he say? "It's
17 okay, it's okay." Who wants to talk about the dead? We
18 don't know that it wasn't okay.

19 The only thing we have to say that was a
20 lie was the State's avenging angel, Sarah Hawthorne, who
21 came to tell all of these things that -- he's going to
22 burn her in the house, she has to hide in the closet to
23 make a phone call. It's almost a nightmare scene over
24 there according to Sarah Hawthorne, but, again -- and
25 this time, it's Nichole's actions that are speaking so

1 loudly that we can't hear Sarah Hawthorne.

2 She has her own vehicle. She comes and
3 goes. She's got her own phone, she's got her own
4 business, and her own son came and testified and told
5 you that that was a normal household. And they would
6 have you believe over Danny, over the other witnesses,
7 this woman, who herself in her almost hysterical state
8 said that she had vowed to avenge Nichole's death.

9 Well, Nichole's actions, again, speak so
10 loudly that that makes no sense. She had a place to go.
11 She had a way to go. She didn't have to stay if that
12 was that kind of household, but it wasn't. That's the
13 imagination of a hysterical woman.

14 Now, I want to tell you -- remind you that
15 one of the witnesses said the lack of evidence is not
16 evidence. Your job is to consider the evidence that
17 you've heard and that has come to you. What we do know
18 is this: We know that Ranger Kemp and Miles Tucker
19 decided at the scene that they needed someone to come
20 and do a scene reconstruction out there at that house
21 and they made the determination to call Noel Martin. He
22 was their choice. He was their first choice.

23 They didn't call Tom Bevel up. They didn't
24 call Richard Ernest. They called Noel Martin, a man
25 well known to him, a man that on many occasions

1 Mr. Whitley has called to the stand to testify against
2 accused citizens because he relied upon testimony.

3 MR. WHITLEY: I don't think I've called him
4 on many occasions. I've called him one time.

5 THE COURT: I'll just tell the jury that
6 you've heard the testimony. Judge this on what you
7 heard.

8 MR. PARKS: Certainly, they're on a
9 first-name basis. They've known each other for years.
10 We know that Noel Martin has been called to testified, I
11 know, on more than one occasion in Wood County. He's
12 the man they chose. They called him and he came. They
13 called him because he's an expert. They sponsored him
14 as an expert. Came and did his work. And at some point
15 in time, he told them what they didn't want to hear,
16 that this was a suicide, no question about it, for
17 whatever reason.

18 We can't plumb the depths of someone else's
19 mind. How often do we see on television or read in the
20 newspaper, gosh, that would have been the last person in
21 the world who would have done this, he was quiet, then
22 he wipes his family out. We don't know. It's not my
23 job to prove why. I couldn't do that if it was my job.
24 I don't know why Taylor did what he did. No one else
25 knows why he did what he did.

1 What we do know is, is that for whatever
2 reason, he killed his mother that morning, went into his
3 bedroom, re-chambered another round, sat down on that
4 bed, put that gun in his face, and shot himself. Now,
5 whether he shot himself before he was ready or whether
6 he shot himself when he was ready doesn't matter, and we
7 will never know. That's -- and it's tragic, it's
8 senseless, but tragic and senseless things happen. We
9 all have enough life experience to know that.

10 Noel Martin came. He came with his
11 equipment. He spent hours. He put BlueStar down,
12 photographs, and he left, and he gathered other
13 information and finally met in the District Attorney's
14 Office.

15 Now, you can believe Miles Tucker if you
16 want to. You know, Miles Tucker's testimony was -- I
17 was upset because Noel Martin wouldn't answer -- I
18 wasn't satisfied with his answer; we only spent maybe an
19 hour. Noel Martin said it was a good two hours and he
20 answered every question he was asked that morning and he
21 left and told them that day the very same thing he told
22 you folks here yesterday, a suicide, no question about
23 it.

24 Now, one thing that we do know and I want
25 to reemphasize to you, I left the courtroom yesterday

1 with this ringing in my ears, "Reasonable minds can
2 differ, can they not?" I don't believe -- I don't
3 remember which, whether it's Mr. Whitley or Mr. Wheeler,
4 may I have been both of them used that phrase,
5 "Reasonable minds can differ, can they not?" Let me
6 tell you, Folks, when reasonable minds differ about the
7 evidence in the case, the citizen accused goes home
8 because the law says the State is bound to prove their
9 case beyond all reasonable doubt.

10 This isn't about probability. This isn't
11 about possibility. When you boil the State's case down,
12 what they're saying to you is, we have a theory whereby
13 it is possible that Jason Tad Payne killed his wife and
14 son; therefore, we would like for you to convict him
15 only on that possibility, but we're not going to suggest
16 to you how that might have happened, because you haven't
17 heard anything about that, have you?

18 They haven't been suggested to you that
19 could have possibly happened with him taking his kids to
20 school and all the things that we know that happened
21 that day. When did he do that? They don't suggest to
22 you any possibility in that regard. They just want to
23 stand up and say, "We can show you awful pictures of two
24 dead people and we want you to convict him. Trust us."
25 That's not how the system works.

1 They didn't even have probable cause to get
2 an arrest warrant. This offense, the offense that
3 Taylor committed on his mother and his suicide happened
4 December 11, 2007, and after that interrogation, they
5 didn't have probable cause. All of this other stuff
6 about holes in the ground and financial conditions and
7 insurance policies and rags in the pickup truck, they
8 had that stuff. They knew that. It didn't even amount
9 to probable cause. He couldn't even get an arrest
10 warrant.

11 However, on September 5th, 2008, they got a
12 report from Tom Bevel, and it was Tom Bevel's opinion
13 that this was not murder/suicide, that it was a double
14 murder. And based on Tom Bevel -- that's the new --
15 he's the new evidence -- Tom Bevel's report,
16 September 5, on September 25, they get an arrest warrant
17 very largely based upon conjecture and a misstatement of
18 the facts by Miles Tucker.

19 I'll give you a quick example: Miles
20 Tucker says -- you heard his testimony in his affidavit
21 that Ranger Vance was told by the fingerprint man that
22 it was impossible that that rifle would have
23 fingerprints and smudges unless it was wiped down.
24 That's what he told you under oath to get his warrant.
25 We know now from the fingerprint guy, he said, I never

1 said that, I didn't tell Ranger Vance that; I said it
2 was possible, but I never say that.

3 So one of two things happened; either
4 Ranger Vance just made that up or Miles Tucker did. And
5 I'll let you resolve that issue for yourself. I suspect
6 you know what happened. Miles Tucker is the person who,
7 in his affidavit, decided those holes in the ground were
8 graves. No evidence of that. That's pure conjecture.

9 Let's talk a minute -- you know, I kind of
10 hate in a way to talk about things because it gives them
11 some sort of credibility, but I've got to talk about
12 them, so I'm going to. Insurance premiums: I think I
13 remember from opening statement from the State, they
14 were going to prove that Mr. Payne went out and obtained
15 these life insurance policies, mastermind. I guess, the
16 theory was this was well planned out; graves were dug,
17 insurance policies were obtained. You would think it
18 would be a little bit better story about that if there
19 was a great mastermind plan. That's ridiculous.

20 We all know that he didn't seek those life
21 insurance policies out himself. The agent himself said,
22 no, we suggested that they buy life insurance, but
23 here's the key to it: They wanted a quarter-of-million
24 dollars of life insurance and he quoted them a premium
25 of less than \$500 a year. I don't remember exactly. I

1 wrote it down, but I don't have it in front of me and
2 not going to look for it, but 400-something dollars a
3 month a year for this life insurance policy, but when it
4 came back from the company, it was 10 or 15 percent
5 higher than that, you know, being another 4 or \$5 a
6 month for the insurance policy on Nichole.

7 So instead of this mastermind who needed
8 money and was planning to kill his wife for the premium,
9 instead of paying another \$4 or \$5 a month for that
10 extra \$150,000, he just dropped it down to hundred.
11 That doesn't make any sense. You know it doesn't make
12 any sense. That's just something they've thrown against
13 the wall.

14 Yeah, they've never -- they've suggested
15 that he killed his family for the money, for the
16 insurance policy. If it wasn't that, it was because he
17 had bad marital relations, and if it wasn't that, maybe
18 it was something else. Well, the fact of the matter is
19 they don't have any evidence, any physical evidence
20 whatsoever, zero, none to connect Jason Payne to these
21 offenses except their invitations to you to speculate
22 about selling boats.

23 They were in bad financial shape. Well,
24 let's talk about that just a minute because the evidence
25 you heard is pretty clear, that Jason Tad Payne had

1 assets worth about a quarter-of-a-million dollars. Now,
2 were they low on cash? Yes, they were. Were they
3 broke? No.

4 Now, let's make something clear: Jason
5 Payne was in an accident. Jason Payne got a settlement.
6 Jason Payne spent his money on Nichole and Taylor and
7 others in such a fashion that the District Attorney's
8 Office is offended. What did this terrible man do with
9 his money? He put a roof over his wife's head, put a
10 roof over his son's head, Taylor, and his other
11 children, put a roof over their head, bought them a
12 house, paid cash for it. That offends the District
13 Attorney's Office in some way. I'm not sure how.

14 He bought transportation for himself and
15 for Nichole and he bought transportation for Taylor, and
16 that offends the District Attorney's Office. They don't
17 approve of the way he spent his money. I will tell you
18 this, ladies and gentlemen, it is none of the district
19 attorney's business how he spent his money, how you
20 spend your money, or how I spend my money.

21 He was not broke. He had a net worth of
22 about a quarter-of-a-million dollars and he was low on
23 cash. They translated that into motive and murder, and
24 that, ladies and gentlemen, is ridiculous. Sold his
25 boat. Drag a man down here and we have to listen to

1 boat sale negotiations as evidence that he's a murderer.

2 That's their theory.

3 Well, a bloody rag, let's talk about that:

4 You've got a picture of it. Make up your own mind.

5 What we do know from the State's own witness, right out

6 of the State's own witness's mouth is: When did that

7 rag get in there? I don't know. What were the

8 circumstances of it? I don't know. Who put it there?

9 I don't know.

10 They're asking you to make a leap of faith.

11 If that rag has anything at all to do with this offense,

12 because they're sure as the Dickens haven't brought you

13 any evidence that it does, it's not a smear, it's not a

14 gob, where did it come from? I tell you what it's

15 consistent with, it's consistent with someone taking a

16 rag and holding it against a wound to stop their minor

17 bleeding. That's what it's consistent with. You can

18 look at it. They want you to speculate that it has some

19 meaning in this case because that's what it would have

20 to be, speculation because there's no connection with

21 this.

22 I want to talk to you a few minutes before

23 I get away from it about the expert in this case. I

24 don't think this is too subtle, although I think it may

25 have passed over pretty quickly for the testimony, what

1 Tom Bevel told you essentially was this: That with
2 respect to the actual scientific portion of his work, he
3 would defer to Mr. Ernest. That was the range of fire
4 issues.

5 He did some range of fire issues, but said
6 to you on the stand that Mr. Ernest is better qualified
7 than I am, Mr. Ernest does that, I'm going to defer to
8 Mr. Ernest. So we can just put his range of fire stuff
9 aside and talk about Mr. Ernest in just a moment.

10 What he did, ladies and gentlemen, is what
11 he calls an event analysis. Now, how does that differ
12 from a crime scene analysis? Noel Martin did a crime
13 scene analysis. That's a scientific operation. You go
14 by the facts that you see on the ground. You look at
15 the blood spatter, you look at the blood flow, you look
16 at where -- you use lasers if you need to to find paths
17 of bullets, you BlueStar the area to see where this
18 misting blood went if there was any. You do that in a
19 scientific way and let the facts bring you to your
20 conclusion.

21 Now, an event analysis, on the other hand,
22 that Mr. Bevel did let's him take into consideration
23 subjective issues. He told you that from the stand. He
24 can take what Miles Tucker told him to be the truth and
25 factor that into his equation. It's not scientific at

1 all.

2 It basically is, if I do an event analysis,
3 I can take into consideration the insurance policy and I
4 can take into consideration the holes in the ground and
5 I can take into consideration all the theories that the
6 State has, people who are paying me to do this work, and
7 so I can factor all of that in and come in and
8 say -- what did he say in his report? Oh, Taylor was
9 long dead before Nichole was ever shot, long dead. What
10 does at that mean, I asked. He didn't know. Well, I
11 guess now if I reflect on it, I'd just take "long" out,
12 but I still think he was shot first, but he offers you
13 no reason for that other than that's what he thinks.
14 There's no evidence to support it. He couldn't tell you
15 a thing that supported that theory.

16 It's a mind-boggling thing if you think
17 about it. How that could ever be possible? They want
18 you to over look, just over look that theory. So
19 frankly what we've got in Tom Bevel is a guy who has
20 come down, dumped a bunch of stuff that is either
21 misinterpreted, didn't exist to begin with, or even
22 falsified --

23 THE COURT: Counsel, you have five minutes.

24 MR. PARKS: Thank you.

25 -- and factored that in.

1 With respect to Mr. Ernest, the bottom line
2 is he ignored the most important of all evidence in this
3 case and that was the soot, just ignored it, because
4 there's no explanation for it. So if you can't explain
5 it, if it doesn't fit with your theory, ignore it. Not
6 once does he mention soot in his report. He uses a
7 medium of plastic where the soot really won't even
8 adhere to it.

9 Why is that important? Because range of
10 fire could be important in the case. And we know from
11 the State's own witness that soot deposits 12 inches and
12 in. We know that from our expert witnesses, 12 inches
13 or in. And here we've got Ernest firing a gun out here
14 at 18 and 20 inches and bringing you things to show you
15 about patterns that are meaningless. He knows that.
16 He's been around long enough to know that. He can't
17 explain the soot. Soot didn't fit with him, so he
18 ignored it.

19 But I'll tell you, you know, he was paid,
20 so Mr. Heuske, no question about that, but I will tell
21 you that Noel Martin told the District Attorney's Office
22 the truth way back there. He told you folks the truth,
23 and he is beholding to no one. He testified without
24 fear and without favor. He doesn't belong to us and he
25 doesn't belong to them. He works for the Smith County

1 Sheriff's Department. He's an expert that's called
2 upon, and he came down here and told you to the truth
3 and he didn't equivocate; it was a suicide and there was
4 no question about it, period.

5 Mr. Heuske did -- his -- you heard his
6 testimony, and I'm running out of time. I'm going to
7 tell you what it was: It was yesterday afternoon.
8 There was one thing significant about Ed Heuske, that
9 when he finished testifying, the district attorney did
10 not ask him one question that went to what he had to
11 say. They didn't challenge one thing that he had to
12 say, not one conclusion that he had to reach. They
13 attacked him personally and that was their
14 cross-examination, and I tell you that says a lot. Why
15 didn't they attack what he had to say? Because they
16 couldn't. It was the truth. It was science.

17 They even attacked Noel Martin: Well,
18 Deputy Martin did you take into consideration the
19 insurance policy? Did you know he had marital
20 difficulties? Did you know? He said, no, no, no, I
21 didn't know any of that. It doesn't matter. What he
22 finally said was, I based my conclusions on the
23 scientific evidence, that other stuff doesn't matter,
24 I'm a scientist.

25 So how did we end? Oh, I want to mention

1 one other thing: Philip Kemp. I think this is a good
2 example of what we've heard this week and last. Philip
3 Kemp, the Ranger took the stand, and right at the end of
4 his testimony, he was asked a question by the district
5 attorney: Do you believe -- do you agree with Noel
6 Martin this was a suicide -- murder/suicide? No, I
7 don't. I believe it was a double murder.

8 Well, you see, the follow-up question to
9 that if you've got a burden of proof in a criminal case
10 is, why don't you tell the members of the jury, Ranger
11 Kemp, why you believe that. Give us some reasons. Tell
12 us some evidence. Don't just give us your gut feeling.
13 Tell us? Why? Did you hear that question? No, you did
14 not. What you heard was, "Pass the witness."

15 Now, Mr. Wheeler may get up and say, I
16 could have asked him that question. Yeah, I could have,
17 but it's not my job. I don't sit here. It's their job
18 to prove their case and prove it with evidence, ladies
19 and gentlemen.

20 We've had a fairly long trial and I can
21 probably talk to you for 30 more minutes and it's
22 probably a good thing that we don't have that much time.
23 Y'all have heard the evidence. You can think for
24 yourself. You each have minds. You have received the
25 Court's Charge and you know what the law is and you all

1 took the oath.

2 THE COURT: Do you need any extra time?

3 MR. PARKS: Give me one minute, Your Honor.

4 I'm confident, ladies and gentlemen, that
5 when you've had an opportunity after the argument, to
6 consider -- carefully consider what you have heard
7 today, that it will be clear to you that the State's
8 case is nothing by smoke and mirrors. They have no
9 evidence in this case. This case is not about slurs.

10 It's not about calling Jason a liar when he's grieving
11 for his family. It's not about calling a witness names.

12 You know how this works? I'll tell you
13 real quickly: If you've got a witness on the stand and
14 you've got some evidence that he's done something wrong,
15 that he's testified in another trial some way, what you
16 do is you get the transcript of that and you have it
17 with you and you ask him, didn't you say so and so, and
18 then when he says, no, I didn't, you take the evidence
19 up there and show it to him. That's when you're
20 operating in good faith. You don't just don't throw
21 accusations and slurs out at a witness without any
22 evidence without any justification.

23 This trial started with a slur calling this
24 good man a liar and a murderer and it ended with slur
25 against our witness and there's nothing with any

1 substance in between. And I ask you folks respectively
2 to return a verdict of not guilty and end this
3 nightmare.

4 THE COURT: Mr. Wheeler, you have 15
5 minutes.

6 MR. WHEELER: May I have a minute to move
7 the podium?

8 (Pause in the proceedings.)

9 REBUTTAL CLOSING ARGUMENT

10 BY MR. WHEELER:

11 May it please the Court.

12 THE COURT: Yes, sir.

13 MR. WHEELER: Mr. Parks. Mr. King.

14 You can evaluate a case based on the
15 credibility of the witnesses you hear from the stand and
16 the evidence that's presented to you. Lawyers are not
17 witnesses, you know.

18 Ridicule does not make the illogical
19 logical. Let me say that again and I want you to hear
20 clearly: Ridicule is not a defense. Ridicule does not
21 make the illogical logical. The Defense ridicules the
22 evidence, evidence against Jason Thad Payne, casting the
23 mistakes he made in staging this scene, casting his
24 inconsistent statements, casting his inexplicable
25 behavior, and casting the hard physical evidence as

1 proof not of guilt, but of innocence. That's an
2 illogical argument.

3 First, let's look at the mistakes in
4 staging this scene: Number one, the bloody rag that was
5 in the vehicle. If Taylor Wages shot himself, he was
6 incapable of putting that rag inside a truck he was not
7 in that day, okay? There is a bloody rag in the truck.
8 It has bright red blood on it. For it to be otherwise
9 would be to call William Burge a liar, and he's not
10 going to lie about the color.

11 The blood is Nichole Payne's DNA. There
12 isn't any doubt about it. And that rag matches a wet
13 towel that was in the washing machine, and that's in
14 evidence. There are bloody smudges on the truck door.
15 They are there. The amount of the sample was too small
16 to determine whose DNA it was, but there was a bloody
17 rag that Jason Thad Payne was in and there's bloody
18 smudges on the door of that truck.

19 At the crime scene, Jason Thad Payne,
20 headed in the direction of that truck, though he had
21 been told several times to stay put with Officer Misty
22 Burns, and the door of that truck was opened. He's
23 conscious of the bloody rag that is in that truck.
24 That's the reasonable inference from the evidence.

25 There is none of Nichole Payne's blood on

1 Taylor Wages' clothing. You heard about atomized blood.
2 You heard about how far it goes. And that boy forever
3 will not have his mother's blood on his clothing, not on
4 his socks, not on his pants, not on his T-shirt, not on
5 his jacket. His mother's blood is not on him, period,
6 and it never will be.

7 The wound indicates other than what would
8 be expected other than a suicide by rifle. The
9 distance, 12 inches plus or minus two inches, did not
10 have contact as you would expect in a suicide by rifle.
11 The barrel was not in the boy's mouth and it was not
12 under his chin. That is clear from the evidence. The
13 angle is awkward. That is clear from the evidence. It
14 enters his upper lip and goes through his head
15 traversing the midpoint of the head. And the wound is
16 not explosive, like what you saw with Nichole Payne. It
17 is not a close wound where his head explodes from the
18 gasses emitted from that rifle barrel. Those gases did
19 not go into his wound. That's because the rifle is away
20 from his face.

21 The upward trajectory that the Defense
22 argues is not shown on the ceiling of that room. There
23 is no biological matter on the ceiling of that room.
24 There is no hole in the ceiling of that room, though the
25 argument is it's the same rifle, and that rifle did make

1 a hole in the wall of Nichole Payne's bedroom, but the
2 spent bullet is in the bedding. The ceilings up there.
3 The bedding is down there. And you can draw reasonable
4 inferences from it that all the blood on that crime
5 scene before the body was moved is down and to the left.

6 Taylor has dirty socks, and we have a photo
7 in evidence. It's photo No. 44. And that's a feed bowl
8 for an animal on the floor. There's an animal in that
9 room where he stayed. He's got a bare foot walking
10 around on this carpet. His shoes aren't anywhere kicked
11 off. He's walked on that floor in a room with an
12 animal, and the bottom of his socks, as you can tell
13 from the photos and when you look at the socks that are
14 in evidence are dirty, though the gun doesn't have a
15 single hair from his feet or a single piece of dirt that
16 was identifiable, nothing the Department of Public
17 Safety told you was on that gun.

18 There are no identifiable prints on the gun
19 or the ammunition, not of Taylor who was found with the
20 gun, not of Jason Thad Payne who admits ownership of the
21 gun, not of Jason Thad Payne who admits firing the gun
22 on the day before this incident. And this smudging no
23 where, no smudges are on there. His fingerprints are no
24 on there. It's not on the trigger, the trigger housing,
25 the lever. It's not on the metal parties. There aren't

1 any smudges on the butt, on the stock, anywhere,
2 nothing. There's a strong smell of gunpowder, and I
3 would submit to you that an officer who's worked on
4 gunshot wounds over 15 years and a Texas Ranger knows
5 the difference of gunpowder and the smell of a wound.

6 MILES TUCKER, all he did was ask the
7 Rangers, the crime scene reconstructionists, experts,
8 Cellmark experts, DPS, the experts at Southwestern
9 Institute of Forensic Sciences, and the District
10 Attorney's Office all to help. And they call him a
11 liar. Her body was warm to the touch, and he's not a
12 liar. I'd give the court any one of his cases.
13 Mistakes in staging, that is not an exclusive list.
14 That's a partial list of the mistakes in staging this
15 crime scene and that is over 20 individual pieces of
16 evidence. That's an evidentially strong case.

17 Now, let's talk about the inconsistent
18 statements. The school records indicate that General
19 Jackson was on time getting to school at 8:00 on the
20 morning of December 11, 2007. He had Remington with him
21 in the truck. Then, according to his statement, he
22 headed back home with Remington, then he decided he
23 needed pigeon feed. So they head back to town to buy
24 pigeon on feed. Then they decide to go back home
25 according to his statement, but Remington wanted to go

1 to the park, so they head back to town again. And this
2 is three times in that short period; to school, then to
3 go get pigeon feed, then to go to the park. Then he
4 decides, I need to tell Nichole they're going to the
5 park. He's got a cellphone with him and there's a phone
6 in the house and he knows she's asleep, but he goes back
7 to tell her there. He decides to go back home.

8 When he gets on the property, does he do
9 what he says he's going to do and wake her? No.
10 Instead, he didn't tell her that he and Remington are
11 going to the park. He walks down on the backside of the
12 property to the creek and they throw acorns into the
13 creek and then they go -- or he goes -- he says, I need
14 to ask Nichole where the birdseed is, though he's
15 already said he needed to go buy pigeon feed because
16 he's out of feed. And then nearly an hour later after
17 getting back on that property -- he says he's back at
18 8:15, he calls 911 at about 9:06 -- he discovers
19 Nichole. That's illogical. Three trips to town, down
20 on that property, then calling 911, that doesn't make
21 any sense. You can't make that logical.

22 Now, let's talk about inexplicable
23 behavior: Shutting off contact among Nichole and the
24 family is not explicable. That is what a controlling
25 man does. Now, when he discovers Nichole, he has a

1 two-year-old with him. He does not know if the gunman
2 is still on the property when he sees Nichole. He does
3 not know who the gunman is when he discovers Nichole.
4 He has no idea if he's the target when he discovers
5 Nichole; yet, he does not arm himself, he takes no steps
6 to protect his daughter Remington, the two-year-old. He
7 runs immediately to Taylor's room, according to his own
8 statement, and he does not flee with his daughter. He's
9 not afraid, y'all. Why? He makes no effort to aid
10 Taylor or Nichole because he knew they were already
11 dead, that's why.

12 When he's asked by Ranger Kemp a very
13 simple question early in that interview -- and you'll
14 hear it -- which room was it -- which gun was it in
15 Taylor's room, was it the .30 caliber or the .30-30?
16 And immediately, Jason Thad Payne answers: "It's the
17 .30-30 lever action." Later in the interview, he's
18 asked again about that gun, and he hems and haws and
19 stammers and says, "Oh, yeah, I remember the gun because
20 of the leather stock." That acting is deceitful.

21 Jason Thad Payne lied about his marital
22 relationship. Come on, we talked about credibility in
23 voir dire. People lie for two reasons: People lie to
24 cover things up or people lie to make themselves look
25 better. That's why people lie. Everybody's had folks

1 lie to them.

2 He lied that day. He said he had a good
3 marital relationship. And Nichole had told several
4 people she wanted a divorce, she was afraid, she had to
5 have conversations with her family from a closet or she
6 had to get out of the house to go down to the creek to
7 have a conversation, that she feared him, that if
8 something happened to her, that her family was to avenge
9 her, and she had reestablished contact with an old
10 boyfriend, Dmitri Nobles.

11 THE COURT: Mr. Wheeler, you have two
12 minutes.

13 MR. WHEELER: Why couldn't Jason Payne just
14 leave her? He wouldn't get his insurance money. He
15 would have lost control of her. He would have lost the
16 house in a divorce proceeding. He would have lost
17 custody of his kids. He had everything to gain by her
18 being dead. And remember, you can take all the evidence
19 with you, every bit of it. You can go through it.

20 He didn't have a job, that's his financial
21 situation. He had liquidated his boat. He spent the
22 entire settlement. His wife had little income. His
23 financial position was so dicy that he couldn't purchase
24 the adjoining property from Preston Bridges. His life
25 insurance was readily available. Desperate people do

1 desperate things.

2 He made no effort to contact Nichole
3 Payne's parents. What kind of grieving husband and
4 father is that? You saw him on the phone. He had the
5 phone with him on the video. He called his own family
6 about himself and his biological kids on the day of the
7 killings. He didn't contact Todd Wages, the father of
8 the dead stepson that he had. He refused to give a
9 recorded statement to the insurance company. Taylor had
10 a good home to go to and he had room in it. He had a
11 place to go and it was near by. He was going to stay
12 with his mother.

13 The Defense condemns circumstantial
14 evidence telling you it's specious. It takes bricks to
15 make a wall. This, I tell you, is an eraser killing,
16 and they're arguing he would not have made mistakes that
17 would give him away. Well, here is what he gains --

18 THE COURT: Time, Counsel.

19 MR. WHEELER: All right. 30 seconds, Your
20 Honor.

21 THE COURT: Yes, sir.

22 MR. WHEELER: Jason Thad Payne is seeking
23 to kill those two because he would be better off without
24 Nichole Payne and the child, without having to share his
25 estate, give up his home, and he can't abide him to go

1 on living. He wants his mother and brother living
2 there. And he lied about the holes. That is signs of
3 premeditation.

4 There's a lot more I can tell you. I've
5 just given you about 75 pieces of evidence. Letting him
6 go it not right. It's not justice. It's not
7 reasonable. I'm asking you to go back there because
8 we're counting on you to find him guilty.

9 THE COURT: Thank you, Mr. Wheeler.

10 Chief, let me get you, if you would, come
11 and take the charge, and then, if you would, escort the
12 jury back to the jury room where they can begin
13 considering their verdict.

14 (Jury exits courtroom.)

15 THE COURT: All right. Let the record
16 reflect that the jury has left the courtroom.

17 I'll ask the clerk to assist in
18 gathering -- making sure we've got all the evidence put
19 together and then we'll get that, then, on into the jury
20 room, so we'll be in recess at this time.

21 Oh, call the court back to order. I assume
22 full responsibility for this: I forgot to ask the
23 alternate to stay with us. I have asked the bailiff to
24 bring her back so she's back here. That's what I get
25 for not writing my --

1 (Alternative juror enters courtroom.)

2 THE COURT: Ms. Strickland, I apologize.

3 Go ahead and have a seat for a second. You were, as
4 you're probably aware, the alternate since we've asked
5 you to come back after you had gone home from the voir
6 dire. I should have asked you just to remain here
7 before you left.

8 Now, under the current state of the law, a
9 few years I would have, at this point, just released you
10 from your service and thanked you very much and said
11 you're free to go, but at this point, it's necessary for
12 me to keep you here sequestered just like the jury is
13 sequestered, so you have the instructions that you
14 previously had.

15 Your situation is going to be a little more
16 awkward. You get to be by yourself. It's the hardest
17 jury service, I think, it is. We use the law library
18 over here. We don't have an extra bailiff to sit
19 outside the room there, but there will be a sign telling
20 everybody else not to go in there during this period of
21 time. I will have somebody checking with you
22 periodically if you need water or drinks, things like
23 that. If you need something, you can always come to
24 that door, and whoever you see, ask them to contact the
25 court coordinator to see what needs you have.

1 So let me ask you, at this time, if you
2 would go with the bailiff to that location.

3 (Alternate juror exits courtroom.)

4 THE COURT: I do have some other matters
5 that I need to take up, but this case will be in recess
6 until we hear from the jury.

7 (Recess from 10:22 to 11:41.)

8 THE COURT: 20,529, State vs. Jason Thad
9 Payne. Let the record reflect that counsel for the
10 State, counsel for the Defendant, and the Defendant is
11 present. The jury is not.

12 We have a note from the jury that says:
13 "Can we get the measuring stick and rod presented by the
14 prosecution?," signed by the presiding juror.

15 MR. PARKS: They're entitled to anything
16 that's in evidence.

17 THE COURT: I guess that raises the
18 question. I don't think those were in evidence.

19 MR. WHITLEY: No, they were not.

20 THE COURT: And the Court believes they
21 have all the matters that are in evidence. The response
22 that you would like is what?

23 MR. WHEELER: "You've received all the
24 evidence in this cause. We ask you to continue
25 deliberations."

1 THE COURT: We'll go off the record at this
2 time.

3 (Pause in the proceedings.)

4 THE COURT: All right. I've written out
5 the following response: "You have received all the
6 evidence admitted into this cause. Please continue your
7 deliberations."

8 Any objection from the State?

9 MR. WHEELER: Not from the State.

10 THE COURT: From the Defendant?

11 MR. PARKS: No, Your Honor.

12 THE COURT: I sign it and ask that a copy
13 be made and that copy be sent back. We'll be in recess
14 again at this time.

15 (Recess from 11:43 to 2:58.)

16 THE COURT: All right. Let me get on the
17 record in 20,529-2008, State of Texas versus Jason Thad
18 Payne. Let the record reflect counsel for the State,
19 counsel for the Defendant, and the Defendant is present.
20 The jury is not present.

21 The jury has reached a verdict. I'm just
22 telling you so you won't be confused, they didn't hand
23 me the note, they handed the bailiff the verdict form,
24 but we'll just go ahead and bring them in and then I'll
25 ask that the presiding juror whether they've reach a

1 verdict and I'll read it and take up whatever we need to
2 take up.

3 Now, ladies and gentlemen, I talked
4 earlier for those of you who were at the beginning of
5 closing arguments, closing arguments are emotional, but
6 verdicts or even more emotional. And I'll just say that
7 I'm happy to have everybody here. Everybody's got the
8 right to be here, but at the same time, juries have the
9 right to not have any emotional outbursts.

10 They didn't ask to come here. They got
11 chosen and were given a job to do and have the right to
12 not have any emotional outburst. That's all predicate
13 in saying that anyone who thinks they might not be able
14 to control their emotions in the event that the verdict
15 does not go in the way you're hoping it goes should just
16 go ahead and step out and find out what the verdict is
17 after the fact and not have that outburst in the
18 presence in the jury. If you remain here, that's just
19 fine. What that means is basically you're telling the
20 Court that you can control yourself and not have an
21 emotional outburst.

22 Is the state ready to proceed?

23 MR. WHEELER: The State's ready.

24 THE COURT: Defendant ready to proceed?

25 MR. PARKS: Ready, Your Honor.

1 THE COURT: If you'll bring the ladies and
2 gentlemen of the jury back in.

3 (Jury enters courtroom.)

4 THE COURT: Let the record reflect the jury
5 has returned to the courtroom.

6 Ask Ms. Strickland to come in.

7 THE BAILIFF: Yes, sir, she's on the way.

8 THE COURT: And she can sit right out there
9 if she wants to. That will be fine.

10 (Alternate juror enters courtroom.)

11 THE COURT: Ms. Strickland, I wanted you to
12 know that the jury has let us know they have reached a
13 verdict.

14 Mr. Reynolds, it's my understanding you all
15 have reached a verdict; is that correct?

16 PRESIDING JUROR: Yes, sir.

17 THE COURT: All right. Then, Mr. Payne,
18 let me ask you to stand, if you would, please, sir.

19 (Defendant stands.)

20 THE COURT: All right. Verdict reads as
21 follows: "We, the jury, find the Defendant, Jason Thad
22 Payne, guilty of capital murder as alleged in the
23 indictment."

24 Is there anything else that anyone needs
25 from the jury before I release them?

1 MR. PARKS: Ask that the jury be polled.

2 THE COURT: Very. Let me explain to you
3 what I'm doing here: I've been asked to poll the jury,
4 and what I'm going to be doing is asking each of you
5 individually if that is your verdict, that what I read
6 that Mr. Payne is guilty as charged of capital murder.

7 And so, Mr. Reynolds, you signed it. Let
8 me start with you: Is that your verdict?

9 PRESIDING JUROR: Yes, it is.

10 THE COURT: Ms. Judkins?

11 JUROR: Yes, sir.

12 THE COURT: Ms. Raulston, is that your
13 verdict?

14 JUROR: Yes, sir.

15 THE COURT: Mr. Clark, is that your
16 verdict?

17 JUROR: Yes, sir.

18 THE COURT: Mr. Lindley, is that your
19 verdict?

20 JUROR: Yes, sir.

21 THE COURT: Ms. Swann, is that your
22 verdict?

23 JUROR: Yes, sir.

24 THE COURT: Mr. Helping, is that your
25 verdict?

1 JUROR: Yes, sir.

2 THE COURT: Ms. Rhodes, is that your
3 verdict?

4 JUROR: Yes, sir.

5 THE COURT: Ms. Williams, is that your
6 verdict?

7 JUROR: Yes, sir.

8 THE COURT: Mr. Gary, is that your verdict?

9 JUROR: Yes, sir.

10 THE COURT: Ms. Bird, is that your verdict?

11 JUROR: Yes, sir.

12 THE COURT: Ms. Mize, is that your verdict?

13 JUROR: Yes, sir.

14 THE COURT: All right. Is there anything
15 further required of the jury?

16 MR. PARKS: No, Your Honor.

17 THE COURT: All right. Then I do at this
18 time receive that as the jury's verdict.

19 And, ladies and gentlemen, you have been
20 under some very serious restrictions for a very long
21 time. First, I want to thank you for your service and
22 for the attention to the evidence as it came in. When I
23 release you here in just a moment, all of those
24 restrictions that have -- that you have had will be
25 lifted and you will be free to talk to anybody you want

1 to about anything involving this case. Now, that
2 includes what y'all discussed while you were in the jury
3 room considering your verdict.

4 If somebody from the national networks
5 calls you up and wants to talk to you, you're free to
6 talk to them if you choose to. I don't anticipate
7 anybody from the national network is going to do that.
8 You could also tell them, I don't want to talk to you
9 about it. You have the same -- it's just like any other
10 information you have; you can talk about or not talk
11 about.

12 It would not be surprising to have
13 attorneys who want to visit with you afterwards. That's
14 not an uncommon thing, and, again, you can feel
15 perfectly all right to talk to them if you want to or
16 not if you don't want to. I mention that specifically
17 because I used to do that as a regular part of my
18 practice and often, if the judge hadn't said something
19 like that, often the jurors thought there was something
20 unethical about that, to find out how they had reached
21 it. Again, you have no obligation to talk to the
22 attorneys.

23 If you have an employer who needs to know
24 that you have been here doing your public service for
25 these two weeks and not out fishing or taking a little

1 vacation or something like that, why then, please don't
2 forget to go by the district clerk's office and they
3 will be happy to provide you with forms to address that
4 and to take back to your employer. And if for any
5 reason they have any questions about it being invalid or
6 not, don't hesitate to ask to give me a ring and I'll be
7 happy to verify that.

8 All right. Then at this time, if you'll go
9 with the bailiff back to the jury room and leave your
10 juror badges on the table. Once you have done that,
11 you're free to go. Thank you very much.

12 (Jury exits courtroom.)

13 THE COURT: All right. Let the record
14 reflect the jury has been released.

15 Is there, I guess, any reason at this time
16 why the Court should not go ahead and pronounce
17 sentence?

18 MR. PARKS: No reason at bar, Your Honor.

19 THE COURT: All right. Mr. Payne, let me
20 ask you to stand.

21 (Defendant stands.)

22 SENTENCING

23 BY THE COURT:

24 The Court has received the jury's verdict.
25 Based on that verdict, I do find that you are guilty as

1 charged with the offense of capital murder. There is
2 only one sentence for that offense at this time since
3 it's been tried not as a death case and that is life
4 imprisonment without parole, so I do at this time so
5 sentence you. I do, then, remand you back into the
6 custody of Sheriff until such time as you can be
7 transported.

8 MR. WHEELER: We do have victim impact
9 statements, Your Honor.

10 THE COURT: All right. Before we take that
11 up, let me just say that I do give you, of course,
12 credit for time served. I don't have a time credit
13 sheet, but, counsel, if you will stay on top of that
14 before he gets out of the custody of Wood County
15 Sheriff's Office.

16 So let me ask you to go ahead and have a
17 seat, then, and we will take up the victim impact
18 statements at this time.

19 (Victim impact statements read.)

20 THE COURT: Mr. Payne, let me address some
21 other matter: Counsel, if you want to give him a copy,
22 I have signed the original. You have there a copy of
23 the Trial Court's Certification of Defendant's Right of
24 Appeal. I am, of course, finding that the Defendant
25 does have a right of appeal.

1 And then beneath where I have signed it and
2 dated, there is a paragraph that addresses your rights
3 of pro se appeal. I guess, I need to give you that so
4 we can get that filled out for the -- hand that to him.
5 I'm going to need for him to fill out information on
6 address. I know that's going to change, but the whole
7 point there is that you need to keep the Court and your
8 attorney informed of where you are and if you're going
9 to be moved around, they need to know how do get in
10 touch with you because -- that is whoever's representing
11 you on appeal.

12 MR. PARKS: I will give notice of appeal
13 and --

14 THE COURT: I counting on that assumption.

15 Mr. Parks, have you all discussed who
16 should represent him on appeal, whether there's any
17 problem --

18 MR. PARKS: We have not, Judge. I would
19 like to speak with him about that.

20 THE COURT: If you could. I mean,
21 technically your service terminates with the end of the
22 trial, but as a part of trial, if you'll make sure that
23 he understands dealing with the notice of appeal and the
24 time frame in an appeal. And I suspect whatever advice
25 you give very might not well be listened to at this

1 point, but if there is a need to appoint someone else on
2 appeal, the Court will be notified of that and we'll
3 take care of that. I have written down I've been given
4 notice for receiving that notice of right of appeal, so
5 give that notice to the Court before you leave. If you
6 might go over that with him and take care of that.

7 Basically, Mr. Payne, I guess the bottom
8 line is is that if you can't afford an attorney to
9 represent you on appeal, the Court will appoint someone
10 to represent you on appeal, and there are very critical
11 time deadlines. Probably the most critical is the fact
12 that the Court has to receive a notice of appeal from 30
13 days from today's date. I anticipate I'll get it today.

14 MR. PARKS: Today.

15 THE COURT: All right. At any rate, if you
16 need to communicate with the Court, you should be able
17 to do that, you know, through the jail.

18 Unless there's anything else that you need
19 to visit with him before he goes back, I would remand
20 him back in the care of the Sheriff's Office until you
21 can be transported. We'll be in recess at this time.

22 (Recess taken from 3:20 to 3:31.)

23 THE COURT: Mr. Payne, I wanted to visit
24 with you about my understanding that you don't have any
25 problems Mr. Parks representing you on appeal?

1 THE DEFENDANT: No.

2 THE COURT: I guess for the record, this is
3 in Cause 20,529-2008, State vs. Jason Thad Payne. Just
4 gotten through receiving the jury's verdict and
5 sentencing Mr. Payne on capital murder, sentenced to
6 life without parole.

7 Mr. Payne, do you understand if you want
8 someone else appointed, that you have the right to not
9 have Mr. Parks represent you, and I'll be happy to
10 appoint --

11 THE DEFENDANT: That will be fine.

12 THE COURT: You're perfectly happy with his
13 representation?

14 THE DEFENDANT: (Moving head up and down).

15 THE COURT: Anything else?

16 MR. PARKS: No, sir.

17 THE COURT: I'll be happy to appoint him.

18 Mr. Parks, I have space for an address. If
19 you will take care of that. This is the 28th of
20 January.

21 All right. Thank you very much.

22 (End of proceedings.)

23

24

25

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

21

22

23

24

25

Una B. Garland, Texas CSR 5856
Expiration Date: 12/31/2011
Official Court Reporter
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 11 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE)	402ND JUDICIAL DISTRICT

TRIAL ON THE MERITS

EXHIBITS

1 A P P E A R A N C E S

2

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	78	Photograph	43	43	6
	79	Photograph	43	43	6
	80	Photograph	43	43	6
	81	Photograph	43	43	6
	82	Photograph	43	43	6
	83	Photograph	43	43	6
	84	Photograph	125	126	6
	85	Photograph	125	126	6
	86	Photograph	125	126	6
	87	Photograph	125	126	6
	88	Photograph	133	134	6
	89	Photograph	133	134	6

1 EXHIBIT INDEX - CONT'D

2 STATE'S

3	NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
4	90	Photograph (WITHDRAWN)	133	--	6
5	91	Photograph (WITHDRAWN)	133	--	6
6	92	Photograph	133	134	6
7	93	Gray shirt and white towel (RETAINED BY DISTRICT CLERK)	232	232	6
8	94	Spent copper bullet (RETAINED BY DISTRICT CLERK)	234	234	6
9	95	Copper jacket (RETAINED BY DISTRICT CLERK)	238	238	6
10	96	Copper jacket (RETAINED BY DISTRICT CLERK)	236	236	6
11	97	Photograph	244	244	6
12	98	Aaron Polk, M.D., records of Nichole Payne	15	15	7
13	99	Blood standards (RETAINED BY DISTRICT CLERK)	44	44	7
14	100	Bloody clothing (RETAINED BY DISTRICT CLERK)	49	50	7
15	103	Curriculum Vitae of Tom Bevel	68	68	7
16	104	Photograph	76	76	7
17	108	Photograph	76	77	7
18	109	Photograph	109	109	7
19	110	Photograph	137	137	7
20	111	Resume of Richard Ernest	154	154	7
21	112	Photograph	160	160	7
22	113	Test-fire exemplar at 6 inches (RETAINED BY DISTRICT CLERK)	175	176	7
23	114	Test-fire exemplar at 8 inches (RETAINED BY DISTRICT CLERK)	175	176	7

1 EXHIBIT INDEX - CONT'D

2 STATE'S

3 NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
4 115	Test-fire exemplar at 10 inches			
5	(RETAINED BY DISTRICT CLERK)	175	176	7
6 116	Test-fire exemplar at 12 inches			
7	(RETAINED BY DISTRICT CLERK)	175	176	7
8 117	Test-fire exemplar at 14 inches			
9	(RETAINED BY DISTRICT CLERK)	175	176	7
10 118	Test-fire exemplar at 16 inches			
11	(RETAINED BY DISTRICT CLERK)	175	176	7
12 119	Test fire exemplar at 18 inches			
13	(RETAINED BY DISTRICT CLERK)	175	176	7
14 120	Posterboard with photographs of			
15	Austin Taylor Wages			
16	(RETAINED BY DISTRICT CLERK)	175	176	7
17 121	Template			
18	(RETAINED BY DISTRICT CLERK)	189	189	7
19 122	Photograph	71	71	8
20 123	Photograph	71	71	8
21 124	Photograph	136	137	8

21 DEFENDANT'S

22 NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
23 4	Photograph	51	51	9
24 5	Photograph	55	56	9
25 6	Photograph	55	56	9
26 7	Photograph	55	56	9

1 EXHIBIT INDEX - CONT'D

2 DEFENDANT'S

3	NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
4	8	Photograph	55	56	9
	15	Photograph	17	17	9
5	16	Photograph	17	17	9
	18	Photograph	151	152	8
6	20	Photograph	151	152	8
	21	Photograph	151	152	8
7	22	Photograph	151	152	8
	23	Photograph	84	84	9
8	24	Test-fired Styrofoam Head			
9		(RETAINED BY DISTRICT CLERK)	68	69	9
10	25	Test-fired Styrofoam Head			
11		(RETAINED BY DISTRICT CLERK)	68	69	9
12	26	Piece of test denim with bloodstains			
13		(RETAINED BY DISTRICT CLERK)	86	87	9
14	27	Soot test-fire exemplar at 4 inches			
15		(RETAINED BY DISTRICT CLERK)	146	147	9
16	28	Soot test-fire exemplar at 6 inches			
17		(RETAINED BY DISTRICT CLERK)	146	147	9
18	29	Soot test-fire exemplar at 2 inches			
19		(RETAINED BY DISTRICT CLERK)	146	147	9
20	30	Soot test-fire exemplar at 8 inches			
21		(RETAINED BY DISTRICT CLERK)	146	147	9
22	31	Soot test-fire exemplar at 10 inches			
23		(RETAINED BY DISTRICT CLERK)	146	147	9
24					
25					

1 EXHIBIT INDEX - CONT'D

2 DEFENDANT'S

3 NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
4 32	Soot test-fire exemplar at 12 inches			
5	(RETAINED BY DISTRICT CLERK)	146	147	9
6 33	Test-fire exemplar at 6 inches			
7	(RETAINED BY DISTRICT CLERK)	157	157	9
8 34	Test-fire exemplar at 11 inches			
9	(RETAINED BY DISTRICT CLERK)	157	157	9
10 35	Test-fire exemplar at 8 inches			
11	(RETAINED BY DISTRICT CLERK)	157	157	9

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1 TRIAL COURT CAUSE NO. 20,529-2008
2 THE STATE OF TEXAS) IN THE DISTRICT COURT
3)
4 VS.) WOOD COUNTY, TEXAS
5)
6 JASON THAD PAYNE) 402ND JUDICIAL DISTRICT

7
8 I, Una B. Garland, Official Court Reporter in and
9 for the 402nd Judicial District Court of Wood County,
10 Texas, do hereby certify that the following exhibits
11 constitute true and complete duplicates of the original
12 exhibits, excluding physical evidence, offered into
13 evidence during the trial on the merits in the
14 above-entitled and numbered cause as set out herein
15 before the Honorable G. Timothy Boswell, Judge of the
16 402nd Judicial District Court of Wood County, Texas, and
17 a jury trial beginning JANUARY 19, 2010.

18
19 WITNESS MY OFFICIAL HAND on this, the _____ day of
20 _____, 2010.

21

22

23 _____
24 Una B. Garland, Texas CSR 5856
25 Official Court Reporter,
402nd District Court
Wood County, Texas
Quitman, Texas 75783

REPORTER'S RECORD
VOLUME 12 OF 12 VOLUMES

TRIAL COURT CAUSE NO. 20,529-2008

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
)	
)	
VS.	)	WOOD COUNTY, TEXAS
)	
)	
JASON THAD PAYNE	)	402ND JUDICIAL DISTRICT

MOTION TO QUASH SUBPOENA

AND

MOTION TO STRIKE EVIDENTIARY HEARING

On the 19th day of March, 2010, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable G. Timothy
Boswell, Judge presiding, held in Quitman, Wood County,
Texas;

Proceedings reported by machine shorthand.

1 A P P E A R A N C E S

2

3 FOR THE STATE OF TEXAS:

4

5 SBOT NO. 21376000

6

7 MR. HENRY WHITLEY

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11 WOOD COUNTY, TEXAS

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27 ATTORNEY AT LAW

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37 - AND -

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1	CHRONOLOGICAL INDEX		
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1 PROCEEDINGS

2 THE COURT: Get on the record, then, in
3 Cause 20,529-2008. That's State of Texas versus Jason
4 Thad Payne.

5 And we're here, as I understand it, on the
6 State's motion to quash the subpoena of the District
7 Attorney. That's the only thing we have to hear?

8 MR. WHITLEY: No, sir, Your Honor. We have
9 two motions. We have -- there's an evidentiary hearing
10 that Joy set for April the 1st on the Motion for New
11 Trial. I have filed a motion to strike that setting.
12 The State's position is they're not entitled to an
13 evidentiary hearing. Secondly, there is a motion to
14 quash the subpoena that's wanting certain things from
15 the State.

16 THE COURT: All right. And so with both of
17 those matters, the State's ready to proceed?

18 MR. WHITLEY: I'm ready.

19 THE COURT: And the Defendant?

20 MR. PARKS: The Defense is ready.

21 MR. WHITLEY: First of all, Judge, I want
22 to make sure that we're on the same page and we're
23 talking about the same thing. In the Motion For New
24 Trial, basically, as I see the bottom line, the
25 Defense's position is that Miles Tucker testified that

1 the meeting that had transpired earlier in which the
2 State heard Noel Martin's presentation of what his
3 ultimate opinion was where he concluded it was a
4 murder/suicide. That meeting occurred in the jury room
5 at some point in time prior to trial as preparation for
6 a trial meeting.

7 In the Motion For New Trial, the Defense
8 alleges that at trial, Miles Tucker testified that the
9 meeting lasted less than an hour. Noel Martin testified
10 it was in excess of two hours. From that, they conclude
11 that Mr. Wheeler, the District Attorney, who was present
12 at the meeting and should have knowledge as to how long
13 the meeting lasted, I assume, they conclude that
14 immediately should have recognized that Noel Martin was
15 telling the truth and Miles Tucker was not telling the
16 truth. Accordingly, he, at that point, should have
17 divulged and corrected the false testimony, thereby
18 becoming a witness and thereby disqualifying him from
19 trying the case and the office.

20 I think if -- that's my understanding of
21 what the position is. If I'm not grasping it correctly,
22 I would like to be corrected.

23 MR. PARKS: That's partially correct. It's
24 not just our concern to not just how long it lasted
25 because there was a discrepancy between the two

1 witnesses about how long it lasted, even more
2 importantly how it was conducted with Mr. Tucker
3 basically saying, well, from my recollection, I was
4 upset with Deputy Martin because he was just saying all
5 this was a suicide, I've seen it many times, and never
6 really gave any explanation or reasoning behind why he
7 had come to that conclusion; whereas, what Mr. Martin
8 said was that he had gone over it in detail and
9 explained everything, so I think that is most really at
10 issue, the substance more at issue than the length, but
11 both of them are in --

12 MR. WHITLEY: And secondly, what I would
13 like to do is make sure we are on the same page as to
14 what testimony was actually given in trial. I have the
15 transcript of Miles Tucker's testimony, and I'll direct
16 everybody to Page 142: "And about how long was it after
17 he did the reconstruction work and you had this sit-down
18 with the District Attorney's Office and Noel Martin?"
19 Answer is: "I don't remember how long." And that is
20 part of the cross-examination that Miles Tucker went
21 through and it's a very lengthy cross-examination that
22 dealt with what happened at that meeting.

23 The only other thing that I can find in
24 that testimony is that, if the Court will recall, Miles
25 Tucker testified all of the first day, went into the

1 second day, and we had the medical examiner here and the
2 people from SWIFTS here and we interrupted his
3 testimony, and his testimony then resumed. And then
4 after it resumed, Question -- this is on Page 8 of Una's
5 supplement: "At this meeting" -- by Mr. Parks: "At
6 this meeting you described to us was you and Deputy
7 Martin and the District Attorney's Office. About how
8 long did that last?" His answer: "Not long. I don't
9 know how long exactly, but not more than probably an
10 hour."

11 Now, is that the testimony that the
12 State -- that the Defense is zeroing in on?

13 MR. PARKS: I'm not zeroing in on that
14 particular phrase. That's part of the issue, certainly,
15 but the greater issue is how that was conducted and the
16 impression that he left with the jury. That's our
17 concern.

18 As I said in the motion, we've got a
19 situation where the State's original own witness is
20 giving testimony critical to the case against the State,
21 and as I said in the motion, it's obvious that the only
22 way the State could win this case is to discredit Noel
23 Martin.

24 MR. WHITLEY: Which we disagree with,
25 Judge.

1 MR. PARKS: So that is the process, it
2 seems to me that was the gun, by minimizing Deputy
3 Martin, by mischaracterizing his opinion, by turning him
4 into a dogmatic statement, well, it's a suicide, take my
5 word for it, I've seen it many times, I have no
6 justification for that, which was the impression that
7 Miles Tucker was leaving with this jury. Noel Martin
8 testified quite the opposite of that.

9 I wasn't at the meeting. As I said in the
10 motion, one of those two witnesses were not testifying
11 accurately. I believe that Noel Martin was testifying
12 accurately. That's my belief because I wasn't at the
13 meeting, but the District Attorney was, and that's the
14 crux of it. The district attorney knows or should know
15 whether or not Miles Tucker was accurately describing
16 not only the length of that meeting but the substance of
17 that meeting and the impression that it was leaving with
18 the jury and that's -- that's the issue, not just one or
19 two particular answers.

20 MR. WHITLEY: Well, that's what he says in
21 his motion, Judge. First of all, has the Court read the
22 motion?

23 THE COURT: Yes, sir.

24 MR. WHITLEY: Has the court read the case
25 that was cited?

1 THE COURT: No, sir.

2 MR. WHITLEY: He zeros in on Miles Tucker's
3 testimony and he says the District Attorney at that
4 point should have known it was false. He cross examined
5 Miles Tucker extensively in front of this jury. And my
6 question is: Is that what we're relying upon in there,
7 that Miles Tucker lied about? Is that yes or no?

8 MR. PARKS: The motion speaks for itself.
9 I'm not required to say why we -- I -- I thought we were
10 going to speak to the motions that the State had filed.
11 I didn't know we were going to be arguing the Motion For
12 New Trial.

13 MR. WHITLEY: I'm trying to get to the
14 bottom of what he's asking.

15 MR. PARKS: It's perfectly clear in my
16 motion what I'm asking for. I -- I don't know whether
17 Miles Tucker was lying or he wasn't lying. I don't know
18 whether he was honestly mistaken or he wasn't honestly
19 mistaken.

20 The issue is that the impression that was
21 left with the jury, and that's what it's all about. It
22 has nothing do with whether I extensively cross examined
23 him or vigorously cross examined him. That's not the
24 focus of the issue. The focus of the issue is whether
25 or not the District Attorney allowed a witness to leave

1 a false impression with the jury.

2 He doesn't have to be committing perjury.

3 He jumped on the perjury because that's the way Napue
4 has it and it's very largely apparent in the other cases
5 I've cited. And it can be perjury, but it doesn't have
6 to be perjury. All it has to be is some testimony that
7 the district attorney knows is false or, if not false,
8 knows that a false impression was being left with the
9 jury about that testimony, and that's my concern.

10 I wasn't at the meeting, but I suspect that
11 if Noel Martin's testimony is correct, and I believe
12 that it is, at some point in time, Mr. Wheeler must have
13 had a thought, wait a minute, these two witnesses are
14 testifying to something different and I was there. If
15 Mr. Wheeler hadn't been there, it would be exactly as
16 Mr. Whitley says, it would be a matter of the jury to
17 make a determination which of those two witnesses they
18 want to believe and resolve the discrepancy in the
19 testimony, but that's not the issue.

20 The issue is not the jury resolving the
21 discrepancy, because the district attorney's first duty
22 is to see justice is done, and if he has knowledge that
23 one or the other -- that his witness is not giving a
24 fair rendition of the facts to the jury, knows that of
25 his own personal knowledge, then he has a duty under

1 Napue to correct that misapprehension and let the jury
2 know the true facts however he wants to do it.

3 Now, this is an odd case in that I don't
4 have -- I don't have any idea that Mr. Wheeler knew that
5 there was going to be this discrepancy when the trial
6 started. And despite what he may believe, I have no
7 animosity toward Mr. Wheeler. I don't believe
8 Mr. Wheeler has purposefully put on false testimony or
9 any of that and I don't believe this is something he
10 could necessarily have anticipated would happen. I
11 suspect that he may have been, if he was listening close
12 enough, as surprised by Miles Tucker's testimony as Noel
13 Martin was, but that doesn't matter.

14 What matters is that once that has
15 happened -- and there's really, I guess, the danger with
16 having a meeting with witnesses that you believe are
17 going to be your witnesses and it turns out that you're
18 not wanting to hear what they've got to say and they're
19 going to be testifying anyway, there's a danger right
20 there that something is going to happen during the trial
21 because it's a conflict of interest that causes the
22 district attorney or whoever was in that meeting to
23 transform themselves from prosecutor to witness. It
24 didn't have to happen that way.

25 I'm not saying that Mr. Wheeler ought to

1 have recused himself from the case from the getgo, but
2 the way it finally wound down, it put him in a position
3 to make a, do I advise the court, do I advise the jury
4 that I've got a witness that is testifying differently
5 from what I believe happened and how do I do that? I
6 don't know. That's his problem. And I think that's
7 exactly what happened here.

8 And, you know, I -- it's our -- it's our
9 feeling that unfortunately the case went to the jury
10 with this false impression that marginalized Deputy
11 Martin. It's a curable part of the case. And, you
12 know, if we're talking about the Motion for New Trial,
13 the Napue standards are such that even if that could
14 have had an effect on the outcome of the trial, the
15 Defendant is entitled to a new trial. And I believe
16 that's our stand in this case.

17 MR. WHITLEY: Judge, if that were the case,
18 at any time that you had a conflict in the testimony,
19 then the district attorney is subject to be called as a
20 witness, and that's not what the district attorney is
21 for. You've got to show he was proffering perjured
22 testimony and all you've got is a conflict of testimony
23 that the jury resolved against the Defense; Witness A
24 testified to this, Witness B testified to that. It's
25 that simple.

1 MR. PARKS: Well --

2 MR. WHITLEY: You cannot turn that into a
3 claim to get behind and question and make the district
4 attorney a witness.

5 MR. PARKS: Well --

6 MR. WHITLEY: You know, it's perfectly
7 clear to me what they're trying to do. They're trying
8 to get back everything in there in that pretrial
9 meeting -- that's a work-product meeting -- and try to
10 turn it into something that's not there. They have
11 alleged no facts, none, none, none, that would entitled
12 them to do that.

13 Now, beyond that, they're going into
14 something that is not apparent from the record. They
15 want to go back to this meeting. It's not a sworn
16 motion. It has to be a sworn motion and it's not.

17 MR. PARKS: Well --

18 MR. WHITLEY: You know, he says in his
19 response, in -- in one paragraph, he says, "The grounds
20 for a new trial in this case are in the record and
21 evident from testimony which this Honorable Court can
22 judicially notice." The next paragraph says, "If the
23 court determines -- "if he raises the motion or turns
24 over the record, then no hearing is required."

25 MR. PARKS: I'll speak to that when it's my

1 turn.

2 MR. WHITLEY: I mean, we're trying to dig
3 up something that happened in a post pretrial meeting in
4 trial preparation. That is work product and not
5 discoverable. And these subpoenas that they're asking
6 for are notes, memorandums -- all of them are the
7 processes recorded by the district attorney or his
8 agent, so, first of all, they're not entitled to an
9 evidentiary hearing. They're not entitled to the relief
10 they're seeking.

11 MR. PARKS: Just briefly, Judge:

12 With respect to Mr. Whitley's remarks about
13 any time there's a conflict in testimony, that we could
14 go back into a case, as we have here, which, of course,
15 is not the case because the significant difference is
16 this: And I think the Court understands that if a
17 witness comes in and is interviewed by the District
18 Attorney's Office about something that he's going to
19 testify about; I saw the man rob the store and he got
20 out and he ran out and he got in a red car and he drove
21 away and he was wearing a hat, and another witness comes
22 in and says, well, I saw it too and he got out and he
23 ran in and got in a blue car and drove away and wasn't
24 wearing a hat, and the District Attorney's Office wasn't
25 there, he knows he's got a conflict in evidence.

1 The witness says it's a blue car and no hat
2 and his witness says it's a red car and a hat. That's
3 the sort of thing that the jury is called upon to
4 reconcile in some way because the D.A. wasn't there. He
5 didn't see the guy come out of the store and get in the
6 car and drive away. It would be a far different matter
7 if the district attorney was, in fact, there and saw the
8 man get out of the car -- out of the store and get in
9 the car and drive away.

10 That's the situation we have here. This
11 is -- he was there. It's the same as if he had seen the
12 robber. He was present at the time of the occurrence
13 that Mr. Tucker was testifying about. That's the issue.
14 That's not that there is a discrepancy in testimony.
15 It's the fact that the District Attorney was there
16 present and knew, so that's the difference in that.

17 Now, let me speak to these two motions:
18 First, the motion to strike the hearing, and what
19 Mr. Whitley pointed out to the Court -- and this is an
20 interesting -- it's an interesting issue, frankly,
21 because as the courts have stated in their opinions, the
22 statute doesn't require verification. This a court-made
23 ruling that where a motion for new trial alleges facts
24 outside the record, there should be either a verified
25 motion for a new trial or affidavits in support of the

1 claim. I don't dispute that whatsoever. And that has
2 sort of evolved over time into a flat rule that really
3 has nothing do with the situation we have here.

4 What the courts have been trying to prevent
5 is a fishing expedition. This isn't a fishing
6 expedition. It would have me in the position
7 essentially of giving an affidavit to tell the Court
8 what the Court heard during the course of the trial
9 because all of the allegations I raise here arises out
10 of the court itself. It's not an extra -- it's not
11 newly discovered evidence that the Court hasn't heard.

12 Sure, I would have to have an affidavit or
13 something to give the Court some reason to believe this
14 was a legitimate issue, but this is a unique kind of a
15 situation where, in effect, I would be doing a really
16 silly thing of saying, you heard the testimony, Judge,
17 and I swear to you this is what you heard. I don't --
18 you know, if it's a hard-and-fast, court-made rule that
19 these things must be verified, then Mr. Whitley is
20 right. It doesn't affect the motion for new trial. It
21 only affects whether or not we're entitled to a hearing.

22 What I said in my motion was that the Court
23 may well see a situation, as we have here from the
24 motion, that if there is sufficient grounds for a new
25 trial alleged in the motion that transpires to what

1 happened in the trial, the Court can certainly grant the
2 motion for new trial without a hearing. That's why I
3 say if it's all within the knowledge of the Court, then
4 the Court can say that. Ultimately, I believe it's up
5 to the Court whether or not the Court wants to have a
6 hearing.

7 I understand the State opposes the hearing,
8 and if that's the Court's feeling about that, well, the
9 caselaw certainly seems to justify that position. With
10 respect to the subpoenas, I basically rely on our
11 response. I'm not asking for work product. The case
12 that the State cites in support of their motion makes it
13 perfectly clear for the work product. I'm not asking
14 for Mr. Wheeler's thought processes. I'm asking for the
15 facts as it surrounded that particular meeting; when was
16 it, who attended it, how long was it, what was the
17 substance of it.

18 You know, the work product rule, if you
19 will, essentially is intended to protect the thought
20 processes of one of the parties against the other party
21 taking a shortcut and trying to figure out -- not having
22 to do the work themselves. In fact, on Page 9 of Pope
23 that the State cites, the court says, "The work product
24 doctrine is intended to protect and to act as a
25 limitation upon pretrial discovery of a lawyer's

1 strategies, legal theories, and mental processes, but
2 information that the lawyer himself puts into the public
3 form via a formally filed legal motion can hardly be
4 thought of as a secret trial strategy."

5 Well, I would subject to the Court the same
6 would be true when it's being put out in the public form
7 of a public trial. This isn't secret strategy any
8 longer, it's not thought process, and it's not strategy.
9 It's facts. We're just asking for the facts. So I
10 believe our subpoenas are good. Whether the Court wants
11 to grant the State's motion to strike the hearing is
12 certainly within the discretion of the Court.

13 MR. WHITLEY: Judge, this is from the
14 subpoena request to James P. Wheeler, District Attorney:
15 "All notes, recordings, memorandums, or other
16 memorizations of any meeting with Deputy Noel Martin
17 concerning his investigation of the death of Nichole
18 Payne..., " et cetera, Paragraph 1. Paragraph 2: "All
19 notes, recordings, memorandums, and other memorizations
20 of any meeting..., " that's pure work product. That's
21 not facts. That's what the district attorney's thought
22 processes that were put down in either notes,
23 recordings, memorandums, et cetera.

24 He has thoroughly cross examined Miles
25 Tucker. He knows from the testimony. I went in and

1 asked Jerry Hirsch personally, were you actually at the
2 meeting, and he said yes. So that's in the trial
3 record. He doesn't need subpoenas for that. Who was
4 present? That's it.

5 Notes, memorandum, and so forth that the
6 district attorney memorialized, if there were any, I
7 don't think there are, he's not entitled to. It's pure
8 work product pretrial meeting with potential witnesses.
9 Now, that's the bottom line. He says one thing in his
10 argument, but you can see what he's asked for on paper.
11 I can't lay my finger on it now, but I read it yesterday
12 in the cross-examination as to who was present.

13 There was a question on how long the
14 meeting lasted. I don't care what he says in the
15 argument. That's what his motion for new trial is. He
16 makes the issue that the district attorney should have
17 known that Miles Tucker's testimony was false, period.
18 That's the basis of his whole argument. And the
19 district attorney should have known it; thereby, he
20 became a witness and should have corrected it. Pure
21 conclusion, speculation, et cetera.

22 I might add this: If the Court
23 grants -- denies the State's motion, the Attorney
24 General's Office is going to have to come in because
25 Mr. Wheeler and his office is going to be disqualified

1 and we will not have a hearing on the motion for new
2 trial by April the 1st, I don't think. I respectfully
3 ask the State's motion, both motions to prevent the
4 fishing expedition this is.

5 MR. PARKS: I have nothing further.

6 MR. WHITLEY: I have nothing further.

7 THE COURT: Okay.

8 MR. WHITLEY: I might add one thing, Judge:
9 He committed that because we put testimony on in a
10 public trial, that waives any -- absolutely, that's not
11 the case. The Court of Appeals case says that is not a
12 waiver.

13 THE COURT: Talking about the prejudice?

14 MR. WHITLEY: Yes, it doesn't waive the
15 prejudice.

16 THE COURT: I do grant the State's motions
17 as to quashing the subpoena and as to the hearing on the
18 motion for new trial.

19 MR. WHITLEY: Thank you, Your Honor.

20 MR. PARKS: Thank you, Your Honor.

21 THE COURT: Yes, sir.

22 MR. WHITLEY: We can forget about April the
23 1st?

24 THE COURT: Yes, sir.

25 MR. PARKS: Let me make sure that I notice

1 before with get away the motion has got to be ruled upon
2 within 75 days whether or not we have a hearing. Does
3 the Court want to hear additional argument on the Motion
4 for New Trial? I mean, this was not a motion on the new
5 trial, just a motion on the hearing.

6 THE COURT: Yes, sir. I'm sorry, if you
7 still want to have -- if you want to argue that on
8 April 1st, it's set for that time, we can go ahead and
9 hear it, but is there anything in the motion other
10 than --

11 MR. PARKS: I don't anticipate --

12 THE COURT: Is there --

13 MR. PARKS: I'm sorry?

14 THE COURT: I mean, this is the only issue
15 you've raised on it?

16 MR. PARKS: Yes, sir. And it's -- I mean,
17 it's there. I don't have anything to argue that we
18 haven't already talked about here today, but I just
19 wanted to make sure, you know, at some point the Court
20 is going to have to rule on it between now, I guess. It
21 will be over by operation of law in 75 days. I don't
22 see that we should argue it unless the State wants to.

23 MR. WHITLEY: I'm not asking to.

24 THE COURT: Okay. Very well.

25 (End of proceedings.)

1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)
3 COUNTY OF WOOD)

4 I, Una B. Garland, Official Court Reporter in and
5 for the 402nd District Court of Wood County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$_____ and
18 was paid by _____.

19 WITNESS MY OFFICIAL HAND this the _____ day of
20 _____, 2010.

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