IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

RAY JEFFERSON CROMARTIE,	:	
Petitioner,	:	
v.	:	Civil Action No. 7:14-CV-39-MTT
WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,	:	**CAPITAL CASE:**
Respondent.	:	**Execution Scheduled for Wednesday, November 13, 2019 at 7:00 p.m.**

MOTION FOR RELIEF FROM FINAL ORDER AND JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

Petitioner Ray Cromartie, through undersigned counsel, hereby moves to set aside the final order and judgment denying habeas corpus relief in this matter pursuant to Federal Rule of Civil Procedure 60(b) to permit consideration of Mr. Cromartie's claim that his right to the effective assistance of counsel was violated where his attorneys failed to adequately investigate and present mitigating evidence at the penalty phase, which was previously found to be time-barred. In support of this motion, Mr. Cromartie states as follows:

INTRODUCTION

1. Shortly before Mr. Cromartie's scheduled execution, Mr. Cromartie's co-defendant (and prosecution trial witness) Thaddeus Lucas contacted counsel for Mr. Cromartie. On November 6, 2019, Mr. Lucas signed a sworn statement acknowledging, for the first time, that he overheard Corey Clark admit to killing Richard Slysz. As Mr. Lucas stated:

> While I did not see what happened in the Junior Food Store, I later overheard Corey Clark tell Gary Young that he shot the clerk in the face. I heard Corey say this to Gary just before the shooting that happened at the Cherokee apartments. I think we were in Tina Washington's apartment when I heard Corey say that he shot the clerk to Gary Young.

> I have not wanted to talk about this before. I have not told anyone what Corey said about shooting the clerk because I was worried that it would ruin my life more than it already has. I served 10 years in prison for this and I didn't think saying anything about it would change the situation for Ray or Corey and so I just tried to put the whole thing behind me.
>
> But over the last couple of weeks I have read about the case in the news and it has made me very angry because the story is not the truth of what really happened. I know that some of my own past statements and being quiet about this helped hide the truth. But I keep hearing that Jeff Cromartie is the shooter and I know that is probably not true. I don't know for certain what happened that night because I wasn't in the store, but I know what I heard Corey say about it to Gary—that he shot the clerk.

Affidavit of Thaddeus Lucas, Ex. A, ¶¶ 4-6

2. This newly available evidence that Clark shot Mr. Slysz exonerates Mr. Cromartie, who was convicted of malice murder as the shooter, not on the basis of felony murder. Doc. 18-19 at 4-26 (charge of the court). The newly available evidence of innocence is one of several extraordinary factors, discussed below, that merit reopening of the judgment under Rule 60(b) and consideration for the first time of the merits of Mr. Cromartie's meritorious claim that he was deprived of the effective assistance of counsel at trial under *Wiggins v. Smith*, 539 U.S. 510 (2003).

PROCEDURAL HISTORY

3. Petitioner Ray Cromartie is a Georgia state prisoner under sentence of death who is currently scheduled to be executed at 7:00 p.m. on Wednesday, November 13, 2019.

4. Mr. Cromartie was convicted of malice murder and other charges in the Thomas County Superior Court on September 26, 1997, and sentenced to death on October 1, 1997. The Supreme Court of Georgia affirmed Mr. Cromartie's convictions and death sentence on March 8, 1999. *Cromartie v. State*, 514 S.E.2d 205 (Ga. 1999). The United States Supreme Court denied certiorari on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974 (1999).

5. Mr. Cromartie filed an application for a writ of habeas corpus in the Butts County Superior Court on May 9, 2000. Doc. 19-14. The state-habeas court held an evidentiary hearing on August 12 through 14, 2008, Docs. 21-14, 21-15, 21-16, and ultimately denied relief after reconsideration on October 5, 2012, Doc. 24-9. Mr. Cromartie applied to the Georgia Supreme Court for a Certificate of Probable Cause to Appeal on November 8, 2012, Doc. 24-11, which was denied on September 9, 2013, Doc. 24-14. The United States Supreme Court denied Mr. Cromartie's petition for certiorari on April 21, 2014. *Cromartie v. Chatman*, 134 S. Ct. 1879 (2014).

6. Mr. Cromartie petitioned this Court for a writ of habeas corpus on March 20, 2014. Doc. 1. At the time, Mr. Cromartie was represented by the Georgia Resource Center, Doc. 3, and Attorney Martin McClain, Doc. 8, the same attorneys who had represented him in state-habeas proceedings. On April 1, 2014, the State filed a motion to dismiss the petition as untimely. Doc. 9. On October 9, 2014, in light of the allegations in the State's motion to dismiss, the Court appointed undersigned counsel to represent Mr. Cromartie. Doc. 36.

7. On December 29, 2014, the Court denied the State's motion to dismiss, finding that Mr. Cromartie's initial habeas petition was timely. Doc. 42. Following the Court's denial of the State's Motion to Certify for Interlocutory Appeal, Doc. 46, the State filed a Petition for Permission to Appeal in the United States Court of Appeals for the Eleventh Circuit, which was denied on April 10, 2015. The Court granted brief extensions of time to allow Mr. Cromartie to complete his investigation and to be seen by defense experts in prison. Docs. 49, 55-58.

8. Mr. Cromartie filed his Amended Petition for Habeas Corpus Relief along with an accompanying Appendix on June 22, 2015. Docs. 62, 62-1, 62-2. Included in the amended petition was a fully developed claim that Mr. Cromartie's trial attorneys were ineffective for

failing to investigate and present mitigating life-history and mental-health evidence at the penalty phase. Doc. 62 at 55-71. The supporting materials included declarations from numerous lay witnesses, expert reports, and records. Docs. 62-1, 62-2.

9. The amended petition alleged that Mr. Cromartie's life has been plagued by trauma, abuse, and neglect, starting from before he was born, when his mother drank alcohol throughout her pregnancy. *See* Doc. 62-1 at 7 (Estelle Barrau Dec.); Doc. 62-2 at 87 (Julian Davies, M.D., Report). The trauma continued from there, as Mr. Cromartie's life was marked by "family violence; verbal, emotional, and physical abuse; severe parental neglect and abandonment; poverty; witnessing extreme violence; frequent changes in living arrangements; and a family and personal history of substance abuse." Doc. 62-1 at 88 (Bhushan Agharkar, M.D., Dec.).

10. The amended petition further alleged that Mr. Cromartie's life history has had severe consequences. He suffers from Alcohol-Related Neurodevelopmental Disorder; multiple neuropsychological impairments, including impaired executive functioning; and the effects of complex trauma. Doc. 62-2 at 97-100 (Julian Davies, M.D., Report); Doc. 62-2 at 77 (Daniel Martell, Ph.D., Report); Doc. 62-1 at 87-90 (Bhushan Agharkar, M.D., Dec.).

11. The amended petition also alleged that, although this mitigating evidence was available at the time of trial, very little of it was presented during the penalty phase. *See* Doc. 62 at 55-71. Trial counsel offered only a brief presentation involving five lay witnesses, and failed to adequately investigate or present expert testimony that could explain Mr. Cromartie's life history from a mitigating and mental-health perspective. Doc. 18-19 at 88-154.

12. Finally, the amended petition alleged that Mr. Cromartie was prejudiced by counsel's failure to effectively present mitigating evidence. Doc. 62 at 63-71. The amended

petition alleged that, given the non-aggravated nature of the case—as demonstrated by the prosecution's pretrial offer of life with parole after seven years, *see* Doc. 21-14 at 57—there is a reasonable probability that, had counsel performed effectively, at least one juror would have voted to spare his life. *Id.* at 71.

13. The State filed an answer to the amended petition on July 22, 2015. Doc. 64. In its answer, the State argued that Mr. Cromartie's claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence at trial was unexhausted and procedurally defaulted because it was not raised in the state courts. *Id.* at 13. The State did not allege that this claim was untimely.

14. Mr. Cromartie subsequently filed a memorandum of law in support of his amended habeas petition. Doc. 69. In light of the affirmative defense of procedural default raised in the State's answer, Mr. Cromartie argued that any default could be overcome by state-habeas counsel's ineffectiveness under *Martinez* and *Trevino*. Specifically, Mr. Cromartie alleged that state-habeas counsel "did not litigate a claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence at the penalty phase. As [state-habeas counsel] each acknowledge, they failed to do so not for any strategic reason, but due primarily to inattention that resulted from focusing on competing obligations in other cases." Doc. 69 at 132. Mr. Cromartie presented a detailed argument regarding why he meets the *Martinez*/*Trevino* standard, along with an additional proffer of supporting materials. *Id.* at 131-50; Doc. 69-1. Mr. Cromartie further requested a hearing on the claim. Doc. 69 at 151-53.

15. On March 21, 2016, the State filed a response to Mr. Cromartie's memorandum of law. Doc. 75. While the State raised various procedural arguments for why the district court should deny relief on the penalty-phase ineffectiveness claim, the State likewise "request[ed]

discovery and an evidentiary hearing to fully litigate this claim" in the event the court denied those arguments. *Id.* at 227.

16. Simultaneously with its response, the State filed a motion to amend its answer. Doc. 74. The State sought to amend its answer solely to argue that Mr. Cromartie's penalty-phase ineffectiveness claim was time-barred. *Id.* at 2. The State argued that the penalty-phase ineffectiveness claim raised in the amended petition did not relate back to any claim in the original petition and was not otherwise timely. *Id.* at 3-4, 9-11, 24-28. The State's counsel explained their failure to raise the time-bar defense in their initial answer as being "based upon counsel's misunderstanding of the law regarding claims brought in amended petitions." *Id.* at 5.

17. On June 6, 2016, Mr. Cromartie filed a reply memorandum and consolidated response to the State's motion to amend. Doc. 78. In it, Mr. Cromartie argued that the penalty-phase ineffectiveness claim in his amended petition (Claim X) related back to the penalty-phase ineffectiveness claim in his initial petition (a portion of Claim II). *Id.* at 12-20.

18. This Court rejected Mr. Cromartie's relation-back arguments and granted the State's motion to amend its response. Doc. 80. The Court ruled that Claim X of the amended petition did not relate back to Claim II of the initial petition, and therefore was untimely. *Id.* at 4-12. As such, the Court determined that amendment of the State's answer would not be futile. *Id.* at 12.

19. The Court subsequently denied Mr. Cromartie's habeas petition without granting an evidentiary hearing. Doc. 81. Having previously determined that the penalty-phase ineffectiveness claim was untimely, the Court denied it without additional analysis solely on timeliness grounds. *Id.* at 70-72. The Court declined to grant a COA as to any claim. *Id.* at 85-86.

20. Mr. Cromartie sought COA from the Eleventh Circuit. On January 3, 2018, Chief Judge Ed Carnes denied the COA application. Mr. Cromartie then sought panel reconsideration of Chief Judge Carnes's COA denial. The panel denied reconsideration as to the ineffectiveness claim over Judge Martin's dissent. The United States Supreme Court denied certiorari. *Cromartie v. Sellers*, 139 S. Ct. 594 (2018).

21. Mr. Cromartie filed an Extraordinary Motion for New Trial and Postconviction DNA Testing and a Motion for Preservation of Evidence in the Thomas County Superior Court on December 28, 2018. After hearing evidence from the defense only, on September 16, 2019, the Thomas County Superior Court denied Mr. Cromartie's motion for new trial and DNA testing. *State v. Cromartie*, No. 94-CR-328, Order.

22. Mr. Cromartie timely filed a request for a discretionary appeal in the Georgia Supreme Court. While that request was pending, the trial court issued a warrant for Mr. Cromartie's execution. Mr. Cromartie requested a stay. On October 25, 2019, the Georgia Supreme Court denied the requests for a stay and for a discretionary appeal. On October 30, 2019, the Georgia Supreme Court issued a stay based on a question of state law regarding the validity of the warrant. On October 31, 2019, the Georgia Supreme Court then found that the warrant was void because it had been issued while the DNA appeal was pending before it.

23. On November 1, 2019, the trial court issued another execution order, setting Mr. Cromartie's execution for the week beginning November 13, 2019. Mr. Cromartie moved to have the second execution warrant found invalid and for a stay of execution. On November 5, 2019, the Georgia Supreme Court denied all of Mr. Cromartie's requests.

24. On October 22, 2019, Mr. Cromartie filed a Complaint under 42 U.S.C. § 1983 in this Court, and on October 24, 2019, he moved for a stay of execution. On October 28, 2019, the

Court dismissed the complaint and denied the request for a stay. *Cromartie v. Shealy*, No. 7:19-CV-181, 2019 WL 5553274 (M.D. Ga. Oct. 28, 2019).

25. Mr. Cromartie appealed, and on October 30, 2019, a panel of the Eleventh Circuit addressed his motion for stay and appeal. Based on the Georgia Supreme Court's stay, the Eleventh Circuit denied the motion for stay as moot. The panel at the same time affirmed the dismissal of Mr. Cromartie's complaint in a published opinion. *Cromartie v. Shealy*, No. 19-14268, 2019 WL 5588745 (11th Cir. Oct. 30, 2019). On November 7, 2019, Mr. Cromartie filed a petition for en banc review of the Eleventh Circuit's panel opinion denying relief on his section 1983 lawsuit. That petition was recently denied.

STATEMENT OF FACTS

A. The Affidavit Of Thaddeus Lucas

26. At trial, Lucas testified that Mr. Cromartie asked Lucas to drive Corey Clark and him to a store so that they could steal some beer. Lucas did not see a gun. TT[1] 2306-09. He dropped them off and waited for them while they went into the store. They came back with two cases of beer. TT 2309-10. He testified that Clark told him what happened at the store, but was not asked what Clark told him. TT 2313.[2]

27. Prior to trial, in a May 1997 statement to the Board of Pardons and Paroles, Lucas described his participation in the Junior Food Store crime as follows: "I was with my brother [Mr. Cromartie] and his friend [Corey Clark] and they went in this convenience store to take some beer and his friend shot the clerk in the face. The police said I hindered them by taking my

[1] Trial Transcript

[2] Mr. Lucas is Mr. Cromartie's stepbrother, but did not know him or even that he existed until Lucas was eighteen years old. TT 2301-02. Lucas was, however, a long-time friend of Corey Clark and Gary Young. Doc. 18-15 at 135; 18-19 at 27.

brother and his friend from the scene of the crime. I never went in the store and didn't know what was going on." Georgia State Board of Pardon and Parole *Personal History Statement* at 4 (attached as Ex. B). Lucas did not say anything about the source of his information that Clark was the shooter.

28. Since the trial, Lucas has never made any formal statement or given any testimony about the Junior Food Store crime, despite numerous attempts by Mr. Cromartie's counsel and investigators. This week, he contacted Mr. Cromartie's counsel and then signed a sworn, notarized affidavit. As set forth above, Lucas attests that he heard Corey Clark admit to having committed the shooting, and that he was never previously willing to disclose this information. Lucas Aff., ¶¶ 4-6.

B. The Crimes

29. On the evening of Thursday, April 7, 1994, a single assailant shot Dan Wilson, the clerk at the Madison Street Deli in Thomasville, Georgia. *See* TT 1779. Mr. Wilson survived the shooting. Surveillance video of the cash register area captured a view of the assailant (but not the shooting itself), but the assailant's face was covered up to his nose. TT 1829; ROA[3] 3192 (State's Ex. 149). He wore a dark knit hat and a dark-colored hooded sweatshirt. *Id.* Police also recovered a fired cartridge casing from the floor. TT 2101.

30. On April 8, 1994, the morning after the shooting, police received a call from a man named David McRae who lived one block from the store. He noticed a black knit cap and dark green hooded sweatshirt in his yard that he had not seen there before; police retrieved the

[3] Record on direct appeal to the Georgia Supreme Court

items. TT 1843. At trial, it was the State's theory that the shooter had worn and discarded the cap and sweatshirt. TT 1934-37.[4]

31. In the early-morning hours of April 10, 1994, clerk Richard Slysz was shot twice and killed at the Junior Food Store in Thomasville. TT 1895-1903. Witnesses described seeing two men at or around the store at the time of the shooting. TT 2247-48. Police recovered two fired cartridge casings found on the floor near the deceased, TT 2447, two beer cans that had apparently been dropped outside the store, TT 2428, a piece of cardboard from a Budweiser beer case, TT 2428, and a box of cigarettes found near the deceased. TT 2665.

32. On the evening of April 12, 1994, a shootout broke out at a housing development in Thomasville. Gary Young testified that he fired a gun during the shootout. TT 1953, 1968. Young attempted to hide the gun later that night by tossing it near adjacent railroad tracks. TT 1869.

33. The following day, April 13, 1994, police detained and questioned Carnell Cooksey. TT 1869, 2119. Cooksey told them where Young had thrown the gun, and Cooksey implicated Mr. Cromartie in the two convenience-store shootings. TT 1850, 1854, 1857. Police arrested Mr. Cromartie that same day. They also arrested two alleged co-conspirators in the Junior Food Store shooting, Corey Clark and Thaddeus Lucas, as well as Young. Investigators collected the shoes and various items of clothing from the suspects.

34. Police recovered the firearm that Young had thrown near the railroad tracks. TT 2120. A ballistics analysis of the gun and the fired cartridge casings from the two crime scenes revealed that the gun—a Raven Arms .25 caliber semiautomatic pistol—had been used to shoot

[4] Terrell Cochran and Keith Reddick testified in state habeas proceedings in this case that, on the night of the Madison Street Deli shooting, they saw Gary Young running from the area of the Madison Street Deli wearing a dark colored hooded sweatshirt. Doc. 21-14 at 144-45.

both Mr. Wilson and Mr. Slysz. TT 2504-11. It was the same gun that Young testified that he had fired at the housing development. Young testified that the gun was his. TT 1956, 2206.

C. Evidence Adduced at Trial

35. In September 1997, Mr. Cromartie stood trial alone for the Madison Street Deli and Junior Food Store shootings.[5] The evidence that Mr. Cromartie committed the Madison Street Deli shooting consisted almost entirely of inculpatory statements allegedly made by him to Young, as well as testimony by Cooksey that he had seen Young hand his gun to Mr. Cromartie. During state habeas proceedings, Cooksey testified that he, in fact, never saw Young hand a gun to Mr. Cromartie. Doc. 21-14 at 127. There was no physical evidence tying Mr. Cromartie to the Madison Street Deli shooting, there were no witnesses to the shooting, and the surveillance video was of too poor quality to identify the shooter.

36. As for the Junior Food Store shooting, the key testimony came from the alleged co-conspirators, Lucas and Clark. Lucas testified that he drove Clark and Mr. Cromartie to the Junior Food Store so that they could steal beer and then waited for them in a nearby parking lot. TT 2309. He also testified that he drove them from the scene of the crime. TT 2307.

37. Clark testified that both he and Mr. Cromartie went into the Junior Food Store. TT 2360. Clark stated that Mr. Cromartie walked to the counter at the front of the store while Clark went to the cooler at the back of the store to get the beer. *Id.* According to Clark, he then heard two shots, and Mr. Cromartie instructed him to run to the front of the store to attempt to

[5] Lucas received a twenty-year sentence for robbery, with ten years to serve in custody. TT 2290. That sentence was concurrent with another identical sentence on an unrelated assault case. *Id.* Clark received a twenty-five-year sentence for robbery and hindering apprehension. TT 2351. He was paroled in 2005, after serving slightly more than ten years of his sentence. Young was initially charged in the Madison Street Deli shooting, ROA 3228, but those charges were later dropped, ROA 3227. His charge for being a felon in possession of a firearm was also dropped despite his admission to possessing and firing the gun. ROA 3227.

open the cash register. TT 2361. Clark claimed that he did. TT 2362. Meanwhile, according to Clark, Mr. Cromartie—who was already standing at the front of the store—ran to the back of the store and took two twelve-packs of Budweiser. *Id.* Clark explained that, when they ran from the store, one of the two packs of beer ripped open and several beers fell on the ground. *Id.* Clark testified that he picked up several beers and they fled. TT 2363. The State also presented evidence that: (1) a fingerprint found on a piece of cardboard outside the Junior Food Store was Mr. Cromartie's, TT 2605; and (2) a footprint in the mud near the store was from an Adidas shoe, and that Mr. Cromartie had Adidas shoes. TT 2515.[6]

38. On September 26, 1997, the jury convicted Mr. Cromartie of malice murder and related charges. After a brief penalty-phase hearing, the jurors debated Mr. Cromartie's fate over three days. Press reports indicated that the jurors were initially deadlocked six-six over whether to sentence Mr. Cromartie to death or life imprisonment without the possibility of parole. Doc. 18-24 at 105. The jury ultimately reached a verdict and sentenced Mr. Cromartie to death. Before trial, the District Attorney had offered Mr. Cromartie a plea deal to life with the possibility of parole, which, at that time, would have resulted in parole eligibility after seven years. Doc. 21-14 at 57.

[6] Although this physical evidence shows that Mr. Cromartie was *present* at the Junior Food Store, no physical evidence established that he shot the victim or ever touched the gun. The State's primary evidence that Mr. Cromartie was the shooter came from Corey Clark's testimony. Clark had clear motive to lie; to convince investigators that he was not the shooter, he had to convince them that Mr. Cromartie was.

Carnell Cooksey also testified that Mr. Cromartie told him that Cromartie shot the Junior Food Store clerk twice. In state habeas proceedings, Cooksey testified that Cromartie had never made that statement to him, Doc. 21-14 at 127, but the state habeas court did not find that testimony credible. In any event, Cooksey's trial testimony was subject to question: he talked to the police after he was apprehended and needed to implicate someone. He was a longtime friend of Clark, Lucas and Young, but had only recently met Mr. Cromartie. Doc. 18-12 at 102-04.

LEGAL STANDARD

39. Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6), "the catchall provision of Rule 60(b), authorizes relief for 'any other reason that justifies relief' from the operation of a judgment.'" *Lugo v. Secretary, Florida Dept. of Corrections*, 750 F.3d 1198, 1210 (11th Cir. 2014) (quoting Fed. R. Civ. P. 60(b)(6)). Rule 60(b)(6) "does not particularize the factors that justify relief," *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988), but the Supreme Court has "previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). "The 'main application' of Rule 60(b) 'is to those cases in which the true merits of a case might never be considered.'" *Ruiz v. Quarterman*, 504 F.3d 523, 531–32 (5th Cir. 2007) (quoting *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977)).

40. A 60(b) movant must "show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). In "determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Liljeberg*, 486 U.S. at 863-64).

ARGUMENT

I. This Claim Is Properly Raised In A 60(b) Motion.

41. Where a 60(b) motion "challenges only a district court's prior ruling that a habeas petition was time-barred, it 'is not the equivalent of a successive habeas petition.'" *Lugo*, 750

F.3d at 1210 (quoting *Gonzalez*, 545 U.S. at 535-36). As set forth above, this Court denied Mr. Cromartie's claim that his trial counsel ineffectively failed to present mitigating life-history and mental-health evidence at the penalty phase solely on the ground that it was untimely. Because this motion challenges only that time-bar ruling, it is not the equivalent of a successive habeas petition. *Id.*

II. This Motion Is Being Filed Within A Reasonable Time.

42. 60(b) motions must be filed within "a reasonable time." Fed. R. Civ. P. 60(c)(1). Mr. Lucas finally was willing to disclose that Mr. Clark admitted to committing the murder for which Mr. Cromartie is on death row just two days ago. This disclosure serves as a critical basis for this motion, and it is being filed almost immediately after Mr. Cromartie learned the new information from Mr. Lucas. It is thus being filed within a reasonable time within the meaning of the rule.

III. Mr. Cromartie's Case Presents Extraordinary Circumstances That Merit 60(b) Relief.

43. The totality of the equitable circumstances in Mr. Cromartie's case constitute extraordinary circumstances meriting relief from his final judgment pursuant to Rule 60(b)(6). One of Mr. Cromartie's two-co-defendants, Thaddeus Lucas, has come forward and revealed in a sworn statement that the other co-defendant, Corey Clark, was the person who committed the malice murder for which Mr. Cromartie stands on death row. This revelation demonstrates Mr. Cromartie's actual innocence within the meaning of *Schlup v. Delo*, 513 U.S. 298 (1995). Under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), meritorious claims of actual innocence provide an equitable exception to AEDPA's statute of limitations. This actual innocence gateway claim will permit the Court to consider Mr. Cromartie's underlying claim of ineffective assistance of trial

counsel at the penalty phase on the merits, as the only barrier to this Court's consideration of the claim is its untimeliness.

44. Mr. Cromartie's meritorious claim of ineffective assistance of counsel at the penalty phase likewise constitutes an extraordinary circumstance supporting 60(b) relief. No court, state or federal, has ever considered the merits of Mr. Cromartie's penalty-phase ineffectiveness claim. And, as noted above, the State requested discovery and a hearing on this claim in the event their procedural arguments were rejected; this is tantamount to a concession that Mr. Cromartie has pled a prima facie case for relief. *See Satterfield v. District Att'y Philadelphia*, 872 F.3d 152, 163 (3d Cir. 2017) (The Supreme Court's "recent decision in *Buck v. Davis*[, 137 S. Ct. 759 (2017)] established that the severity of the underlying constitutional violation is an equitable factor that may support a finding of extraordinary circumstances under Rule 60(b)(6)."

45. Additionally, the dysfunction of Mr. Cromartie's initial federal habeas counsel constitutes an extraordinary circumstance meriting 60(b) relief. The only reason that Mr. Cromartie's ineffective assistance of counsel claim was untimely in the first place was due to his predecessor federal counsel's failure to properly plead this claim in his initial habeas petition. Both of Mr. Cromartie's initial habeas attorneys were under the mistaken impression that they had blown his statute of limitations in its entirety, yet they nonetheless successfully sought to be appointed to his case after filing a shell federal habeas petition in haste. Although the initial petition was ultimately ruled timely, one of Mr. Cromartie's two initial counsel remained on the case until after the statute of limitation had expired, thus precluding amendments adding new claims for relief.

46. Lastly, the daughter of the murder victim in this case has publicly indicated her desire not to see Mr. Cromartie executed in the absence of DNA testing to determine his guilt. *See* Ex. D. The desire of the victim's daughter not to see Mr. Cromartie executed without knowing with certainty who killed her father constitutes yet another extraordinary circumstance supporting 60(b) relief. Under the totality of the circumstances, the Court should set aside its final judgment denying habeas relief and consider the merits of Mr. Cromartie's penalty-phase ineffectiveness claim.

A. Thaddeus Lucas's Recent Disclosure That Corey Clark Killed Richard Slysz Is Both An Extraordinary Circumstance And A Means To Overcome The Untimeliness Of Mr. Cromartie's Penalty-Phase Ineffectiveness Claim.

47. Thaddeus Lucas's disclosure that Corey Clark confessed to him that he killed Richard Slysz is an extraordinary development. It demonstrates that Mr. Cromartie is not in fact guilty of the malice murder for which he stands convicted. This fact is extraordinary for purposes of 60(b) relief, and independently serves as a basis upon which the untimeliness of Mr. Cromartie's penalty phase ineffectiveness claim may be excused.

1. Meritorious Claims Of Actual Innocence Are "Extraordinary," And Relief From Judgment Is Warranted To Correct Miscarriages Of Justice.

48. *McQuiggin* embodies a legal principle that is extraordinary by nature. *McQuiggin* "illustrates that where a petitioner makes an adequate showing of actual innocence, our interest in avoiding the wrongful conviction of an innocent person permits the petitioner to pursue his constitutional claims in spite of the statute-of-limitations bar." *Satterfield*, 872 F.3d at 162-63. This interest "is so deeply embedded within our system of justice that we fail to see a set of circumstances under which this change in law, paired with a petitioner's adequate showing of actual innocence, would not be sufficient to support Rule 60(b)(6) relief in this context." *Id.* at 163.

49. Rule 60(b)(6), like *McQuiggin* itself, exists to prevent miscarriages of justice from going uncorrected. *See Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) (noting that the purpose of Rule 60(b) is to balance "the sanctity of final judgments . . . and the incessant command of the court's conscience that justice be done in light of all the facts"); *Klapprott*, 335 U.S. at 614-15 (60(b) motions should be granted when "appropriate to accomplish justice"). "The quintessential miscarriage of justice is the execution of a person who is actually innocent." *Schlup*, 513 U.S. at 324-25. Accordingly, relief from judgment is manifestly appropriate in the extraordinary case of an actually innocent petitioner.

50. Additionally, a capital defendant can establish a miscarriage of justice by showing that she is innocent of the death penalty. Such a showing is made where, inter alia, some "condition of eligibility [for the death penalty] had not been met." *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). For a person who neither killed nor intended to kill, the minimum culpability requirement for the death sentence is the "reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." *Tison v. Arizona*, 481 U.S. 137, 157 (1987). On the facts of this case, evidence that Mr. Cromartie was not the shooter would render him ineligible for the death sentence under *Tison*.

2. Mr. Cromartie Is Able To Satisfy The Actual Innocence Standard.

51. The *Schlup* actual innocence gateway enables a habeas petitioner to overcome procedural defaults (and, post-*McQuiggin*, statute of limitations violations) by demonstrating that his confinement constitutes a "miscarriage of justice." *See House*, 547 U.S. at 536 (citing *Schlup*, 513 U.S. at 324). A petitioner attempting to demonstrate his actual innocence must support his contention with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. To establish a miscarriage of justice, the "petitioner must

show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. Stated differently, "[a] petitioner's burden at the gateway stage is to demonstrate . . . that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. A habeas petitioner may satisfy this burden using "new, reliable evidence that 'undermine[s] the [trial] evidence pointing to the identity of the [perpetrator] and the motive for the [crime].'" *Reeves v. Fayette SCI*, 897 F.3d 154, 161 (3d Cir. 2018) (quoting *Goldblum v. Klem*, 510 F.3d 204, 233 (3d Cir. 2007)) (alterations in original).

52. While the actual innocence standard is exacting, it is not insurmountable. The standard "does not require absolute certainty about the petitioner's guilt or innocence." *House*, 547 U.S. at 538. The Supreme Court in *House* found the *Schlup* standard satisfied even though it was "not a case of conclusive exoneration," as "[s]ome aspects of the State's evidence . . . still support an inference of guilt," and "[i]f considered in isolation, a reasonable jury might well disregard" the alternative perpetrator evidence presented by House. *House*, 547 U.S. at 552, 553-54; *see also Wolfe v. Johnson*, 565 F.3d 140, 155-56 (4th Cir. 2009) (remanding *Schlup* issue for an evidentiary hearing even though the essential affidavit relied upon by petitioner to demonstrate his innocence was subsequently disavowed by the affiant and the district court had previously found the affiant incredible).

53. Mr. Cromartie satisfies the actual innocence standard. Mr. Lucas's sworn statement constitutes new, reliable evidence of Mr. Cromartie's innocence of the crime for which he is on death row. As set forth above, this was not an overwhelming case for guilt. Although physical evidence placed Mr. Cromartie at the scene of the Junior Food Store shooting, the primary evidence that Mr. Cromartie actually killed the victim came from Corey Clark who was

himself implicated in the crime and therefore had every reason to inculpate Mr. Cromartie in order to protect himself.

54. The primary evidence presented regarding who shot Mr. Slysz came from Corey Clark. Investigators believed that Mr. Cromartie and Clark went into the Junior Food Store that night, and that Lucas waited in a car that he parked a short distance away off of Pinetree Boulevard. On the day the three were arrested, Clark gave a statement admitting his involvement in the Junior Food Store robbery-shooting, but denying responsibility for the shooting and instead blaming Mr. Cromartie. He testified to the same at trial. Clark had an obvious motivation to fabricate, as he would be implicated as the shooter if the blame were not placed on Mr. Cromartie. Now, Lucas has given a sworn affidavit that he heard Clark admit to the shooting.

55. No reasonable juror would have convicted Mr. Cromartie if presented with Mr. Lucas's testimony that Mr. Clark—the star witness against Mr. Cromartie—himself confessed to having shot Mr. Slysz. Because Mr. Cromartie was not charged with felony murder, it was required that Mr. Cromartie be the actual shooter in order for him to have been found guilty at trial. Because Mr. Lucas's new disclosure plainly creates a reasonable doubt as to whether Mr. Cromartie was, in fact, the shooter, Mr. Cromartie is able to satisfy the actual innocence standard. Satisfaction of the actual innocence gateway both serves as an extraordinary circumstance warranting 60(b) relief and a means by which to reach the underlying claim of ineffective assistance of counsel that was found untimely during Mr. Cromartie's habeas proceedings.[7]

[7] To the extent there is any doubt whether Mr. Cromartie meets the standard, he requests an evidentiary hearing. *See* Part IV, *infra*. In connection with such a hearing, he would also request discovery for the purpose of conducting DNA testing of physical evidence collected from the

56. This evidence, together with the other evidence in the case, also shows that Mr. Cromartie is innocent of the death penalty. There is no evidence whatsoever that anybody other than the shooter knew that the shooter was carrying a gun. To the contrary, the evidence suggests that both Thaddeus Lucas and the non-shooter believed that the plan was simply to go into the store, grab some beer, and run out. While such conduct is criminal, it is not conduct "known to carry a grave risk of death." *Tison*, 481 U.S. at 157. Mr. Cromartie's evidence that he was not the shooter shows that he is innocent of the death penalty.

B. Mr. Cromartie's Meritorious Claim Of Ineffective Assistance Of Counsel At The Penalty Phase Is An Equitable Factor Supporting Relief.

57. The Supreme Court's "recent decision in *Buck v. Davis*[, 137 S. Ct. 759 (2017)] established that the severity of the underlying constitutional violation is an equitable factor that may support a finding of extraordinary circumstances under Rule 60(b)(6)." *Satterfield*, 872 F.3d at 163. Because the "right to the effective assistance of counsel at trial is a bedrock principle in our legal system," *Martinez v. Ryan*, 566 U.S. 1, 12 (2012), Mr. Cromartie's meritorious ineffectiveness claim is a strong equitable factor in favor of relief.

58. Mr. Cromartie has set forth his claim of ineffective assistance of counsel at the penalty phase in detail in his prior submissions, including his memorandum of law. *See* Doc. 69 at 94-114. Rather than repeat those discussions in detail here, Mr. Cromartie submits that his allegations and legal analysis show that he has presented a claim of ineffective assistance of counsel on which relief can be granted.

---

crime scenes that has never been tested. DNA testing of such items, including the murder weapon and fired cartridge casings collected at the scene, has the potential to reveal, for example, that Corey Clark extensively handled the murder weapon and loaded the fatal bullets. *See* Declaration of R. Thomas Libby, Ph.D., at 11-14 (attached as Ex. C).

59. In particular, the prior submissions show that counsel concentrated on the guilt phase of the trial, and as a result conducted only a limited investigation for mitigating evidence. The limited investigation that counsel did conduct, however, revealed both that Mr. Cromartie had a highly troubled and mitigating life history, and that Mr. Cromartie had serious psychological problems, a history of trauma, and test results indicating that he could suffer from the effects of prenatal alcohol exposure. *See* Doc. 62-1 at 98-99, 101-02, 106, and 139 (Dr. Grant's declaration, clinical notes, and WAIS-R score sheet). Despite these red flags for mental and emotional problems, counsel did not investigate further and made no attempt to present expert testimony either as to Mr. Cromartie's history of trauma or as to his emotional and mental problems, including the effects of possible prenatal alcohol exposure. This failure to follow up on red flags constitutes an unreasonable investigation. *Wiggins*, 539 U.S. at 525 (the "scope of [counsel's] investigation was . . . unreasonable in light of what counsel actually uncovered"); *see also Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (counsel must follow up on "red flags" of which they are aware); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel's failure to present available evidence "was not justified by a tactical decision" where counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

60. The prior submissions also demonstrate that Mr. Cromartie was prejudiced by counsel's deficient performance. Mr. Cromartie proffered an expert report documenting that his childhood was marked by "family violence; verbal, emotional, and physical abuse; severe parental neglect and abandonment; poverty; witnessing extreme violence; frequent changes in living arrangements; and a family and personal history of substance abuse." Doc. 62-1 at 88 (Bhushan Agharkar, M.D., Dec.). The results of such trauma are highly mitigating, and include damage to cognitive functioning. *Id.* at 88-90. Mr. Cromartie proffered a second expert report

finding that he suffers from Fetal Alcohol Spectrum Disorder, a disorder caused by his mother's pre-natal ingestion of alcohol that itself and in combination with his history of trauma causes serious disorders in functioning. Doc. 62-2 at 97-100 (Julian Davies, M.D., Report). And Mr. Cromartie proffered a third expert report, concluding that he suffers from multiple neuropsychological impairments and a history of trauma. Doc. 62-2 at 77 (Daniel Martell, Ph.D., Report).

61. To assess the probability that Mr. Cromartie would have received a different sentence, the reviewing court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397-98) (brackets in *Porter*). Here, the evidence summarized above likely would have tipped the balance. Mr. Cromartie notes that even though the penalty phase in this capital case lasted approximately one hour and involved no expert testimony, Doc. 18-19 at 80-154, the jury was initially deadlocked six-to-six in deciding Mr. Cromartie's fate, Doc. 18-24 at 105. Mr. Cromartie has presented a meritorious and powerful claim of penalty phase ineffectiveness to this Court. That claim constitutes a strong equitable factor supporting 60(b) relief.

C. The Fact That Mr. Cromartie's Initial Federal Habeas Counsel Were Conflicted And Ineffective Is An Extraordinary Circumstance.

62. Mr. Cromartie's initial federal habeas petition was filed on March 20, 2014, by Brian Kammer, an attorney with the Georgia Resource Center (GRC), which represented Mr. Cromartie during his state habeas proceedings. *See* Doc. 1. Mr. Kammer filed a motion seeking to be appointed to Mr. Cromartie's case the same day, noting that the GRC represented Mr.

Cromartie during state habeas proceedings and was familiar with the case. Doc. 3 at 6. The Court granted Mr. Kammer's appointment motion on March 24, 2014. Doc. 6.

63. On March 28, 2014, Mr. Cromartie's other state habeas attorney, Martin McClain, separately moved to be appointed in this case. Doc. 8. Mr. McClain likewise noted his state habeas representation of Mr. Cromartie in his appointment motion. *Id.* at 4.

64. Almost immediately after the initial habeas petition was filed, the State moved to dismiss it as untimely. Doc. 9. Under the State's view, initial habeas counsel for Mr. Cromartie had filed the petition after 382 days had elapsed on the AEDPA clock, making the filing 17 days late. *Id.* at 4. Mr. Kammer filed a motion to withdraw as counsel the next day, acknowledging that the initial petition may have been untimely and that, "because counsel's conduct is at issue in determining whether an equitable remedy is available to Petitioner, neither Mr. Kammer nor the Georgia Resource Center are able to provide conflict-free representation." Doc. 11 at 2. Notwithstanding this acknowledgment, Mr. Kammer informed the court that "Attorney Martin McClain, whose appointment is pending before the Court, will be assuming representation of Petitioner in this action." *Id.*

65. The Court granted Mr. Kammer's withdrawal motion, recognizing that he "may have filed Cromartie's federal habeas petition untimely under the provisions of 28 U.S.C. § 2244(d)(1)(A)." Doc. 13 at 1. But the Court then proceeded to appoint Mr. McClain as substitute counsel, even though he had "represented Cromartie since 2001, representing him in post-conviction proceedings seeking habeas relief in Georgia state courts." *Id.* at 2. In other words, Mr. McClain shared the exact same potential conflict because he was similarly situated to Mr. Kammer.

66. As it turned, out, the initial petition was not untimely filed. As this Court would ultimately note *sua sponte*, the parties appeared to misunderstand Georgia procedure regarding when the state post-conviction proceedings actually ended. Doc. 33 at 1 ("Counsel has cited no law for the proposition that statutory tolling ended on the date the Georgia Supreme Court denied the Petitioner's certificate of probable cause to appeal and the Court is not convinced counsel are correct."). Because, as the Court ultimately found, the state post-conviction proceedings remained pending until the Georgia Supreme Court transmitted its remittitur, thus extending the period of statutory tolling, the initial habeas petition was not in fact filed late.

67. While this question remained unsettled, however, Mr. McClain continued to represent Mr. Cromartie alone until undersigned counsel was eventually substituted on October 9, 2014. During this time period when Mr. McClain alone represented Mr. Cromartie, the remaining time on Mr. Cromartie's statute of limitations did in fact lapse. By the time undersigned counsel were appointed to represent Mr. Cromartie, they had no ability to raise any new claims that did not relate back to claims raised in the initial habeas petition.

68. Instead of protecting Mr. Cromartie's rights during this critical time period, Mr. McClain largely spent his energy casting aspersions on Mr. Kammer. Following his appointment, on May 1, 2014, Mr. McClain filed a motion for an extension of time to respond to Respondent's motion to dismiss. Doc 15. In it he claimed that although he had been "Petitioner's primary counsel since 2001," he only learned from Mr. Kammer of the denial of the CPC on the afternoon of March 29, 2014, and further that a habeas petition would be filed for Mr. Cromartie the next day. *Id.* at 1-2. He claimed Mr. Kammer in effect "remov[ed]" him as "Petitioner's primary counsel without any notice to him or any indication that Petitioner was aware of what the new attorneys at the Georgia Resource Center had done." *Id.* at 4. He alleged,

based on an in-person conversation with Mr. Cromartie, that "Petitioner was not advised and did not understand that the affidavit that he signed on March 20th requested the appointment of Brian Kammer, and Brian Kammer alone, to represent him in federal habeas corpus proceedings." *Id.* Further, "Petitioner advised the undersigned that he wanted him to serve as his primary counsel, that he wanted him to seek to be appointed to represent Petitioner in these proceedings and that he wanted Mr. Kammer to no longer be involved in his case." *Id.* at 5. Significantly, while Mr. McClain was busy seeking to reclaim his role as "primary" (and sole) steward of Mr. Cromartie's interests, there remained a month on the statute of limitations in which to amend to include the defaulted claim of ineffective assistance of counsel at the penalty phase.

69. In his response to the Warden's motion to dismiss, Mr. McClain was even more vitriolic. He claimed Mr. Kammer intentionally withheld information from him and ascribed a pecuniary motive to Mr. Kammer's misconduct. He alleged Mr. Cromartie was "tricked [by Mr. Kammer] into signing an affidavit asking that Kammer be appointed as his CJA counsel so that GRC would receive compensation for his services." Doc. 15 at 58-67. Thus, while Mr. Cromartie was seeking habeas corpus review, Mr. McClain abandoned any effort to protect his client at a critical time, and, rather, was consumed with casting aspersions at prior conflicted counsel, seemingly conceding the correctness of the Warden's view that the statute had expired by the time of the initial filing. *See* Order, September 17, 2014, Doc. 33 at 1 ("The Petitioner's counsel apparently agrees that statutory tolling ended on September 9, 2013.").

70. The breakdown of any meaningful attorney-client relationship during the pendency of the statute of limitations—because of counsel's ethical lapses, and conduct

amounting to a breach of the duty of loyalty—constitutes an additional extraordinary circumstance supporting 60(b) relief.

D. The Victim's Daughter Does Not Support Mr. Cromartie's Execution Without Conducting DNA Testing.

71. The daughter of Mr. Slysz has been vocal that she does not wish to see Mr. Cromartie executed without having conducted the DNA testing that he has been requesting for the last year. She has gone so far as to write to the District Attorney, Attorney General, and Georgia Supreme Court expressing her desires. *See* Ex. D. Her request not to execute Mr. Cromartie in the absence of the DNA testing that may well provide certainty as to who killed Mr. Slysz and shot Mr. Wilson is another extraordinary circumstance supporting 60(b) relief. It is not every day that a family member of the victim comes out publicly in opposition to moving ahead with a capital defendant's execution. Her wishes should be taken into consideration when determining whether to set aside the final judgment in this case.

IV. The Court Should Set Aside The Final Order Denying Habeas Relief And Consider Mr. Cromartie's Claim Of Ineffective Assistance Of Counsel At The Penalty Phase On The Merits; At A Minimum, It Should Grant A Hearing On This Motion.

72. Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott*, 335 U.S. at 615. This power certainly includes the ability to grant an evidentiary hearing in light of Mr. Cromartie's allegations, which Mr. Cromartie respectfully requests. *See Satterfield*, 872 F.3d at 163 (vacating denial of Rule 60(b) motion and remanding, noting that an evidentiary hearing could be required with respect to the movant's showing of innocence and other equitable factors). In connection with such a hearing, Mr. Cromartie would request discovery and in particular the ability to conduct DNA testing of physical evidence collected at the crime scene that could confirm and corroborate Mr. Lucas's affidavit.

73. In the alternative, in light of Mr. Cromartie's weighty allegations and evidence already submitted, the Court should summarily grant Rule 60(b) relief as a preliminary matter, set aside the final judgment denying habeas relief, and grant a hearing on the merits of Mr. Cromartie's claim of ineffective assistance of counsel at the penalty phase.

CONCLUSION

74. For the foregoing reasons, Mr. Cromartie respectfully requests that the Court stay his execution, grant this Motion for Relief from Final Order and Judgment Pursuant to Federal Rule of Civil Procedure 60(b), grant oral argument and an evidentiary hearing, as necessary, set aside the final order denying habeas relief in this case, and consider Mr. Cromartie's claim of ineffective assistance of counsel at the penalty phase of trial contained in his Amended Petition for a Writ of Habeas Corpus on the merits.

Respectfully submitted,

/s/ Aren Adjoian
Eric Montroy
Aren Adjoian (ID No. 325488)
Federal Community Defender Office
for the Eastern District of Pennsylvania
Curtis Center, Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
Eric_Montroy@fd.org
Aren_Adjoian@fd.org

Attorneys for Petitioner Ray Jefferson Cromartie

Dated: November 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2019, I electronically filed the foregoing *Motion for Relief from Final Order and Judgment Pursuant to Federal Rule of Civil Procedure 60(b)* using the Court's CM/ECF system. Electronic notice will be provided to the following individuals:

Beth Burton
Deputy Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
bburton@law.ga.gov

Sabrina Graham
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
sgraham@law.ga.gov

/s/ Aren Adjoian
Aren Adjoian

Exhibit A

AFFIDAVIT OF THADDEUS LUCAS

State of Georgia
County of Chatham

I, Thaddeus Lucas, having been duly sworn or affirmed do hereby say:

1. My name is Thaddeus Lucas. I am over the age of eighteen and competent to testify to the truth of the matters contained herein.

2. I was a witness in Ray Jefferson Cromartie's capital murder trial in Thomasville, GA in 1997. Mr. Cromartie was my co-defendant but I pled guilty to robbery and hindering apprehension in the case and did not go to trial. I served 10 years in prison.

3. As I testified at trial, I took my brother (Ray Jeff Cromartie) and Corey Clark to the Junior Foods store on the night of the murder because they wanted to steal some beer. I had

no idea that anyone had a gun or planned to shot anyone in the store. I stayed in the car and didn't see what happened in the store.

4. While I did not see what happened in the Junior Food Store, I later overheard Corey Clark tell Gary Young that he shot the clerk in the face. I heard Corey say this to Gary just before the shooting that happened at the Cherokee apartments. I think we were in Tina Washington's apartment when I heard Corey say that he shot the clerk to Gary Young.

5. I have not wanted to talk about this before. I have not told anyone what Corey said about shooting the clerk because I was worried that it would ruin my life more

than it already has. I served 10 years in prison for this and I didn't think saying anything about it would change the situation for Ray or Corey and so I just tried to put the whole thing behind me.

6. But over the last couple of weeks I have read about the case in the news and it has made me very angry because the story is not the truth of what really happened. I know that some of my own past statements and being quiet about this helped hide the truth. But I keep hearing that Jeff Comastie is the shooter and I know that is probably not true. I don't know for certain what happened that night because I wasn't in the store, but I know what I heard Corey say about it to Gary that he shot the clerk.

7. I don't know if this information is helpful, I always thought what ~~Gates~~ I heard Corey say about shooting the clerk was hearsay and could not be used. But I still wanted to say what happened before it was too late.

FURTHER AFFIANT SAITH NAUGHT

Thaddeus Lucas

THADDEUS LUCAS

Sworn to and subscribed to before me this 6th day of November, 2019 by Thaddeus Lucas.

Aaron Rodgers

NOTARY PUBLIC, STATE OF GEORGIA

NOTARY PUBLIC EXPIRES GEORGIA Feb. 12, 2020 CHATHAM COUNTY

Exhibit B

STATE BOARD OF PARDONS AND PAROLES

Atlanta, Georgia

PERSONAL HISTORY STATEMENT

Date Completed 05/16/97

1. NAME: LUCAS, THADDEUS MARK Number: EF-370530
Alias: LUCAS, THADDEUS LAMAR

Age: 25 D.O.B.: [redacted]/71 Race: BLACK Sex: M
Height: 5'11" Weight: 176 Eye Color: BROWN Hair Color: BLACK Skin Color: MEDIUM
Scars, Marks & Tattoos: CLAIMS NONE

Soc. Sec. No.: [redacted]-6716 Religion: HOLINESS Guardian: GRAND PRN
Social Class: MINIMUM STD Environment: SMALL TOWN
Family Behavior: NOT RPTD
Primary Lang: ENGLISH Secondary Lang: UNREPORTED Ethnic Origin:
Citizenship: UNITED STATES (USA) Birth Place: THOMASVILLE, GA

2. CURRENT CONVICTIONS:

Offense	County	Sentence
HINDERING APPREH OR PUN	THOMAS	5Y CC
ROBBERY	THOMAS	20Y SV 10Y B/P CC
AGGRAVATED BATTERY	THOMAS	20Y SV 10Y B/P
AGGRAVATED ASSAULT	THOMAS	10Y TO SV

Detainers/Pending Charges: CLAIMS NONE
Escapes and Recaptures: CLAIMS NONE

3. HEALTH: Physical condition, impairments, addictions, diagnosis

(A) Profile: GC-1 UB-1 LB-1 HE-1 E-1 P-1 Restrictions: NO
(B) Alcohol: BEER OCCASIONALLY
Treatment: CLAIMS NONE
(C) Drugs: EXPERIMENTAL Type: MARIJUANA
Treatment: NONE
IV Drugs: NEVER Other Drugs:
(D) Mental Diagnosis:DSMIII ALCOHOL ABUSE Medicated: N Level:
Previous Mental Health:

4. EDUCATION:

Grade Completed or GED Date: 9TH GRADE Degree or Skill (Trade): REST. MANAGEMENT
IQ Test: Score: WRAT: Read 4.9 Math 6.5 Spell 8.5 Avg 6.6

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4007

EXHIBIT
tabbies 64

5. MILITARY: Branch NO SERVICE SN: Job:

Entered: Date Discharged: Type Discharge: Rank:

6. LAST THREE HOME ADDRESSES (Within the Past 10 Years):

		From	To
(A) 109 ELY ST	THOMASVILLE, GA	07/06/95	04/10/96
(B) 1005 M STEVENS ST	THOMASVILLE, GA	03/12/93	06/05/95
(C) 1950 S HAMPTON RD APT C	COLLEGE PARK, GA	07/05/89	03/12/93

7. LAST THREE JOBS HELD STARTING WITH THE LAST JOB HELD (Within the Past 10 Years):

(A) Employer Name: GA CRATE & BASKET CO Phone: LISTED Salary: $4.65/HR
Address: W JACKSON ST THOMASVILLE, GA
Type of Work: PRODUCTION WORKER 01/03/96-04/10/96
Foreman: BILLY ? Dept:

(B) Employer Name: DOMINO'S PIZZA Phone: 912-228-5885 Salary: $4.50/HR
Address: E JACKSON ST THOMASVILLE, GA
Type of Work: DELIVERER 06/12/94-11/16/95
Foreman: MARK ENGLEWOOD Dept:

(C) Employer Name: MCDONALD'S Phone: 404-250-1504 Salary: $250/WK
Address: 999 JOHNSON FERRY RD SANDY SPRINGS, GA
Type of Work: SHIFT MANAGER 01/00/90-08/00/94
Foreman: JACKIE PARIAS Dept:

8. (A) Father: JOSEPH LUNDY, SR Phone: 912-226-1264
Address: 208 W JERGER ST THOMASVILLE, GA THOMAS CO
Employer: SOUTHWESTERN STATE HOSP Phone: LISTED

(B) Mother: JUANITA HOLLOWAY Phone:
Address: SEE SOCIAL INF FULTON CO
Employer: SELF EMPL Phone: 404-763-2

(C) Stepfather: Phone:
Address:
Employer: Phone:

(D) Stepmother: PEARL LUNDY Phone:
Address: SEE FATHER
Employer: HOPPER ELEM SCH Phone:

(E) Social Informant: JUANITA HOLLOWAY Phone: 404-763-2413
3038 WASHINGTON RD APT 7 ATLANTA, GA Dist: 33-0

(F) Directions: WITHIN CITY LIMITS

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9. Number of Brothers: 00 Number of Sisters: 02

	NAME	ADDRESS	AGE	PHONE
(A)	FELISHA LUCAS	SEE SOCIAL INF	23	
(B)	CHRISTINA LUCAS	"	24	
(C)				
(D)				
(E)				
(F)				
(G)				
(H)				
(I)				
(J)				

10. List present spouse or common law spouse:
NAME: Last, First Maiden Date and Place of Marriage Date of Separation

Address: Phone:
Employer: Phone:

11. CHILDREN:

	NAME	ADDRESS		AGE
(A)	LEXUS WYNN BRITTANY	APT F COVINGTON DR	DECATUR, GA	05
(B)				
(C)				
(D)				
(E)				
(F)				
(G)				
(H)				
(I)				
(J)				

12. Person to contact in case of emergency:
Name: HOLLOWAY, JUANITA Relationship: PARENT Phone: (404) 763-2413
Address: 3038 WASHINGTON RD APT 7 ATLANTA, GA FULTON CO

13. Immediate relatives who are now serving, or have previously served, in prison and why:
(A) CLAIMS NONE
(B)
(C)

14. Co-Defendants and Sentence Received:
(A) CLAIMS NONE
(B)
(C)
(D)
(E)
(F)

4009

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15. PREVIOUS CONVICTIONS in all courts including all state, city, juvenile and other courts:

Offense	County	Sentence	Date Sentence Began	Date of Release	Type of Release
SIMPLE BATT	THOMAS	1Y PROB	2/20/95	8/1/96	NORMAL

Comments: SEE FBI 932386LAO AND SID 02091345K

16. OFFENDER'S EXPLANATION OF CRIME:

AGG ASSLT, AGG BATTERY: THESE 2 YOUNG GIRLS WERE ARGUING ABOUT ME THEN A FIGHT BROKE OUT. I GOT IN BETWEEN THEM TO BREAK IT UP AND ONE OF THEM KICKED ME IN THE GROIN AND THE SAME ONE BIT MY HAND AND WOULDN'T LET GO. I PUNCHED HER AND BROKE HER JAW.

ROBBERY AND HINDERING APPREHENSION: I WAS WITH MY BROTHER AND HIS FRIEND AND THEY WENT IN THIS CONVENIENCE STORE TO TAKE SOME BEER AND HIS FRIEND SHOT THE CLERK IN THE FACE. THE POLICE SAID I HINDERED THEM BY TAKING MY BROTHER AND HIS FRIEND FROM THE SCENE OF THE CRIME. I NEVER WENT IN THE STORE AND DIDN'T KNOW WHAT WAS GOING ON.

ADDITIONAL INFORMATION:

Exhibit C

Declaration
of
Dr. R. Thomas Libby

I. Background and Qualifications

1./ I am Dr. R. Thomas Libby. I hold a doctoral degree in the area of molecular genetics with extensive post-graduate fellowship training and experience in the areas of genotyping procedures and methodologies employed for the purposes of human identification. My *Curriculum Vitae* is attached herein.

2./ I am trained in the use of polymerase chain reaction (PCR) methodologies as used in forensic genotyping, and have additional specific expertise in the areas of Recursive PCR (rPCR), Asymmetric PCR (aPCR), Quantitative Expression Real-Time PCR (QT-PCR), Reverse-Transcriptase PCR (RT-PCR), In Situ PCR (isPCR), PCR Cloning, PCR Genotyping, RACE PCR, Small Pool (spPCR), Exon-Array PCR (eaPCR), etc. and have published numerous articles in the peer-reviewed scientific journals.

3./ I have previously trained in the laboratories of Dr. John N. Reeve (Ohio State University), Dr. Lacy Daniels (University of Iowa), Dr. Ed Fritsch (Michigan State University), Dr. Jonathan Gallant (University of Washington-Genome Sciences), Dr. Albert LaSpada (University of Washington-School of Medicine), Dr. Jacques Ninio (Universite de Paris VII) and Dr. Phillip LeCompte (Universite de Paris VII) in the areas of DNA/RNA regulation of synthesis. I was a Staff Scientist at the Immunex Corporation (Department of Human Genetics) where my efforts were directed towards the first cloning and expression of the human lymphokine gene, Granulocyte-Macrophage Colony Stimulating Factor (GM-CSF) which has since

been approved by the Food & Drug Administration (FDA), and is currently the drug of choice for treatment of individuals who are either immunocompromised and/or have undergone bone marrow failure, as a result of radiation therapy. I was similarly responsible for the first cloning (by rPCR) methods of a hybrid mouse-human monoclonal antibody (Mab) for the treatment of various solid tumors in humans, as well as for the development of non-viral gene therapy procedures for the introduction of novel genes, such as the Vascular Endothelial Growth Factor (Vegf), via percutaneous transluminal coronary angioplasty (PTCA), otherwise known as the balloon cardiac catheterization procedure for the treatment of coronary heart disease.

4./ I previously served as an Affiliate Investigator at the Virginia Mason Medical Center, Benaroya Research Institute, Translational Research Program in the Laboratory of Neurogenomics, and Member in the School of Medicine at the University of Washington Medical Center, as well as Member in the Center for Neurogenetics & Neurotherapeutics and Center for Human Development & Disability within the Division of Medical Genetics. My academic work involved the molecular analysis of various human neurodegenerative disorders which are characterized by the hyper expansion of a short-tandem repeat (STR) within the coding region of either the Ataxin 7 or Androgen Receptor (AR) gene. Dynamic mutations of this nature result in either Spinocerebellar Ataxia Type 7 (SCA7) or Spino and Bulbar Muscular Atrophy (SBMA) [Kennedy's Disease] respectively. Both disorders are representative of upper motor neuron defects caused by the degeneration of specific neuronal populations in the cerebellum. While SCA7 is an autosomal dominant disorder, which has been mapped to a region on chromosome 3p, SBMA is an X-linked disorder. Both, however, exhibit classical Mendelian inheritance and clinical anticipation. This work was designed to provide a basic

understanding of the molecular events of these disease states, as well as to develop novel genetic therapeutic strategies for the treatment of neurodegenerative diseases. These procedures are highly dependent on advanced bioinformatics and PCR approaches.

The (STR) DNA tests are part of my daily work which rely upon the same technologies and procedures, and further employ the same instrumentation and software (e.g. ABI 310 CE system, ABI 3100 CE system, ABI 3700 CE system, ABI3500/xL, ABI 377 gel electrophoresis system, TC 480, TC 2400, TC 9600, and TC 9700 thermal cyclers, GeneScan/Genotyper software, GeneMapper software, GeneMarker HID software, etc.), as are used in forensic laboratories across the United States, Canada and Europe.

5./ I have been retained on numerous criminal cases involving the use of DNA over the past approximately twenty years. I have evaluated data and rendered opinions as to the significance of the DNA data generated by numerous forensic laboratories, as well as providing advice and assistance on the analysis of samples which have yet to be tested. I have testified and given evidence in both state and federal courts in various jurisdictions across the country including, but not limited to, the states of Washington, Oregon, California, Arizona, New Mexico, Nevada, Idaho, Iowa, Illinois, Missouri, Indiana, Michigan, Minnesota, Colorado, Pennsylvania, Texas, Florida, Louisiana and North Carolina, as well as several Provinces in Canada in the areas of forensic DNA analysis, and have consulted on numerous additional cases in other states, and have further served as an expert in Court Martial cases both in Europe and the United States. Additionally, I have monitored and evaluated DNA related test results at numerous government and private laboratories throughout the United States and Canada over the past approximately twenty years.

6./ I have lectured at numerous conferences and meetings including University College London (UK) and Cambridge University (UK) on issues related to forensic DNA analysis.

7./ I was the first in the U.S. to introduce genetic testing for schizophrenia in a criminal case which involved the use of a high density (~ 580,000) bead array including sophisticated bioinformatic approaches to identify the presence of DNA alleles which have been associated with various psychiatric disorders including schizophrenia.

8./ For over twenty years I have been the Chief Scientific Officer at GeneQuest Diagnostics (Seattle) specializing in human DNA identity analysis in criminal proceedings.

9./ I was a Co-Founder and CEO of SNPgenomics Incoporated (Seattle) which specialized in state-of-the-art pre-natal noninvasive testing methods for the screening and detection of fetal chromosomal abnormalities including Fragile X Syndrome and related X-chromosome aneuploidies.

10./ I hold a Bachelor of Sciences degree in Animal Science and Physiology (University of California), a Master's of Science degree in Microbial Genetics (California State University), and a Doctoral degree in Molecular Genetics (Oregon State University). I have held various positions at the University of Washington-School of Medicine in both the Departments of Genetics and Laboratory Medicine over the years, including as a Research Associate, Research Assistant Professor, Visiting Scholar (Universite de Paris VII), Senior Fellow and Senior (Faculty)

Research Associate.

11./ My past and present scientific affiliations include the Society for Neuroscience, the American Academy of Forensic Sciences and the American Academy of Forensic Genetics, International Society of Psychiatric Genetics, as well as numerous other affiliations. Throughout my career I have published numerous articles in the peer-reviewed literature. A selected list of my articles is contained in my *Curriculum Vitae* (attached).

II. Case of Ray Jefferson Cromartie v. State of Georgia (Case 94-CR-328)

12./ I was contacted by Mr. Loren D. Stewart (Federal Community Defender for the Eastern District of Pennsylvania), and counsel to Mr. Ray Jefferson Cromartie, to evaluate the potential significance of performing state of the art DNA testing on various items of evidence which were relied upon, but not tested, by the State of Georgia in Mr. Cromartie's criminal prosecution.

13./ Significant advances in DNA testing have been achieved since Mr. Cromartie's arrest and conviction which had not been developed, and thus unavailable to the Georgia Bureau of Investigation during the mid to late 1990's. These advances include enhanced methods for the detection and analysis of low-copy number touch DNA which allows for the determination of individual(s) who may have had contact with an evidence item during the commission of a crime. These techniques, coupled with advanced genetic test systems (e.g. GlobalFiler, PowerPlex Fusion 6C, etc.), as well as analytical genotyping equipment are capable of yielding highly discriminating data - useful for individualizing the origin of an evidence sample, and

thus allow for enhanced identity determination.

14./ I have been provided with the following documents by Mr. Stewart for my review and evaluation:

Description	Page
Volume I (Police Reports)	
Thomasville Police Department Reports.....	01
Georgia Bureau of Investigations Lab Report, Victim: Slysz.....	298
Supplemental Latent Print Report.....	303
Evidence Control Property Forms.....	304
Evidence Control Property Forms, cont'd.....	354
Georgia Bureau of Investigations Lab Reports, Victims: Slysz & Wilson.....	371
Video Property Report, FBI Laboratory Division/Video Enhancement Unit.....	380
Handwritten Notes.....	385
Shoe Impression Photos.....	413
Volume II (State Habeas Record)	
Discovery Compiled from State Habeas Record.....	435
Volume III (Pretrial Transcripts)	
Transcript of Commitment Hearing (06/17/94)	744
Transcript of Pretrial Hearing (04/19/95)	800
Transcript of Pretrial Hearing (09/06/95)	831
Transcript of Pretrial Hearing (02/20/96)	872
Transcript of Ex Parte Pretrial Hearing (02/23/96)	1164
Transcript of Pretrial Hearing (02/23/96)	1196

Description	Page
Volume IV	
Transcript of Pretrial Hearing (03/19/96)	1250
Transcript of Pretrial Hearing (06/06/96)	1272
Transcript of Pretrial Hearing (10/01/96 – 10/02/96)	1280
Transcript of Ex Parte Pretrial Hearing (10/02/96)	1669
Volume V	
Transcript of Pretrial Hearing (12/19/96)	1755
Transcript of Pretrial Hearing (01/06/97)	1768
Transcript of Pretrial Hearing (08/15/97)	1982
Transcript of Pretrial Hearing (08/29/97)	2113
Volume VI (Trial Transcripts)	
Index to Witnesses and Exhibits.....	2229
Trial Transcript (09/22/97)	2246
Trial Transcript (09/23/97)	2493
Volume VII (Trial Transcripts)	
Trial Transcript (09/24/97)	2828
Trial Transcript (09/25/97)	3157
Volume VIII (Trial Transcripts/Motion for New Trial)	
Trial Transcript (09/26/97, 09/29/97 – 10/01/97)	3428
Transcript of Motion for New Trial (03/12/98)	3656
Volume IX (Finger Print Evidence)	
Finger Prints from Jr. Food Store (04/10/94)	3778
Print from Budweiser Carton (04/10/94)	3802
Print Card of Corey Clark (04/13/94)	3807

Description	Page
Print Card of Ray Cromartie (04/13/94)	3810
Print Card of Gary Young (04/13/94)	3813
Print Card of Thad Lucas (04/13/94)	3816
Photos of Physical Evidence (08/11/15)	3819
Surveillance Video, Ex. 32 (Madison Street Deli)	
Trial Exhibits	
Trial Exhibit List.....	3878
Combined Trial Exhibits.....	3894
Opinions	
Opinion, Supreme Court of Georgia (03/8/99)	4297
Order Denying Motion for Reconsideration of Certificate of Appealability, 11th Circuit (03/26/18)	4312
Images of evidence items photographed at Clerks Office by L. Stewart	467 files

15./ It is my understanding that DNA testing was not performed on any of the evidence collected by the Thomasville Police Department (TPD) in relation to either the Madison Street Deli (TPD Casefile 9406524) robbery/aggravated burglary or the Junior Food Store (TPD Casefile 9406722) attempted robbery/murder.

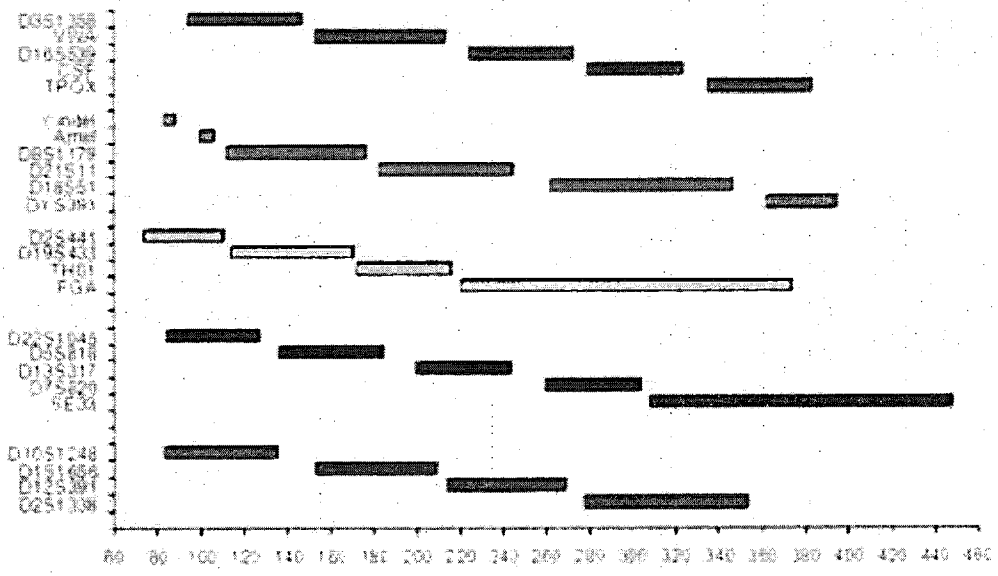
III. Advances in DNA Testing Methodologies

16./ The state of science in relation to DNA identification methodologies in and around the time of both incidences (above) were not capable of reliably detecting and resolving minute quantities of DNA and ascribing weight to potential contributors (in situations in which a mixture of DNA types is detected). Present

day technologies are extremely sensitive with the capability of detecting sub-nanogram (i.e. less than 0.000000001g) of DNA, often times referred to as 'touch DNA'.

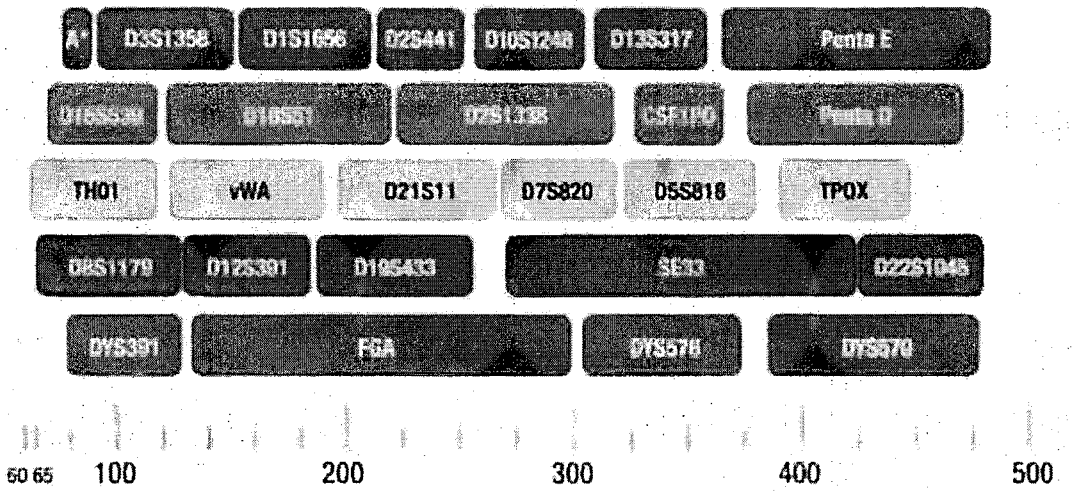
Through the use of advanced bioinformatic analysis, including the use of probabilistic genotyping methods, it is possible to identify with a high degree of confidence, the source attribution of the biological material obtained from any given evidence sample. Had this approach been available at the time of the events in this matter it would have revealed additional information relative to the source(s) of DNA on the various items of evidence which were collected by the TPD. Current state-of-the-art methodologies would additionally assist in identifying the habitual wearer of any item of clothing found and/or collected by the TPD which was believed to be associated with the perpetrator(s) of the crime(s).

17./ Advanced DNA testing methodologies rely upon a multi-locus system in which groups of loci (i.e. independent genetic sites on the chromosome) are amplified (i.e. copied) under stringent amplification conditions resulting in high yields of low copy input DNA (including touch DNA). Each loci group associated with 4-6 genetic sites are concurrently attached to a unique fluorochrome which allows for detection as schematically illustrated below for the GlobalFiler™ PCR Amplification Kit (ThermoFisher Scientific):



Use of an advanced highly sensitive system such as GlobalFiler™ will allow for the simultaneous detection of polymorphic regions across 21 autosomal loci (above) as well as providing interrogation at one Y-STR site (DYS391), one insertion/deletion site (Indel) on the Y-chromosome, as well as the amelogenin sex determining marker. The GlobalFiler™ system is particularly well suited for archived samples, or samples which have been stored for long periods of time, as it includes the use of 10 mini-STRs (< 220 base pair amplified product) which allows for maximum performance on degraded samples.

Additional highly advanced systems which provide similar levels of sensitivity are currently available including the PowerPlex Fusion 6C (Promega) which allows for the interrogation of 24 polymorphic autosomal STR sites, as well as three Y-STR loci (i.e. DYS391, DYS576, DYS570) as schematically illustrated below:



18./ The use of either analytical approach (i.e. GlobalFiler™ or PowerPlex Fusion 6C), coupled with probabilistic genotyping to calculate Likelihood Ratios and infer probable genotypes associated with a particular forensic item, provides the best methodology for assessing the weight to be applied to an inferred genotype, and thus most likely contributor(s) of the evidence.

IV. Proposed DNA Testing

19./ In my professional opinion, testing should be conducted using either the GlobalFiler™ or PowerPlex Fusion 6C system in order to determine the origin of biological material found associated with the items collected in the Cromartie case. DNA typing of the following items are expected to yield newly discovered data useful in determining individual(s) associated with either the Madison Street Deli or Junior Food Store crime scenes (see Tables I – VII, below and Appendix I, attached herein):

Table I – Madison Street Deli (401 N. Madison Street, Thomasville, GA)

Exhibit	Description
156	Cartridge shell casing-collected at crime scene (shell casing 1)

Table II – Junior Food Store (1335 West Jackson Street, Thomasville, GA)

Exhibit	Description
160	Cartridge shell casing-collected at crime scene (shell casing 1)
159	Cartridge shell casing-collected at crime scene (shell casing 2)
4	Handle section of Budweiser beer carton
9	Basic Light 100 cigarette package
2	Budweiser beer can-collected outside at crime scene
3	Budweiser beer can-collected outside at crime scene

Table III – Evidence from Secondary Crime Scenes

Exhibit	Description
30A	Black knitted cap with white emblem-collected at 229 W. Monroe, Thomasville, GA
30B	Green hooded sweatshirt-collected at 229 W. Monroe, Thomasville, GA
162	Raven .25 Cal Semi-Auto Pistol-collected in the area between the Jail Justice Center and Cherokee Apartments (vicinity of 921 Smith Avenue, Thomasville, GA)
162	Magazine from Raven .25 Cal Semi-Auto pistol

Table IV – Clothing Collected from Gary Young

Exhibit	Description
27	Bag of clothes collected from Gary Young:
27	-White T-shirt
27	-Green Khaki polo shorts (size 38)
27-C	-Black Converse tennis shoes (size 10)

Table V – Clothing Collected from Corey Clark

Exhibit	Description
14	Bag of clothes collected from Corey Clark
14	-Green colored jeans
14-A	-Nike tennis shoes (size 11)

Table VI – Clothing Collected from Thaddeus Lamar Lucas

Exhibit	Description
16	Shoes collected from Thaddeus Lucas
16-A	-Nike Air shoes (size 10)

Table VII – Clothing Collected from Ray Jefferson Cromartie

Exhibit	Description
17-22	Bag of clothes collected from Ray Cromartie
17	- Yellow shorts
18	-Adidas Tennis Shoe
20	-Flannel shirt/jacket
22	-White socks

Table VIII – Reference Sample for Richard Slysz

Exhibit	Description
1	Cut portion of victim's short-left sleeve with blood pattern

V. Goals of DNA Testing

20./ Exhibits 156, 159 and 160:

STR based DNA testing using either the GlobalFiler™ or PowerPlex Fusion 6C system should be performed on the shell casings from both the Madison Street Deli and Junior Food Store in order to genotype the biological contributor of the individual who had contact with the .25 Cal shells (presumably as they were loaded into the clip). Knowledge of this information would assist in determining the individual who had contact with bullets used in the Madison Street Deli and Junior Food Store crimes. This information could be extremely useful in Mr. Cromartie's efforts to demonstrate he did not have contact with the cartridge casings collected at the crime scene.

21./ Exhibits 2, 3, 4 and 9:

STR based testing of the beer cans, and piece of beer can carton obtained from outside of the actual crime scene at the Junior Food Store, as well as cigarette packaging obtained from inside the crime scene would assist in establishing the identity of the individual(s) involved in the shoot of Mr. Slysz, and thus could provide very useful information in Mr. Cromartie's defense.

22./ Exhibits 30A and 30B:

Items 30A (black knit cap) and 30B (green-hooded sweat shirt) were collected at a secondary site (remote from the Madison Street Deli), however, were presumed to have been worn by the suspect(s) involved in the robbery and assault of Mr. Wilson. It is essential that these items be tested for touch DNA in order to establish the habitual wearer of the item. This information could be helpful in demonstrating that Mr. Cromartie may not have been involved in the Madison Street Deli assault.

23./ Exhibit 162:

Testing of the Raven .25 Cal auto pistol is essential in determining who had contact with the weapon (which allegedly was involved with both the Madison Street Deli and Junior Food Store assault/murder). Extremely useful information may be obtained by examining the source(s) of contact DNA from both the exterior of the weapon as well as the associated magazine. Information of this nature could demonstrate that Mr. Cromartie had not handled the weapon during the assaults on Mr. Wilson or Mr. Slysz. This determination is possible even IF the firearm had

been previously handled by other individuals. It is likely that probative evidence may be obtained from both the exterior of the weapon (i.e. trigger, trigger guard, barrel/slide, handle, etc), as well as parts associated with the interior of the weapon (i.e. magazine, etc.).

24./ Exhibit 27:

Testing for transfer or contact DNA on the clothing, including shoes, obtained from Gary Young (Exhibit 27) would be deterministic in assessing if Mr. Young was in close proximity and/or contact with the victims in either the Madison Street Deli or Junior Food store crimes.

25./ Exhibit 14:

Testing for transfer or contact DNA on the clothing, including shoes, obtained from Corey Clark (Exhibit 14) would be deterministic in assessing if Mr. Clark may have similarly been in close proximity and/or contact with the victims in either the Madison Street Deli or Junior Food store crimes.

26./ Exhibit 16:

In order to determine if Thaddeus Lamar Lucas was similarly in close contact with either Mr. Wilson or Mr. Slysz during the assault it is necessary that testing for contact/transfer DNA be conducted on the shoes obtained from Mr. Lucas.

27./ Exhibits 17-22:

DNA testing on Exhibits 17-22 (clothing and shoes obtained from Mr. Cromartie) will be conducted to similarly assess any possible presence of transfer/contact from victims in the Madison Street Deli or Junior Food Store assaults.

Executed on this 14th day of December 2018 in Seattle, Washington.

Dr. R. Thomas Libby

6/6/19

SUBSCRIBED AND SWORN TO BEFORE ME
this 6th day of June 2019

Notary Public in and for the State of Washington
residing at King County

Notary Public
State of Washington
MIKI SHIMIZU
MY COMMISSION EXPIRES
JAN. 4, 2022

Appendix I

Table I – Madison Street Deli Evidence:

Exhibit 156
(container with shell casing inside)

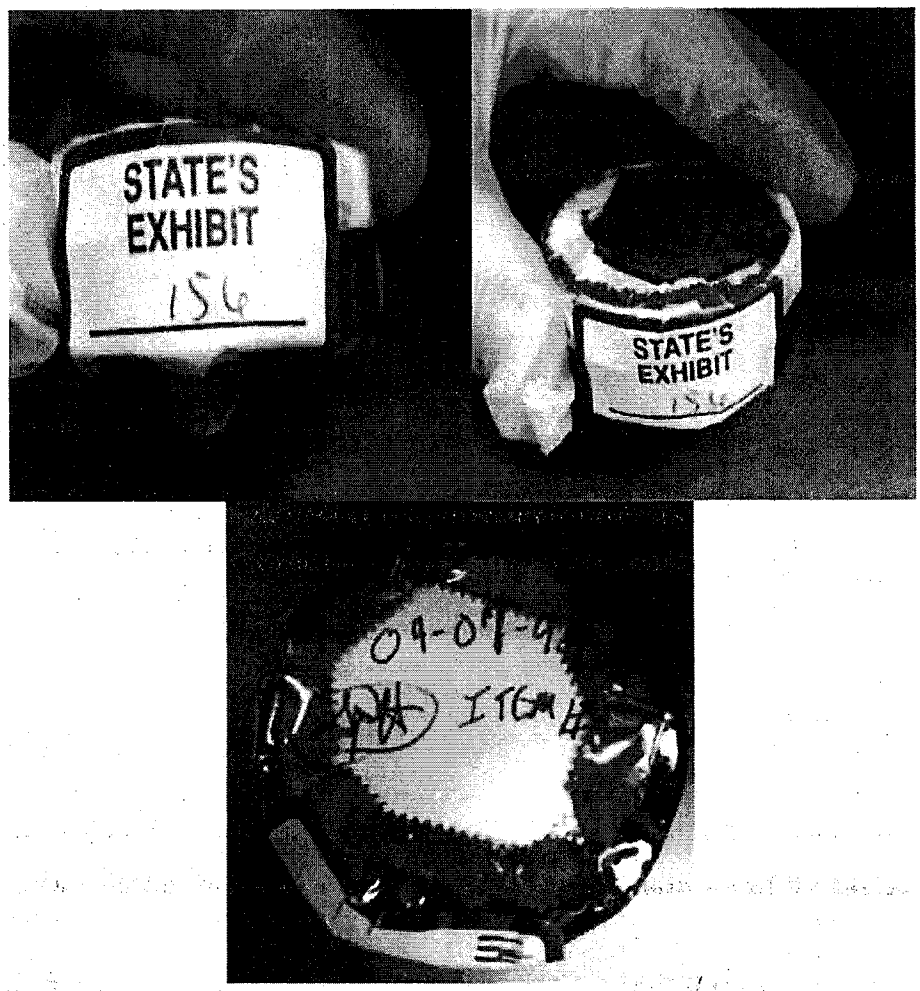


Table II – Junior Food Store Evidence:

Exhibit 160 (Casing #1)*

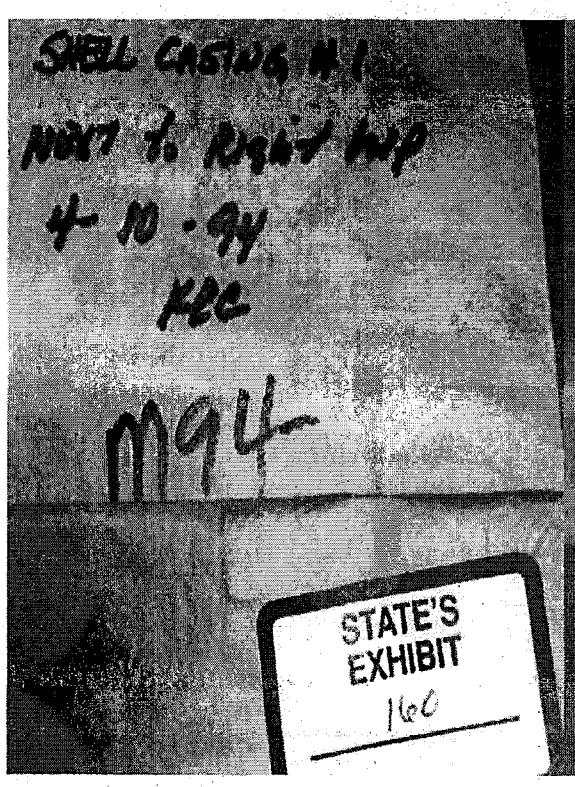
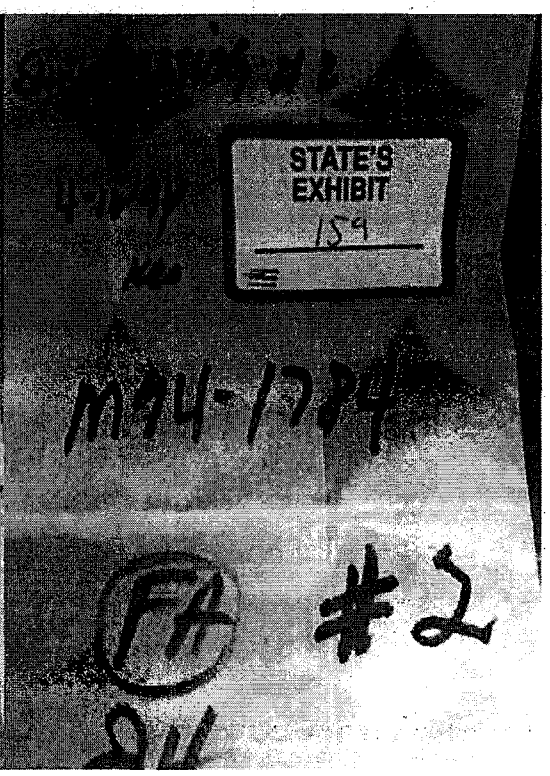


Exhibit 159 (Casing #2)*



*, shell casing maintained inside evidence bag for security/sterility

Exhibit 4 (Portion ov Budweiser Beer Carton)

Exhibit 9 (Cigarette Package)

Exhibit 2 (Budweiser Can)

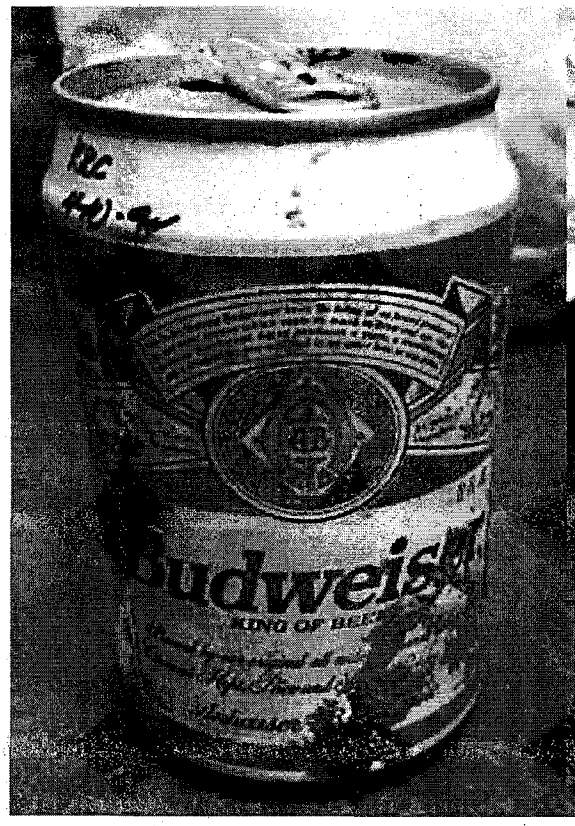


Exhibit 3 (Budweiser Can)

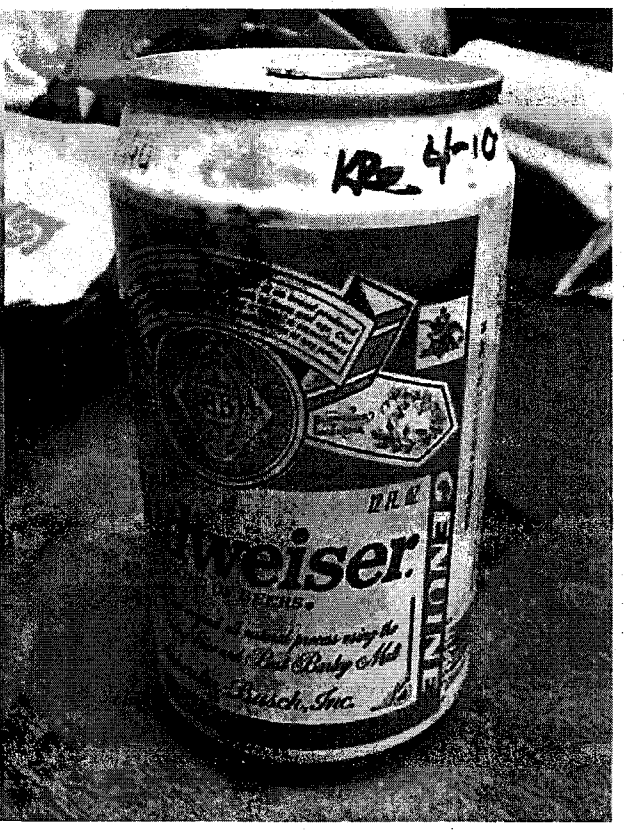


Table III – Evidence from Secondary Crime Scenes

Exhibit 30A (Knitted Ski Cap)

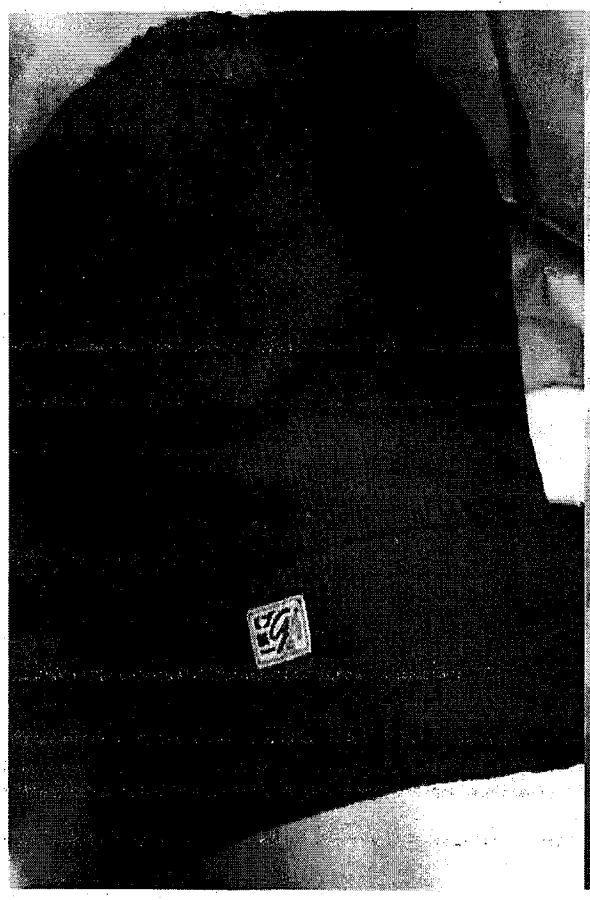


Exhibit 30B (Green Sweatshirt)

Exhibit 162 (Pistol-Side View)

Exhibit 162 (Pistol Clip-Side View)

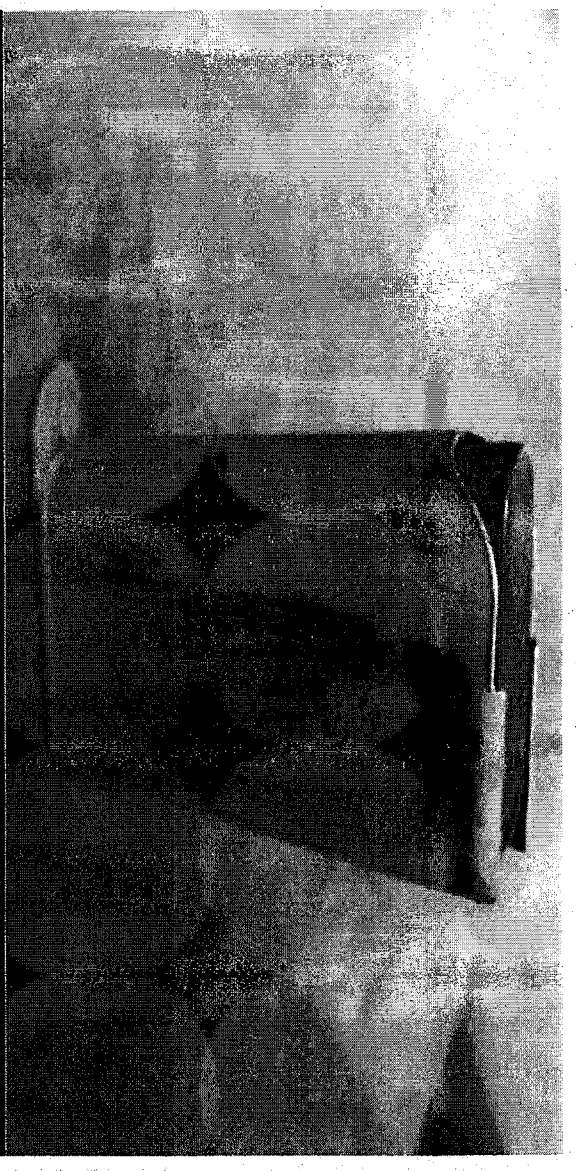


Table IV – Clothing Collected from Gary Young

Exhibit 27 (Outside of Bag)

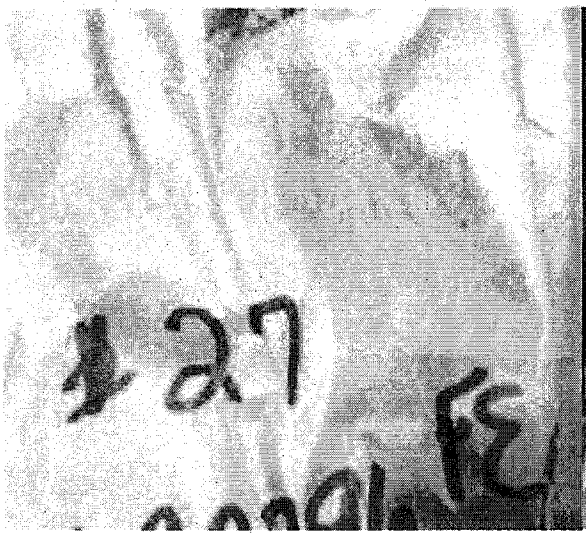
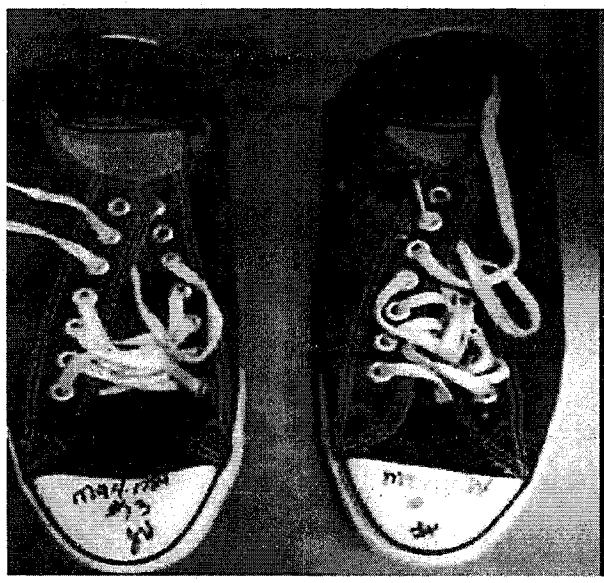


Exhibit 27 (Inside of Bag)

Item 13 (Converse Shoes-Top)



Item 13 (Converse Shoes-Bottom)

Table V – Clothing Collected from Corey Clark

Exhibit 14A (bag with clothing + shoes)

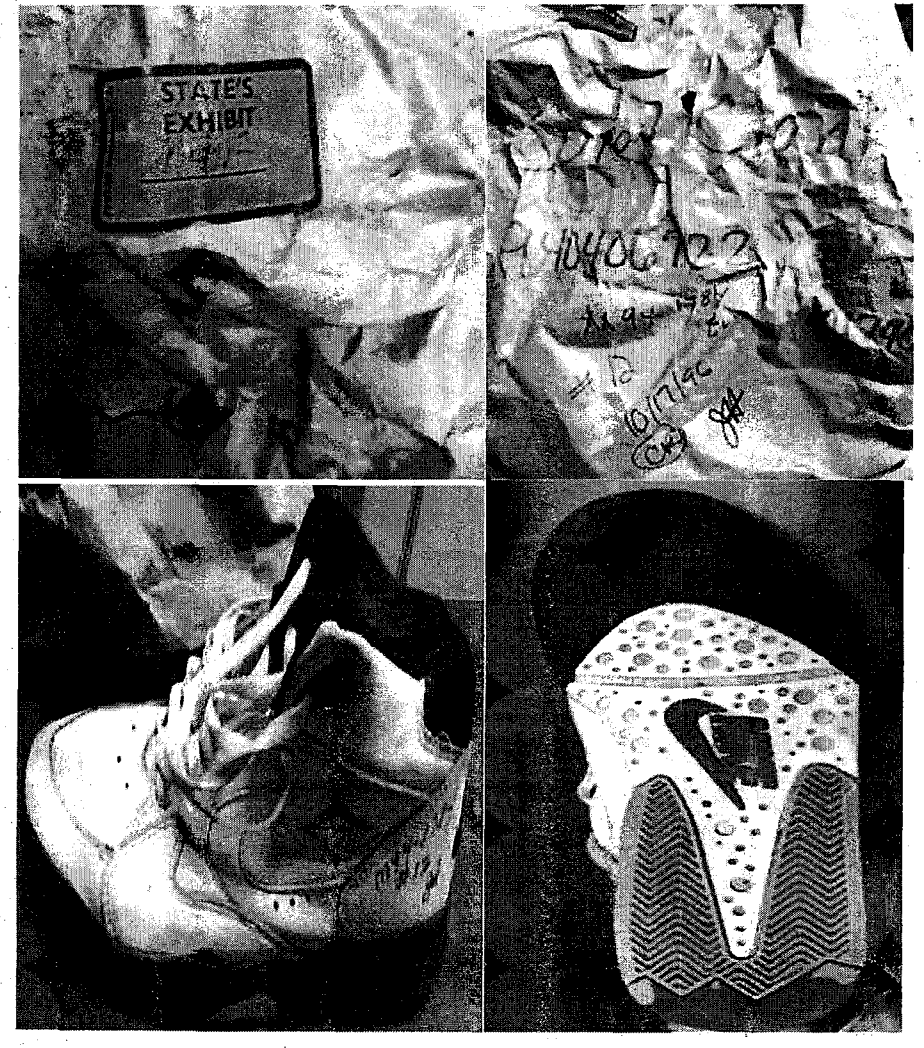


Exhibit 14 (green jeans)

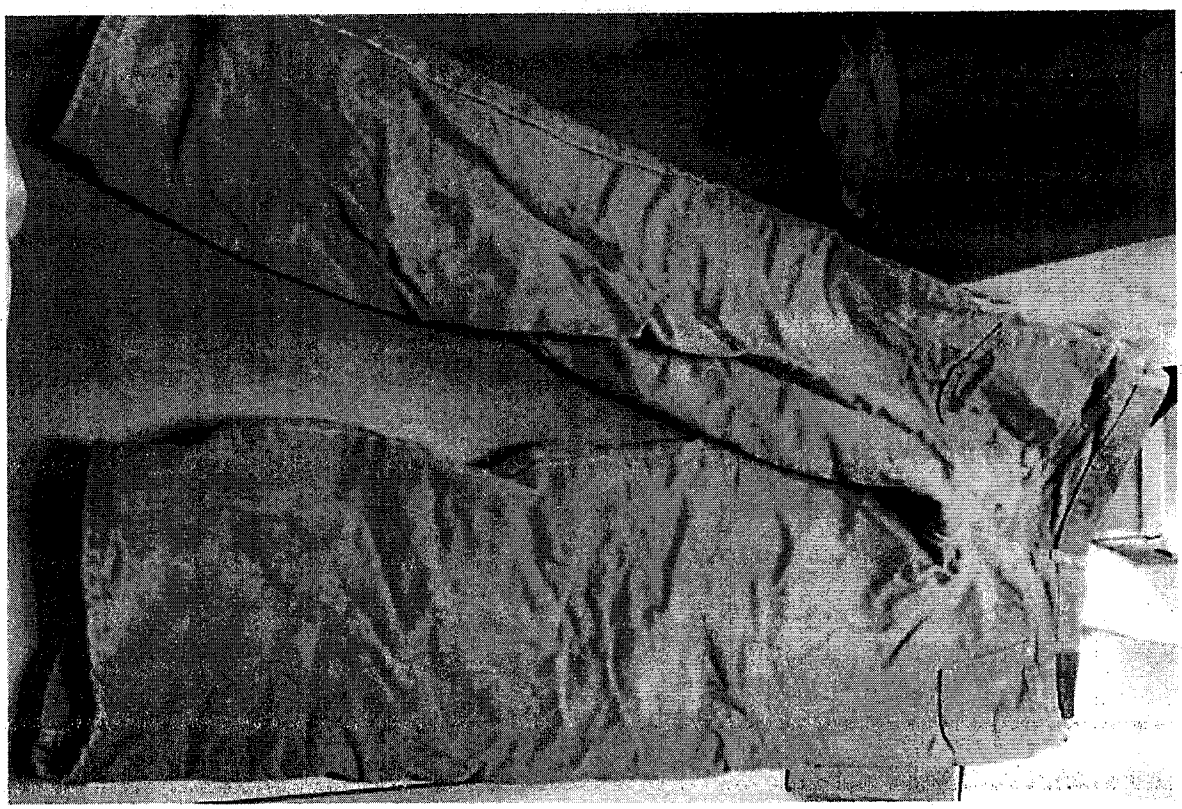


Table VI – Clothing Collected from Thaddeus Lamar Lucus

Exhibit 16 (bag with shoes)

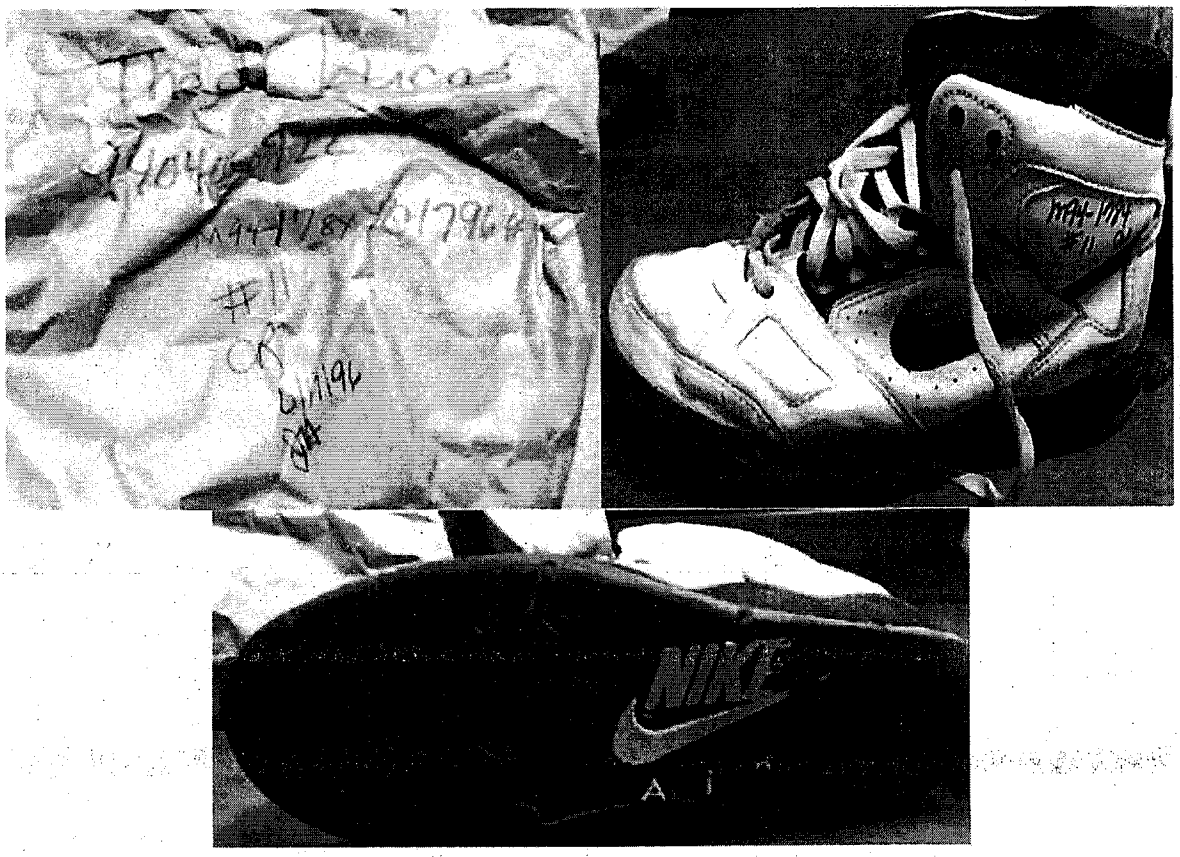


Table VII – Clothing Collected from Ray Jefferson Cromartie

Exhibit 22 (socks, T-shirt, etc.)

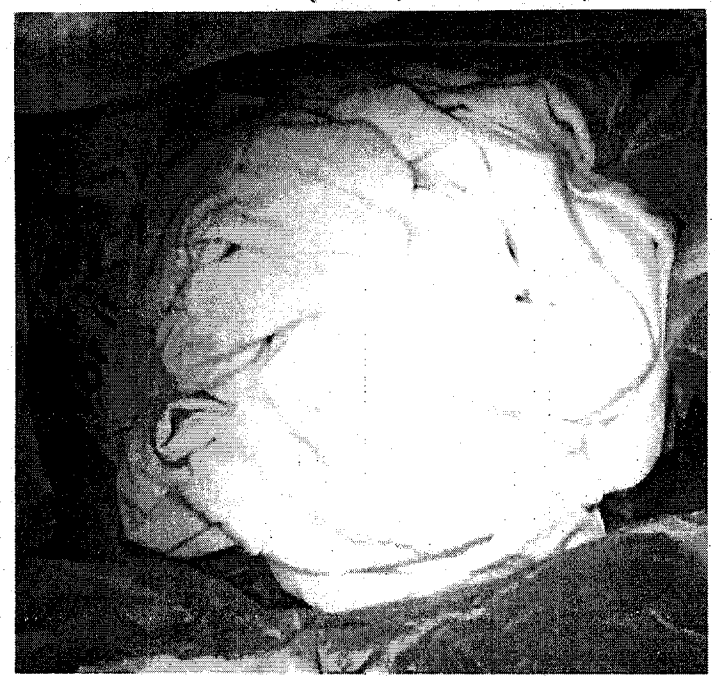


Exhibit 18A/18B (shoes)

Exhibit 20 (bag of clothing)

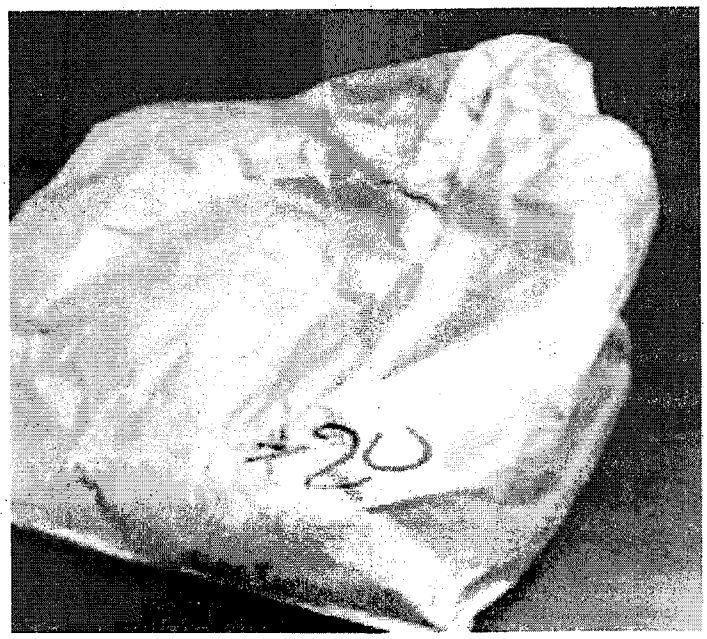


Exhibit 20 (flannel shirt/jacket)

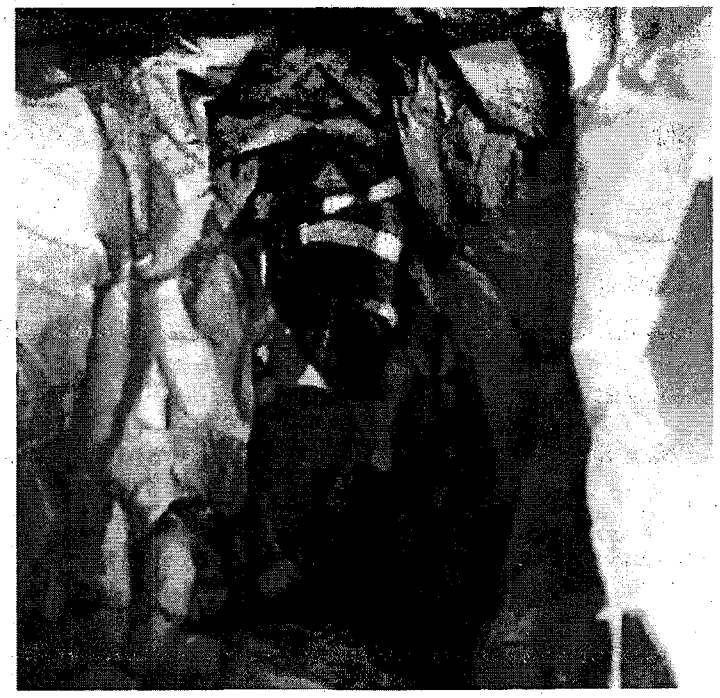


Exhibit 17 (bag with clothing)

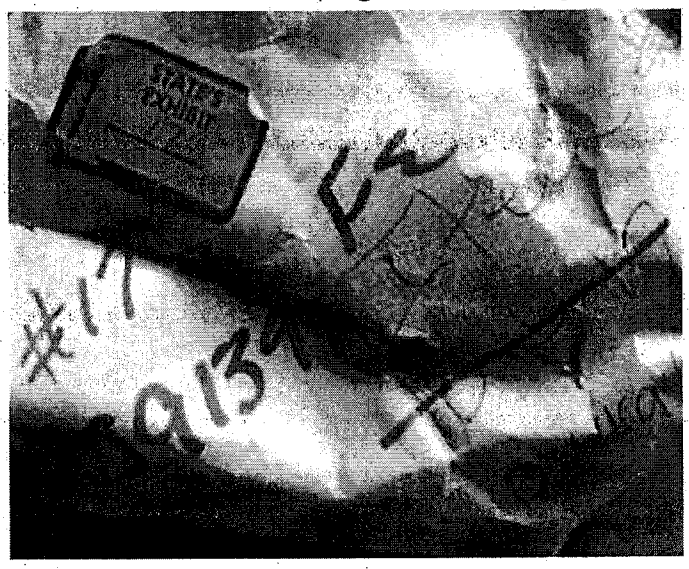
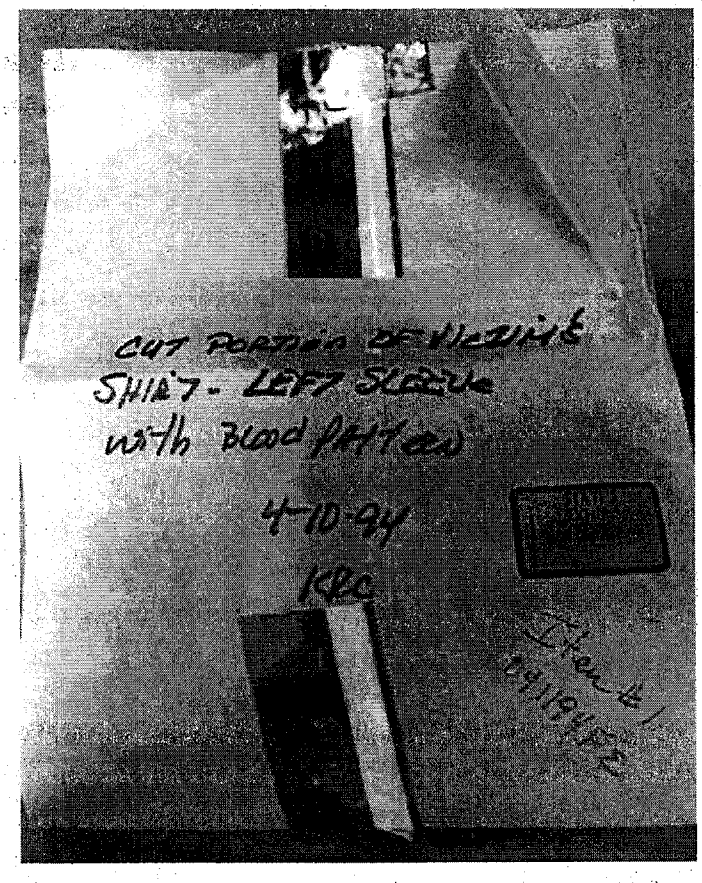


Exhibit 17 (yellow shorts-front)

Exhibit 17 (yellow shorts-back)

Table VIII –Bag containing cut portion of victim's shirt

Exhibit 1



Exhibit

D

October 16, 2019

Supreme Court of Georgia
244 Washington Street, SW
Atlanta, GA 30334

To the Justices of the Supreme Court of Georgia,

I am writing to urge you to require DNA testing of the evidence in the case of Ray Cromartie, currently a death row inmate in Georgia. My father, Richard Slysz, was the victim in Mr. Cromartie's case, and I consider myself a victim under Georgia's victim's rights statute and Constitution.

I have read a lot about the case and I believe that there are serious questions about what happened the night my father was murdered and whether Ray Cromartie actually killed him.

This past summer, I contacted the prosecutors in this case and told them that I wanted DNA testing conducted. My letter to them is attached. They never responded to me, but I understand that they opposed the testing.

I still want DNA testing to occur. Today I learned that the State has set a date to execute Mr. Cromartie without doing any testing. This is wrong, and I hope that you will take action to make sure that the testing happens.

Thank you for your consideration.

Sincerely,

Elizabeth A. Legette

Elizabeth A. Legette

Mr. Bradfield M. Sheely
District Attorney
P.O. Box 99
Valdosta, GA. 31603-0099

Mrs. Sabrina Graham
Senior Assistant Attorney General
40 Capital Square, SW
Atlanta, GA 30334

July 16th 2019 94-CR-328
Re: State v. Ray Jefferson Cromartie

Dear Mr. Sheely and Mrs. Graham,

I am writing this letter in support of DNA testing in the case of Georgia versus Ray Cromartie. I was a young woman when my father was murdered at the Junior Food Store in Thomasville.

I've since read a great deal about Ray Cromartie's legal case. There are questions about what happened that night that could be answered by DNA testing. My father's death was senseless. Executing another man would also be senseless, especially if he may

not have what my father.

Thank You very much for your consideration.

Sincerely,

Elizabeth A. Legette
Daughter of Richard Sluss

Elizabeth A Legette
July 17th 2019

Exhibit

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IN THE SUPERIOR COURT OF THOMAS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

vs. CASE NO.: 94-CR-328

RAY JEFFERSON CROMARTIE,

Defendant.
_____/ VOLUME I

EXTRAORDINARY MOTION FOR NEW TRIAL AND POST-CONVICTION DNA TESTING PURSUANT TO O.C.G.A. 5-5-41(C)
BEFORE THE HONORABLE FRANKLIN D. HORKAN, SENIOR JUDGE, ON MONDAY, JUNE 24th, 2019 at 9:00 A.M.
AT THE THOMAS COUNTY JUDICIAL BUILDING

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INDEX TO EXAMINATIONS Page

RANDELL THOMAS LIBBY

Direct Examination By Federal Defender Stewart: 12
Cross-Examination By Assistant Ag Graham: 46
Redirect Examination By Federal Defender Stewart: 60
Examination by The Court The Court 64
Further Redirect Examination By Federal Defender Stewart: 75
Recross Examination By Assistant Ag Graham: 77

LAURA SCHILE

Direct Examination By Federal Defender Adjoian: 78
Voir Dire Examination By Assistant Ag Graham: 85
Cross-Examination By Assistant Ag Graham: 109
Redirect Examination By Federal Defender Adjoian: 122
Further Cross-Examination By Assistant Ag Graham: 124

INDEX OF EXHIBITS

Exhibit Number	Description	Page
**Exhibit No. 4 (not identified but stipulated to)		
Exhibit No. 1	Libby Vitae	13
Exhibit No. 2	Dr. Libby Declaration	18
Exhibit No. 3	Power Point Presentation	18
Exhibit No. 5	Schile Vitae	79
Exhibit No. 7	Materials Reviewed	84
Exhibit No. 6	Schile Report	84
Exhibit No. 1-65	Trial Evidence*Stipulated	126

PROCEEDINGS

THE COURT: Ladies and gentlemen, we'll call the case of State of Georgia versus Ray Jefferson Cromartie. We're here on Mr. Cromartie's petition, an Extraordinary Motion for New Trial, request for DNA testing pursuant to Official Code of Georgia Annotated 5-5-41C.

I would like, for purposes of the record, if we could have Mr. Cromartie's counsel identify themselves, please.

FEDERAL DEFENDER ADJOIAN: Good morning, Your Honor. Aren Adjoian from the Federal Defender Office on behalf of Mr. Cromartie.

THE COURT: Adjoian?

FEDERAL DEFENDER ADJOIAN: Adjoian, Your Honor. Thank you.

FEDERAL DEFENDER STEWART: Good morning, Your Honor. Loren Stewart, also from the Federal Defender Office representing Mr. Cromartie.

THE COURT: Thank you, gentlemen. And for the State?

ASSISTANT AG GRAHAM: Good morning, Your Honor. Sabrina Graham here on behalf of the Georgia Attorney General's Office.

DISTRICT ATTORNEY SHEALY: Brad Shealy with the

District Attorney's Office.

THE COURT: Ladies and gentlemen, any matters that we need to address prior to presentation of evidence?

FEDERAL DEFENDER ADJOIAN: Your Honor, we do have a couple of brief housekeeping matters we have discussed with opposing counsel, some stipulations regarding chain of custody and evidence foundation type of issues that we were hoping to put on the record before we call our first witness. And we have two witnesses here present with us in the courtroom. They are both expert witnesses, and we would ask of the Court that our second expert be permitted to observe in the courtroom to observe our first expert's testimony by way of housekeeping.

ASSISTANT AG GRAHAM: We have no objection to that, Your Honor.

THE COURT: Very well.

FEDERAL DEFENDER ADJOIAN: And I don't know if the Court is interested in a brief overview of what we intend to present here today. I'm happy to do so, but if the Court would prefer just getting straight to the witnesses, we're happy to do it that way, as well.

THE COURT: Mr. Adjoian, of course I've read your motion.

FEDERAL DEFENDER ADJOIAN: Yes, Your Honor.

THE COURT: Your brief accompanying your motion and likewise, the State's. If there's anything that you think you need to add to that, feel free to do so. Otherwise, as I said, I've read it, looked at it multiple times.

FEDERAL DEFENDER ADJOIAN: Yes, Your Honor. We're happy to get right to it, so.

THE COURT: Very well. Do you-all wish to announce your stipulations, first?

FEDERAL DEFENDER STEWART: That's precisely what I'd like to do, Your Honor. Good morning.

First, there are the two stipulations, and I express gratitude to counsel. I think we obviated the need to call a whole lot of foundational and chain of custody witnesses with these stipulations, so hopefully we can move things along.

The first stipulation, there's a stipulation by and between counsel: the chain of custody was maintained as to the physical evidence that is the subject of this motion, all of which is currently in the possession of the Town -- Thomas County Clerk of Courts. Specifically, the following individuals -- all of whom are members of law enforcement or court staff or officers at various times took custody of the physical evidence. Ken Collins from the Georgia Bureau

of Investigation, Fran Everett, the evidence custodian of Thomas County, Special Agent Douglas A. Goodwin from the FBI, Special Agent James C. Grady from the FBI.

THE COURT: Excuse me, Mr. Stewart. If you could slow down just a little bit.

FEDERAL DEFENDER STEWART: Sure. Your Honor --

THE COURT: Douglas Goodwin?

FEDERAL DEFENDER STEWART: If the Court please, I have an extra copy should the Court want a copy of the same. I also have one for the court reporter if the court reporter would like that.

THE COURT: All right, sir. That would be helpful.

FEDERAL DEFENDER STEWART: May I approach, Your Honor?

THE COURT: Yes, sir. Thank you, sir.

FEDERAL DEFENDER STEWART: Shall I continue?

THE COURT: Yes, sir.

FEDERAL DEFENDER STEWART: I was, Your Honor, midway down the list at James W. Howard, criminalist, Georgia Bureau of Investigation; David Hutchings, the former clerk of this Court; Sergeant Glenn Hutchinson with the Thomasville Police Department; Lieutenant Melven E. Johnson of the Thomasville Police Department; Defense Attorney Michael Mears; Police Officer Kathy M.

Murphy with the Thomasville Police Department; Dr. John Parker, the medical examiner; Detective Willie Spencer of the Thomasville Police Department; Detective Bobby Stephens of the Thomasville Police Department; Detective Charles Weaver of the Thomasville Police Department; and Randa Wharton, the current Clerk of Courts. If called to testified -- well, strike that.

Chain of custody over the physical evidence was demonstrated at trial in 1997. Since that time the evidence has been maintained by the Thomas County Clerk of Courts. If called to testify, representatives from the Thomas County Clerk of Courts would testify that they have complied with all rules and regulations of their offices and have, thereby, maintained chain of custody of the physical evidence since trial. That concludes the first stipulation.

THE COURT: All right, sir.

FEDERAL DEFENDER STEWART: The second stipulation to the second page of what I've handed to the Court and to the stenographer, there is a stipulation by and between counsel that all evidence offered by either party from the State Court record in this case is authentic and need not be authenticated by calling foundational witnesses. Such evidence includes, but is not limited to, law enforcement investigative reports,

crime scene photos, the physical evidence, photos of the physical evidence, including photos taken by Mr. Cromartie's defense team of the evidence maintained in the Thomas County Clerk of Court's Office, trial and pre-trial transcripts, trial exhibits, State habeas transcripts and State habeas exhibits.

By and through this stipulation, the parties may offer as evidence and base arguments on documents, testimony or other evidence in the State court record. The parties remain free to dispute the truth of the matters asserted in any document or testimony from the State Court record.

Your Honor, with those stipulations entered, may I call my first witness?

THE COURT: Yes, sir.

FEDERAL DEFENDER STEWART: And, Your Honor, before I do, just to facilitate our hearing today, initially, I was going to use technology. I understand the Court's technology has suffered from some lightning locally, so we'll be using paper today. What I've done is I have compiled packets of exhibits that I'll provide to the witness, to counsel and to the Court so we can all be in the same place in looking at exhibits. May I approach?

THE COURT: Yes, sir.

FEDERAL DEFENDER STEWART: To pass one to the court? Shall I give one also to the Clerk of Courts, Your Honor?

THE COURT: If you have an extra one.

FEDERAL DEFENDER STEWART: I do. May I approach the witness stand?

Your Honor, Mr. Cromartie calls for the first witness Dr. Randell Thomas Libby. Your Honor, should I swear the witness?

THE COURT: That would be fine.

(Witness sworn.)

FEDERAL DEFENDER STEWART: Is that adequate, Your Honor?

THE COURT: It is.

THEREUPON,

RANDELL THOMAS LIBBY

was called as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY FEDERAL DEFENDER STEWART:

Q Can you state your name for the record, please.

A Randell T. Libby, R-A-N-D-E-L-L, L-I-B-B-Y.

Q Dr. Libby, what is your profession?

A I am a neuro geneticist by training.

Q And can I direct you to the very first item in the

packet before you, what's been marked for identification as Defense Exhibit Number 1, behind the index.

A Yes.

Q Do you recognize that document?

A Yes, this is a copy of my vitae.

Q Your vita, that is your resume, as it were?

A Yes, that's correct.

(Thereupon, Defendant's Exhibit No. 1 was marked for identification.)

FEDERAL DEFENDER STEWART: Your Honor, I would like to proceed with some questions to qualify Dr. Libby as an expert if I may.

THE COURT: Yes, sir.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, can you describe for the Court your educational background.

A I have a bachelor of science in animal sciences and physiology, a master's in microbial genetics, molecular genetics, and a Ph.D. also in molecular genetics.

Q And can you please describe for the Court what your current work and research involves.

A Our research over the last 20 years or more relates to the development of molecular strategies for defining the events underlying certain upper motor and neuron disorders such as Parkinson's Disease, Huntington's

Disease and some other spinal cerebellar ataxias, all related to an SGR type repeat.

Q And just in layperson's terms, do those disorders relate to DNA in any manner?

A Yeah, they all relate -- all the studies we have done over the last number of years relate to DNA, the analysis of DNA, the manipulation of DNA and strategies for altering the DNA to correct certain genetic defects.

Q You talk about things that "we have done," is the words that you used. Where do you work and with whom?

A That work is done at the University of Washington School of Medicine.

Q And do you maintain your own private business?

A As GeneQuest Diagnostics.

Q And is -- what kind of work do you do at GeneQuest?

A So that focuses on specifically forensic identity issues, and also some issues related to neurological issues for testing.

Q Have you yourself ever done any DNA testing?

A Many times, yes.

Q And where do you do that, or where have you done that?

A Well, in the past that was done at the University of Washington.

Presently, it's done at many laboratories across the United States.

Q Have you ever done any academic work, either publication or lecturing?

A Many times, yes.

Q Can you give the Court a very short synopsis of, say, publications, first?

A At least 40 publications, all in, say, high impact peer-reviewed journals, so those would include journals such as PNAS, Proceedings of the National Academy of Sciences, human molecular genetics, so a variety of journals such as that.

Q And have you also lectured or taught in any capacity?

A Yes, many times.

Q Have you ever testified before a court of law before?

A Yes, I have.

Q And approximately how many times if you could say?

A About 200 -- over 200 times.

Q What jurisdictions?

A Many jurisdictions in the United States, so starting from the west coast, I suppose Washington, Oregon, California, Arizona, Nevada, Michigan, Texas, Louisiana, Florida, North Carolina, Indiana and Illinois. So there is

probably 25 or -- at least states and jurisdictions.

Q I take it you haven't testified in Georgia before; is that right?

A I don't think I have, Counselor.

Q Have you testified in state court or federal court?

A Both.

Q Has there ever been a time where you have been proffered but not accepted as an expert to a Court?

A No.

FEDERAL DEFENDER STEWART: Your Honor, I would ask that the Court qualify Dr. Libby as an expert in forensics and human molecular genetics.

If counsel has questions on qualifications before we do that, I would concede to counsel.

ASSISTANT AG GRAHAM: No questions, Your Honor. No objection.

THE COURT: The Court will recognize Dr. Libby as an expert in the field of forensics and human molecular genetics.

FEDERAL DEFENDER STEWART: Thank you, Your Honor.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, did my office retain you to work as an expert in this case?

A Yes, they did.

Q Did my office provide you any materials for your review?

A Yes, they did.

Q If I could ask you to turn in the exhibit packet to the fourth item which is marked D Exhibit 4.

A Yes, I have Exhibit 4 in front of me.

Q Do you recognize that document?

A Yes, I do.

Q And does -- where do you recognize that document from?

A These are items which have been provided to me in the past to review in relation to this particular case.

Q And approximately how many pages of materials do you think you reviewed for this case.

A I would guess five to six thousand pages, maybe something in that range.

Q As a result of your review of those materials, were you able to form opinions in this case?

A Yes.

Q And the opinions that you did form and that you express today, are those opinions to a reasonable degree of scientific certainty?

A Yes.

Q And those opinions, are they based on -- in your opinion, generally accepted scientific principles?

A Yes.
Q Did you produce a report in this case?
A Yes.
Q Can I direct you to item 2 in the packet before you? It's Defense Exhibit 2.
(Thereupon, Defendant's Exhibit No. 2 was marked for identification.)
A Yes, I have it in front of me.
Q And is that the report that you authored?
A Yes, it is a 32-page document.
Q And, finally, did you prepare anything additional in preparation for your testimony today?
A Yes.
Q I'd like to direct you to the third item in the exhibit packet Defense Exhibit 3.
A Yes, I have it in front of me.
Q And what is it that you prepared in preparation for today?
A It is a 17-page slide deck for a Power Point presentation.
(Thereupon, Defendant's Exhibit No. 3 was marked for identification.)
FEDERAL DEFENDER STEWART: And, Your Honor, if I may, we initially were hoping to use the Power Point for everyone to see visually in the court; however,

I've provided the paper copies, and in light of the issue with the technology, I would just ask that we follow along with the presentation as it is on paper.

THE COURT: Yes, sir.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, I would now like to ask you a series of questions along with the Power Point on paper that you have before you. I'd ask you to turn to the second page of that Power Point.

A Yes.

Q Just briefly, by way of background, can you please provide the Court with some information about sources, traditional sources, of DNA, deoxyribonucleic acid.

A Yes. What I've indicated on this particular slide two as indicated in the lower right-hand corner, is just the traditional sources of where DNA could be obtained and it's just illustrated both schematically in the picture as well as to the left, so those would be from nuclear sources such as blood, white blood cells, semen, saliva, urine, hair, teeth, bone and other tissues. So all of these are relatively good sources of DNA, urine being less of a source where you would get -- obtain high levels of DNA. But what I've indicated in the bottom is that you can obtain DNA in nanogram quantities down to picogram quantities, so that's in the 10 to the minus 9th range, 10 to the minus 12th grams

of DNA.

Q So for those of us who aren't familiar with picograms, when you talk about 10 to the minus 9th or 12th picograms, what does that look like to the naked eye?

A So you would not be able to see it, of course, so mathematically, it's 0.000000001 nanograms -- or grams. And that would be a nanogram. And then three more zeros added to it would be a picogram. So we are talking about very small quantities of DNA.

Q As to these sources of DNA, you said these traditional sources are nuclear, I believe you said?

A What I'd indicated on the slide, these are where you obtain DNA from -- this would be nuclear, that's correct.

Q And what is non-nuclear DNA, if you can explain briefly?

A So that would be DNA that would be obtained in other types of tissue, which there is not a nucleus. For example, the shaft of a hair you could obtain DNA from.

Q I would like to turn to the next slide, so we're still on Defense Exhibit Number 3, now we are on page 3 of it.

A Yes.

Q There are page numbers in the lower right-hand corner. Can you please tell the Court briefly just about

how DNA testing works?

A Yeah. So what I had indicated here, this is a slide taken from the literature, so there is many different versions out in the literature, but basically there is three major steps to performing DNA analysis. There is the biology step, then the technology step, and then the -- excuse me -- the genetic step. So this is all involved -- every step, every DNA test would involve these sort of three basic steps. So within each step there was sub-steps. So the biology step would involve the actual DNA extraction from the cells, and once that DNA is removed from the cell, it is released by various chemical means. The amount of DNA that is obtained is quantitated so that one can get an estimate of how much DNA is present so you know what type of test you are able to perform successfully. Once that is obtained and you know what the quantity of the DNA and the quality of the DNA, then the next step is to amplify a certain region within the gene, so we're not trying to look at the whole genome, we're trying to look at certain regions which differ from one individual to the next, which are called polymorphic regions within the genome. So once we amplify or sort of molecularly copy certain regions of the DNA, we try to separate the fragments of the DNA that differ from one individual to the next, and these are called alleles, and then those alleles are genotyped to determine

what the exact type is, if you are a type A, B or 3, 4 or whatever -- whatever type test we're performing.

Once you have that information, the last step is the genetics step and that's where you determine if there's a match between the given evidence sample and a given reference sample, so you look to see where the matches are. Once a match is determined to be present -- and the statistics is applied, so you apply some weight to the evidence. So whether it is a frequency of one in 1,000; one in a 10,000, that you might find this profile amongst the general population, so those are generally steps we generally perform.

Q And at this juncture -- I'll wait. Take a sip.

You talked about presence and quantity of DNA. At this juncture, the evidence in this case, do you know anything as to whether there is and how much DNA, what quantity there is present on any particular item?

A We do not at this point.

FEDERAL DEFENDER STEWART: Your Honor, if the Court, please, Dr. Libby could provide further background information regarding general DNA processes, but if the Court finds that adequate, I could move on.

THE COURT: Yes, sir, you can move on.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, turning to the next page of your

presentation to page 4 --

A Yes.

Q -- can you describe for the Court the current technology of this PCR-based STR technology.

A Sure. So, currently, that is in the year of 2019 now, the way DNA testing is performed, it is not performed at a single site, it is performed at numerous genetically independent sites. So greater than 30 regions are looked at on the chromosomes, some kits, even many more sites. These can all be amplified simultaneously in the same small test tube, if you will, and one can amplify less than 50 picograms of -- that's that 10 to the minus 12th, which is a really very small quantity of DNA, which can be amplified. So it's capable of amplifying mixtures of DNA, as well as DNA which is graded. It's conducted using fluorescent dye system which different colors of dye are associated with different primers, which are then designed to amplify various regions within a chromosome.

It's fast, so we're talking about an amplification process requiring about an hour in the laboratory, that's after we get the preliminary steps done. And then it provides a very high-powered discrimination, so these are providing numbers in with this septillion, that is 10 to the 24th, so enormously high statistical frequencies. So it's a -- it's now a very efficient procedure for amplifying very

small quantities of DNA.

Q And the procedure you just described, in your expert opinion in the scientific community, is that a procedure that has been accepted with verifiable certainty?

A Absolutely.

Q Have you ever used that procedure?

A Yes.

Q And have you ever testified about that procedure in other courts of law?

A Yes.

Q If I may, let's turn to the next page of your presentation, it's page 5. You describe the technology as it exists in 2019. Could you please describe for the Court how technology in DNA testing has evolved. And since 1997 is what I would like you to opine on. I choose 1997 because that was the year of the trial in this case.

A Yes. So what I have indicated on slide 5 indicated in the lower right-hand corner is sort of the major steps that one goes through in DNA typing. A collection of DNA evidence, the extraction that we talked about before, the quantitation and then PCR amplification, separation and detection, the data analysis. And then within each one of those sections there has been enormous improvements in the process of DNA typing which has been developed. So, for example, the extraction step: It used

to be done by purely an inorganic differential extraction using phenol, various chemicals. That's over the years been replaced by much more efficient systems, such as DNA IQ I indicated in 2004, parentheses, it just happens to be the company that produces that kit, charts which have been developed by ABI and then PrepFiler 2008 and then QIAamp DNA Investigator 2012.

So each one of these steps has been a progression in the improvements in the efficiency of extracting DNA from samples which are expected to contain low quantities of DNA. So it's made the extraction much more efficient, particularly at getting at low quantity DNA such as touch DNA.

The quantitation that is determining how much DNA has similarly evolved over the years from the early days when we used to do hybridization slot bots with radioactive isotopes has been improved to presently we're doing essentially quantifier type testing. So the present systems out now are indicated at the top, Plexor HY and then Power Point 2018. So these allow for a realtime analysis for determining the quantities, low level quantities, of DNA and what the level of degradation of that sample might be.

And then the particular steps regarding the amplification, that is the next step on the quantitation has probably been developed the most over the last 20 years --

well, since 1996, '97, so it's gone from a system in which there has only been a handful, maybe two or three of STR sites which have been amplified at the same time, originally just one site to systems such as GlobalFiler and Fusion 6c, which is the fourth one up from the bottom. That system was developed in the range of 2013 to 2015, and it targets either 21 independent genetic loci or 24 independent genetic loci.

And then there has been further development since that time; for example, the Forensic DNA Signature kit is actually now getting at sequencing the genomes, so it's been a systematic progression of the development of the testing procedure in terms of the identification of various allelic forms within a sample.

And then, of course, there's been improvements on the technology end or side of the process for the -- actually detecting the alleles which are present. So we've gone from a very -- I don't want to call it primitive, but one of the earlier forms of capillary electrophoresis, it's called the EDI 310 system. It's one in which a sample is injected through a small capillary, passes through a laser where the laser excises the fluorochromes and then that's detected. These then developed into the ADI 3500 XL system which is a much more intense laser beam and provides more, greater sensitivity and detection. And then lastly is the

steps of evaluating the genetics of a match and the weight of the evidence, and we have moved now from random match probabilities of testing to what is called probabilistic genotyping. So the random match probability testing is in the lower portion where I have just indicated the dinosaur, not that it's a dinosaur yet, but it is surely becoming that.

And so we're developing into other procedures which allows one to evaluate a mixture and put a weight on the particular different genotypes which are detected within the mixture.

Q Okay. As a non-scientist, if I may ask a couple of follow-up questions?

A Sure, absolutely.

Q You said that you could, I guess, distinguish amongst different genotypes in a mixture.

A Yes.

Q Does that mean that if you have a sample where multiple people have contributed to it or touched it, that you're better able to distinguish sort of who is who than it used to be?

A That is correct. And to apply a weight to it, as well. So what percentage of a mixture is genotype A versus what percentage is genotype B or C or D.

Q As to separation and detection, you talked about

the more sensitive, I'll say, labor that exists currently --

A Yes.

Q -- to detect very small quantity -- is it very small quantities of DNA?

A Yes, that's correct.

Q And how over time has that changed?

A Well --

Q In ability to detect.

A Oh, I see. In terms of the sensitivity?

Q Yeah.

A It's probably increased at least 10 to the 3rd fold, a thousand fold.

Q 10 to the 3rd fold over what period of time, if you could put years on it?

A Since about '94, '95.

Q In say the last 10 years has some of that 10 to the 3rd sensitivity change occurred in the last, say, decade?

A Oh, yes, absolutely.

Q Could you put a number on that, approximately?

A Of what percent has changed?

Q Yes, if you could. If not --

A Well, I think that the -- in the past you would not have been able to detect the low level of DNA that we're detecting today, so the low levels of DNA we are detecting

today would not have been detectable in '94, '95 and '96. So that data would have been discarded.

Q And what of, say, 2005, 2008 compared to today, detectability of --

A Yeah, it's probably at least another factor of 10 more sensitive.

Q Okay. And if I could turn you to the next page, page 6 of your presentation. I think we've just been talking about low level. Is that touch or contact DNA that you have depicted on this slide?

A It is. It has been referred to. So it's been referred to as touch DNA or contact DNA.

Q And what -- in the real world, what is touch or contact DNA?

A So it's simply -- as I have kind of indicated with picture format, it is simply when one touches an item or an object indicated as a gun on the left panel in the middle, it's another item, I think it's a metal bar or touching a doorknob, it's the transfer of DNA cells from your hand, your skin to the -- an object. And it's then the ability to detect that type of genotype, that DNA which is on that item.

Q And so as your hand rests on the stand before you right now, might you be leaving touch DNA?

A Yes, that is correct. And, of course, it changes

a little bit depending on the substrate of the type of object you are touching, but basically one can detect a profile from as few as seven to eight cells, so that's a really small quantity of DNA.

Q And the seven to eight cells, is that visible to the human eye?

A No, not at all. You would not be able to see this.

Q Dr. Libby, I would like to change gears now and ask you some questions about the case. If you could turn to page 7 of your presentation.

A Yes.

Q First, I'd like to ask you some questions about specific exhibits that were trial exhibits in the case, and this is physical evidence from this case. Do you recognize the photographs in page 7 of your presentation?

A Yes, I do.

Q And can you describe what you see depicted there in the photograph?

A So on slide 7 is item 156, it is a cartridge casing, and this was obtained from the Madison Street Delicatessen.

Q And just to be clear, you can't see the cartridge casing; is that correct?

A That is correct. You cannot see it. It's inside

the cartridge indi -- the round cartridge labeled at State's Exhibit 156.

FEDERAL DEFENDER STEWART: And with the parties' stipulation, Your Honor, relating to the exhibits and the foundation of those exhibits, I would submit to the Court that that Exhibit 156 from trial was described at trial as a cartridge casing recovered from the Madison Street Deli shooting and was recovered by Detective Chuck Weaver at that time.

BY FEDERAL DEFENDER STEWART:

Q What, if any, significance from a forensic perspective would this exhibit have in your view?

A Well, in my opinion, spent cartridges are potentially a good source of obtaining DNA from handling a cartridge prior to loading it into a magazine, so it would be -- it would be something we would want to sort of look at and see if we can obtain a profile from them. It would give an indication of who has handled that object beforehand.

Q Is it then possible to get DNA off of fired cartridge casings?

A Oh, absolutely, yes.

Q Have you ever heard of cases where that has been done?

A Yes, yes.

Q Have you ever examined those cases yourself or

simply read about it in the literature?

A No, I've had cases of that nature, yes. And it's -- there is a fair amount of body of literature on this.

Q And I don't need you to turn to it now, but at the conclusion of the presentation, the last three slides, I believe, is there some of the literature on which you relied?

A That is correct.

Q And that is both also in the report that you produced?

A That is correct, yes.

Q So would you recommend to the Court any type of testing if the Court were to order testing on this particular exhibit?

A It would be my recommendation that one of the more advanced forms, present-day forms, of STR testing be done in this item 156, yes.

Q Could I turn you to the next page of your presentation, page number 8 to this?

A Yes.

FEDERAL DEFENDER STEWART: And, Your Honor, before I ask the questions relating to these three items, I represent to the Court as part of the stipulation between counsel that at trial, items State Exhibit 159

and 160 were cartridge-fired cartridge casings that were recovered at the Junior Food Store shooting. They were recovered by Detective Chuck Weaver and Ken Collins from the Georgia Bureau of Investigation jointly. And then the cigarette packaging was also recovered from the Junior Food Store crime scene. It was State's Exhibit 9 at trial.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, starting first with -- there is some sort of a -- strike that question.

FEDERAL DEFENDER STEWART: Before I ask, there is one more item depicted here, which at trial was State's Exhibit -- Court's indulgence briefly. It was State's Exhibit 138 at trial. I have it marked in my exhibit packet as Defense Exhibit 28 for purposes of this motion, that that item is a diagram that was drawn by Ken Collins of the Georgia Bureau of Investigation, it was admitted at trial, and that item depicts a diagram of the crime scene that shows where the deceased was and also shows two cartridge casings relative to where the deceased's body was.

THE COURT: Okay.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, first, I'd like to ask you about what's identified as item 159. It's the first -- it's actually

labeled cartridge casing number 2.

A Yes.

Q And you don't need to go into as much detail because we did just talk about a cartridge casing, but what, if any, testing would you recommend as to this cartridge casing if a Court were to order testing?

A I would recommend the same, for the same reasons. So the same type of STR-based testing in order to determine what profiles could be detected on those cartridges.

Q Let me ask you: You reviewed the trial in this case; right?

A Yes.

Q The trial transcripts?

A Yes.

Q Do you recall that the cartridge casing was examined ballistically; is that right?

A Yes.

Q If it had been handled, say, in a ballistics lab, would there be a chance there would be a mixture of DNA on the cartridge casing?

A It is possible.

Q Is that something -- would testing still be advisable?

A Yes.

Q And how? How would you deal with a mixture if

there were a mixture?

A Well, it would be the same means of using a probabilistic approach for resolving out the individual components of a mixture. My guess is -- I'm not sure on this especially, but my guess is that whoever handled it probably wore gloves. So I'm thinking that is probably less of an issue.

Q That's your guess; we don't know that for the record, do we?

A That is correct.

Q So would your opinion as to that item number 160 that's the second cartridge casing, would you have the same opinion as to that?

A Yes, I would.

Q And item -- what is listed as State's Exhibit 9, what is that? Can you tell the Court about that?

A That is a package of cigarettes which were found next to the decedent and Mr. Slysz?

Q Yes?

A I'm thinking there would be someone most likely handled those cigarettes. It could have been just the victim or could have been whoever committed this homicide, so that would be also another item that I would recommend testing on.

Q I would like you to turn to the next slide.

FEDERAL DEFENDER STEWART: Your Honor, at trial these two items were identified as State's Exhibit 30A and 30B. They were admitted as evidence at trial, and they also have larger photographs of every item in Dr. Libby's presentation. There are larger photographs in the exhibit packet.

For purposes of these questions, the green-hooded sweatshirt is Defense 8 through 10 here, and the black cap is Defense 11 and 12. And just again, by way of the stipulations from trial, in the State court record, it's established that the black cap and the green-hooded sweatshirt were recovered at 229 West Monroe Street here in Thomasville, which the testimony indicated was about one block from the Madison Street Deli.

A resident of that address, Mr. David McCrae (phonetic) testified that the morning of April 8th, 1994, which was the morning after the Madison Street Deli shooting, that he went outside and observed these items in his yard, knew of the shooting from the night before and called the police, and they were received by a Detective Chuck Weaver at that time and admitted as State's evidence at trial.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, first as to item 30A, that black

knitted cap, do you have any recommendation as to what could be done with that item if any testing were ordered?

A Yes. So 30A, the black knitted cap could be evaluated for the habitual wearer status or who would have normally worn the hat. So, again, we would be looking for -- so for autosomal DNA, so epithelial cells that might be on the brim, the inside brim of the cap that would have contact with an individual's skin. So we would be looking for a profile from that, as well as there could be hairs in there, which would be subject to analysis, either by autosomal or mitochondrial DNA, depending on whether a telogen or root was associated with any of the hairs which might be found there.

So that is one level; the other level is if there was any evidence of the victim's DNA on there as a result of any blow-back from the firearm.

Q And very well. As to the green-hooded sweatshirt, which is the next item, item 30B?

A The green-hooded sweatshirt with similar would be -- I would recommend testing for habitual wearer status. I would also recommend that we examine those regions on the sweatshirt; for example, the pockets in the front. I'm assuming this has the pockets in the front where one might have put their hands or might have put the weapon in, but there might be a transfer of the -- of any evidence from the

crime scene; that is, any blood from Mr. Slysz.

Q I'm sorry. This was the Madison Street Deli shooting, this particular --

A Oh, I'm sorry. Yeah, from Mr. Wilson.

So any evidence of any DNA from that individual, as well, that might be detected on the sweatshirt. So it could be the pocket areas; it could be the rims around the bottom of the sweatshirt, as well.

Q And, in general, when you talk about habitual wearer, are you talking about friction skin cells or sweat or what could produce it?

A Yeah. I'm talking about, as counselor indicated, friction transfer from maybe around the neck area onto the sweatshirt itself or around the wrist where the garment is.

Q Okay. And just as to those two items, I'm sorry, what type of testing did you say you would recommend?

A So it would be both autosomal, so it would be both probably GlobalFiler or Fusion or Fusion 6C.

Q Is that YSTR testing?

A Those are STR forms of testing.

Q STR.

A And then probably Y -- the Y testing would be something like Y23. So it would be another form, just from looking at -- well, that is from Mayo but mitochondrial is another form of testing we would be looking at.

Q If I could have you turn to the next slide in your presentation, page 10.

FEDERAL DEFENDER STEWART: Your Honor, State's Exhibit 162 at the trial, a .25 caliber Raven Arms semi-automatic pistol that was recovered between the Jail Justice Center and the Cherokee Homes near the railroad tracks. And the ballistics evidence that was admitted at trial indicated that both decedents were shot by this firearm, was what the testimony was, and we're not disputing that as we are here today.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, what, if any, testing would you suggest as to the firearm in this case?

A So it would be the same type of transfer DNA that we're looking at where skin cells might have been transferred to the weapon itself, either -- there are various regions on the weapon, so the slide on the weapon, the trigger, the trigger guard, the handle, anywhere where an individual who had been handling that weapon might have transferred their cells to the hand gun. And that could also include the magazine, as well, or when it's loading the magazine bullets.

Q And why the magazine in particular?

A Because that is one in which there would be a lot of friction as one's holding on to that item as you are

inserting, you know, various bullets into the -- in the magazine, so I would expect that there would be a reasonably good expectation to find a profile there.

Q If the firearm was handled during the trial as an exhibit, would that change your opinion?

A It wouldn't change my opinion, just you would have to take into consideration at the end the testing: Do we have other profiles there? And we would resolve those profiles based on the mixture in which we develop.

Q And would this also be you recommend autosomal testing on these?

A It would, yes. On this particular, it would.

Q Turning onto page 11, Dr. Libby, the next three slides all depict various items of clothing.

FEDERAL DEFENDER STEWART: And before I ask you questions about them, Your Honor, just by way of background, the State Court record indicates that items 14A and 14C are clothing that was collected from Corey Clark. Mr. Clark was a co-defendant in this case who is alleged to have been and convicted of being present at the Junior Food Store shooting.

Item 16, these are -- the numbers I'm referring to are the State's exhibit numbers at trial. Item 16 is shoes from Thaddeus Lucas. He was a co-defendant at the time of trial who was convicted of being a driver

at the Junior Food Store shooting. Item 27A, B and C on the next slide are clothing and shoes that were taken from Gary Young. Gary Young testified that this firearm was his, that he had the gun before the shootings, that he had the gun after the shootings and that he fired the gun on April 12th. That was clothing from Gary Young.

And then the third page of clothing is, Your Honor, is evidence that was put on the property receipt that was collected from my client Mr. Cromartie, a pair of shoes and a green flannel shirt, those are items 18B and 20.

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, what I would like to do is first just ask you questions, generally, about the collection of evidence from these items and then sort of ask why. So first as to the shoes, there are shoes from each individual that I just described?

A Yes.

Q Is it possible to lift DNA from shoes, and how would that be done?

A Answer to the first question is yes. Answer to the second question is usually by swabbing the area on the shoes, which could be at the bottom of the shoes, the top of the shoes, the shoe laces as an example. So we lift DNA

from those areas, and then start the extraction at that point.

Q Do you do DNA from the interior, from the exterior, both?

A You can do it from there, as well, yes.

Q And why would you try to get DNA from the shoe in this case, from each pair of shoes?

A Well, in this instance -- and of course, you want to look to see if there is any evidence connecting the shoe with the crime scene, so we're looking from DNA from any one of the victims in this case. We're also looking to confirm the identity of the individual who wore the shoes, so that could be obtained by swabbing the area on the shoe laces as one ties their shoes. That would be a rich source of DNA as cells slough off on the shoe strings. So it's both to determine who was wearing the shoes and what other evidence is on the shoes which connected those shoes to the two crime scenes or the one crime scene.

Q And, in your opinion, and based on the record in this case, why would there be DNA of a victim on the shoes or why could you expect that?

A I could imagine it as a result of blow-back from -- from discharging the weapon.

Q And would that -- I guess that is at close range; is that right?

A Yes. I mean, it could be, yeah, close range but it could be -- may not necessarily be visible to your eye. You may not actually see the blood spatter, or you might very well obtain a profile.

Q And how is that -- if say on a white shoe there was blood but you don't see it today, why would that happen?

A Well, I mean, over time that heme in that blood might have been oxidized. It may not be very visible these days.

Q So the heme, is that HEME?

A H-E-M-E.

Q Is that what produces the color of the blood --

A That's correct.

Q -- as we know it?

A That is correct. So these shoes have been around for what, over 20 years? So depending on, you know, if they were stored in sunlight or not, that would affect that, as well.

Q If you did find biological material on one of the victims on the shoe, on any one of these shoes, could it tell you what someone did, what the shoe wearer actually did?

A Maybe you could explain more. I'm not sure.

Q Sure. I can rephrase it. Would it show you that someone had been in proximity?

A Oh, I see what you are asking. Yes, absolutely.

Q So proximity, yes. And would it tell you more than just proximity?

A It would tell you they were somehow close enough to the incident that there would be some transfer of those cells, either blood or whatnot to those shoes.

Q Okay. So the second item on this I'd like to ask you about is item 14C, this is a pair of pants that were taken from Corey Clark.

A Yes.

Q What, if any, testing would you recommend be done on that item?

A Well, on the green pair of jeans, certainly we would check the waistband, as well, for habitual wearer status, but also around the pocket regions where one might put their hands into the pockets. And if the individual was in close proximity to the victim, there might be transfer of DNA from that individual's cells to his pockets, the inside pockets or maybe near the rim of the pockets, so we would certainly look closely in those areas.

Q And based on your experience, have you ever examined clothing for DNA or pants in particular?

A Many times, yeah.

Q Have you found there to be DNA in pocket regions or waistbands?

A Yes.

Q As to these green jeans, based on the record, you don't know, do you, whether Mr. Clark was wearing those at the time of the crimes?

A I do not know that, that's correct.

Q Turning to the next page, there is clothing -- so this is items 27A and 27B, clothing that was described that's taken from Gary Young and it's described as a white T-shirt, a green polo -- and green polo shorts?

A Yes.

Q What kind of testing, if any, would you recommend on those items if the Court were to grant testing?

A Again, I would recommend an autosomal type test that we've talked about that being either GlobalFiler or Fusion, Fusion 6C. They are very sensitive tests particularly for low-level contact DNA.

Q And as to the shoes, I take it that would be the same as you already described; is that correct?

A That's correct, yes.

Q And, finally, there are the items on page 13 of your presentation that were taken from Mr. Cromartie, item 18B and item 20. Do you recommend the same type of testing as you've described for Mr. Cromartie?

A I would, yes.

FEDERAL DEFENDER STEWART: With the Court's

indulgence if I may?

THE COURT: Yes.

FEDERAL DEFENDER STEWART: Your Honor, the only thing I would add is as to the photographs in Dr. Libby's presentation, they are rather small here. Larger versions of all of those items are present in the exhibits that I've presented in the package before. I'm not going to go through those items with Dr. Libby, but I will be asking that they be made of record at the end of the hearing when we move the evidence in.

THE COURT: All right, sir.

FEDERAL DEFENDER STEWART: And with that, I pass the witness.

THE COURT: Ms. Graham.

CROSS-EXAMINATION

BY ASSISTANT AG GRAHAM:

Q Good morning, Dr. Libby.

A Good morning.

Q I'm Sabrina Graham. Nice to meet you.

I just have a few questions here. I want to clear up some things. All right. Let's go to page -- lets see. Page 56 of your Power Point presentation regarding when DNA testing of certain types of DNA extraction, testing, all that became available.

A Yes.

Q So there was DNA testing in 1997; is that correct?

A That is correct.

Q Let's look at just -- let's take a couple of items here. Let's take the clothing and the knit hat and the sweatshirt that was found at Mr. McCrae's house a block from the Madison Street Delicatessen.

A Yes.

Q Could they have done DNA testing on that at that time?

A Well, they could have done DNA testing, but the likelihood of detecting any sort of trace or testing it would not be very high.

Q When did touch DNA become available?

A Well, the concept of touch DNA has been talked about for a number of years. Probably goes back to '90 -- well, actually before that. Let's see. '89, I guess. So the concept has been around. The development, in terms of the really ability to detect small quantity is more recent.

Q Can you give me a year when touch DNA testing became available?

A Say that first part again.

Q Can you give me a year when touch DNA became available?

A I would say it became more of an accepted procedure, if you will, around middle of 2006, '7, something

around there.

Q So could they have tested that clothing in 2006 and 2007 for touch DNA?

A It could have. It would still be -- that's when the beginning of the type of type testing began, and there is certainly some body of literature there, but what I'm speaking of is the kits that were supporting this type of testing have become available more recently.

Q And can you give us a year, please, when you say more recently.

A I want to say around 2010 and '11.

Q So 2010 or '11 they could have had that tested for touch DNA at that time?

A Well, the kits were more developed at that point to allow that type of testing, and the instrumentation.

Q This is just a little education here for me. When was it possible to separate the DNA samples? What year could you start separating the DNA samples?

A Well, I have to ask the context you are speaking of because, of course, we have been separating DNA for --

Q Sure. That's a very accurate question.

A The concept of capillary electrophoresis, so if you --

Q What I'm referring to is, let's say if you took the knit cap and you got three different possible DNA

samples or a whole bunch of information there, when was it possible to take that and separate it out into three different DNA identifiers?

A Oh, I understand what you're saying. The different contributors?

Q Correct.

A So I would say in a more reliable method, if you will, it would be we're talking about probabilistic genotyping, that's really been only the last couple of years, so it's been very recently.

Q Could you have done it before that time?

A No. The development of that -- those algorithms, if you will, was not in place to do that. So no crime lab could have had that available at that time.

Q So prior to 2017, you could not have taken DNA samples or contributors from -- on a piece of clothing where there were three or more than one person and separate it and said there is three different DNA samples there?

A You would be able to see different alleles indicative of different contributors or potential contributors, but the next step in terms of relying -- putting weight to those different contributors did not come about for the last couple of years.

Q Okay. So what do you mean by weight? Do you mean how much they contributed to the item or that's how you

identify them?

A Well, identification. So let's say you've got four different alleles, okay? One, two, three and four. And it was a mixture. So the available technology now would allow, for example, with 95 percent confidence that that mixture contained a type 2-3 versus a type 1-3, so it would allow for one to have greater confidence in the interpretation of the mixture. And it's based on -- it's based on mathematical algorithms, which I won't bore you with, that have been around for a little while.

Q So you're saying -- okay. So in 2017 you could have taken DNA from a piece of clothing at that time and said this has three different contributors and identify -- gotten a DNA allele or whatever you want to call it for those three people?

A And apply a weight to it.

Q Okay.

A Yeah.

THE COURT: Ms. Graham, could I ask a question?

ASSISTANT AG GRAHAM: Sure.

THE COURT: Dr. Libby, when you're speaking of a mixture --

THE WITNESS: Yes.

THE COURT: Can you give me a little better idea of exactly what you're speaking about? I mean, if

you're looking at a piece of clothing that more than one individual wore and you can identify more than one contributor of DNA to that item --

THE WITNESS: Yes.

THE COURT: I mean, how is there -- I can understand in a sexual assault, possibly a mixture of DNA, but from the wearing of clothing, how does a mixture occur? Maybe I'm not understanding what you're --

THE WITNESS: Yeah, sure. I'm sorry. So a mixture can occur from several people handling an item, several people wearing an item where you would have their genetic profiles of two or three different individuals on there that could be mixed in with some evidence sample which might have -- I'm just using an example -- a blow-back from the weapon or whatnot onto the items. You might have multiple different sources of DNA on there.

So what one would look at is the peak heights of DNA that you would see in the profile. And the present technology that allows then one to associate by using various mathematical modeling which peaks are associated with one another, most likely associated with it, and it allows them to put a weight, meaning a statistical frequency called a likelihood ratio, how

likely that profile is, would be found in the population.

THE COURT: So that's what you -- when you say weight, you're referring to that?

THE WITNESS: That is correct. And it's based on what's called a Monte Carlo -- Markov chain Monte Carlo approach for a statistical genotyping. So and this type of testing has only become more recent -- made available in the last couple of years so systems such as STRmix or TrueAllele, the system developed by Mark Perlin, have been available and accepted in courts in various jurisdictions throughout the United States.

THE COURT: All right. Ms. Graham.

BY ASSISTANT AG GRAHAM:

Q Can I clarify, just to make sure I understand about the weight again. What you're saying, again, with weight, is that that particular DNA contributor, there is one in a one million chance, or whatever it is, that that is who that person is, that that's that contributor?

A Right. So the way it would work is on the probabilistic modeling approach, it's based on plus or minus, so it's not binary. Either you include it or don't include it. It's based on sort of a continuous spectrum, so in the plus direction, favoring the prosecution's hypothesis that these individuals are involved; or if it's a negative,

it's more favorable to the defense hypothesis.

So if you had an individual who -- they have contributed to that mixture, you'd come up with a likelihood ratio of 10 to the 24th or in this septillion that it would be anybody else, so almost you are saying it is almost impossible it could be anybody else, down to another individual who might be at a likelihood ratio of 10. So there is a huge difference in the likelihood ratios meaning if one is down to 10, it's a good chance that they did not contribute to that. The one in 10 to the 24th septillion, a good chance that they did, almost impossible that they did not. And as you move more negative or below one, then it favors the defense hypothesis -- but without going into the details of how this works, that's basically what you're doing.

Q But anybody who wore the hat could have left behind the DNA?

A Anybody who had contact with the hat potentially could have left a profile, that's correct.

Q So Mr. McCrae, who found the garment, could have left his DNA; any of the law enforcement individuals who picked up the garment could have left their DNA?

A Anyone who might have touched it could have. The individual who was a habitual wearer would have a much stronger profile, so there would still be an enormous

difference. So if -- I forgot the names of the individuals you just cited, but they would have -- maybe if they would have touched it, maybe they'd have a low LR ratio, a low LR, likelihood ratio. I don't know. I'm using numbers 10, 100, that is low.

A person who is a habitual wearer could be in the septillion or beyond, so there would still be an enormous difference in that likelihood ratio.

Q And even after all these years, having been stored, you could still find out who the habitual wearer of the item is?

A Oh, absolutely. Absolutely.

Q Have you done that before?

A Yes, it has been done on many cases, yes.

Q Okay. You gave some testimony regarding the cartridge casing and the weapon that was used as -- in this case.

A Yes.

Q So you are aware that the weapon did not belong to the defendant?

A I'm not aware who -- well, I think I do know that. I think it belonged to or was borrowed from Gary Young.

Q Correct. And you understand that the weapon was given back to Mr. Young; correct?

A I think that is my understanding, that's correct.

Q Then you understand that the weapon was recovered at a railroad track where he had thrown it?

A That's correct. That is my understanding.

Q And you are aware that Mr. Clark is the one who led the police to that weapon at the railroad tracks?

A I'm not particularly aware of that.

Q So that weapon was touched by at least two people that we know of, or at least one other person that we know of, Mr. Young; is that correct?

A Could have been, yes.

Q And if law enforcement touched it, then they would have left -- they could have left behind DNA on it, as well?

A It is possible.

Q And because the weapon belonged to Mr. Young, he could have loaded the cartridge casings into the weapon; is that right?

A I have no knowledge of -- on that end, that's correct, Counselor. I think the important -- I mean, the gun absolutely is important, and I think that should be looked at, in particular the magazine where one is actually holding onto the cartridge and the spent cartridges, I think those all would be important and fruitful to look at.

Q It -- okay. Just to clarify, when you say important, do you mean important because it's a possible source of DNA?

A That is correct.

Q You're not saying -- you're not giving some sort of weight to the importance of the actual evidence in the case, are you?

A Oh, I see what you're asking. No, no, I'm not.

Q You're just saying that --

A I'm just saying from a biological standpoint, right.

Q Okay. Going to the clothing that was taken from the co-defendants, Mr. Clark and Mr. Lucas and clothing that was also taken from Mr. Young, you stated that you could find out the habitual wearer of that clothing?

A I would expect so, yes.

Q Okay. Is that how you normally get a positive DNA sample from someone?

A That would not be a -- you would not use that unless everything else failed and you had no other recourse, to use as a reference sample, if that's what you're asking.

Q Yes.

A Right. And that is in large part due to the quantity of DNA, you would obtain lower quantities. It's just like in the early days of DNA testing, for example, RFLP, the only thing people used was blood sources. Well, as technology developed further, then they began using oral swabs and now they can use less invasive procedures for

determining the genotype or a reference type of an individual. So, yeah, I mean, we had blood from some of these individuals. I'm not sure what's available in that regard, we might use that, but habitual wearer status oftentimes will produce a complete profile.

Q Okay. So, for example, if Mr. Clark had picked up somebody else's shoes and worn them the day that he was arrested, it would show that the habitual wearer wouldn't necessarily be Mr. Clark, it could be someone else, it could be the original owner of the shoe?

A No. I would think you would be able to sort much of that out through the method I talked about.

Q I'm sorry. So if someone else had worn the shoes 20 times and then he took them that day and he wore them one time, are you saying that he would then become the habitual wearer of the shoe?

A I'm saying the person who wore them the most over time would have a -- probably a stronger profile.

Q Okay. So it may or may not be Mr. Clark, depending on whose shoes they belong to?

A Well, if Mr. Clark bought a pair of new shoes and they're his shoes and he gave them to someone else to wear, they are still his shoes. The other person has been wearing them, that profile would show up. So whoever has been wearing those shoes, that item, or worn that garment for a

long period of time or a longer period of time would be expected to have a stronger genetic profile. And that would be -- that information would be revealed when performing this type of analysis.

Q But you wouldn't typically take a habitual wearer DNA identifier and say that that is necessarily the person who you obtained the clothing from?

A Well, it wouldn't be the best, I agree with you. Of course, you'd want a reference sample, so. But it is not always available. So Mr. Slysz' case, I'm not sure a reference sample from him in particular is available, but certainly his blood-stained shirt which was obtained would be almost as good.

Q But you have his blood on his shirt?

A Sure.

Q Correct?

A That's correct.

Q So you know -- we know that that was his shirt he was wearing --

A That is correct.

Q You have the picture; that's his blood?

A That's correct, Counselor.

Q Right? Okay.

Okay. Let's go to the blood, you said there could possibly be blood on the tennis shoes that were collected.

And let me see. I will take you to -- it's page 11 of your Power Point slide and we have here Corey Clark's tennis shoe and Thaddeus Lucas' tennis shoe, and as counsel pointed out, they are white shoes and you said, well --

A I'm sorry. I missed a couple -- the last sentence, if you could just --

Q I'm sorry. You had stated that, you know, these are white shoes and I think counsel, everyone has acknowledged these are white tennis shoes; therefore, you were explaining that you still may not be able to see the blood after all of these years; is that correct?

A It may not be that visible.

Q So how would you identify where on the shoe there was any of the victim's blood if you were going to do the testing?

A Well, you would end up swabbing different areas on the shoe. So you may not -- as I mentioned, you may not be able to see it visually, so you would end up swabbing a wet swab on various regions of the shoe, the outside of the shoe, most likely.

Q So just random swabbing?

A Say it again.

Q Just random swabbing of the shoe?

A You would have them do that, that's correct. That is correct.

Q And you are aware that Mr. Clark went behind the counter where Mr. Slysz was found?

A I am aware of it, yes.

Q And that was also where the cigarette pack was found?

A That is correct, yes.

ASSISTANT AG GRAHAM: Could I have a moment, Your Honor?

THE COURT: Yes, ma'am.

ASSISTANT AG GRAHAM: No further questions of Dr. Libby.

FEDERAL DEFENDER STEWART: I just have a brief redirect.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, I just have four, really just four areas of questioning I'd like to follow up.

A Sure.

Q First, counsel asked you a little bit about mixture interpretation.

A Yes.

Q And you talked about what the probabilistic algorithms that have existed since 2017?

A Yes.

Q Was there some manner in which mixtures were interpreted before 2017, at least in a rudimentary fashion?

A There were. There were.

Q And what is your opinion about those processes versus what is available now?

A Well, basically, yes, there were some procedures, lab use in the past, but in large part it was guess work.

Q What do you mean by that?

A Well, I mean, you really didn't have any -- every lab would do it differently. You didn't really have a sense of which alleles you could include or should include. And, in fact, many times in the past, yes, you would see a mixture of low level DNA, and those were simply not included in the analysis, so they weren't included in the interpretation, they were regarded as inconclusive. So as counselor asked was the ability to detect mixtures available in the past, in part yes, but it's the analysis and the interpretation of the mixture now which is important. So a lot of that data -- excuse me. A lot of that data in the past would have been discarded.

Q And you said different labs did it differently, used different approaches and protocols. Would you say that before the probabilistic algorithms that it was generally accepted when different labs were doing different things, or it was reliable in your expert opinion?

A If I can ask you to rephrase that.

Q Sure.

A If you don't mind.

Q The -- you described that before the current algorithms, that different labs would interpret mixed samples in different ways. Would you opine that at that time that it was generally accepted in the scientific community to use a particular method of interpretation or that it wasn't yet really well-established?

A I don't think it was well-established. I think different labs use different -- so the interpretation one might obtain from one lab on a particular item of evidence may be different when analyzed at a different lab, so ...

Q Second question, in the early days of touch DNA, and I guess also now, is it frequent that small samples of DNA are consumed in the testing; that is, they are used up?

A Very common, yes.

Q So had touch DNA been done on this evidence, say, 10 years ago and been unsuccessful, do you think any sample would be left today, as a general matter?

A No, I do not. It generally would have been consumed.

Q Regarding reference samples from individuals, counsel asked you about habitual wearer as a manner of getting a reference sample. Have you seen other manners of

getting reference samples from suspects?

A Sure. I mean, of course, blood samples, oral samples and other forms would be items which have been discarded and which have been known to be used by an individual. So, for example, cigarette butts, cans of -- drinking, you know, cans somebody has drank out of. So those would be common sources which would be used in the past.

Q And then I guess Courts, sometimes in the proper circumstances, ordered that a reference sample be obtained from a particular individual. Have you had that experience or is that --

A Yes, yes, absolutely.

Q Okay. And then, finally, counsel asked you a little bit about people sharing shoes.

Do you recall from the record how these shoes were seized when these men were arrested? That's in that -- the materials that you reviewed; right?

A I did review -- you might have to refresh my memory on that.

Q Do you recall that the last person to wear each of these shoes was the person to whom they are identified?

A That was my understanding.

FEDERAL DEFENDER STEWART: Your Honor, I don't have any further questions.

THE COURT: Ms. Graham.

ASSISTANT AG GRAHAM: No further questions, Your Honor.

THE COURT: Mr. Stewart, as part of your motion, you also requested testing of a Budweiser beer carton and beer cans. I have not heard any reference to that. Are you abandoning those particular items in your motion?

FEDERAL DEFENDER STEWART: I think so. Yes, Your Honor, we are abandoning our request as to those items. Yes.

EXAMINATION

THE COURT: All right, sir.

Dr. Libby, I gather most of the time when you go through the process of trying to obtain DNA and you get to the point where you can weigh it, you know, within the general population --

THE WITNESS: Uh-huh.

THE COURT: The next step, I gather, most of the time -- or certainly a lot of the time -- is trying to match that DNA sample with an individual?

THE WITNESS: That is correct. That would actually take place before you would sort of compute any frequencies, so.

THE COURT: Okay. So you are using the test

results from your sample and in comparison with a sample taken from an identified person?

THE WITNESS: That is correct, yes.

THE COURT: That reach that weight?

THE WITNESS: Right, that's correct. So that just obtaining the profile from the evidence sample in and of itself, absent any other DNA to compare it to, is meaningless.

THE COURT: Okay.

THE WITNESS: So we would have to have reference from other individuals who are potential suspects.

THE COURT: Okay. And that's my question. Can you tell me how we would get a sample from Mr. Slysz, the deceased, from the Junior Food Store?

THE WITNESS: Yeah, right.

THE COURT: In the same -- the blood from the shirt?

THE WITNESS: Yes, the shirt. And that's a good question, but the answer is the shirt, which was obtained from him at the time of the incident, was, in my view of the evidence and reading of the data which was sent to me, is that the shirt was stained in his blood, so that's -- clearly his DNA type could be obtained from him, so there should be no problem whatsoever in that.

THE COURT: Is that what you've referred to as a reference sample?

THE WITNESS: That is correct, yeah. Often people -- I'm sorry.

THE COURT: Go ahead.

THE WITNESS: Oftentimes, people in the literature would refer to a reference source as if I took your blood directly or an oral swab from you directly as a reference, but many times these days when you have a blood sample soaked in an individual such as this Mr. Slysz, that is actually a good source of his reference.

THE COURT: Dan Wilson, where are you going to get a reference sample? He was the victim of the Madison Street Deli shooting.

THE WITNESS: Yeah. Mr. Wilson, I am assuming he is still alive. I don't know for sure. But one would have to obtain some type of personal item from him, a reference source from him, either oral or blood sample from him to have his profile.

THE COURT: All right, sir. And if you didn't obtain it directly from him such as blood, saliva, something of that nature, I mean someone's hands, a hair brush, says it's his hair, you have to assume that that's accurate?

THE WITNESS: You would be making a leap.

THE COURT: Would be making a leap?

THE WITNESS: Yeah, you would be making an assumption. But it's been done in the past. I mean, people have -- a body is not found and the only thing they have is a hair brush, and that has been used in the past for a reference.

THE COURT: Okay. So Mr. Cromartie is available.

THE WITNESS: I'm sorry. Say that again.

THE COURT: Mr. Cromartie is available to provide a reference.

THE WITNESS: Yeah, I am guessing he is available, yes.

THE COURT: And may already be on file with the GBI DNA bank.

FEDERAL DEFENDER STEWART: Indeed, Your Honor. And furthermore, if the Court were to order testing, the Court is required to order that a reference sample be taken as part of the Court's order.

THE COURT: Gary Young, where are we going to get a reference sample?

THE WITNESS: Gary Young is deceased, and I would have to give more thought to that actually because that's the only one individual who I don't necessarily -- other than his shoes -- so the shoe

laces where he is tying his shoes certainly could be used as a source. It is not a typical reference source of course, but --

THE COURT: But you're assuming that any material you get from the shoes, that you can identify by DNA analysis is material from him?

THE WITNESS: That is correct.

THE COURT: You're making that assumption?

THE WITNESS: That is correct. And if we have other clothes of his that were also tested for habitual wearer status, that would be used to confirm the profiles.

THE COURT: Is that -- in the industry in general, is that -- I say industry. The scientific community?

THE WITNESS: Yes.

THE COURT: In identifying DNA in a source of the DNA, is that generally accepted to try to match a DNA profile to an individual from what you assume? I mean you're assuming this individual is the habitual wearer.

THE WITNESS: Yes.

THE COURT: Isn't that rather dangerous?

THE WITNESS: Yeah. It's not generally -- I would agree it's not done that often, I would agree. So, yeah, I mean, the best would have been, of course, the blood sample, an oral sample. If the individual was

incarcerated in the past, I would expect they would have that profile on record somewhere. So that could also be used to confirm a more complete profile that one might have -- not a complete. A profile that has more low site or more genetic sites that you're looking at which would have been obtained from a shoe lace or something like that. So I would expect the -- if the individual -- and I'm not sure he has been or not, but if the individual has been in the Department of Corrections in the past 10 or 15 years, then most likely his profile is on file.

THE COURT: Okay. Same question as to Corey Clark?

THE WITNESS: Yes, same answer.

THE COURT: Where are we going to get reference material?

THE WITNESS: So Corey Clark is not deceased, is my understanding. So I'm not sure if the Court can order a sample from that individual. That would be the best source. And, again, we have the same issues in matching a profile obtained from any evidence sample, his shoes or whatnot, with his potential authentic reference profile.

THE COURT: All right. And, of course, same as to Thaddeus Lucas?

THE WITNESS: That is correct, yes, sir.

THE COURT: Okay. You indicated that you had reviewed, I think, between five and six thousand pages --

THE WITNESS: I think so.

THE COURT: -- of the record.

THE WITNESS: Yes. Whatever counsel has provided to me.

THE COURT: Yes, sir.

Did you review the Georgia Code section that the motion is based upon?

THE WITNESS: I'm not sure. If I had, it's probably escaped my memory.

THE COURT: I just had a couple of questions arising from that. You know, part of that -- and this goes to if the Court, in fact, orders testing.

THE WITNESS: Sure.

THE COURT: The Court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation.

THE WITNESS: Yes.

THE COURT: One question arises: You had mentioned that any sample obtained could, in obtaining and/or testing that particular sample, result in the destruction of the sample.

THE WITNESS: An assumption, correct.

THE COURT: I mean, what happens if tests are ordered as to one or more items and the Court is required to send it to the GBI or order them to test it, I gather, first, what happens if in their testing there is no more sample for you to test?

THE WITNESS: Yeah. Well, I speak in a particular area. There would be multiple areas that potentially could be tested, so probably they wouldn't consume all of the areas. They might consume one area to be tested. If it's an issue of consumption, at least I can speak to how other jurisdictions have handled this. A lab is chosen and in this case it might be the GBI, or it might be another independent lab, but one in which representatives from both the prosecution and the defense could be there to monitor that testing, so.

THE COURT: And that was another question that, you know, the Court may al -- it goes on to state that the Court may also authorize the testing of the evidence by a laboratory that meets the standards --

THE WITNESS: Yes.

THE COURT: -- of the DNA Advisory Board established pursuant to the DNA Identification Act of 1994.

THE WITNESS: Yes.

THE COURT: Which was a federal statute. I gather you are familiar with that statute?

THE WITNESS: I know of it.

THE COURT: If it were going to be tested at an independent lab such as you had referenced before --

THE WITNESS: Yes, sir.

THE COURT: -- would that lab be in compliance with this particular law?

THE WITNESS: It would be. It is -- if I can just add to that, Your Honor.

THE COURT: Yes, sir.

THE WITNESS: And it would also depend on the capabilities of the particular lab. So, for example, the GBI -- I'm not saying they do or do not, but if they did not have online certain types of testing, for example, mitochondrial, we might have to choose a lab that could perform that type of testing, so ...

THE COURT: Have you been through a similar process before where an individual convicted of a crime has filed a motion for new trial or something similar in a different jurisdiction requesting DNA testing of this nature?

THE WITNESS: I have.

THE COURT: My question is: From the time period that the Court ordered such until the Court had the

results from such testing, what kind of time period is it?

THE WITNESS: I would say generally a couple months at most. In this particular case maybe even faster because the evidence items are known, we know they're present, counsel has looked at them, and so the location is known. So it's a matter of transferring the items to the appropriate lab and getting them scheduled in the queue, but generally these days I would say at most two months or less, so probably four to six weeks. I mean, if the -- depending on the Court's schedule, if it was really something that needed to be taken care of straight away, some labs would expedite, so ...

THE COURT: Can you tell me approximately when you were brought into the case?

THE WITNESS: Yes. I think November of 2018, I think was about that time. It was -- it was late November.

THE COURT: And what amount of time, typically, based on the information you were provided to review -- I'm just assuming, let's say you were provided that information expeditiously. What typical time period would it take to review that information and render an opinion?

THE WITNESS: You mean on some punitive future testing? Is that what the Court is asking?

THE COURT: Well, what you did in this case.

THE WITNESS: Yes.

THE COURT: I don't know if you looked at it a bit, then put it aside and did other stuff, looked at it a bit, put it aside, did other stuff.

THE WITNESS: Yes.

THE COURT: Say you were hired 11/18, say you were provided the information at that time --

THE WITNESS: Yes.

THE COURT: -- typically how long would it take you to review it and render an opinion?

THE WITNESS: Oh, I see what you're asking. It depends on the quantity of materials, if you will, but oftentimes, 30 to 40 hours or more, so it could take me a while.

THE COURT: It could have been done within a month or less?

THE WITNESS: If you worked straight through, yes, right. If you worked straight through.

THE COURT: Dr. Libby, I believe those are all of the questions I have at this time.

Mr. Stewart, do you have any other questions for Dr. Libby?

FEDERAL DEFENDER STEWART: May I ask one follow-up based on Your Honor's questioning?

THE COURT: Sure.

REDIRECT EXAMINATION

BY FEDERAL DEFENDER STEWART:

Q Dr. Libby, are you familiar with combined DNA information system CODIS?

A Yes.

Q In the event that you have an unknown profile, let's say an unknown male DNA profile --

A Yes.

Q Is it your experience that -- well, I guess first, what is CODIS?

A So it's an acronym for, as you mentioned, a combined DNA index system, so it's a national database.

Q So that is combined systems from the several; right?

A That is correct.

Q And if you have an unknown male profile, let's say in the event that you weren't comparing to a particular reference sample, what -- how can CODIS assist you?

A So CODIS can assist by -- it would interrogate that database for profiles which are matching at various levels of stringency, at 8 loci -- 10 loci, all loci and would assist you in narrowing down your search of the

individual who could have contributed that sample.

Q And as to the -- so that would be like an upload of the unknown profile; is that right?

A That is correct. So the lab would -- after it would have conducted its testing, it would upload the profile -- a qualified lab would upload the profile to CODIS, and it would do so on a continuing basis until a hit was obtained or not obtained.

Q And if I told you that Corey Clark, Gary Young and Thad Lucas had all been convicted of felonies in Georgia, and that's in the State Court record in this case what, if anything, would that mean to you as to a CODIS upload?

A Yes. That is what I was -- maybe not doing so in such an artful way, but what I was trying to indicate to the Court is that those profiles are probably there, and so that would assist in confirming the identity or the origin of those profiles.

Q So even if you did not have a reference sample from the evidence here; is that correct?

A That is correct. So I would expect their profiles to be in a DOC Department of Corrections file or in CODIS directly.

FEDERAL DEFENDER STEWART: Thank you. Your Honor, I don't have further questions based on that.

ASSISTANT AG GRAHAM: Your Honor, I have a couple

of questions, if you don't mind, about CODIS.

THE COURT: Yes, ma'am.

RECROSS EXAMINATION

BY ASSISTANT AG GRAHAM:

Q Dr. Libby, it is my understanding that -- please correct me if I'm wrong. I haven't talked to the GBI.

A I'm sorry, Counsel. If I can ask you to repeat the first few words.

Q Sure, sure. My southern accent?

A That's okay. Maybe I'm not hearing as well.

Q Regarding CODIS, if you are seeking out information from CODIS, you can't ask whether or not a specific individual is in CODIS; is that correct?

A That is correct.

Q Therefore, all that would be put into CODIS would be the DNA results from the testing that is done in this particular case to see if you get a match that is currently in CODIS?

A That is correct.

Q Do you know when they started taking DNA samples from inmates and putting it into the CODIS?

A That's a good question. I don't know the specific date. I would be guessing. I don't know exactly.

Q You can guess. That's fine.

A I would guess, I don't know, '94, '93, something

like that.

ASSISTANT AG GRAHAM: All right. No further questions about that, Your Honor.

THE COURT: Thank you, sir. You can step down.

FEDERAL DEFENDER STEWART: Your Honor, Mr. Cromartie would next call Laura Schile.

Your Honor, may we take just a five-minute bathroom break?

THE COURT: Yes, sir.

FEDERAL DEFENDER STEWART: Thank you very much.

THE COURT: Be in recess for five minutes.

(RECESS.)

THEREUPON,

LAURA SCHILE

was called as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY FEDERAL DEFENDER ADJOIAN:

Q Ms. Schile, would you please state and spell your name for the record.

A Laura, L-A-U-R-A, Schile, S-C-H-I-L-E.

Q And, Ms. Schile, what is your profession?

A I'm a forensic scientist.

Q And do you have any exhibit package with you?

A I certainly do.

Q Would you turn to Item 5 in that package?
A Yes.
Q Do you recognize that document?
A Yes, I do.
Q What is it?
A It is my CV, my curriculum vitae.
(Thereupon, Defendant's Exhibit No. 5 was marked for identification.)
Q Can you tell us just briefly, give us a brief synopsis of your educational history.
A I went to school in Leavenworth, Kansas. I -- upon finishing undergraduate school, I started graduate school. During graduate school I was recruited by UT MD Anderson to do molecular work in their genetics lab and after about three and a half years, that's when the Texas Department of Public Safety started DNA in their crime laboratories and the Texas Department of Public Safety -- I was then recruited by them to start DNA and learn how to become a forensic scientist.
Q And can you tell us a little bit more about your work background following your work at the Texas Department of Public Safety?
A As far as training from the Texas Department of --
Q No. Just a brief summary of your work history basically.

A So with the University of Texas MD Anderson, I was in charge of several laboratories writing the protocols, dealing with DNA, breakage and repair research as well as R&A research. We were the laboratory responsible ultimately for the blood tests that we now have for identification of breast cancer and prostate cancer. That was -- that was the summation of my career at UT MD Anderson before moving on to be a forensic scientist.

Q And then can you just tell us a little bit about your forensic science career?

A So I was trained by the Texas Department of Public Safety, I went through the DNA training that everybody else did. I had already known the DNA part of it, but then I was trained as a criminalist, so I was trained for crime scenes, trace comparisons, blood spatter, evidence collection, handling, hair comparisons. I was cross trained for a year at Austin at headquarters, and then I was assigned Houston and 37 counties in and around Houston was my coverage area.

Q And then following the Texas Department of Public Safety, did you move on elsewhere?

A I did. After I rose in the ranks as far as I could go with the Texas Department of Public Safety, I went on to have my own laboratory with the Oklahoma City Police Department where I wrote the protocols and opened the DNA crime lab for the Oklahoma City Police Department.

Q And after you worked with the police department of Oklahoma City, where did you move on to from there?

A I moved on to the Oklahoma Indigent Defense as the first forensic scientist in the country that a state public defender had access to.

Q And then how about currently, how are you currently employed?

A So in 2006 I opened a company to do cases for the prosecution on the side, and in 2010 I just took that company full time for defense and prosecution, but while I was with Oklahoma Indigent Defense, I needed the business if I needed to help prosecutors.

Q And you did that on your own time?

A Yes, sir.

Q If you could just tell us briefly what is forensic science. If you could just give us a very brief snapshot.

A Forensics -- there's a lot of different disciplines in forensics. The disciplines that I deal with are mostly biological disciplines, DNA, serology. That's the -- serology would be the study of biological fluids as it pertains to criminal cases. DNA, again forensic DNA, the DNA analysis -- all forensic science is a comparison type analysis, so hair, you're going -- ballistics, you're taking an evidentiary sample and comparing it to a known sample. And so -- and then the other discipline that I am skilled

in, or proficient in, is crime scene analysis and evidence handling.

Q So if you could just tell us a little bit more about that, what goes into crime scene analysis and evidence handling.

A Mainly making sure that the protocols are followed, not just by you as a crime scene person, but by all of the people that are responding to that crime scene. Making sure that they're trained in how to process a crime scene and what is the best processing method, collection method, storing method, handling methods.

Q And I believe you briefly touched on this, but have you received training in each of these disciplines?

A Yes, I have.

Q Have you traveled to crime scenes as part of your work?

A Yes, I have.

Q How many times would you say you've traveled to crime scenes over the course of your career?

A I still do crime scenes that are not being held by the police, but I still consider them crime scenes -- more than a hundred.

Q Have you been responsible for collecting evidence at crime scenes?

A Yes, I have.

Q Are you familiar with generally accepted evidence handling techniques and protocols?
A Yes.
Q Have you done any sort of teaching or training yourself in the disciplines with which you're familiar?
A Yes.
Q Have you worked on homicide cases before?
A Many.
Q Would that include capital cases?
A That's correct.
Q And have you worked on capital cases both in your career as -- with law enforcement and on the defense side?
A Yes.
Q Have you worked on a capital case on the law enforcement side where an individual has been sentenced to death or executed?
A I have.
Q And have you worked on a capital case on the defense side where a person has been exonerated?
A I have.
Q And so you've been retained by my office in this case; is that right?
A That is correct.
Q And what were you retained to do?
A To look at the materials that I was -- that I

received from you-all and to go over those, and ultimately what I ended up doing is writing a report on my analysis of the materials that I had reviewed.

Q So if you would please turn to Exhibit 7 in the packet and tell me if you recognize that.

(Thereupon, Defendant's Exhibit No. 7 was marked for identification.)

A Yes.

Q And is that an index of the materials that you reviewed?

A Yes, it is.

Q And then if you would turn back to Exhibit 6.

A Yes.

Q Is that a copy of the report that you authored in this case?

A It certainly appears to be, yes.

(Thereupon, Defendant's Exhibit No. 6 was marked for identification.)

FEDERAL DEFENDER ADJOIAN: Your Honor, with that, we would tender Ms. Schile as an expert in forensic science and crime scene analysis.

THE COURT: Ms. Graham.

ASSISTANT AG GRAHAM: Can I actually ask Ms. Schile a couple of questions?

THE COURT: Yes, ma'am.

ASSISTANT AG GRAHAM: Just so I understand exactly what she's here for and what you're proffering her for.

VOIR DIRE EXAMINATION

BY ASSISTANT AG GRAHAM:

Q Hi, Ms. Schile. My name is Sabrina Graham. I think we were staying at the Best Western together. Did I see you --

A Oh, maybe.

Q Okay. So just -- so I'm here for the Georgia Attorney General's Office. Just a couple of questions. You talked about you had expertise in how you collect information from a crime scene; is that correct?

A How to collect evidence, yes.

Q Are you a crime scene reconstructionist expert?

A I have done crime scene reconstruction, but I was not. That's not what I was doing in this case.

Q Have you been qualified as a crime scene reconstructionist?

A Yes. That's usually hand-in-hand with the blood spatter interpretation.

Q Okay. So it's just regarding blood spatter that you've been qualified as an expert or in other areas of crime scenes?

A Well, with the blood spatter trajectory, those types of things.

Q So in this particular case you're just testifying regarding collection of DNA and how it relates to the case?

A Collection, processing, yes. What could have been done perhaps.

ASSISTANT AG GRAHAM: Okay. No further questions, Your Honor. We don't object to her being qualified in the area that Mr. Adjoian requested.

THE COURT: Very well. Mr. Adjoian.

FURTHER DIRECT EXAMINATION

BY FEDERAL DEFENDER ADJOIAN:

Q Just to follow up briefly, Ms. Schile, when you were working for law enforcement, you traveled to crime scenes? You processed crime scenes?

A That is correct. I was the person who was called out to formulate the team and then to go to the crime scene. That is correct.

Q And you, as part of that, did crime analysis on site as a member of law enforcement?

A Yes. I was mainly with the Texas Rangers Company A.

Q Thank you. As part of your review of the materials in this case, are you sort of generally familiar with the facts underlying the incidents for which Mr. Cromartie was convicted?

A Yes.

Q And you're familiar that there were two separate shooting incidents at issue?

A Yes.

Q So I'd like to just turn first to the Madison Street Deli shooting incident. Are you aware from your review of the materials whether that incident was captured or partially captured on videotape?

A Yes, I am aware.

Q And was it?

A It was -- I wouldn't say the incident, but portions of the incident were captured on videotape.

Q And have you been provided that videotape?

A I have.

Q Have you watched that videotape?

A I have.

Q Have you seen still photographs taken from frames of that videotape?

A Yes, I have.

Q And if you could just sort of briefly describe what the videotape depicts.

A It's certainly not very clear, but it depicts a person coming in, going off screen, coming back to a cash register.

Q And you touched on it briefly, but what is the general quality of the videotape that you reviewed?

A You can't make out anything -- I couldn't make out, with glasses on, anything more than to tell just that it's a person in dark clothes.

Q If I could ask you to turn to Exhibit 19 in the packet in front of you.

A You bet. This appears even to be worse. Yes.

Q Can you just tell the Court what Exhibit 19 is?

A Exhibit 19 is a still shot from the video surveillance from the Madison Street Deli.

Q And if you could just sort of describe the quality of that image.

A It's extremely pixilated; you're able to just tell the shape of a body essentially.

Q And are you yourself able to identify anybody in particular as being the individual depicted?

A I am not.

Q Are you aware of whether law enforcement -- or if there was any testimony as to any identification based on the videotape at the time of the trial?

A I am with the FBI.

Q I'm sorry. Did they identify anybody in particular by the videotape?

A They were unable to.

Q Are you aware of whether any fingerprint evidence was collected from the Madison Street Deli?

A Yes.

Q And are you aware from your review of the materials whether any fingerprint identification was able to be made of anyone at the Madison Street Deli?

A In the documentation it does not -- does not appear that any identification was formulated to the lift card, the print cards in the Madison Street.

Q So are you aware though that fingerprint evidence was in fact collected from Madison Street?

A Yes.

Q Are you able to tell from your review of the materials what happened, what became of that evidence?

A It appears that it's been thrown away, that all the fingerprint lift cards have been thrown away.

Q And in your experience, is it -- in your opinion, is it proper protocol to throw away fingerprint cards in that manner?

A Absolutely not.

Q I'm going to ask you to look next at Exhibit 16 in the packet.

A Yes.

Q And tell us what that depicts.

A Exhibit 16?

Q Yes.

A It is a photo partially of a counter and partially

to the left, to my left, is a counter and to my right is a industrial type sink.

Q And do you know does that depict the Madison Street Deli scene?

A Yes, from what I'm aware, it does.

Q And if you would turn next to Exhibit 17 and tell us what that depicts.

A This is the depiction of the flooring of the Madison Street Deli with an officer, I believe, pointing out a shell casing with a pen.

Q And then likewise for Exhibit 18.

A This is a photograph of several tiles on the floor of the Madison Street Deli with a single picture, no scale, of a shell casing.

Q And are you aware of whether any biological forensic testing was done on any of these -- I'm sorry. On the cartridge casing from the Madison Street Deli at the time of trial, or at any point in time?

A I'm not aware of any biological testing being performed.

Q And I believe you heard Dr. Libby touch on it briefly, but if DNA evidence were able to be recovered from this cartridge casing, what significance would that be to you as a crime scene analyst?

A One of the significances is that when you're

loading a magazine, you're leaving a lot of skin cells behind because it takes a lot of pressure and friction to load a magazine, and you also usually have the bullets and magazine in the same hand, and it would help to potentially identify the person or a person who was holding the bullets as well as loading the bullets into that magazine.

Q Are you aware, Ms. Schile, of whether any clothing was recovered at or around the Madison Street crime scene?

A Yes.

Q And what was that clothing?

A There was -- a block away from the Madison Street Deli the next morning was a dark green hooded sweatshirt as well as some -- it's been described in various different ways, but a black cap, or I think it's been described as a toboggan ski cap, so something like that was collected.

Q And do you recall roughly the time frame between the incident and when the clothing was actually recovered?

A I believe it was less than 24 hours.

Q Do you recall how it came to be recovered?

A I may not be right on that, but I believe. A gentleman who owned the house where it had been deposited, called the police and said that there was some clothing in his yard. The police went over and collected the clothing from that gentleman.

Q And was the clothing entered into evidence at

trial?

A Yes, it was.

Q To your knowledge, was any biological forensic testing done on either the hat or the sweatshirt?

A To my knowledge, no.

Q And if DNA evidence were able to be recovered from either the hat or the sweatshirt, what significance would that have from a forensic science perspective?

A I think we heard Dr. Libby talk about wearer DNA. He would say habitual wearer. I know of nomenclature as just wearer DNA found at various sites where the wearer is going to be depositing a lot of epithelial cells or skin cells, so certainly to be able to identify or potentially identify wearer DNA on the hoodie and/or the hat as well as potential back spatter or blow-back from the gunshot.

Q And are you aware of whether there was any trial testimony as to whether that clothing was in fact the clothing that was worn by the assailant in the Madison Street Deli shooting?

A Would you repeat that.

Q Sure. Are you aware of whether there was any testimony or evidence presented at trial as to that clothing's relevance to the Madison Street Deli shooting specifically?

A I'm -- the State brought it in because they felt

like -- I mean, how it was presented and why it was brought in is because they felt that it was in connection with that shooting.

Q And was there any testimony that you recall that specifically described Mr. Cromartie as wearing that clothing at the time of the Madison Street shooting?

A Yes, I believe Gary Young testified to the fact that that's the color and type of clothing that was being worn.

Q You mentioned just briefly blow-back. If you could just sort of -- and Dr. Libby alluded to it, as well. Could you just give us a little bit more depth on what blow-back is and how it comes to be found on clothing or other items?

A Okay. So in blood spatter you have different velocities. You have a low velocity blood spatter which would be a 90-degree drop where if you cut your finger and you just dropped on the floor, it's going to be a round circle that's almost perfectly round that will be on the floor, that's a low velocity or low impact blood spatter. And then if you had a sponge and you hit that with a hammer as hard as you could, you're going to see other different blood spatter patterns made. That's a medium velocity. But when you actually shoot, say a melon, full of blood, when you shoot that, that's going to be such a high impact blow

that it's actually going to aerosol -- excuse me. I get excited when I start talking. It's going to aerosolize the blood in that, let's say, melon. And so that goes into almost a vapor form where you wouldn't be able to see it.

Now, as the bullet is going towards that melon full of blood, say a watermelon full of blood, as it enters the watermelon, it enters with such a force that the blood inside the watermelon actually comes back out towards the entry point of the bullet or the projectile that's going that fast. And so you have -- now what you have is aerosolized or aerosolized/vapor coming back at the direction that the gun is or that the projectile came from that gun.

So what we normally do, if we get a gun in, depending on some of the circumstances, is that we will go directly to that gun and look for blood in the barrel of that gun. And then we do other types of testing as well, depending on the scenario that we're told or that we discover when we're out at the scene.

Q And, of course, here we're talking about a gunshot wound to individuals. In the scenario like that, at what sort of range might you expect to see blow-back in terms of the distance between the gun and the individual who has been shot?

A Closer range. Between a foot or less.

Q All right. And I'd like to turn next to the Junior Food shooting, if I may. To your knowledge, was the Junior Food shooting captured on videotape?

A No, to my knowledge it was not.

Q Are you generally familiar, nonetheless, with the evidence and testimony regarding the Junior Foods incident --

A Yes, I am.

Q -- from your review of the materials.

What is your understanding of the number of individuals who were present in the store at the Junior Foods incident from your review of the trial?

A It -- it depends on who is testifying but --

Q Sure. From your review of the evidence that was presented at trial.

A From most of the evidence, two is the number.

Q And so would that be two including the clerk or not including the clerk?

A I apologize. Two individuals and then the clerk, or as well as the clerk. So three total in the store.

Q Sure. And was there any physical evidence introduced at trial from Junior Foods indicating who the shooter was?

A Scientific evidence?

Q Sure. Any physical or scientific evidence

whatsoever demonstrating who shot the clerk inside the store.

A No.

Q Was there any physical evidence demonstrating presence at the store of any individual?

A I apologize. I'm having a hard time with your --

Q Sure. And I asked that poorly. You just testified that there was no evidence suggesting who the shooter was. Was there any evidence, physical evidence, that revealed any particular individual's presence at the scene, at the --

A At the scene?

Q Yes.

A Or in the store?

Q At the scene.

A At the scene there was a fingerprint, yes.

Q Was there anything else in addition to a fingerprint?

A There were casings. There were two shell casings, two beer cans, a cardboard flap from a Budweiser 12-pack, some glasses, some pieces of glasses, a roll of paper towels and a yellow wooden pencil, I believe is what was collected.

Q Was there any footprint casting?

A I apologize. Yes, there were. There were pictures taken of footprints, as well as two castings made.

Q So what was the testimony at trial regarding the footprint? Did that -- was that sort of identified as belonging to or consistent with any particular individual?

A It was consistent with the Adidas shoe.

Q And who was the owner of the Adidas, according to the trial --

A Mr. Cromartie.

Q And was that inside the store or outside the store?

A That was outside of the store.

Q And, likewise, you mentioned a fingerprint. Where was that fingerprint located?

A That was on the cardboard of the Budweiser -- the flap of the Budweiser 12-pack. And that was outside by the footprints.

Q So was there anything from the interior of the store that suggested, as between the two individuals who were there, who did what as far as physical evidence?

A No.

Q Do you know, were there fingerprints recovered from the Junior Foods crime scene?

A There was the one on the --

Q I'm sorry. From the interior of the store.

A No, I don't believe any fingerprints were developed. I think that they tried, but they didn't get

any.

Q I'd like you to take a look, please, at Exhibit 23.

A Yes.

Q And just tell us what that depicts.

A This is an exhibit showing the exterior of Junior Food Store.

Q And is there anything that you find noteworthy about this picture about the store itself?

A There is a lot of advertising in the window -- in the windows of that store. It's not completely see-through with the -- obviously the windows are see through, but when you put the posters up, and the advertising, the ability for somebody to be able to see clearly becomes diminished for every poster that's been put up.

Q And then next exhibit, 24, if you would take a look at that.

A Yes.

Q And if you could just sort of tell me generally what that depicts.

A This is a picture of the inside of the Junior Food Store, showing again more advertising, it shows the dairy section and just a bunch of items for sale at the Junior Food Store as well as a depiction of the cash register.

Q And then to Exhibit 25.

A This is another angle from inside the Junior Food Store showing an inflatable Budweiser blimp, a display of Budweiser and then it also shows the reverse of being able to look out the store with the advertising posters on the windows, not being able to get a clear view outside of the store with those posters blocking or obscuring vision.

Q And if you would turn to Exhibit 26 and tell me what you see there.

A This is looking from the front of Junior Food Store across the street to the Jack Rabbit BP gas station.

Q And what from your review of the materials was the significance of the Jack Rabbit store?

A The clerk at the Jack Rabbit store on the night of the incident said that they had a direct view of what was happening inside of Junior Food Store.

Q And then I'm going to ask you to turn to Exhibit 28 and tell me what that depicts.

A This is a non-scale drawing done by Ken Collins, I believe, of Junior Food Store and the location of the deceased behind the cash register.

Q And does it indicate anything else as far as items that were recovered from the store?

A It does. It shows the location of both of the shell casings that were recovered.

Q And if you could just describe where the shell

casings were recovered.

A Item 1 was 5 feet, 6 inches on the north wall -- 5 feet, 6 inches from the cash register on the north wall. Both casings were found by the north wall on the floor -- I'm assuming and it's not super clear here. And Item 2 appears to be 7 feet, 3 inches from the cash register to the corner of the north wall, which would be behind the desk and the chair that the clerk had.

Q And where were they in relation to the decedent in this case?

A They're behind the counter and then they're behind his desk and chair area all the way up against the wall.

Q I would ask you to take a look next at Exhibits -- well, Exhibits 30 and 31. Exhibit 30, if you could just tell me what that depicts.

A It is actually a fairly -- it's close to a 90-degree photograph of one of the shell casings which is not identified with the scale.

Q And how about Exhibit 31?

A Again, it's a scaled photograph of a shell casing.

Q And is it your understanding that these correspond to the diagram of the two shell casings that were recovered?

A That is my understanding.

Q Are you aware of whether any biological forensic testing was done on either of these shell casings?

A Not to my knowledge.

Q And as with the Madison Street shell casing, what would be the significance from the crime scene or forensic science perspective to finding DNA on either of these shell casings that were able to be obtained?

A Again, you've got a lot of friction and force going into loading the magazine, so you're -- the potential to have DNA is quite good.

Q And what -- if that DNA were able to be recovered, in fact, what would that tend to demonstrate from a crime scene perspective?

A It would -- it would quite possibly show who was loading the magazine.

Q Did you review, as part of your materials, the autopsy photo -- excuse me, the autopsy report that was done in this case?

A Yes, I did.

Q At the Madison Street incident. Would you take a look at Exhibit 39, please, for me.

A You bet.

Q I'm sorry. Exhibit 40.

A Yes.

Q And tell me what that document is.

A This is a form that the State of Georgia used for their GBI record of the medical examiner.

Q And is this a multi-page document?

A It is. Describing the medical examiner re -- it's a medical examiner report.

Q And if you would turn with me to page 3 of that document -- it's actually page 2 of 5, but it's the third of this exhibit. Page 205 is printed at the bottom.

A Yes.

Q If you could just take a look at -- it's about halfway down the page. If you just read to yourself under the heading: Gunshot Wound of Head, Gunshot Wound Number 2.

A Yes.

Q Do you see an indication in that paragraph about stippling?

A I did.

Q And can you tell us what stippling is?

A Stippling is where the very hot gunpowder will -- an example of stippling is where the gunpowder will scorch the skin and actually burn the skin and leave marks.

Q And what does that tell you from a crime scene perspective? What is the significance of stippling?

A That the gunpowder or the gun is actually in close proximity to the skin.

Q Are you aware of whether the medical examiner in fact testified about muzzle distance for the gunshot indicated as Number 2 in this report?

A I am.

Q And what is your recollection of how far away the medical examiner testified the shooter was from the victim?

A I believe that it was five to six inches away from the entrance wound.

Q And, again, what is the significance, from a crime scene perspective, potentially, or from the DNA collection perspective, potentially, from having a very close range gunshot wound?

A Well, the potential for blow-back or back spatter is much greater.

Q Where might you be interested in searching for the victim's DNA via blow-back in light of the close range of a gunshot wound, just generally speaking?

A On arms of clothing, on the gun itself, the hands obviously of the shooter, but where the hands would go after something like this. So I think Dr. Libby mentioned the hoodie pouch, the kangaroo pouch that most hoodies have, in there would be -- would be a potential area, as well as in pockets of jeans or pants.

Q Are you aware of whether clothing was recovered from any of the suspects in this case?

A I am, yes.

Q And do you know for certain whether the clothing that was recovered was, in fact, clothing that was worn on

the night of the incident?

A Absolutely no, no, I cannot comment on that.

Q And do you know whether for sure we know it was not the clothing that was worn on the night of the incident from your review of the materials?

A No. Based on -- based on police protocol and based with dealing with this, I would have assumed that the officers would have -- if that's why they were collecting it and going after it, I would assume that those questions had already been asked by the officers, but I didn't see anything to that extent.

Q So that was my next question. Did you see any indication or any documentation as to whether those questions were sufficiently resolved by the officers who had collected the evidence at the time?

A I did not.

Q Turning now to the gun itself, are you aware of whether the gun that was used in both of these incidents was ultimately recovered?

A That's -- yes, that's what -- that's what has been testified to, absolutely.

Q There was testimony that -- well, strike that.

Where was the gun that was entered into evidence in this case recovered?

A It was by the railroad tracks between the Cherokee

Apartments and the justice center. I'm -- I don't think it's the police station, but over behind the Cherokee Apartments by the railroad tracks.

Q And do you know when the gun was recovered in relation to the Junior Food shooting?

A I believe it was -- some documentation actually says the 19th, but I believe it was the 13th, it was recovered. And Junior Food happened on the 10th, I believe, of April 1994.

Q Are you aware of what the circumstances were that sort of precipitated that gun being recovered, how did it come to be found?

A I believe one of the -- a person who was arrested for an incident that had occurred over at Cherokee Apartments was giving the police some information, and in their statement they told the police where this gun was.

Q So I'd ask you to take a look now at Exhibit 41, please.

A Yes.

Q And what does Exhibit 41 depict?

A A model 25 or model P-25, .25 caliber. Actually it doesn't say that on there, but that's going to be the Raven Arms.

Q And is it your understanding that this was the weapon that was suggested at trial that was used in both

shootings?

A That is my understanding, yes.

Q And can you just briefly describe the weapon for us. What type of weapon is it? I know the -- the -- that Raven Arms is the manufacturer. Is it a semi-automatic, a revolver?

A It is not a revolver. It is a very small semi-automatic, silver tone with wooden grips.

Q And then if you would, turn with me to Exhibit 43.

A Yes.

Q And tell us what that is.

A This is a picture of an empty magazine.

Q And is it your understanding that this was the magazine that was recovered with the Raven Arms?

A That is my understanding, yes.

Q Are you aware of whether any biological forensic testing was performed on any portion of the gun or the magazine?

A No, to my knowledge, no testing has ever been done. Biological testing.

Q If DNA evidence were able to be recovered from the gun or from the magazine, what, to your expertise, would be the significance of that potential evidence?

A I think that that would give an idea of who was loading the magazine, who was handling the magazine, who was

handling the gun.

Q And are there any sort of areas of the gun -- let's start with the gun, that you would be particularly interested in looking for DNA?

A May I go back to pictures?

Q Yes, absolutely.

A Going back to Exhibit 41, the grip area that -- I apologize. Yes, the grip area is a very good choice, as well. Underneath the exhibit sticker would be -- I heard testimony -- I heard talk during testimony of the possibility of other people touching it. If an exhibit sticker is put over it, that protected that area at least if other people had touched it, so underneath that exhibit sticker somewhere, the exhibit sticker itself, the DNA that's transferred onto that after you take it off would be a good area. The slide -- the grooves on the slide is a good area of catching it.

And then if you go to Exhibit 43, again you have the magazine and I spoke about that before. Holding that piece of plastic down as you're loading the bullets in that magazine, you are applying pressure, you're possibly -- I've only been -- I've only been here for a day, but I'm already feeling the humidity. And so the skin cells in humid environments, we leave more skin cells even than we would normally in dry environments. But you're shedding a lot of

skin cells in the action of loading that magazine. So that magazine would be a good candidate for DNA testing.

Q And we've heard a lot of talk, and as we saw from the review of the materials, that a number of people may have handled this weapon. Would any information we might be able to get about DNA profiles, nonetheless, be significant to you as a crime scene analyst?

A Well, if people -- even when this was -- in '94, '95, '96, '97 people -- everybody should have been handling this with gloves on, and so I would assume that if any law enforcement or court officer handled it, it would have been handled with gloves on, so the profiles on there could be mixed profiles of other people, could be single profiles.

Q Even if you found -- even if there were to be recovered multiple profiles from individuals who had handled the weapon prior to its recovery, would you want to know that information as a crime scene analyst?

A Yes. I think we want to know all the information that we can, through DNA.

FEDERAL DEFENDER ADJOIAN: If I might just have one moment, Your Honor.

THE COURT: Yes.

BY FEDERAL DEFENDER ADJOIAN:

Q Ms. Schile, every opinion that you have offered here today, are those offered to a reasonable degree of

certainty within your respective field?

A Yes, they are.

FEDERAL DEFENDER ADJOIAN: Thank you, Your Honor. I would pass the witness at this point.

THE COURT: Ms. Graham.

CROSS-EXAMINATION

BY ASSISTANT AG GRAHAM:

Q Hello again, Ms. Schile.

A Hello.

Q I have a few questions for you. Let's start off with the murder weapon. You are aware that the murder weapon belonged to Mr. Young? Gary Young?

A Yes.

Q You are aware that Mr. Young was the person who had possession of it -- had possession of it after the Junior Food Store shooting?

A Yes.

Q Do you know who else had possession of that weapon?

A I don't.

Q Having someone's DNA on that weapon, does that prove that they were the shooter at the Junior Food Store or the Madison Street Deli?

A No.

Q Okay. Let's go over a little bit of the actual

crimes. Are you aware in the first -- in the first crime, the Madison Street Deli, that Mr. Wilson testified that the person came in and they shot him in the head?

A Yes.

Q So did he have any notice that this person was going to shoot him in the head? Did he testify that he had any notice that the person was going to shoot him in the head?

A No.

Q Okay. And you talked about the blow-back there at the Madison Street Deli shooting; is that correct?

A Yes.

Q Do you have an opinion as to how close the shooter was when they shot Mr. Wilson?

A I didn't see any pictures of that so, no, I don't.

Q And is it your testimony that you have to be, I think you said, at least a foot from the person to get the blow-back; is that correct?

A No, no. Anywhere from right up against the person to a foot away.

Q Okay. So if they were farther than a foot away, there would not be blow-back on the shooter?

A There would be blow-back, but you're absolutely right. The likelihood of there being -- unless there was like a fan or something, the likelihood of it being on the

shooter is negligible, given that scenario. The blow-back is still going to happen because it's physics, but it's just where it is deposited, so I couldn't say absolutely.

Q And you don't know how far or close the shooter was or the exact location the shooter was to Mr. Wilson when he shot him?

A No, I do not.

Q And on the video that you watched, did it appear that the person was attempting to open the cash register?

A Yes, it did.

Q And they were unable to open the cash register?

A That's what it appeared to be, yes.

Q So would it be a fair representation of the crime that the person walked into the Madison Street Deli, they shot the clerk and then they went and attempted to open the cash register and were unable to do so?

A Yes.

Q You also testified about the fingerprint cards, you said they were thrown away; is that correct?

A Or lost.

Q Or lost?

A Yes.

Q And is it under -- are you testifying that they -- they took fingerprints from that crime scene; is that correct?

A Yes.

Q And they attempted to identify those fingerprints from the crime scene?

A Correct.

Q But they were unable to find any matches?

A Correct.

Q Okay. Regarding the clothing that was found one block from the Madison Street Deli --

A Yes.

Q -- do you -- and maybe I misunderstood your testimony. You said that the police would have asked questions to find out who wore that clothing. Is that what you were testifying to? I just didn't understand. I'm sorry.

A It's my accent now. The -- I would -- in that same situation, from my experience, the questions would be asked: Did you wear these on the certain dates? So not -- it would be when, not where.

Q And who would you have asked that question of?

A Anybody that I was collecting clothing from.

Q Okay. And so it's the gentleman who found the clothing, Mr. McCrae?

A Oh, I'm sorry. I meant from the clothing that -- not from him. Yeah, I see where you're going. That was when I was being asked about the shoes and the pants that

were collected by all of the individuals that were potentially involved in these different incidences.

Q Okay.

A As opposed to on the lawn.

Q Okay. Well, let's just focus on the lawn first and then we'll go to the other clothing.

A Yes.

Q So you weren't stating that the police failed to ask questions regarding the clothing that was found on Mr. McCrae's lawn?

A No.

Q And you don't know who wore that clothing?

A I do not.

Q And you don't know if it could have had more than one person wearing that clothing?

A I would have no idea.

Q Okay. Going to the clothing that was obtained from the co-defendants, Mr. Clark, Mr. Lucas and Mr. Young, you're stating that the police should have asked them at that time when they collected -- when they arrested them, when they wore this clothing and if it was their clothing?

A I'm suggesting that's how it happens in many municipalities. I'm not telling them what they should do via their protocol, but you don't collect items of evidence unless you know -- I mean, in my training items of evidence

wasn't just collected willy-nilly. You wanted to make sure that those -- otherwise, you just overflow the property room, right? So you want to make sure that there's significance of evidentiary items that are coming in.

Q And when someone is arrested for a possible homicide and you're put into jail, don't they typically take their clothes?

A That is my understanding.

Q Okay. Let's go to the Junior Food Store, the second crime.

A Yes.

Q So in that particular crime, is it your understanding that the person came in and shot Mr. Slysz in the head without warning?

A There is not a video of that. I don't know what happened on that.

Q Okay. Well, let's talk a little bit about the crime scene. When Mr. Slysz's body was found, did it appear that he had been holding a pencil?

A I believe he was holding a pencil.

Q Okay. Would that have any suggestion to you about if he was surprised by the shooting?

A I know what you're going after. I would have no idea how much warning he would have had before he got shot.

Q Okay. Are you suggesting that the person looking

at -- this is Defendant's Exhibit Number 28 and that's the diagram of -- do you have that? Do you want to look at it?

A I have it.

Q Okay. Looking at the diagram, does it appear to you that the shooter was standing in front of the counter when they shot Mr. Slysz?

A I can't answer that question because I have some confusion about that myself. The measurements are extremely difficult to go through, and the ballistics report does not have information in it that I really would like in it.

Q Are you saying --

A But looking at -- but looking at the drawing by Ken Collins, I couldn't make a statement to you about where they were shot from.

Q Okay. So you can't tell from the trajectory of the bullet where he was shot from?

A We don't have a trajectory. We have a --

Q Okay. So this diagram isn't indicating a trajectory of the bullet?

A No, this is not.

Q Okay. It's just saying that that's how far away the bullet casing was found and where it was found in relation to the crime scene?

A Exactly. The spent casing was found on that wall and that wall is 5 feet, 6 inches from the cash register;

simply all that is saying.

Q So what would you need in order to determine the trajectory of the bullet, then?

A Well, we would want to know -- so from the ballistics report, we would want to know, first, does it eject right, left, front, back; how far is that ejection pattern, right; so what is the ejection pattern. And so you're not really doing a proper trajectory. You're getting an idea of the casing landing area. Right? The trajectory has more to do with the projectile itself, so when we would be looking at wound patterns and the bullet track patterns within the skull of the victim, that would be a trajectory as opposed to the likelihood of finding a casing here as opposed to here, going right as opposed to left.

Q So you can't say whether or not Mr. Slysz was shot while the person was standing in front of the counter or if the person came around the counter and shot him?

A I cannot.

Q But he was still holding his pencil when he died?

A Yes.

Q Okay. And in that particular case, did the perpetrator attempt to open the cash register?

A There was testimony that somebody attempted to open the cash register.

Q Was there any money taken from the cash register?

Was there any evidence at trial that there was money taken from the cash register?

A There was -- no, there was not.

Q So, again, we have a crime where the victim was shot in the head and the person was unable to obtain any money from the cash register?

A Yes.

Q Okay. You were given some pictures of the Junior Food Store to look at.

A Yes.

Q And I think that was in relation to the testimony from the clerk from the Jack Rabbit Food Store. Do you recall that the clerk was outside of the Jack Rabbit Food Store when he heard the shot?

A Yes, he was emptying the trash bins, the small trash bins.

Q And so this was night when the crime occurred?

A Yes.

Q So the Junior Food Store would have been lit up with lights?

A Yes. I'm assuming, yes.

Q Okay. So the person standing outside, even though there are, I understand, advertisements in the windows, they still would have been able to see inside of the Junior Food Store?

A Sure. Sure. To some -- I mean, to whatever extent the visibility would have been there.

Q And did that -- and also there was another individual who testified at trial. Do you recall that he saw two people running from the Junior Food Store?

A Well, yes, but the Jack Rabbit employee did as well.

Q Correct. I'm just --

A Or not running, but leaving.

Q Correct.

A Yes, I did.

Q Yes. So you had two people, two different witnesses saying they saw two people inside the store. And, again, I understand you're saying that the other guy's view was obstructed, but that was his testimony; is that correct? The Jack Rabbit Food Store?

A Not in the store, outside the store. Right?

Q The clerk from the Jack Rabbit Food Store, he testified he saw two individuals inside the store. Do you recall that?

A Now, I recall him testifying that he saw one person inside of the store.

Q Running back and forth?

A Right. Yes.

Q All right. Okay. I think we're on the same page.

A Okay. Okay.

Q So -- and that person and what he said, the running back and forth, did that -- was that similar to the testimony of Mr. Clark as to what occurred in the Junior Food Store?

A With -- if the Jack Rabbit -- the clerk from the Jack Rabbit, they would have seen -- from Mr. Clark's testimony, if I'm not getting this all mixed up, they would have seen Mr. Clark by the beer aisle and then go down and then come back up and two people exchanging places.

Q Actually, didn't the Jack Rabbit Food Store clerk testify that he wasn't looking until he heard the gunshot? Is that correct?

A Yes. Yes.

Q Okay. So he may or may not have seen Mr. Clark go down or come back up?

A No. You were just -- just based on your question, that's where --

Q Yeah. I'm just asking, was it not similar testimony in the sense that Mr. Clark said he went to the front and the back of the store and that's what the Jack Rabbit Food Store clerk testified to?

A I think he testified -- and I may be completely wrong, but I think that he said that the one person, he saw the lighter-skinned person run from over by the cash

register to over by the beer. And how Clark described it is that you would have two individuals trading places almost.

ASSISTANT AG GRAHAM: Can I have just one moment to look at this?

THE COURT: Yes.

THE WITNESS: And that's based on my memory and I apologize if that is inaccurate.

BY ASSISTANT AG GRAHAM:

Q But if the records say something else then --

A I would agree with the record obviously.

Q Right. We'll just let the record stand. And that's in our brief, as well, Your Honor.

So it's your testimony here today that DNA taken from the handgun or from the shell casings would only show who handled the weapon; is that correct?

A It would show who handled the bullets, it would show who handled the magazine, and it would show who handled the gun. Possible -- there's a possibility to -- and it all depends on how much DNA we get, right, to what the DNA actually tells us after the test is done. Because the DNA will describe different scenarios. I mean, if there is a major component versus a minor component. So the --

Q I'm sorry. Could you explain that for a moment? A major component and a minor component.

A You bet. So, for example, when Dr. Libby was

talking about the habitual wearer DNA, there -- if there were multiple people handling that hoodie, there could be several minor components or minor contributors, but the major component would -- you would suspect to be the person whose hoodie it is which is the wearer DNA. And that's going to be the -- the peak heights are going to be at a level that you'll be able to distinguish that as a major contributor.

Q But you can't say whether or not that piece of clothing -- when it was worn, who it was worn by at the time of the shooting?

A No. You can -- you can say who the likelihood is the wearer DNA. You could say that Ms. Wilson's DNA is on the sleeve of that, but DNA only answers the question: Who is it coming from? Who this material is coming from?

Q So if the shooter obtained the hoodie and the sweatshirt from somebody an hour before the crime that had already worn it, they could be the habitual wearer of the clothing and not the person who actually did the shooting?

A Yes. But you will have -- you'll still have the other skin cells there being deposited, but yes.

Q And, again, going back to the weapon, since the weapon belonged to Mr. Young, we know he had it before the shootings, we know he had it after the shootings, so we know somebody else had the weapon. That's not going to show us

necessarily who the shooter was either.

A No. It will only show you whose DNA is on the gun.

Q And we don't know if anybody else handled the weapon other than Mr. Young, do we? Other than Mr. Cromartie.

A I don't. No.

ASSISTANT AG GRAHAM: One second, Your Honor.

No further questions at this time, Your Honor. Thank you.

FEDERAL DEFENDER ADJOIAN: Just a few additional questions, Your Honor.

Your Honor, may I approach the witness just to show a portion of the transcript? I've handed a separate copy to opposing counsel.

REDIRECT EXAMINATION

BY FEDERAL DEFENDER ADJOIAN:

Q If I could ask you to look, Ms. Schile, about halfway down the page marked 2632 on the right-hand side.

A Yes.

Q At line 13. If you could just read lines 13 through 18.

A Line 13. Question: "Okay. What did you do with those partial prints after you finished with them?"

Answer: "I just -- I threw them away. They were

of no value to me, no evidence."

"When did you throw them away?"

"That night."

Q So the prints weren't, in fact, lost?

A They were thrown away. According to this testimony.

Q There were questions asked of you regarding the Junior Food Store and whether you were able to tell where in relation to the victim the shooter was standing. Do you recall that --

A I do.

Q -- series of questions?

A Yes.

Q And you testified that you weren't able to, in fact, tell where the shooter was standing?

A That is correct.

Q And that was because there was some absence of information in the records you reviewed?

A That is correct.

Q Can you tell us, when you were discussing the ejector pattern of the shell casings, is that something you would ordinarily expect to see in a ballistics report?

A Yes.

Q When you were discussing the lack of a bullet trajectory in the medical examiner report, is that the type

of thing that you would expect to see in a medical examiner report?

A Yes.

Q Does it make it more or less difficult to come to these types of scientific conclusions if that evidence is not documented contemporaneously?

A It makes it impossible.

FEDERAL DEFENDER ADJOIAN: I just beg the Court's indulgence.

Your Honor, I would have no further questions for Ms. Schile.

ASSISTANT AG GRAHAM: Your Honor, I'd like to clarify one thing.

THE COURT: Yes. Go ahead.

FURTHER RECROSS-EXAMINATION

BY ASSISTANT AG GRAHAM:

Q Going back to the Junior Food Store --

A Yes.

Q -- and the Jack Rabbit Food Store clerk's testimony, okay, so do you recall that he testified that he saw a light-skinned black person run from the front of the store to the back of the store, and then he saw another male, darker complexion, thinner, exit the store in the same direction as the first male?

A If you're reading that, I -- absolutely.

Q Okay. So the Jack Rabbit Food Store clerk did testify that he saw two males at the store?

A At the store, but not running around in the store.

Q Okay. That's -- so that's where our --

A Yes.

Q Okay.

A And I don't have these memorized, so there are thousands of pages of transcripts.

Q Sure.

A But, yeah, to my recollection, they were at the store, not in the store. Yes.

Q And then the other eyewitness, Mr. Taylor, said he saw two individuals come out of the store?

A Yes.

ASSISTANT AG GRAHAM: All right. No further questions. Thank you, Your Honor.

FEDERAL DEFENDER ADJOIAN: Nothing further, Your Honor.

THE COURT: Ms. Schile, let me ask: It's my understanding that your involvement in this matter was to review the materials submitted to you and to render an opinion as you have today; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Okay. You will not be doing any testing or anything of that nature?

THE WITNESS: No, sir. I may be giving advice but that's all, sir.

THE COURT: Okay. Thank you, ma'am.

THE WITNESS: Thank you.

THE COURT: You may step down.

Mr. Stewart, any other evidence to be presented?

FEDERAL DEFENDER STEWART: No, Your Honor. Only in light of the stipulations on the record before we began and the evidence adduced today, I would like to move into evidence, for purposes of this motion, the Exhibits 1 through 65 that have been proffered to the Court and counsel.

(Thereupon, Defendant's Exhibit No. 1-65 was marked for identification.)

ASSISTANT AG GRAHAM: No objections.

THE COURT: They are admitted. I understand you handed the clerk the originals or a copy of those at the beginning.

FEDERAL DEFENDER STEWART: That's right. Exactly the same that Your Honor has.

And then, Your Honor, we wanted to sort of leave it to the Court how to proceed at this juncture. I'm prepared to argue the motion if we are to argue today. The statute does allow for post-hearing briefing if the Court prefers that approach, but I'm at Your Honor's

pleasure.

ASSISTANT AG GRAHAM: I'm good with either one, Your Honor.

THE COURT: Ma'am?

ASSISTANT AG GRAHAM: I'm good with either one, Your Honor.

THE COURT: Well, I would rather -- yeah, I think I've got the information that I need, I've heard the evidence, so there's going to be no more evidence presented. Unless you can think of something specifically that you would argue in a post-hearing briefing that's not already been argued in what's been provided to me, then I don't know of any reason --

ASSISTANT AG GRAHAM: I looked back over it last night, Your Honor. I feel like we've heard everything. In -- we had spoken, in the event -- and certainly we do oppose any testing, but if the Court were to grant any kind of testing, Mr. Stewart and I talked about this, and I also called the GBI Crime Lab to ask them, you know, what kind of testing they would be able to do, and we've also done this testing in a couple of other death penalty cases, and we have an outside lab that we normally use, and Mr. Stewart and I talked about that, and he agreed to that lab. If you have any questions about that, I'm happy to answer it. And I

did ask if Mr. Wilson is still alive to our victim advocate's knowledge.

FEDERAL DEFENDER STEWART: And I can represent to the Court that my belief is that he is alive, or at least that three or four months ago he was, so I believe he still lives in the area. Mr. Wilson, that is. To add --

THE COURT: Y'all cannot tell me -- I gather from what was indicated earlier, the questions asked earlier, that as to Mr. Clark and Mr. Lucas and Mr. Young, we can't even ask if their DNA is in the -- is it GBI DNA bank or you said CODEX [sic]?

ASSISTANT AG GRAHAM: CODIS, yes. And I called the GBI to ask them about that, and they said, no, that the way that the database is set up, there's not even really a name associated with it, and the only way that you can even run anything in CODIS is if it's an active case and they take -- yeah, and they take whatever sample you have and they run it through CODIS, but they couldn't even tell us if those three individuals were in CODIS or not.

THE COURT: But if you had a match, it's going to give you a name?

ASSISTANT AG GRAHAM: Correct. Yes, Your Honor.

FEDERAL DEFENDER STEWART: And, your Honor, I can

represent to the Court from my own experience in other cases that even post-conviction cases that are not active as an active prosecution, that in the event that testing is done on any evidence and a profile of any sort is developed that with a ASCLD, A-S-C-L-D, certified lab, they get approval to upload that profile to CODIS and then CODIS kind of spits out the result, basically tells you if there is a match and to whom. That's something that I've done in other cases.

Ms. Graham and I also talked about specific labs and we've agreed on a lab that could do it, and it's a lab that I have experience with, as well. The one thing I do want to just add for Your Honor's information, I think as much as I like Dr. Libby's, perhaps, optimistic estimate of the time it would take, my experience is it usually takes a bit longer than two months for the, you know, identification of evidence, sending to the lab, processing of evidence and getting a result back. But I just wanted to flag that for the Court.

THE COURT: Do you want to be more specific?

FEDERAL DEFENDER STEWART: It can vary case to case, but --

ASSISTANT AG GRAHAM: Well, we've done it a couple of times, so I checked during the break, and usually

it's only about a month with Bode Labs.

FEDERAL DEFENDER STEWART: That's funny. I have another case with Bode Labs, Bode, B-O-D-E, is the lab that we had discussed, another case that it's taken much longer.

ASSISTANT AG GRAHAM: It was more evidence or --

FEDERAL DEFENDER STEWART: Yeah. In any event, Your Honor, as Ms. Graham indicated -- and I've had the experience in other cases, as well, where either of the parties can communicate jointly with the lab, in the event that any particular item of evidence is going to be consumed, we agree in writing that it may be consumed. Sometimes we even file that with the Court to make sure everyone is on the same page just so there's -- a steady hand is on the testing along the way to make sure it's done well.

ASSISTANT AG GRAHAM: I do think that determining which pieces of evidence have enough DNA on it to test, sometimes when you build that in, it does take a little bit longer, the actual figuring out what you can test does take a little while.

And, also, I wanted to explain to the Court, when I spoke to the GBI, I sent them Dr. Libby's report and all of the evidence they wanted testing, and there are certain things that they can't test such as the bullet

casings, they won't test that. And Mr. Stewart and I talked. If the Court were to grant testing of all items, we'd want to use the same lab instead of piecemealing it, but if the Court limited it to, say, the clothing, then the GBI could do the testing for that. So it just depends on what's tested as to whether or not they can do it.

THE COURT: All right.

ASSISTANT AG GRAHAM: And I haven't checked with the GBI about mitochondrial DNA testing. I didn't realize that was the issue.

FEDERAL DEFENDER STEWART: And, Your Honor, to the extent that we were to proceed with testing perhaps with Bode, Ms. Graham and I could make sure that we submit to the Court what's required under the statute to ensure that it complies with the DNA Identification Act that is codified in the Georgia statute.

THE COURT: And, again, unless -- we have no reference -- as far as we know right now, we have no reference insofar as Gary Young, Corey Clark or Thaddeus Lucas, insofar as we know.

FEDERAL DEFENDER STEWART: That's correct. We don't have a reference that would be submitted to the lab. However, I think there's a fair chance that all three of them would be in the CODIS database. I'm

almost certain that Corey Clark would be in there by virtue of state prison incarceration from 2012 to 2014 for a parole violation on a case and actually he had a new domestic case, as well, in the Atlanta area in that time period. I think he served two years.

ASSISTANT AG GRAHAM: I would have less confidence in Mr. Young being in CODIS because --

THE COURT: Length of time?

ASSISTANT AG GRAHAM: Correct. And he was never convicted of any crime after this particular -- after this trial, he was never convicted of any crime or sentenced or housed in any state institution, so it would have been the early 90's when he was locked up, so I just -- I'm not sure that we would have DNA from him.

FEDERAL DEFENDER STEWART: He definitely had a prior felony. He was charged with felony possession in relation to this case, the Cherokee Homes shooting of April 12th of 1994, so he had a predicate felony which was a drug case, but I don't know -- I don't know one way or another about his criminal history after this case, nor do I know whether his DNA would have been collected earlier. I do know that in the courthouse downstairs there are his shoes that were taken when he was arrested and then that bag of clothing that's

depicted there. Socks, underwear, shorts, maybe a shirt.

THE COURT: You know, one of the statutory requirements is that the motion not be filed for purposes of delay. That would -- a couple of questions, raises a couple of questions. When did y'all initially begin your representation of Mr. Cromartie?

ASSISTANT FEDERAL DEFENDER STEWART: We were appointed by the Federal District Court, Middle District in October of 2014.

If I may, Your Honor, one point as to timeliness, Mr. Cromartie, with his predecessor counsel, asserted in state habeas that he was innocent of shooting Mr. Slysz and of the Madison Street Deli shooting. When the state habeas court dealt with that and in the record below there's an opinion dated perhaps February of 2012 where that particular claim of innocence of being the shooter is denied as being inappropriate for the state habeas mechanism at that time and, in fact, a footnote on page 8 of that opinion indicates that the appropriate mechanism for raising it at the right time might be an extraordinary motion for a new trial, as we filed here.

The next step from, of course, the state habeas

proceedings was federal habeas. That is when our office was appointed to represent Mr. Cromartie and, of course, in federal habeas we were dealing with claims that had been exhausted in the state court proceedings below. So in federal habeas that claim had been procedurally denied. We were able to proceed in the United States District Court on the claims that had been dealt with on the merits or the denial of merits on the state habeas. We proceeded through the United States District Court, the 11th Circuit Court of Appeals and the United States Supreme Court and filed this motion before Your Honor within about four weeks of the determination of that process.

THE COURT: All right, sir.

ASSISTANT AG GRAHAM: Your Honor, can I speak to that, please?

THE COURT: Well, let me -- I've still got a question or two. You came into the case October of 2014, and of course, this statute was in existence at that time. Was there anything to prevent you from simultaneously filing this motion while you were proceeding in the federal habeas matters?

FEDERAL DEFENDER STEWART: I would say as a practical and legal matter, there were great difficulties. Number one was, of course, coming into a

capital case that's been litigated for 20 years -- not quite that long -- but we were in the procedure of receiving from predecessor counsel, you know, 40 banker's boxes of the entire record of the case and learning that with very, very tight deadlines in federal court. That's the sort of practical side. And we've been basically unceasingly litigating the case in federal court until recently. But as to the legal matter, you know, that claim had been sort of shut down in the state habeas proceeding, as I mentioned earlier, so I think those are the main reasons. If Your Honor would like more detail, I would like to look through our record on it and also, you know, we could provide supplemental briefing on that if Your Honor chose to hear that.

THE COURT: All right, sir. Well, I'm just -- I think it's a legitimate question because it appears that -- it appears that Mr. Cromartie got to the end of the line, so to speak, on any appeal, any type of appeal, habeas, whatsoever when the US Supreme Court denied certiorari I guess, December --

FEDERAL DEFENDER STEWART: Correct.

THE COURT: -- of 2018, and then this was filed. And it just appears that, on the face of it anyway, that if there was valid reason for ordering testing of

some item in the nature that you have requested, that that reason has been in existence all this time and this could have been pursued and acted upon in one way or the other without pushing things down the road, so to speak.

FEDERAL DEFENDER STEWART: Well, and two things I would say in response: One, I think Dr. Libby's testimony today, particularly about dealing with mixtures and the probabilistic algorithms that are now available he testified as of 2017, earlier than that really -- I mean, particularly if we are dealing with mixed samples, would have been problematic.

Second, we don't even know that answer until the testing is actually done.

Third, you know, when the DNA statute was enacted in 2003, the Georgia Supreme Court's first case really interpreting it, Crawford versus State, I think Your Honor may be aware of it, but two of the justices of the Court, they said that -- and this is quoting Crawford, page 406 of the Southeast (2d) version, they said, "Recognizing that errors in the criminal justice system may lead to the execution of innocent persons, the legislature enacted OCGA 5-5-41(c) to help ensure that only those who are actually guilty will be put to death at the hands of the State."

What's never happened in this case is the testing of that forensic evidence that could answer those questions. You know, the evidence could speak, the forensics could speak. So far in a trial, yeah, there were witnesses, but a lot of them had tremendous motivation to fabricate to save themselves. What this Court could do with DNA testing would be to allow certainty, and particularly in a capital case where there is testable forensic evidence in this courthouse, and we have testimony that it could be tested. So, you know, I have more I could say in support of it and, of course, addressing the various factors in the statute but, you know, really the -- really at its heart, if the Court's assessing whether this jury, whether there's a reasonable probability that this jury would have either acquitted or would have returned a different verdict, you know, this jury deliberated on penalty for three days in this case. If this jury were to have learned that there was DNA evidence on the various items from the crime scene and that none of it was Mr. Cromartie's, I dare say that would have swayed them. If the jury learned that there was DNA other than from Corey Clark who was the one pointing the finger at Mr. Cromartie, DNA evidence on the gun or the cartridge casings, I dare say that would have caused

them to question his testimony. So whatever the greater picture, I think this is precisely the kind of situation where DNA testing is appropriate.

THE COURT: Ms. Graham?

ASSISTANT AG GRAHAM: First, I'd like to address the unreasonable delay. Habeas, Your Honor, as I'm sure you're aware, has nothing to do with actually -- you can't bring a --

COURT REPORTER: I can't hear you.

ASSISTANT AG GRAHAM: I am sorry, usually I am too loud.

They could have filed an extraordinary motion for new trial at any time. And, in fact, we have habeas cases, death penalty cases in which they have done that during the middle of their state habeas case where they've gone and filed an extraordinary motion for new trial. Mr. Leonard Drain (phonetic) did it, and the Court stopped the habeas action while that was litigated, and when it was denied, we came back and picked up the habeas. It's not -- that's exactly what an extraordinary motion for a new trial is there for, is for them, if they think they're innocent, to go back and ask for that at the earlier possible time. So, no, there is nothing that would have kept them from that.

And Mr. Cromartie has been represented by counsel

since the time of trial. He had a team of attorneys in his state habeas action.

They could have asked for it at any time. And their theory throughout it was that Mr. Young was the perpetrator for both of these crimes, or at least for the Madison Street Deli crime; therefore, they had no reason not to go back and ask for his DNA. It's exactly for that reason they didn't because now at the very end they can ask for more time now to get their testing and to forestall the execution. So, at any time, they could have asked for that. So they have not shown that it was for undue delay in this particular case.

And I'd like to note to the Court that since Mr. Cromartie filed his extraordinary motion for new trial, the State of Georgia has had two more death row inmates complete their appeals. Donnie Lance and Marion Wilson, who we executed last week. Both of those did the exact same thing. They filed an extraordinary motion, once that last cert petition was denied by the United States Supreme Court. Mr. Wilson filed his. The Court immediately found that he had not shown a reasonable probability of a different outcome, and he had also failed to show it wasn't for the purpose of delay, because he waited until the

expiration of all his appeals to file it. And as I said, we executed him last week, without DNA testing.

Mr. Lance is currently in the briefing process at this time. But also -- so that shows a pattern here with our opposing counsel in our cases, that they are now waiting until all of their appeals are done before they're asking for these extraordinary motions knowing that, hey, that's just one way for them to, you know, come in and ask for more time in their case.

As far as a reasonable probability of a different outcome, I don't think any of this DNA would show that. Even if Mr. Cromartie's DNA isn't on any of that evidence, it would not show that he wasn't involved in those crimes. You had nearly identical crimes. The clerk was shot in the head without warning and the person attempted to open the cash register, and we know for a fact that Mr. Cromartie was at the Junior Food Store because his fingerprint was found on that beer carton outside of the store and a shoe print that was similar to his was found out. We know he was there. It just defies all logic to assume that two different people were at the Madison Street -- committed these crimes. One was at the Madison Street Deli and one was at Junior Food Store. It doesn't make any sense, Your Honor.

So we would submit that there is no DNA testing that would exonerate Mr. Cromartie from these crimes or create a reasonable probability of a different outcome in this sentencing phase.

FEDERAL DEFENDER STEWART: Your Honor, may I just respond to two points --

THE COURT: Yes, sir.

FEDERAL DEFENDER STEWART: -- and then I'll sit down. I appreciate your indulgence.

Whatever other counsel do in other cases, I have no control over, of course. You know, as counsel just stated, yeah, there is evidence that he was there, but that's it. And where is the co-defendant, Corey Clark? There was evidence he was there, too. He was released on November 29th, 2005 in his sentence. If the roles were reversed -- if the forensics could tell us who the shooter was, you know, perhaps then we have the wrong people in the wrong places.

And then, third, I just want to comment to Your Honor in our exhibits from the state court record below there's an exhibit towards the end of your pack, Exhibit 64, where the co-defendant Thaddeus Lucas, he was the alleged driver, he stated -- this is to his state parole officer. And he and Mr. Cromartie are half brothers, and he stated about this incident, Thad

Lucus did, "I was with my brother and his friend and they went in this convenience store to take some beer and his friend shot the clerk in the face."

Thad Lucas in this document, in Exhibit 64 here, is casting yet more doubt on who the shooter was. I mean, he's saying it was Corey Clark, is what he's saying.

Your Honor, it matters. There's a lot of confusion here. There's confusion about Walter Slysc' [sic] testimony. All there is is words, but there isn't evidence, there isn't forensics, and Your Honor has the power and the position to do what I would submit that the statute allows you to do and to clear this up with evidence.

THE COURT: All right, sir.

FEDERAL DEFENDER STEWART: And, Your Honor, we do request -- if the Court would allow it, we would request post-briefing if the Court -- the statute says you may proceed with post-hearing briefing. It's completely your call. What would you ask for?

THE COURT: Mr. Stewart, is that simply as to the issue of delay?

FEDERAL DEFENDER STEWART: I suppose it could be to whatever issue Your Honor would like us to address. But, yes, delay is the issue that I didn't anticipate

coming up, particularly because of the bonafides of this motion; the substance to it. You know, this is not delay where it's a frivolous motion. This is a real motion with real testimony and real questions. So -- but, yes, I would -- yes, I would address delay, I would address anything else that the Court would ask for.

THE COURT: Ms. Graham?

ASSISTANT AG GRAHAM: I don't see any need for a post-hearing brief, Your Honor. I think we've briefed everything. I think it's -- obviously it's for delay, but if you would like briefing, obviously I would do it. I don't think there's any need for it.

THE COURT: Okay. Let me make one other inquiry, and I'm simply inquiring. I don't mind -- I certainly don't mind doing it myself. Insofar as an order in regards to the motion, do y'all wish to submit proposed orders, or would you prefer that I just do it? I've got the bones of one, but it's -- and if you submitted one, it would -- I would ask for it to be in modifiable form, and I'm absolutely sure I would modify -- you know, I may adopt part of each of them, but if y'all don't want to do that, that's fine with me. I can do it myself, no problem.

ASSISTANT AG GRAHAM: I'm very happy to do that,

Your Honor. We do them all the time. Whatever you'd like.

THE COURT: Well, I was really inquiring of your desires because I don't particularly have one one way or the other.

ASSISTANT AG GRAHAM: Yes, I mean we would like the opportunity to prepare a proposed order, Your Honor.

THE COURT: Mr. Stewart?

FEDERAL DEFENDER STEWART: Sure, that is fine. What time frame would Your Honor like those? I suppose -- I guess the first question will be, what time frame would you like any post-hearing briefing and then the second would be a proposed order.

THE COURT: Y'all give me some idea of what -- you know, y'all know your work loads; I don't.

FEDERAL DEFENDER STEWART: I'm sorry, Your Honor?

THE COURT: Y'all know your own work loads; I don't. I assume you're both busy, but I would like it in a, you know, reasonable period of time.

ASSISTANT AG GRAHAM: Sure. I mean, if you want post-hearing briefing on the delay, I'm sure we could do that in 15 to 30 days. Do you want simultaneous briefing on the issue of delay, or do you want him to file it and then us respond?

FEDERAL DEFENDER STEWART: That is fine with me.

THE COURT: You know, I would say give me your briefing and proposed order.

ASSISTANT AG GRAHAM: At the same time?

THE COURT: Same time.

ASSISTANT AG GRAHAM: Sure.

FEDERAL DEFENDER STEWART: And why don't we do that in 30 days, if that's all right with Your Honor.

THE COURT: Thirty days is what I was thinking.

FEDERAL DEFENDER STEWART: Your Honor, should the post-hearing brief address only the question of delay or shall it be broader than that?

THE COURT: I would think only the question of delay. I mean, again, if you can think of something that you think is substantial that you have not already presented, I would certainly like an opportunity to consider that, but I think y'all both have been very thorough in your briefings to this point on the issues that have been submitted.

FEDERAL DEFENDER ADJOIAN: Thank you.

THE COURT: Thank y'all.

Gentlemen from the Department of Corrections, this hearing is completed. Thank y'all.

(Whereupon, proceedings adjourned at 12:00 p.m.)

CERTIFICATE OF REPORTER

STATE OF GEORGIA:
COUNTY OF THOMAS:

I, JULIE F. ROBINSON LAWRENCE, Court Reporter, certify that the foregoing is a true and correct transcript of the proceedings taken down by me in the case aforesaid. The exhibits attached hereto, if any, are copies of documentary evidence only and the physical evidence remains in the custody of the Clerk. This certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript or any part thereof, including exhibits, unless said disassembly or photocopying is done by the official undersigned court reporter and original seal and signature attached hereto.

Dated this 2nd day of June 2019

_____
JULIE F. ROBINSON LAWRENCE, CCR
Certificate Number B-1865

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